MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

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DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
CLIFFORD W. TAYLOR, Laingsburg	2009
Justices	
MICHAEL F. CAVANAGH, East Lansing	2015
ELIZABETH A. WEAVER, Glen Arbor	2011
MARILYN KELLY, Bloomfield Hills	2013
MAURA D. CORRIGAN, Grosse Pointe Park	2015
ROBERT P. YOUNG, Jr., Grosse Pointe Park	2011
STEPHEN J. MARKMAN, Mason	2013

Commissioners

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

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

State Court Administrator: CARL L. GROMEK

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
HENRY WILLIAM SAAD, Bloomfield Hills	2009
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2009
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2013
MARK J. CAVANAGH, Royal Oak	2009
KATHLEEN JANSEN, St. Clair Shores	2013
E. THOMAS FITZGERALD, Owosso	2009
HELENE N. WHITE, Detroit	2011
RICHARD A. BANDSTRA, Grand Rapids	2009
JOEL P. HOEKSTRA, Grand Rapids	2011
JANE E. MARKEY, Grand Rapids	2009
PETER D. O'CONNELL, Mt. Pleasant	2013
MICHAEL R. SMOLENSKI, Middleville	2013
WILLIAM C. WHITBECK, Lansing	2011
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
BRIAN K. ZAHRA, Northville	2013
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
KIRSTEN FRANK KELLY, Grosse Pointe Park	2013
PAT M. DONOFRIO, Macomb Township	2011
KAREN FORT HOOD, Detroit	2009
BILL SCHUETTE, Midland	2009
STEPHEN L. BORRELLO, Saginaw	2013
ALTON T. DAVIS, Grayling	2009
DEBORAH A. SERVITTO, Mt. Clemens	2013
JANE M. BECKERING, Grand Rapids	2009
ELIZABETH L. GLEICHER, Pleasant Ridge	2009

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

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH, Jonesville,	2009
2.	ALFRED M. BUTZBAUGH, Berrien Springs,	2013
	JOHN E. DEWANE, St. Joseph,	2009
	JOHN M. DONAHUE, St. Joseph,	2011
	CHARLES T. LaSATA, Benton Harbor,	2011
3.	DEBORAH ROSS ADAMS, Detroit,	2013
	DAVID J. ALLEN, Detroit,	2009
	WENDY M. BAXTER, Detroit,	2013
	ANNETTE J. BERRY, Plymouth,	2013
	GREGORY D. BILL, Northville Twp.,	2013
	SUSAN D. BORMAN, Detroit,	2009
	ULYSSES W. BOYKIN, Detroit,	2009
	MARGIE R. BRAXTON, Detroit,	2011
	MEGAN MAHER BRENNAN, Grosse Pointe Park,	2009
	HELEN E. BROWN, Grosse Pointe Park,	2009
	BILL CALLAHAN, Detroit,	2009
	JAMES A. CALLAHAN, Grosse Pointe,	2011
	MICHAEL J. CALLAHAN, Belleville,	2009
	JEROME C. CAVANAGH, Hamtramck,	2013
	JAMES R. CHYLINSKI, Grosse Pointe Woods,	2011
	ROBERT J. COLOMBO, Jr., Grosse Pointe,	2013
	DAPHNE MEANS CURTIS, Detroit,	2009
	CHRISTOPHER D. DINGELL, Trenton,	2009
	GERSHWIN ALLEN DRAIN, Detroit,	2011
	PRENTIS EDWARDS, Detroit,	2013
	CHARLENE M. ELDER, Dearborn,	2009
	VONDA R. EVANS, Dearborn,	2009
	EDWARD EWELL, Jr., Detroit,	2013
	PATRICIA SUSAN FRESARD, Grosse Pointe Woods,	2011
	SHEILA ANN GIBSON, Detroit,	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009
	DAVID ALAN GRONER, Grosse Pointe Park,	2011
	RICHARD B. HALLORAN, Jr., Detroit,	2013

		Term Expires January 1 of
	AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2013
	CYNTHIA GRAY HATHAWAY, Detroit,	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
	MICHAEL M. HATHAWAY, Detroit,	2011
	MURIEL D. HUGHES, Grosse Pointe Woods,	2009
	THOMAS EDWARD JACKSON, Detroit,	2013
	VERA MASSEY JONES, Detroit,	2009
	MARY BETH KELLY, Grosse Ile,	2009
	TIMOTHY MICHAEL KENNY, Livonia,	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
	KATHLEEN M. McCARTHY, Dearborn,	2013
	WADE H. McCREE, Detroit,	2009
	WARFIELD MOORE, Jr., Detroit,	2009
	BRUCE U. MORROW, Detroit,	2011
	JOHN A. MURPHY, Plymouth Twp.,	2011
	MARIA L. OXHOLM, Detroit,	2013
	LITA MASINI POPKE, Canton,	2011
	DANIEL P. RYAN, Redford,	2013
	MICHAEL F. SAPALA, Grosse Pointe Park,	2013
	RICHARD M. SKUTT, Detroit,	2009
	MARK T. SLAVENS, Canton,	2011
	LESLIE KIM SMITH, Northville Twp.,	2013
	VIRGIL C. SMITH, Detroit,	2013
	JEANNE STEMPIEN, Northville,	2011
	CYNTHIA DIANE STEPHENS, Detroit,	2013
	CRAIG S. STRONG, Detroit,	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,	2011
	DEBORAH A. THOMAS, Detroit,	2013
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	CAROLE F. YOUNGBLOOD, Grosse Pointe,	2013
	ROBERT L. ZIOLKOWSKI, Northville,	2009
4.	SUSAN E. BEEBE, Jackson,	2011
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHAD C. SCHMUCKER, Jackson,	2011
	THOMAS D. WILSON, Grasslake,	2013
5.	JAMES H. FISHER, Hastings,	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills,	2009
	MARTHA ANDERSON, Troy,	2009
	STEVEN N. ANDREWS, Bloomfield Hills,	2009
	LEO BOWMAN, Pontiac,	2009
	RAE LEE CHABOT, Franklin,	2011

		Term Expires January 1 of
	MARK A. GOLDSMITH, Huntington Woods,	2013
	NANCI J. GRANT, Bloomfield Hills,	2009
	SHALINA D. KUMAR, Birmingham,	2009
	DENISE LANGFORD-MORRIS, West Bloomfield,	2013
	CHERYL A. MATTHEWS, Sylvan Lake,	2011
	JOHN JAMES McDONALD, Farmington Hills,	2011
	FRED M. MESTER, Bloomfield Hills,	2009
	RUDY J. NICHOLS, Clarkston,	2009
	COLLEEN A. O'BRIEN, Rochester Hills,	2011
	DANIEL PATRICK O'BRIEN, Troy,	2011
	WENDY LYNN POTTS, Birmingham,	2013
	EDWARD SOSNICK, Bloomfield Hills,	2013
	MICHAEL D. WARREN, Jr., Beverly Hills,	2013
	JOAN E. YOUNG, Bloomfield Village,	2011
7.	DUNCAN M. BEAGLE, Fenton,	2011
	JOSEPH J. FARAH, Grand Blanc,	2011
	JUDITH A. FULLERTON, Flint,	2013
	JOHN A. GADOLA, Fenton,	2009
	ARCHIE L. HAYMAN, Flint,	2013
	GEOFFREY L. NEITHERCUT, Flint,	2013
	DAVID J. NEWBLATT, Linden,	2011
	MICHAEL J. THEILE, Flushing,	2009
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011
	CHARLES H. MIEL, Stanton,	2009
9.	GARY C. GIGUERE Jr., Portage,	2009
	STEPHEN D. GORSALITZ, Portage,	2011
	J. RICHARDSON JOHNSON, Portage,	2011
	PAMELA L. LIGHTVOET, Kalamazoo,	2013
10.	FRED L. BORCHARD, Saginaw,	2011
	WILLIAM A. CRANE, Saginaw,	2011
	DARNELL JACKSON, Saginaw,	2013
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2013
	TIMOTHY G. HICKS, Montague,	2011
	WILLIAM C. MARIETTI, North Muskegon,	2011
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011

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

		Term Expires January 1 of
27.	ANTHONY A. MONTON, Pentwater,	2013
	TERRENCE R. THOMAS, Newaygo,	2009
28.	WILLIAM M. FAGERMAN, Cadillac,	2009
29.	MICHELLE M. RICK, DeWitt,	2011
	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2013
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2013
	BEVERLEY NETTLES-NICKERSON, Okemos,	2009[1]
31.	JAMES P. ADAIR, Port Huron,	2013
	PETER E. DEEGAN, Port Huron,	2011
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Owosso,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2013
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2013
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2013
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2013
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	MICHAEL J. BEALE, Midland,	2009
	JONATHAN E. LAUDERBACH, Midland,	2013
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2013
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2013
46.	JANET M. ALLEN, Gaylord,	2011

[1] To June 13, 2008.

		Term Expires January 1 of
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	WILLIAM A. BAILLARGEON, Saugatuck,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2013
	RONALD C. NICHOLS, Big Rapids,	2015
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2013
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Port Austin,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2013
55.	THOMAS R. EVANS, Beaverton,	2009
	ROY G. MIENK, Gladwin,	2013
56.	THOMAS S. EVELAND, Dimondale,	2013
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2013

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH, Monroe,	2009
	TERRENCE P. BRONSON, Monroe,	2013
	JACK VITALE, Monroe,	2011
2A.	NATALIA M. KOSELKA, Adrian,	2011
	JAMES E. SHERIDAN, Adrian,	2009
2B.	DONALD L. SANDERSON, Hillsdale,	2009
3A.	DAVID T. COYLE, Coldwater,	2009
3B.	JEFFREY C. MIDDLETON, Three Rivers,	2009
	WILLIAM D. WELTY, Three Rivers,	2013
4.	PAUL E. DEATS, Edwardsburg,	2009
5.	GARY J. BRUCE, St. Joseph,	2011
	ANGELA PASULA, Stevensville,	2009
	SCOTT SCHOFIELD, Niles,	2009
	LYNDA A. TOLEN, Stevensville,	2013
	DENNIS M. WILEY, St. Joseph,	2011
7.	ARTHUR H. CLARKE, III, South Haven,	2009
	ROBERT T. HENTCHEL, Paw Paw,	2011
8-1.	QUINN E. BENSON, Kalamazoo,	2009
	ANNE E. BLATCHFORD, Kalamazoo,	2011
	PAUL J. BRIDENSTINE, Kalamazoo,	2013
	CAROL A. HUSUM, Kalamazoo,	2011
8-2.	ROBERT C. KROPF, Portage,	2009
8-3.	RICHARD A. SANTONI, Kalamazoo,	2009
	VINCENT C. WESTRA, Kalamazoo,	2011
10.	SAMUEL I. DURHAM, Jr., Battle Creek,	2011
	JOHN R. HOLMES, Battle Creek,	2013
	FRANKLIN K. LINE, Jr., Marshall,	2009
	MARVIN RATNER, Battle Creek,	2009
12.	JOSEPH S. FILIP, Jackson,	2011
	JAMES M. JUSTIN, Jackson,	2013
	MICHAEL J. KLAEREN, Jackson,	2009
	R. DARRYL MAZUR, Jackson,	2009
14A.	RICHARD E. CONLIN, Ann Arbor,	2009
	J. CEDRIC SIMPSON, Ypsilanti,	2013
	KIRK W. TABBEY, Saline,	2011
14B.	JOHN B. COLLINS, Ypsilanti,	2009
15.	JULIE CREAL, Ann Arbor,	2013

	ELIZABETH POLLARD HINES, ANN ARBOR,	2011
	ANN E. MATTSON, ANN ARBOR,	2009
16.	ROBERT B. BRZEZINSKI, LIVONIA,	2009
	KATHLEEN J. MCCANN, LIVONIA,	2013
17.	KAREN KHALIL, REDFORD,	2011
	CHARLOTTE L. WIRTH, REDFORD,	2009
18.	C. CHARLES BOKOS, WESTLAND,	2009
	SANDRA A. CICIRELLI, WESTLAND,	2013
19.	WILLIAM C. HULTGREN, DEARBORN,	2011
	MARK W. SOMERS, DEARBORN,	2009
	RICHARD WYGONIK, DEARBORN,	2013
20.	MARK J. PLAWECKI, DEARBORN HEIGHTS,	2009
	DAVID TURFE, DEARBORN HEIGHTS,	2013
21.	RICHARD L. HAMMER, JR., GARDEN CITY,	2009
22.	SYLVIA A. JAMES, INKSTER,	2013
23.	GENO SALOMONE, TAYLOR,	2013
	WILLIAM J. SUTHERLAND, TAYLOR,	2009
24.	JOHN T. COURTRIGHT, ALLEN PARK,	2009
	RICHARD A. PAGE, ALLEN PARK,	2011
25.	DAVID A. BAJOREK, LINCOLN PARK,	2009
	DAVID J. ZELENAK, LINCOLN PARK,	2011
26-1.	RAYMOND A. CHARRON, RIVER ROUGE,	2009
26-2.	MICHAEL F. CIUNGAN, ECORSE,	2009
27.	RANDY L. KALMBACH, WYANDOTTE,	2013
28.	JAMES A. KANDREVAS, SOUTHGATE,	2009
29.	LAURA REDMOND MACK, WAYNE,	2013
30.	BRIGETTE R. OFFICER, HIGHLAND PARK,	2011
31.	PAUL J. PARUK, HAMTRAMCK,	2009
32A.	ROGER J. LA ROSE, HARPER WOODS,	2009
33.	JAMES KURT KERSTEN, TRENTON,	2009
	MICHAEL K. MCNALLY, TRENTON,	2013
	EDWARD J. NYKIEL, GROSSE ILE,	2011
34.	TINA BROOKS GREEN, NEW BOSTON,	2013
	BRIAN A. OAKLEY, ROMULUS,	2011
	DAVID M. PARROTT, BELLEVILLE,	2009
35.	MICHAEL J. GEROU, PLYMOUTH,	2011
	RONALD W. LOWE, CANTON,	2013
	JOHN E. MACDONALD, NORTHVILLE,	2009
36.	LYDIA NANCE ADAMS, DETROIT,	2011
	ROBERTA C. ARCHER, DETROIT,	2013
	MARYLIN E. ATKINS, DETROIT,	2013
	JOSEPH N. BALTIMORE, DETROIT,	2009
	NANCY MCCAUGHAN BLOUNT, DETROIT,	2009
	IZETTA F. BRIGHT, DETROIT,	2011
	ESTHER LYNISE BRYANT-WEEKES, DETROIT,	2008

		Term Expires January 1 of
	RUTH C. CARTER, Detroit,	2011
	DONALD COLEMAN, Detroit,	2013
	NANCY A. FARMER, Detroit,	2013
	DEBORAH GERALDINE FORD, Detroit,	2011
	RUTH ANN GARRETT, Detroit,	2013
	RONALD GILES, Detroit,	2013
	JIMMYLEE GRAY, Detroit,	2009
	KATHERINE HANSEN, Detroit,	2011
	BEVERLY J. HAYES-SIPES, Detroit,	2009
	PAULA G. HUMPHRIES, Detroit,	2011
	PATRICIA L. JEFFERSON, Detroit,	2009
	VANESA F. JONES-BRADLEY, Detroit,	2013
	KENNETH J. KING, Detroit,	2009
	DEBORAH L. LANGSTON, Detroit,	2013
	WILLIE G. LIPSCOMB, Jr., Detroit,	2009
	LEONIA J. LLOYD, Detroit,	2011
	MIRIAM B. MARTIN-CLARK, Detroit,	2011
	DONNA R. MILHOUSE, Detroit,	2013
	B. PENNIE MILLENDER, Detroit,	2011
	CYLENTHIA L. MILLER, Detroit,	2011
	MARK A. RANDON, Detroit,	2009
	KEVIN F. ROBBINS, Detroit,	2013
	DAVID S. ROBINSON, Jr., Detroit,	2013
	C. LORENE ROYSTER, Detroit,	2013
37.	JOHN M. CHMURA, Warren,	2013
	JENNIFER FAUNCE, Warren,	2009
	DAWNN M. GRUENBURG, Warren,	2011
	WALTER A. JAKUBOWSKI, Jr., Warren,	2013
38.	NORENE S. REDMOND, Eastpointe,	2009
39.	JOSEPH F. BOEDEKER, Roseville,	2009
	MARCO A. SANTIA, Fraser,	2013
	CATHERINE B. STEENLAND, Roseville,	2011
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2013
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009
41A.	MICHAEL S. MACERONI, Sterling Heights,	2009
	DOUGLAS P. SHEPHERD, Macomb Twp.,	2013
	STEPHEN S. SIERAWSKI, Sterling Heights,	2011
	KIMBERLEY ANNE WIEGAND, Sterling Heights,	2013
41B.	LINDA DAVIS, Clinton Twp.,	2009
	SEBASTIAN LUCIDO, Clinton Twp.,	2013
	SHEILA A. MILLER, Clinton Twp.,	2011
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2013
43.	KEITH P. HUNT, Ferndale,	2013
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2013

		Term Expires January 1 of
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2013
	WILLIAM J. RICHARDS, Beverly Hills,	2009
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2013
	KIMBERLY SMALL, West Bloomfield,	2009
50.	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2013
52-1.	ROBERT BONDY, Milford,	2013
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2013
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2013
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2013
	MICHAEL A. MARTONE, Troy,	2011
53.	THERESA M. BRENNAN, Brighton,	2009
	L. SUZANNE GEDDIS, Brighton,	2011
	CAROL SUE READER, Howell,	2013
54A.	LOUISE ALDERSON, Lansing,	2011
	PATRICK F. CHERRY, Lansing,	2009
	FRANK J. DeLUCA, Lansing,	2013
	CHARLES F. FILICE, Lansing,	2009
	AMY R. KRAUSE, Lansing,	2011
54B.	RICHARD D. BALL, East Lansing,	2011
	DAVID L. JORDON, East Lansing,	2013
55.	ROSEMARIE ELIZABETH AQUILINA, East Lansing,	2011
	THOMAS P. BOYD, Okemos,	2009
56A.	HARVEY J. HOFFMAN, Grand Ledge,	2011
	JULIE H. REINCKE, Eaton Rapids,	2009
56B.	GARY R. HOLMAN, Hastings,	2013
57.	STEPHEN E. SHERIDAN, Saugatuck,	2013
	JOSEPH S. SKOCELAS, Plainwell,	2009
58.	SUSAN A. JONAS, Spring Lake,	2009
	RICHARD J. KLOOTE, Grand Haven,	2013

		Term Expires January 1 of
	BRADLEY S. KNOLL, Holland,	2009
	KENNETH D. POST, Zeeland,	2011
59.	PETER P. VERSLUIS, Grand Rapids,	2011
60.	HAROLD F. CLOSZ, III, North Muskegon,	2009
	MARIA LADAS HOOPES, North Muskegon,	2009
	MICHAEL JEFFREY NOLAN, Twin Lake,	2013
	ANDREW WIERENGO, Muskegon,	2011
61.	PATRICK C. BOWLER, Grand Rapids,	2009
	DAVID J. BUTER, Grand Rapids,	2009
	J. MICHAEL CHRISTENSEN, Grand Rapids,	2011
	JEANINE NEMESI LaVILLE, Grand Rapids,	2013
	BEN H. LOGAN, II, Grand Rapids,	2013
	DONALD H. PASSENGER, Grand Rapids,	2011
62A.	PABLO CORTES, Wyoming,	2009
	STEVEN M. TIMMERS, Grandville,	2013
62B.	WILLIAM G. KELLY, Kentwood,	2009
63-1.	STEVEN R. SERVAAS, Rockford,	2009
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	2009
64A.	RAYMOND P. VOET, Ionia,	2009
64B.	DONALD R. HEMINGSEN, Sheridan,	2009
65A.	RICHARD D. WELLS, DeWitt,	2009
65B.	JAMES B. MACKIE, Alma,	2009
66.	WARD L. CLARKSON, Corunna,	2013
	TERRANCE P. DIGNAN, Owosso,	2009
67-1.	DAVID J. GOGGINS, Flushing,	2009
67-2.	JOHN L. CONOVER, Davison,	2009
	RICHARD L. HUGHES, Otisville,	2011
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2013
68.	TRACY L. COLLIER-NIX, Flint,	2009
	WILLIAM H. CRAWFORD, II, Flint,	2013
	HERMAN MARABLE, Jr., Flint,	2013
	NATHANIEL C. PERRY, III, Flint,	2009
	RAMONA M. ROBERTS, Flint,	2011[1]
70-1.	TERRY L. CLARK, Saginaw,	2013
	M. RANDALL JURRENS, Saginaw,	2011
	M. T. THOMPSON, Jr., Saginaw,	2009
70-2.	CHRISTOPHER S. BOYD, Saginaw,	2011
	ALFRED T. FRANK, Saginaw,	2009
	KYLE HIGGS TARRANT, Saginaw,	2013
71A.	LAURA CHEGER BARNARD, Metamora,	2009
	JOHN T. CONNOLLY, Lapeer,	2013
71B.	KIM DAVID GLASPIE, Cass City,	2009
72.	RICHARD A. COOLEY, Jr., Port Huron,	2011

[1] To July 1, 2008.

		Term Expires January 1 of
	JOHN D. MONAGHAN, Port Huron,	2013
	CYNTHIA SIEMEN PLATZER, Lakeport,	2009
73A.	JAMES A. MARCUS, Applegate,	2009
73B.	DAVID B. HERRINGTON, Bad Axe,	2009
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2013
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	STEVEN CARRAS, Midland,	2011
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2013
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE, Grosse Pointe,	2012
CARL F. JARBOE, Grosse Pointe Park,	2010
LYNNE A. PIERCE, Grosse Pointe Woods,	2012
MATTHEW R. RUMORA, Grosse Pointe Farms,	2010

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2013
Alger/Schoolcraft	WILLIAM W. CARMODY	2013
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013
Antrim	NORMAN R. HAYES	2013
Arenac	JACK WILLIAM SCULLY	2013
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	MICHAEL F. SKINNER	2013
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2009
Genesee	ROBERT E. WEISS	2013
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	CHARLES R. GOODMAN	2013

Huron	DAVID L. CLABUESCH	2013
Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2009
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	JOSEPH E. DEEGAN	2013
Lenawee	MARGARET MURRAY-SCHOLZ NOE	2013
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2013
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	LaVAIL E. HULL	2013
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013
Monroe	JOHN A. HOHMAN, JR.	2013
Monroe	PAMELA A. MOSKWA	2009
Montcalm	CHARLES W. SIMON, III	2013
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2013
Newaygo	GRAYDON W. DIMKOFF	2013
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	BRADLEY G. LAMBRIX	2013
Ogemaw	SHANA A. LAMBOURN	2013

Ontonagon	JOSEPH D. ZELEZNIK	2013
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2013
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN TOMLINSON	2013
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2013
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	DARLENE A. O'BRIEN	2013
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2009
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wayne	FRANK S. SZYMANSKI	2013
Wexford	KENNETH L. TACOMA	2013

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

29 CASES; 60 OPINIONS; 535 ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL GRANTED OR DENIED

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

G

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

Rules Adopted

Rules Amended

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted May 28, 2008, effective September 1, 2008 (File No. 2005-36)—REPORTER.

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

RULE 2.119. MOTION PRACTICE.

(A)-(E)[Unchanged.]

(F) Motions for Rehearing or Reconsideration.

(1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than ~~14~~ 21 days after entry of an order ~~disposing of~~ deciding the motion.

(2)-(3)[Unchanged.]

(G) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

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

the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

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

(a) [Unchanged.]

(b) 21 days after the entry of an order ~~denying~~ deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other ~~postjudgment~~ 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 ~~may have~~ has allowed for good cause during that 21-day period;

(c)-(d) [Unchanged.]

If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion.

(2) An appeal of right in a criminal case must be taken

(a) [Unchanged.]

(b) within 42 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425~~(F)~~ (G)(1);

(c) [Unchanged.]

(d) within 42 days after the entry of an order denying a motion for a new trial, for ~~judgment~~ directed verdict of acquittal, or ~~for resentencing~~ to correct an invalid

sentence, if the motion was filed within the time provided ~~by~~ in MCR 6.419(B), 6.429(B)~~(1)~~, or 6.431(A)~~(1)~~, as the case may be.

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42-day period.

(3) [Unchanged.]

(B)-(H) [Unchanged.]

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.

For purposes of ~~this rule~~ 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.

(B)-(E) [Unchanged.]

(F) Late Appeal.

(1)-(2) [Unchanged.]

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) [Unchanged.]

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other ~~postjudgment~~ relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court ~~may have~~ has allowed for good cause during that 21-day period, then the 12 months are counted from the entry of the order ~~denying~~ 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 ~~6-month period prescribed~~ time provided in MCR 6.310(C), 6.419(B), 6.429(B), and 6.431(A), or if

(a)-(c) [Unchanged.]

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) [Unchanged.]

(G) [Unchanged.]

MARKMAN, J. (*dissenting*). The instant amendments would extend from 14 days to 21 days the period for filing an appeal after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other post-judgment relief. I respectfully dissent and would not adopt these amendments. Instead, I agree with the Michigan Judges Association that these amendments will "open the door for more motions, unnecessarily extending the time-period for finality of decisions and orders." Judge Michael Warren of the Sixth Judicial Circuit adds that "extending the deadline 50%" will "only serve to delay the administration of justice in the trial court." Although the staff comment emphasizes the "consistency" between MCR 2.119(F)(1) and MCR 7.204(A)(1)(b) that these amendments would achieve and the elimination of a presumed "conflict" between these rules, these objectives could be realized just as easily at 14 days as at 21 days. In enacting these amendments, this Court loses sight of what ought to be a primary objective of procedural reform by this Court—the expedition of the legal process and the avoidance of prohibitive legal costs for litigants. The instant amendments go in precisely the opposite direction. They signify a willingness to prolong the legal process for what could hardly be less compelling grounds.

Staff Comment: The amendments of MCR 7.204 and MCR 7.205 clarify that a party who seeks to appeal to the Court of Appeals has 21 days after the 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 to file a claim of appeal or an application for leave to appeal, if the motion is filed within the initial 21-day appeal period. The amendments also limit the ability of the trial court to extend the 21-day period under MCR 7.204(A)(1)(b), MCR 7.205(A)(2), and MCR 7.205(F)(3)(b) to situations in which good cause is shown.

For consistency with the amendments of MCR 7.204 and MCR 7.205, and to eliminate a conflict between MCR 2.119(F)(1) and MCR 7.204(A)(1)(b), the time limit for filing a motion for rehearing or reconsideration in the trial court under MCR 2.119(F)(1) is increased from 14 to 21 days.

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

Adopted May 28, 2008, effective September 1, 2008 (File No. 2006-04)—REPORTER.

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

RULE 3.204. PROCEEDINGS AFFECTING ~~MINORS~~ CHILDREN.

(A) ~~Unless otherwise provided by statute, original actions under MCL 722.21 *et seq*. that are not ancillary to any other action must be filed in the circuit court for the county in which the minor resides.~~

~~(B) If an action is pending in circuit court for the support or custody of a minor, or for visitation with a minor,~~ Unless the court orders otherwise for good cause, if a circuit court action involving child support, custody, or parenting time is pending, or if the circuit court has continuing jurisdiction over such matters because of a prior action~~:, a subsequent action for support, custody, or visitation with regard to that minor must be initiated as an ancillary proceeding~~.

(1) A new action concerning support, custody, or parenting time of the same child must be filed as a motion or supplemental complaint in the earlier action. The new action shall be filed as a motion if the relief sought would have been available in the original cause of action. If the relief sought was not available in the original action, the new action must be filed as a supplemental complaint.

(2) A new action for the support, custody, or parenting time of a different child of the same parents must be filed as a supplemental complaint in the earlier action if the court has jurisdiction and the new action is not an action for divorce, annulment, or separate maintenance.

(3) A new action for divorce, annulment, or separate maintenance that also involves the support, custody, or parenting time of that child must be filed in the same county if the circuit court for that county has jurisdiction over the new action and the new case must be assigned to the same judge to whom the previous action was assigned.

(4) A party may file a supplemental pleading required by this subrule without first seeking and obtaining permission from the court. The supplemental pleading must be served as provided in MCR 3.203(A)(2), and an answer must be filed within the time allowed by MCR 2.108. When this rule requires a supplemental pleading, all filing and judgment entry fees must be paid as if the action was filed separately.

(B) When more than one circuit court action involving support, custody, or parenting time of a child is pending, or more than one circuit court has continuing jurisdiction over those matters because of prior actions, an original or supplemental complaint for the support, custody, or parenting time of a different child of the same parents must be filed in whichever circuit court has jurisdiction to decide the new action. If more than one of the previously involved circuit courts would have jurisdiction to decide the new action, or if the action might be filed in more than one county within a circuit:

(1) The new action must be filed in the same county as a prior action involving the parents' separate maintenance, divorce, or annulment.

(2) If no prior action involves separate maintenance, divorce, or annulment, the new action must be filed:

(a) in the county of the circuit court that has issued a judgment affecting the majority of the parents' children in common, or

(b) if no circuit court for a county has issued a judgment affecting a majority of the parents' children in common, then in the county of the circuit court that has issued the most recent judgment affecting a child of the same parents.

(C) The court may consolidate actions administratively without holding a consolidation hearing when:

(1) the cases involve different children of the same parents but all other parties are the same, or

(2) more than one action involves the same child and parents.

(~~C~~D) If a new action for support is filed in a circuit court in which a party has an existing or pending support obligation, the new case must be assigned to the same judge to whom the other case is assigned, pursuant to MCR 8.111(D).

(~~D~~E) In a case involving a dispute regarding the custody of a minor child, the court may, on motion of a party or on its own initiative, for good cause shown, appoint a guardian ad litem to represent the child and assess the costs and reasonable fees against the parties involved in full or in part.

RULE 3.212. POSTJUDGMENT TRANSFER OF DOMESTIC RELATIONS CASES.

(A) Motion.

(1) A party, court-ordered custodian, or friend of the court may move for the postjudgment transfer of a

domestic relations action in accordance with this rule, or the court may transfer such an action on its own motion. A transfer includes a change of venue and a transfer of all friend of the court responsibilities. The court may enter a consent order transferring a postjudgment domestic relations action, provided the conditions under subrule (B) are met.

(2) The postjudgment transfer of an action initiated pursuant to MCL 780.151 *et seq*. is controlled by MCR 3.214.

(B) Conditions.

(1) A motion filed by a party or court-ordered custodian may be granted only if all of the following conditions are met:

(a) the transfer of the action is requested on the basis of the residence and convenience of the parties, or other good cause consistent with the best interests of the ~~minor~~ child;

(b) neither party nor the court-ordered custodian has resided in the county of current jurisdiction for at least 6 months prior to the filing of the motion;

(c) at least one party or the court-ordered custodian has resided in the county to which the transfer is requested for at least 6 months prior to the filing of the motion; and

(d) the county to which the transfer is requested is not contiguous to the county of current jurisdiction.

(2) When the court or the friend of the court initiates a transfer, the conditions stated in subrule (B)(1) do not apply.

(C) Unless the court orders otherwise for good cause, if a friend of the court becomes aware of a more recent final judgment involving the same parties issued in a different county, the friend of the court must initiate a

transfer of the older case to the county in which the new judgment was entered if neither of the parents, any of their children who are affected by the judgment in the older case, nor another party resides in the county in which the older case was filed.

(~~C~~D) Transfer Order.

(1) The court ordering a postjudgment transfer must enter all necessary orders pertaining to the certification and transfer of the action. The transferring court must send to the receiving court all court files and friend of the court files, ledgers, records, and documents that pertain to the action. Such materials may be used in the receiving jurisdiction in the same manner as in the transferring jurisdiction.

(2) The court may order that any past-due fees and costs be paid to the transferring friend of the court office at the time of transfer.

(3) The court may order that one or both of the parties or the court-ordered custodian pay the cost of the transfer.

(~~D~~E) Filing Fee. An order transferring a case under this rule must provide that the party who moved for the transfer pay the statutory filing fee applicable to the court to which the action is transferred, except where MCR 2.002 applies. If the parties stipulate to the transfer of a case, they must share equally the cost of transfer unless the court orders otherwise. In either event, the transferring court must submit the filing fee to the court to which the action is transferred, at the time of transfer. If the court or the friend of the court initiates the transfer, the statutory filing fee is waived.

(~~E~~F) Physical Transfer of Files. Court and friend of the court files must be transferred by registered or certified mail, return receipt requested, or by another secure method of transfer.

(G) Upon completion of the transfer, the transferee friend of the court must review the case and determine whether the case contains orders specific to the transferring court or county. The friend of the court must take such action as is necessary, which may include obtaining ex parte orders to transfer court- or county-specific actions to the transferee court.

Staff Comment: The amendments of MCR 3.204 consolidate multiple actions involving more than one child of the same parents in a single action so that all issues between the parents can be determined in a single action. The amendments also require multiple cases involving children of the same parents to be filed in the same county when possible to allow a single judge to consider all support, custody, and parenting time matters involving the same family. The amendment of MCR 3.204(A)(4) states that when the rule requires a supplemental pleading, all filing and judgment entry fees must be paid as if the action was filed separately.

The amendments of MCR 3.212 require the friend of the court to transfer cases to allow a court to consolidate multiple cases involving different children of the same parents in a single court so that all issues between the parents could be determined in a single action. The amendments also allow the transferee friend of the court to take ex parte action to obtain orders to change county-specific orders to the transferee county or circuit.

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

Adopted May 28, 2008, effective September 1, 2008 (File No. 2006-10)—REPORTER.

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

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) [Unchanged.]

(B) Default Judgment.

(1) [Unchanged.]

(2) Default Judgment Entered by Clerk. On request of the plaintiff supported by an affidavit as to the amount due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if

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

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

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

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

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: This amendment eliminates the requirement to file for the cancellation of a note or writing indicating written evidence of indebtedness when applying to the clerk for a default judgment.

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

Adopted May 28, 2008, effective September 1, 2008 (File No. 2007-21)—REPORTER.

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

RULE 2.510. JUROR PERSONAL HISTORY QUESTIONNAIRE.

(A)–(D) [Unchanged.]

(E) Special Provision Pursuant to MCL 600.1324. If a city located in more than one county is entirely within a single district of the district court, jurors shall be selected for court attendance at that district from a list that includes the names and addresses of jurors from the entire city, regardless of the county where the juror resides or the county where the cause of action arose.

Staff Comment: The amendment of MCR 2.510(E) was added by the Court pursuant to MCL 600.1324. Subrule (E) requires that, in a district court district comprised of a city located in two or more counties, jurors must be selected for court attendance at that district from a list that includes the names and addresses of jurors from the entire city. The rule is applicable to both civil and criminal cases pursuant to MCR 6.412(A).

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

Adopted May 28, 2008, effective September 1, 2008 (File No. 2007-27)—REPORTER.

By order dated January 8, 2008, this Court amended Rule 5.125 of the Michigan Court Rules, effective immediately. 480 Mich cvi-cviii (Part 1, 2008). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment, which amended the notice provisions regarding a petition for appointment of a guardian for an alleged incapacitated individual. Notice and an opportunity for comment at a public hearing having been provided, the amendment of Rule 5.125 is retained, and is amended as follows:

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

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B)[Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply.

When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(21)[Unchanged.]

(22) The persons interested in a petition for appointment of a guardian of an alleged incapacitated individual are

(a) the alleged incapacitated individual,

(b) if known, a person named as attorney in fact under a durable power of attorney,

(c) the alleged incapacitated individual's spouse,

(d) the alleged incapacitated individual's adult children and the individual's parents,

(e) if no spouse, child, or parent is living, the presumptive heirs of the individual,

(f) the person who has the care and custody of the alleged incapacitated individual, and

(g) the nominated guardian.

(23)-(31)[Unchanged.]

(D)-(E)[Unchanged.]

Staff Comment: By this order, the Court retains the amendment of MCR 5.125 that conforms the rule to language in MCL 700.5311 by clarifying that parents are interested persons entitled to notice in a petition for appointment of a guardian for an alleged incapacitated individual, and further clarifies that only adult children are entitled to notice under this rule and the statute.

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

Adopted May 28, 2008, effective September 1, 2008 (File No. 2007-36)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration

having been given to the comments received, the following amendments of Rule 9.208 of the Michigan Court Rules are adopted, effective September 1, 2008.

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

RULE 9.208. EVIDENCE.

(A)-(B)[Unchanged.]

(C) Discovery.

(1) Pretrial or discovery proceedings are not permitted, except as follows:

(a) At least 21 days before a scheduled public hearing,

(i) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, and a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing, ; and

(ii) the commission shall make available to the respondent for inspection or copying all exculpatory material in its possession~~, as well as any other material in its possession that it intends to introduce as evidence at the hearing~~.

(b) The parties shall give supplemental notice to one another within 5 days after any additional witness or material has been identified and at least 10 days before a scheduled hearing.

(2) A deposition may be taken of a witness who is living outside the state or who is physically unable to attend a hearing.

(3) The commission or the master may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.

If a party fails to comply with subrules (C)(1) or (2), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

Staff Comment: These amendments require that all parties to a Judicial Tenure Commission proceeding that is scheduled for a public hearing exchange material in their possession that they intend to introduce as evidence at the hearing. The amendments also require the parties to give supplemental notice of any additional material within 5 days after having been identified, and at least 10 days before a scheduled hearing.

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

Adopted May 30, 2008, effective September 1, 2008 (File No. 2006-11)—REPORTER.

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

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A)-(C)[Unchanged.]

(D) Stay on Appeal. Stay on appeal is governed by MCR 7.101(H), 7.209, and 7.302(G). If a party appeals a trial court's denial of the party's claim of governmental immunity, the party's appeal operates as an automatic stay of any and all proceedings in the case until the issue of the party's status is finally decided.

(E)-(G)[Unchanged.]

RULE 7.101. PROCEDURE GENERALLY [APPEALS TO CIRCUIT COURT].

(A)-(G)[Unchanged.]

(H) Stay of Proceedings.

(1) Civil Actions.

(a) Unless otherwise provided by rule or ordered by the trial court, an execution may not issue and proceedings may not be taken to enforce an order or judgment until the expiration of the time for taking an appeal under subrule (B).

(b) An appeal does not stay execution unless

(i) the appellant files a stay bond to the opposing party as provided by this rule or by law; ~~or~~

(ii) the appellant is exempted by law from filing a bond or is excused from filing a bond under MCL 600.2605 or MCR 3.604(L) and the trial court grants a stay on motion~~.~~; or

(iii) a party appeals a trial court's denial of the party's claim of governmental immunity, and the appeal is pending.

(c) The stay bond must be set by the trial court in an amount adequate to protect the opposing party. If the appeal is by a person against whom a money judgment has been entered, it must be not less than $1\frac{1}{4}$ times the amount of the judgment. The bond must:

(i) recite the names and designations of the parties and the judge in the trial court, identify the parties for whom and against whom judgment was entered, and state the amount recovered;

(ii) contain the conditions that the appellant

(A) will diligently prosecute the appeal to a decision and, if a judgment is rendered against him or her, will pay the amount of the judgment, including costs and interest;

(B) will pay the amount of the judgment, if any, rendered against him or her in the trial court, including costs and interest, if the appeal is dismissed;

(C) will pay any costs assessed against him or her in the circuit court; and

(D) will perform any other act prescribed in the statute authorizing appeal; and

(iii) be executed by the appellant with one or more sufficient sureties as required by MCR 3.604.

If the appeal is from a judgment for the possession of land, the bond must include the conditions provided in MCR 4.201(N)(4).

(d) Unless otherwise provided in this rule, the filing of a bond stays all further proceedings in the trial court under the order or judgment appealed from. If an execution has issued, it is suspended by giving notice of the bond to the officer holding the execution.

(2) Probate Proceedings.

(a) The probate court has continuing jurisdiction to decide other matters arising out of a proceeding in which an appeal is filed.

(b) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).

(3) Civil Infractions. An appeal bond and stay in a civil infraction proceeding is governed by MCR 4.101(G).

(4) Criminal Cases. Unless a bond pending appeal is filed with the trial court, a criminal judgment may be executed immediately even though the time for taking an appeal has not elapsed. The granting of bond and the amount of it are within the discretion of the trial court, subject to the applicable laws and rules on bonds pending appeals in criminal cases.

(5) Request for Stay Filed in Circuit Court. If a request for a stay pending appeal is filed in the circuit court, the court may condition a stay on the filing of a new or higher bond than otherwise required by these rules with appropriate conditions and sureties satisfactory to the court.

(I)-(P) [Unchanged.]

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614(D), an~~An~~ appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a case in which a party has appealed a trial court's denial of the party's claim of governmental immunity.

(2) A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.

(3) A motion for bond or a stay pending appeal filed in the Court of Appeals must include a copy of the trial court's opinion and order, and a copy of the transcript of the hearing on the motion in the trial court.

(B)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

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

(a) When the stay is sought before an appeal is filed and a bond is required, the party seeking the stay shall

file a bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

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

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

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

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

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

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

(F)-(I) [Unchanged.]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(G)[Unchanged.]

(H) Stay of Proceedings. MCR 7.209 applies to appeals to the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered or takes effect pursuant to MCR 7.209(E)(4), it operates to stay proceedings

pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or Court of Appeals.

CAVANAGH, J. I would deny the rule amendments.

WEAVER, J. I would deny the rule amendments.

KELLY, J. I would deny the rule amendments.

Staff Comment: This amendment imposes an automatic stay of any and all proceedings in a case in which a party files a claim of appeal of a denial by the trial court of the party's claim of governmental immunity. No order is necessary for the stay to operate.

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

Adopted May 30, 2008, effective September 1, 2008 (File No. 2007-09)—REPORTER.

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

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION.

(A)-(B)[Unchanged.]

(C) Conduct of Deposition; Examination and Cross-Examination; Manner of Recording; Objections; Conferring with Deponent.

(1) Examination of Deponent.

(a) The person before whom the deposition is to be taken must put the witness on oath.

(b) Examination and cross-examination of the witness shall proceed as permitted at a trial under the Michigan Rules of Evidence.

(c) In lieu of participating in the oral examination, a party may send written questions to the person conducting the examination, who shall propound them to the witness and record the witness's answers.

(2) Recording of Deposition. The person before whom the deposition is taken shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness.

(a)-(b) [Unchanged.]

(3) Recording by Nonstenographic Means. The court may order, or the parties may stipulate, that the testimony at a deposition be recorded by other than stenographic means.

(a)-(d) [Unchanged.]

(4) Objections During Deposition.

~~(4)~~(a) All objections made at the deposition, including objections to

~~(a)~~(i) the qualifications of the person taking the deposition,

~~(b)~~(ii) the manner of taking it,

~~(c)~~(iii) the evidence presented, or

~~(d)~~(iv) the conduct of a party,

must be noted on the record by the person before whom the deposition is taken.

Subject to limitation imposed by an order under MCR 2.302(C) or subrule (D) of this rule, evidence objected to on grounds other than privilege shall be taken subject to the objections.

(b) An objection during a deposition must be stated concisely in a civil and nonsuggestive manner.

(c) Objections are limited to

(i) objections that would be waived under MCR 2.308(C)(2) or (3), and

(ii) those necessary to preserve a privilege or other legal protection or to enforce a limitation ordered by the court.

(5) Conferring with Deponent.

(a) A person may instruct a deponent not to answer only when necessary to preserve a privilege or other legal protection, to enforce a limitation ordered by the court, or to present a motion under MCR 2.306(D)(1).

(b) A deponent may not confer with another person while a question is pending, except to confer with counsel to decide whether to assert a privilege or other legal protection.

(D) Motion to Terminate or Limit Examination; Sanctions; Asserting Privilege.

(1) Motion. At any time during the taking of the deposition, on motion of a party or of the deponent and on a showing that the examination is being conducted in bad faith or in a manner unreasonably to annoy, embarrass, or oppress the deponent or party, or that the matter inquired about is privileged, a court in which the action is pending or the court in the county or district where the deposition is being taken may order the person conducting the examination to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in MCR 2.302(C). If the order entered terminates the examination, it may resume only on order of the court in which the action is pending.

(2) Sanctions. On motion, the court may impose an appropriate sanction—including the reasonable expenses and attorney fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule.

~~(2)~~(3) Suspending Deposition. On demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to

move for an order. MCR 2.313(A)(5) applies to the award of expenses incurred in relation to the motion.

~~(3)~~(4) Raising Privilege before Deposition. If a party knows before the time scheduled for the taking of a deposition that he or she will assert that the matter to be inquired about is privileged, the party must move to prevent the taking of the deposition before its occurrence or be subject to costs under subrule (G).

~~(4)~~(5) Failure to Assert Privilege. A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the deposition or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer the testimony of the deponent pertaining to the evidence objected to at the deposition. A party who asserts a privilege regarding medical information is subject to the provisions of MCR 2.314(B).

(E)-(G)[Unchanged.]

Staff Comment: These amendments require that objections to questions asked at a deposition be concise, and be stated in a civil and nonsuggestive manner. The purpose of these amendments is to prohibit the practice of counsel interposing "speaking objections" that are designed to instruct the witness. Further, the amendments require that objections and instructions not to answer a question be limited to a claim of privilege or other legal basis, and prohibit a deponent from conferring with anyone while a question is pending, except to confer with counsel regarding assertion of a privilege or other legal protection. Finally, the amendments add specific language allowing a court to impose sanctions, including reasonable attorney fees and costs, on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates the rule.

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

Adopted June 17, 2008, effective September 1, 2008 (File No. 2006-32)—REPORTER.

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

RULE 2.504 DISMISSAL OF ACTIONS.

(A) [Unchanged.]

(B) Involuntary Dismissal; Effect.

(1) If ~~the plaintiff~~ a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims.~~a defendant may move for dismissal of an action or a claim against that defendant.~~

(2) In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, ~~the defendant,~~ the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has ~~shown~~ no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

(3) Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.

(C)-(E)[Unchanged.]

KELLY, J. I would deny the rule amendments.

Staff comment: This amendment allows a court, on motion of any party or sua sponte, to enter a default or dismiss a party's action or claim for failure to comply with the rules or a court order. The amendment also allows the court to dismiss on its own initiative an action in which the plaintiff, on the law and the facts presented, is not entitled to relief, and makes the rule applicable to claims and hearings in addition to actions.

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

Adopted June 27, 2008, effective September 1, 2008 (File No. 2004-08)—REPORTER.

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

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 9.108 of the Michigan Court Rules and Rule 15 of the Rules Concerning the State Bar of Michigan are adopted, and new Rule 8.126 of the Michigan Court Rules is adopted, effective September 1, 2008, and apply to attorneys seeking temporary admission on or after September 1, 2008.

The information generated as a result of the adoption of these rules will provide guidance to the Court when it revisits the issue within two years of the effective date of this order. The Court is interested in determining the overall incidence and geographical distribution of applications for temporary admission, and will review these rules in light of the information gathered in conformity with the application requirements contained in this proposal.

[MCR 8.126 is a new rule; amendments of existing MCR 9.108 and Rule 15 of the Rules Concerning the State Bar of Michigan are indicated in underlining and in strikeover.]

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court or before an administrative tribunal or agency in this state when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case. An out-of-state attorney may appear and practice under this rule in no more than 5 cases in a 365-day period. Permission to appear and practice is within the discretion of the court or administrative tribunal or agency, and may be revoked at any time for misconduct. For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country.

(1) Procedure.

(a) Motion. An attorney seeking temporary admission must be associated with a Michigan attorney. The Michigan attorney with whom the out-of-state attorney is associated shall file with the court or administrative tribunal or agency an appearance and a motion that seeks permission for the temporary admission of the out-of-state attorney. The motion shall be supported by an affidavit of the out-of-state attorney seeking temporary admission, which affidavit shall verify

(i) the jurisdictions in which the attorney is or has been licensed or has sought licensure;

(ii) that the attorney is not disbarred, or suspended in any jurisdiction, and is not the subject of any pending disciplinary action, and that the attorney is licensed and is in good standing in all jurisdictions where licensed; and

(iii) that he or she is familiar with the Michigan Rules of Professional Conduct, Michigan Court Rules, and the Michigan Rules of Evidence.

The out-of-state attorney must attach to the affidavit copies of any disciplinary dispositions. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed. The motion shall also include the addresses of both attorneys.

(b) The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission. Within 7 days after receipt of the copy of the motion, the Attorney Grievance Commission must notify the court or administrative tribunal or agency and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances. The notification shall also indicate whether a fee is due if the court or administrative tribunal or agency grants permission to appear. The court or administrative tribunal or agency shall not enter an order granting permission to appear in a case until the notification is received from the Attorney Grievance Commission.

(c) Order. Following notification by the Attorney Grievance Commission, if the out-of-state attorney has been granted permission to appear temporarily in fewer than 5 cases within the past 365 days, the court or administrative tribunal or agency may enter an order granting permission to the out-of-state attorney to appear temporarily in a case. If an order granting permission is entered, the court shall send a copy of the order to the Michigan attorney and the out-of-state attorney. The Michigan attorney in turn shall send a copy of the order to the Attorney Grievance Commission.

(d) Fee. If a fee is due, the order shall state that the appearance by the out-of-state attorney is effective on the date the attorney pays a fee equal to the discipline and client-protection portions of a bar member's annual dues. If a fee is not due, the order shall indicate the effective date of the appearance. The attorney is required to pay the fee only once in any period between October 1 and September 30. The discipline portion of the fee shall be paid to the State Bar of Michigan for allocation to the attorney discipline system, and the client-protection portion shall be paid to the State Bar of Michigan for allocation to the Client Protection Fund.

(e) By seeking permission to appear under this rule, an out-of-state attorney consents to the jurisdiction of Michigan's attorney disciplinary system.

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126.

(B)-(D) [Unchanged.]

(E) Powers and Duties. The commission has the power and duty to:

(1)-(6) [Unchanged.]

(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; ~~and~~

(8) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and

~~(8)~~ (9)[Renumbered but otherwise unchanged.]

Rules Concerning the State Bar of Michigan

RULE 15. ADMISSION TO THE BAR.

Sec. 1 [Unchanged.]

Sec. 2 Foreign Attorney; Temporary Permission. Any person who is duly licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, may be ~~permitted to engage in the trial of a specific case in a court or before an administrative tribunal in this State when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case. Such temporary permission may be revoked by the court summarily at any time for misconduct.~~ temporarily admitted under MCR 8.126. The State Bar of Michigan shall inform the Attorney Grievance Commission when an applicant for temporary admission pays the required fee pursuant to MCR 8.126.

Sec. 3 [Unchanged.]

Staff Comment: The adoption of MCR 8.126 and the amendments of MCR 9.108 and Rule 15 of the Rules Concerning the State Bar of Michigan apply to out-of-state attorneys who seek temporary admission to the bar on or after September 1, 2008. They allow an out-of-state attorney to be authorized to appear temporarily (also known as pro hac vice appearance) in no more than five cases within a 365-day period. Because misconduct will subject the out-of-state attorney to disciplinary action in Michigan, a fee equal to the discipline and client-protection fund portions of a bar member's annual dues is imposed. The fee is required to be paid only once in each fiscal year of the State Bar of Michigan for which the attorney seeks admission. The Attorney Grievance Commission is required to keep a record of all such temporary appearances ordered by Michigan courts and administrative tribunals and agencies, and the attorney discipline system is entitled to receipt of the discipline portion of the fee paid in applying for the temporary admission. The Client Protection Fund is entitled to receipt of the portion of the fee representing the client protection fund fee. The State Bar of Michigan will apprise the Attorney Grievance Commission of any fees paid for temporary admissions.

The Court plans to review these rules again within two years of their effective dates in light of the information gathered by the Attorney Grievance Commission.

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

Adopted July 3, 2008, effective October 1, 2008 (File No. 2008-26)—REPORTER.

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

RULE 4. MEMBERSHIP DUES.

On order of the Court, the need for immediate action having been found, the notice requirements are dispensed with and the following amendment of Rule 4 of the Rules Concerning the State Bar of Michigan is adopted, effective October 1, 2008. MCR 1.201(D). Comments will be received until November 1, 2008, and may

be submitted to the Supreme Court Clerk in writing or electronically to P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-26. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administra--tive/index.htm. The amendment will be considered at a future public administrative hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt.

[The present language would be amended as indicated below:]

RULE 4. MEMBERSHIP DUES.

(A) An active member's dues for each fiscal year (October 1 through September 30) are payable at the State Bar's principal office by October 1 of each year. The dues consist of three separate amounts to be set by the Supreme Court to fund: (1) the Attorney Grievance Commission and the Attorney Discipline Board, (2) the client security fund administered by the State Bar, and (3) other State Bar expenses. Each amount shall be listed separately in the dues notice. An inactive member shall be assessed one-half the amounts assessed an active member for the client security fund and general expenses, but the full amount designated for the discipline agencies.

(B) A member who is admitted to the State Bar between April 1 and September 30 shall be assessed one-half the full amount of dues for that fiscal year.

(C) Dues notices must be sent to all members before September 20. A $50 late charge will be added to a dues payment postmarked after November 30. The State Bar must send a written notice of delinquency to the last recorded address provided as required by Rule 2 to a

member who fails to pay dues by November 30. Active members must be notified by registered or certified mail. Inactive members must be notified by first class mail. If the dues and the late charge are not paid within 30 days after the notice is sent, the individual is suspended from membership in the State Bar. If an individual is not subject to a disciplinary order and the suspension is for less than 3 years, the member will be reinstated on the payment of dues, a $100 reinstatement fee, and late charges owing from the date of the suspension to the date of the reinstatement. If the suspension is for 3 years or more, the individual must also apply for recertification under Rule 8 for the Board of Law Examiners.

(D) A person who has been a member of the State Bar for at least 50 years shall not be assessed general expenses, but shall pay the full amount assessed other members for the client security fund and the discipline agencies. A member who elects emeritus status pursuant to Rule 3(F) is exempt from paying dues.

(E) An active or inactive member in good standing serving in the United States Armed Forces in full-time active-duty status, as defined by the United States Department of Defense, is eligible for a waiver of payment of dues, including the attorney discipline system fee and the client security fund assessment. An application for a waiver of dues that includes a copy of military orders showing federal active-duty status must be made for each year for which a dues waiver is requested, and a waiver will be granted up to a total of four times. A member for whom a waiver of dues is granted continues to be subject to the disciplinary system.

~~(E)~~ (F)Annual dues for affiliate members and law student section members are established annually by

the State Bar Board of Commissioners in an amount not to exceed one-third of the portion of dues for active members which fund State Bar activities other than the attorney discipline system and are payable at the State Bar's principal office by October 1 of each year.

~~(F)~~ (G)All dues are paid into the State Bar treasury and maintained in segregated accounts to pay State Bar expenses authorized by the Board of Commissioners and the expenses of the attorney discipline system within the budget approved by the Supreme Court, respectively.

Staff Comment: This proposal, submitted by the State Bar of Michigan, would allow for a waiver of bar dues for up to four year for members who are in full-time active-duty status in the United States Armed Forces.

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

SUPREME COURT CASES

ROSS v AUTO CLUB GROUP

Docket No. 130917. Argued December 4, 2007 (Calendar No. 2). Decided May 7, 2008.

Randall L. Ross brought an action in the Macomb Circuit Court against Auto Club Group, seeking work-loss benefits under the no-fault act, MCL 500.3101 *et seq*. The plaintiff was the sole shareholder and sole employee of a subchapter S corporation, which paid him wages. The defendant, relying on *Adams v Auto Club Ins Ass'n*, 154 Mich App 186 (1986), had denied the plaintiff's claim because the corporation had operated at a loss during the time in question. The court, Donald G. Miller, J., granted the plaintiff's motion for summary disposition and, in addition to awarding him work-loss benefits under MCL 500.3107(1)(b), awarded him attorney fees pursuant to MCL 500.3148(1), ruling that the defendant's refusal to pay benefits was unreasonable. The Court of Appeals, HOEKSTRA, P.J., and GAGE and WILDER, JJ., affirmed, concluding that the defendant had relied on caselaw that did not address the circumstances and that the plaintiff had supplied W-2 forms supporting his claim. 269 Mich App 356 (2006). The defendant sought leave to appeal, and the Supreme Court initially denied leave. 476 Mich 865 (2006). On reconsideration, however, the Supreme Court ordered oral argument on whether to grant the application or take other peremptory action. 477 Mich 960 (2006). Following oral argument, the Supreme Court granted leave to appeal. 478 Mich 902 (2007).

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

A person who is the sole shareholder and sole employee of a subchapter S corporation is entitled under the no-fault act to work-loss benefits based on his or her wages from the corporation, and the corporation's business expenses are irrelevant when calculating the person's loss of income from work.

1. A corporation is a distinct entity, even when a single individual or corporation owns all of its stock. The subchapter S corporation in this case did not remunerate the plaintiff on the basis of its gross receipts. Because the plaintiff received wages from the corporation, the fact that the corporation lost more

money than it paid the plaintiff in wages was irrelevant when calculating the plaintiff's loss of income from work for purposes of MCL 500.3107(1)(b). The plaintiff should be treated no differently than an employee of any other corporation operating at a loss.

2. MCL 500.3148(1) provides for an award of attorney fees if an insurer unreasonably refuses to pay or delays payment of a claim, and an insurer's refusal to pay or delay in paying places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty. The determinative factor in the inquiry is not whether the insurer is ultimately held responsible for the benefits, but whether its initial refusal to pay or the delay was unreasonable.

3. The defendant relied on *Adams*, a factually similar case that held that it was proper under MCL 500.3107(1)(b) to calculate the work-loss benefits of a self-employed independent contractor by deducting his business expenses from his gross income. *Adams* is not directly on point, but the defendant's reliance on it and refusal to pay benefits was reasonable. The trial court clearly erred by deciding that the defendant's argument was not based on a legitimate question of statutory interpretation.

Justice KELLY, concurring, wrote additionally to disagree with a point raised in Justice CORRIGAN's partial dissent concerning the positions that Justice KELLY took in the majority opinion in this case and in an earlier opinion she authored while serving in the Court of Appeals.

Affirmed in part and reversed in part.

Justice WEAVER, concurring in part and dissenting in part, concurred in parts I, II, and III of the majority's opinion affirming the award of work-loss benefits to the plaintiff, but dissented from part IV of that opinion reversing the award of attorney fees to the plaintiff. She agreed instead with the reasons stated in the Court of Appeals opinion for concluding that the trial court did not clearly err by awarding attorney fees.

Justice CORRIGAN, joined by Justice MARKMAN, concurring in part and dissenting in part, concurred in part IV of the majority's opinion reversing the award of attorney fees, but dissented from the conclusion in part III that the plaintiff's W-2 wages established his loss of income from work for purposes of calculating work-loss benefits. The plaintiff reported the corporation's losses on his personal tax returns and paid no income taxes on his wages. The no-fault act explicitly recognizes the relationship between income

from work and taxable income. While the plaintiff and his corporation have separate legal identities, his W-2s merely reflected the cash flow that the plaintiff allowed himself from a business that generated no income from work. Reimbursing the plaintiff for this lost cash flow would subsidize his business losses and would not compensate him for his actual loss of income from work. While the W-2 wages of a subchapter S corporation employee may be the appropriate measure of the loss of income from work in some cases, a work-loss claim by the sole shareholder and sole employee of a subchapter S corporation is subject to a factual inquiry concerning the actual amount of income lost. The plaintiff essentially operated his corporation as a sole proprietorship, and the defendant created a genuine issue of material fact concerning the amount, if any, of the plaintiff's actual loss of income. The judgment of the Court of Appeals should be reversed, and the case should be remanded to the trial court for further proceedings.

1. INSURANCE — NO-FAULT — WORK-LOSS BENEFITS — SUBCHAPTER S CORPORATIONS.

A person who is the sole shareholder and sole employee of a subchapter S corporation is entitled under the no-fault act to work-loss benefits based on his or her wages from the corporation; the corporation's business expenses or the fact that the corporation operated at a loss is irrelevant in calculating the person's wage loss (MCL 500.3107[1][b]).

2. INSURANCE — NO-FAULT — UNREASONABLE DENIALS OF BENEFITS — ATTORNEY FEES.

The no-fault act provides for an award of attorney fees if an insurer unreasonably refused to pay or delayed payment of a claim; an insurer can justify its refusal or delay by showing that it was the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty; the determinative factor is not whether the insurer is ultimately held responsible for paying the benefits, but whether its initial refusal or delay was unreasonable (MCL 500.3148[1]).

Olsman Mueller, P.C. (by *Jules B. Olsman* and *Donna M. MacKenzie*), for the plaintiff.

Schoolmaster, Hom, Killeen, Siefer, Arene & Hoehn (by *David R. Tuffley*) and *John A. Lydick*, for the defendant.

Amici Curiae:

Willingham & Coté, P.C. (by *John A. Yeager, Torree J. Breen*, and *Leon J. Letter*), for Farm Bureau Mutual Insurance Company of Michigan.

Miller Johnson (by *Stephen R. Ryan* and *Salvatore W. Pirrotta*) for the Coalition Protecting Auto No-Fault.

Hall, Render, Killian, Heath & Lyman, P.L.L.C. (by *John L. Lowes* and *Leah Voigt Romano*), for the Michigan Health and Hospital Association.

KELLY, J. This case arises out of a dispute over no-fault benefits. Plaintiff Randall Ross was injured in an automobile accident and submitted a claim for work-loss benefits to defendant Auto Club Group, his no-fault insurer. Defendant denied plaintiff's claim, prompting him to file this lawsuit. The trial court not only awarded plaintiff benefits, but also awarded attorney fees. The Court of Appeals affirmed.

We granted defendant's application for leave to appeal. We hold that the trial court properly awarded plaintiff work-loss benefits. But it clearly erred when deciding that defendant's refusal to pay benefits was not based on a legitimate question of statutory interpretation. As a consequence, we affirm the Court of Appeals judgment that plaintiff is entitled to work-loss benefits, but reverse its affirmance of the award of attorney fees.

I. FACTS

Plaintiff was injured in an automobile accident. At the time of the accident, he was the sole shareholder and sole employee of Michigan Packing Company, Inc. Plaintiff had incorporated this entity under the Busi-

ness Corporation Act (BCA)[1] and, for federal tax purposes, had filed an election under subchapter S of the Internal Revenue Code.[2]

As a result of his injuries, plaintiff was unable to work. He made a claim to defendant for work-loss benefits. In support of his claim, plaintiff provided defendant with W-2 forms showing that Michigan Packing had paid plaintiff wages in 2001 through 2003.[3]

Defendant denied plaintiff's claim. It relied on the benefit-calculation methodology set forth by the Court of Appeals in *Adams v Auto Club Ins Ass'n*.[4] Defendant concluded that plaintiff had failed to establish a claim for lost income because Michigan Packing operated at a loss during the years at issue.[5]

Plaintiff filed this lawsuit on May 6, 2004. The trial court granted his motion for summary disposition, ruling that he was entitled to work-loss benefits based on his wages. The court also awarded attorney fees under MCL 500.3148(1), the no-fault act's attorney-fee provision. It found that defendant had unreasonably delayed making payment to plaintiff. Defendant moved for reconsideration. The trial court denied the motion, and defendant appealed in the Court of Appeals.

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[1] MCL 450.1101 *et seq*.

[2] Subchapter S of the Internal Revenue Code, 26 USC 1361 through 1379, allows a qualifying corporation to avoid federal taxation at the corporate level, instead creating a "pass-through" of income that is taxed at the shareholder level. *Chocola v Dep't of Treasury*, 422 Mich 229, 236; 369 NW2d 843 (1985).

[3] Michigan Packing paid plaintiff wages of $16,200 in 2001, $11,250 in 2002, and $12,150 in 2003.

[4] *Adams v Auto Club Ins Ass'n,* 154 Mich App 186; 397 NW2d 262 (1986).

[5] Michigan Packing lost $21,828 in 2001, $28,179 in 2002, and $35,208 in 2003.

The Court of Appeals affirmed in a published opinion.[6] It held that the trial court had properly rejected the benefit-calculation methodology proposed by defendant and had correctly granted benefits based on plaintiff's wages.[7] The Court of Appeals also held that the trial court had not clearly erred by awarding attorney fees.[8] It found defendant's denial unreasonable because defendant had relied on a case having facts dissimilar to those of this case. Moreover, plaintiff had supplied W-2 forms supporting his claim.[9] The Court denied defendant's motion for reconsideration.

Defendant applied for leave to appeal in this Court. Initially, we denied the application, but later granted defendant's motion for reconsideration. On March 7, 2007, this Court heard oral argument concerning whether "the Court of Appeals correctly affirmed the trial court's award of attorney fees to plaintiff pursuant to MCL 500.3148(1)."[10] After hearing argument on the application, we granted leave to appeal to consider both the attorney-fee issue and the benefits issue.[11]

II. STANDARD OF REVIEW

This case requires us to decide whether the lower courts properly interpreted the no-fault act in determining that plaintiff is entitled to work-loss benefits. Issues of statutory interpretation are reviewed de novo.[12]

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[6] *Ross v Auto Club Group*, 269 Mich App 356; 711 NW2d 787 (2006).

[7] *Id.* at 361-362.

[8] *Id.* at 362.

[9] *Id.* at 363-364.

[10] 477 Mich 960 (2006).

[11] 478 Mich 902 (2007).

[12] *People v Barbee*, 470 Mich 283, 285; 681 NW2d 348 (2004).

We also review the award of attorney fees. The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits.[13] The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact.[14]

Whereas questions of law are reviewed de novo, a trial court's findings of fact are reviewed for clear error.[15] A decision is clearly erroneous when "the reviewing court is left with a definite and firm conviction that a mistake has been made."[16]

III. WORK-LOSS BENEFITS

The issue concerning work-loss benefits is one of first impression. It is whether someone can recover work-loss benefits under MCL 500.3107(1)(b) if he or she is the sole employee and shareholder of a subchapter S corporation that lost more money than it paid in wages. Defendant contends that plaintiff, who is such a person, is not entitled to benefits. Defendant points out that a subchapter S corporation's profits and losses pass through to the shareholders for tax purposes. Accordingly, it argues, plaintiff should be treated like an unincorporated sole proprietor, which means that, when his income is calculated, his gross receipts must be reduced by his business expenses. The Court of Appeals rejected this argument.

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[13] MCL 500.3148(1).

[14] See *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

[15] *Id.*

[16] *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

In holding that the corporation's losses were irrelevant to computing plaintiff's work-loss benefits, the Court of Appeals stated:

> In this case, there is no dispute that (1) plaintiff received *wages* as an employee of the corporation and (2) plaintiff's remuneration from the corporation was *not* determined on the basis of the annual net income of the corporation. Plaintiff did not assert a work-loss claim based on the lost profits of the corporation. These facts distinguish this case from *Adams*. We reject defendant's argument that plaintiff's self-employment status dictates a calculation of the gross receipts of the corporation less the corporate expenses to determine plaintiff's net income. We emphasize that plaintiff as an individual received wages and was not remunerated on the basis of the gross receipts of the corporation. Defendant presents no evidence to justify the disregard of the long-held rule that " '[t]he corporate entity is distinct although all its stock is owned by a single individual or corporation.' " Moreover, "[a corporation's] separate existence will be respected, unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy." Because plaintiff received wages from the corporation, and because defendant has presented no evidence to the contrary, the business expenses of the corporation are irrelevant in calculating plaintiff's wage loss, and plaintiff is treated as being in no different position than an employee of any other corporation operating at a loss. The trial court correctly determined that plaintiff was entitled to work-loss benefits and properly granted his motion for summary disposition.[17]

We conclude that the Court of Appeals reached the right result for the right reasons. Accordingly, we affirm its decision and hold that plaintiff is entitled to work-loss benefits based on his wages.

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[17] *Ross*, 269 Mich App at 361-362 (emphasis in original; citations omitted).

Justice CORRIGAN argues in her partial dissent that defendant has created a factual question regarding the amount of plaintiff's loss of income from work. This ignores the legitimate distinction between a shareholder and the corporate entity that is established by Michigan law. What Justice CORRIGAN says about the nature of a subchapter S corporation is true: for federal income taxation purposes, the income and losses of a subchapter S corporation pass through to the individual shareholders as if the income and losses belonged to the members of a partnership. But her "income" analysis errs by suggesting that the blurring of corporate and shareholder identities for federal taxation purposes also blurs the separate legal identities created for those entities by the BCA. Indeed, the authority she relies on made clear that, for federal taxation purposes alone, a subchapter S corporation is merely analogous to a partnership or a sole proprietorship.

There is no authority for Justice CORRIGAN's proposition that the distinct corporate identity created by *Michigan* law may be ignored. The corporation's income or losses are not the shareholder's income or losses for purposes of the no-fault act's work-loss-benefits provision. Neither the BCA nor the no-fault act supports her analysis. Thus, her statement that "plaintiff and his wife had *no taxable income* in 2001, 2002, and 2003"[18] entirely misses the central point: regardless of whether he was subject to taxation under federal law, plaintiff indisputably received actual income in the form of W-2 wages in those years. Justice CORRIGAN seems to ignore the import of her own observation that "plaintiff's work as the sole employee of his corporation resulted in *no income*—but only overall losses—to the

[18] *Post* at 20.

corporation."[19] The losses ultimately belonged to the corporation, not to plaintiff.

At its core, Justice CORRIGAN's position would accomplish a de facto piercing of the corporate veil. It would do this even though the shareholder had not engaged in fraudulent or wrongful conduct that would justify a court's ignoring the corporate form. It would punish plaintiff for filing an election under subchapter S, a legitimate designation that permits him to report a loss for federal taxation purposes. Justice CORRIGAN indulges in speculation that defendant created a question of material fact to defeat summary disposition under MCR 2.116(C)(10). And she fails to explain how the undisputed proof of plaintiff's wages is an inaccurate reflection of *his* loss of income from work and how the corporation's losses could possibly diminish that figure.[20]

IV. ATTORNEY FEES

The second issue is whether the award of attorney fees was proper.[21] The no-fault act provides for an award

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[19] *Post* at 20.

[20] As noted in footnote 3 of this opinion, plaintiff received at least $11,250 in each of the tax years in question. Thus, as a result of his work for the corporation, plaintiff earned at least $11,000 annually for his own benefit. Presumably plaintiff also paid employment taxes on these W-2 wages, such as payroll taxes under the Federal Insurance Contributions Act, also known as FICA. Justice CORRIGAN does not attempt to explain how the corporation's losses had any effect on the $11,000 in plaintiff's bank account.

[21] Plaintiff argues that defendant has waived this claim by acquiescing in the entry of the trial court's March 7, 2005, final judgment. This argument has no merit. Defendant has consistently objected to the award of attorney fees. Defendant's approval of the entry of the judgment did not transform the disputed issue into an unappealable settlement or consent judgment. See *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74, 77-79; 545 NW2d 4 (1996).

of reasonable attorney fees to a claimant if the insurer unreasonably refuses to pay the claim. Specifically, MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured.[22] Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay.[23] The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.[24]

The trial court correctly set forth this rule of law in determining that plaintiff was entitled to attorney fees. The issue is whether it clearly erred in applying this rule and finding that defendant's refusal was not based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. The determinative factor in our inquiry is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable.

Plaintiff sought work-loss benefits under MCL 500.3107(1)(b), which states:

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[22] See *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 200 n 12; 596 NW2d 142 (1999).

[23] *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999).

[24] *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987).

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> * * *
>
> (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.

In order to be entitled to benefits under this section, a plaintiff must suffer a loss of income.

Plaintiff in this case provided W-2 forms and asserted that they adequately represented his income. He made this claim despite the fact that he was the sole shareholder and sole employee of a subchapter S corporation that had lost more money then it paid him in wages. Defendant asserted that corporate losses must be considered when calculating "income" for a sole shareholder who is also the sole employee. Defendant's argument presents an issue of first impression. In support of the argument that plaintiff was not entitled to work-loss benefits, defendant relied on the Court of Appeals decision in *Adams v Auto Club Ins Ass'n*.

In *Adams*, a motor vehicle accident permanently disabled the plaintiff. At the time of the accident, he was a self-employed cosmetologist who worked as an independent contractor. He paid 41 percent of his weekly gross revenue as chair rental and was also required to pay all of his own business expenses, including expenses for supplies and materials. When he applied for work-loss benefits after the accident, the defendant insurance company initially approved the payment of 85 percent of the plaintiff's average daily gross receipts. Approximately one year later, however, the defendant decided that the plaintiff was entitled to only 85 percent of his net receipts. The plaintiff brought suit, claiming that

benefits should be calculated on the basis of his average daily gross receipts. The defendant argued that it should be allowed to deduct the plaintiff's business expenses in calculating his work-loss benefits.[25]

The Court of Appeals began its analysis in *Adams* by noting that the issue to be decided was the proper method for calculating work-loss benefits under MCL 500.3107(1)(b).[26] The Court noted that the statute allows an injured party to collect benefits for "loss of income" but does not define that phrase.[27] The Court of Appeals examined the statutory language, Michigan precedent, and decisions from sister states. It decided that, under the facts of the case, the term "loss of income" contemplated deducting the plaintiff's business expenses from his gross income in order to determine his work-loss benefits.[28] The Court determined that this procedure was necessary to avoid awarding the plaintiff more in benefits than he would have taken home from his job had he been able to work.[29] The Court was satisfied that this result was consistent with the no-fault act's goal of placing individuals in the same, but no better, position than they were before their accidents.[30]

In this case, defendant relied on *Adams*. It argued that, because plaintiff was the sole shareholder and employee of Michigan Packing and the company lost more than it paid plaintiff in wages, plaintiff was not entitled to work-loss benefits. He suffered no loss of income. Defendant asserted that the benefit-calculation

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[25] *Adams*, 154 Mich App at 190.

[26] *Id*.

[27] *Id.* at 191.

[28] *Id.* at 192-193.

[29] *Id.* at 193.

[30] *Id*.

methodology set forth in *Adams* applies whenever a self-employed person is involved. Its theory was that, because a self-employed individual is solely responsible for profits and losses, the losses should be considered when determining whether there was a loss of income. Otherwise, defendant contended, plaintiff will end up in a better position financially than he was before the accident.

We acknowledge that this case differs from *Adams* in that the plaintiff in *Adams* was an unincorporated independent contractor, whereas Michigan Packing is incorporated. However, the inquiry is not whether defendant is responsible for the benefits, but only whether defendant's refusal to pay them was unreasonable. As defendant points out, a subchapter S corporation does not pay income taxes; the business's profits and losses pass through to the owners.[31] Accordingly, because the profits and losses of Michigan Packing belonged to plaintiff for tax purposes, just as they belonged to the plaintiff in *Adams*, defendant's reliance on *Adams* was reasonable. *Adams* is not directly on point, and, ultimately, we do not extend its reasoning to the facts of this case. Nonetheless, we conclude that the trial court clearly erred in deciding that defendant's argument was not based on a legitimate question of statutory interpretation.

As the Court of Appeals acknowledged, how to calculate the "income" of an individual in plaintiff's situation for the purpose of determining work-loss benefits is an issue of first impression.[32] Because MCL 500.3107(1)(b) does not define the term "loss of income," we conclude that it was reasonable for defen-

[31] See *Holmes v Dep't of Revenue & Taxation Director*, 937 F2d 481, 484 (CA 9, 1991).

[32] *Ross*, 269 Mich App at 360.

dant to rely on the factually similar *Adams* decision. Its position that, in calculating plaintiff's loss of income, the losses suffered by Michigan Packing should be subtracted from the wages paid to plaintiff had support in law and fact.

V. CONCLUSION

The issues we decide in this case are whether plaintiff was properly awarded work-loss benefits and whether defendant's refusal to pay work-loss benefits was reasonable. The trial court held that plaintiff was entitled to benefits. It also awarded attorney fees after finding that defendant's refusal to pay benefits was not reasonable. The Court of Appeals affirmed on both issues. We affirm the award of benefits but reverse the award of attorney fees. Although defendant was ultimately responsible for paying the benefits, its refusal to pay was not unreasonable. Defendant relied on a factually similar Court of Appeals decision to adopt a reasonable position on an issue of first impression.

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

KELLY, J. (*concurring*). In her partial dissent, Justice CORRIGAN asserts that my position in this case is inconsistent with my position in *Kirksey v Manitoba Pub Ins Corp*.[1] She is incorrect. The plaintiff in *Kirksey* was an independent contractor. In this case, plaintiff is not an independent contractor; he is employed by a corporation. My colleague fails to recognize that this material difference distinguishes the case at bar not only from *Kirksey*, but from the other cases she discusses, as well.

[1] *Kirksey v Manitoba Pub Ins Corp,* 191 Mich App 12; 477 NW2d 442 (1991).

WEAVER, J. (*concurring in part and dissenting in part*). I concur in and join parts I, II, and III of the majority's opinion affirming the award of work-loss benefits to plaintiff.

I dissent from part IV of the majority's opinion reversing the award of attorney fees for plaintiff. I agree with the reasons stated in the Court of Appeals opinion for concluding that the trial court did not clearly err by awarding plaintiff attorney fees for defendant's unreasonable failure to pay plaintiff's claim for work-loss benefits.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in part IV of the majority's decision, which reverses the award of attorney fees to plaintiff. I respectfully dissent, however, from the majority's conclusion in part III that plaintiff's W-2 wages established compensable loss of income from work under § 3107 of the no-fault act, MCL 500.3107(1)(b).

Plaintiff was the sole owner and sole employee of a subchapter S corporation that he operated at a loss that exceeded his wages. To establish compensable "loss of income from work" under MCL 500.3107(1)(b), plaintiff merely provided evidence that he paid himself W-2 wages. Defendant persuasively argues that plaintiff's W-2 wages were not a true measure of his income from work because plaintiff's work resulted in *no actual income*, but only created losses. Further, because of the unique tax status of S corporations, plaintiff reported the corporate losses on his personal tax returns and, as a result, paid no income tax on his wages. The no-fault act explicitly recognizes the relationship between income from work and taxable income in MCL 500.3107(1)(b), which provides that, generally, "[b]ecause the benefits received from personal protection

insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% . . . ."

Under these circumstances, for our purposes, the W-2 is a meaningless form that merely reflects the cash flow plaintiff allowed himself from a business that generated no income from work. Reimbursing him for this lost cash flow would, therefore, subsidize his preexisting business losses; it would not compensate him for actual loss of income from work. I acknowledge that plaintiff and his corporation have separate legal identities. See *ante* at 8. But this fact does not alleviate plaintiff's burden to establish, as a matter of fact, that he suffered loss of income from work. Because defendant created a genuine issue of material fact regarding whether plaintiff can establish *any* "loss of income from work an injured person would have performed," MCL 500.3107(1)(b), I would reverse and remand this case to the trial court for further proceedings.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision granting or denying a motion for summary disposition. *City of Taylor v Detroit Edison Co,* 475 Mich 109, 115; 715 NW2d 28 (2006). This case involves a question of statutory interpretation, which we also review de novo. *Haynes v Neshewat,* 477 Mich 29, 34; 729 NW2d 488 (2007). The goal of statutory interpretation is to effectuate the Legislature's intent as demonstrated by the text of the statute. *Casco Twp v Secretary of State,* 472 Mich 566, 571; 701 NW2d 102 (2005). "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Id.*

II. ANALYSIS

The no-fault act describes the benefits available for "work loss" in pertinent part as those for

> [*w*]*ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured*. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. [MCL 500.3107(1)(b) (emphasis added).]

"Work-loss benefits replace income that a claimant would have earned had he not been injured." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472; 521 NW2d 831 (1994). These benefits "are meant primarily to provide claimants with simple income insurance and are intended to compensate claimants approximately dollar for dollar for the amount of wages lost because of the injury or disability." *Id.* Compensable work loss is not always measured by reference to a claimant's preaccident wages, however. The statute defines "work loss" *not* as "lost wages," but as "loss of *income from work*." MCL 500.3107(1)(b) (emphasis added). In accord, for example, an independent contractor may seek work-loss benefits because "work loss includes not only lost wages, but also lost profit which is attributable to personal effort and self-employment." *Kirksey v Manitoba Pub Ins Corp*, 191 Mich App 12, 17; 477 NW2d 442 (1991). Most significantly, "[i]n all cases, claimants are left to their proofs." *Popma, supra* at 472. A plaintiff "will not be allowed to manipulate the statutory scheme to avoid this burden of proof." *Id.*

As noted, plaintiff is the sole shareholder and sole employee of an S corporation. Shareholders of a small-business corporation may elect for the corporation to be treated as an S corporation under subchapter S of the Internal Revenue Code. 26 USC 1361(a)(1); 26 USC 1362(a)(1). An S corporation is generally not taxed directly by the federal government. 26 USC 1363(a). Instead, its tax liabilities and deductions, including income and losses, pass through to the individual shareholders on a pro rata basis. 26 USC 1366. "The effect is to treat electing corporations more like partnerships, since partnership income flows through to the partners and is taxed accordingly." *Chocola v Dep't of Treasury*, 422 Mich 229, 236; 369 NW2d 843 (1985).

Plaintiff's corporation reported overall losses that exceeded plaintiff's wages in 2001, 2002, and 2003. He listed the corporation's losses on his personal income tax return. Accordingly, defendant offered as evidence the opinion of an accounting expert who concluded that, although plaintiff reported W-2 wages, he suffered no actual loss of income from work. Defendant argues that, under these circumstances, plaintiff should not be treated as a wage-earning employee of a distinct corporation. Rather, plaintiff's yearly income from work should be calculated by subtracting his business expenses from his gross receipts, as was done in *Adams v Auto Club Ins Ass'n,* 154 Mich App 186; 397 NW2d 262 (1986).

As the majority explains, *ante* at 13, the *Adams* panel acknowledged that the "goal of the no-fault act is to place individuals in the same, but no better, position than they were before their automobile accident." *Adams, supra* at 193. It opined that the self-employed "plaintiff [could] not claim that his actual expendable income included even that income which he was re-

quired to pay out as business expenses." *Id.* Therefore, to avoid overcompensating the self-employed plaintiff in *Adams*, it was appropriate to conduct a factual inquiry into whether certain business-related expenses should be deductible for purposes of determining work-loss benefits. *Id.* at 193-194.

I agree with defendant and find *Adams* applicable. Here, plaintiff operated his business at a loss that exceeded his W-2 income, and he reported his corporate losses for tax purposes. Indeed, plaintiff and his wife had *no taxable income* in 2001, 2002, and 2003. Most significantly, plaintiff's work as the sole employee of his corporation resulted in *no income*—but only overall losses—to the corporation. The expert opinion offered by defendant, which recounted these facts and conclusions, created a genuine issue of material fact regarding whether plaintiff can establish *any* "loss of income from work an injured person would have performed . . . ." MCL 500.3107(1)(b). Put otherwise, defendant created a genuine issue of material fact with regard to whether plaintiff's W-2 wages constituted a correct measure of his loss of income from work.

In adopting the reasoning of the Court of Appeals in this case, the majority stresses that, to the contrary, plaintiff should merely be treated as any employee of a corporation that is operating at a loss. *Ante* at 8. But plaintiff cannot be compared directly to an employee of any corporation that is operating at a loss. Employees of subchapter C corporations receive real income, which is in no way offset by corporate losses, and must pay income taxes on their wages regardless of whether the corporation, itself, operates at a loss. Here, plaintiff used the S corporation's losses to offset his wages and, as a result, he was relieved from paying any federal income tax.

Further, this and other courts explicitly recognize the unique nature of S corporations, which are often more comparable to partnerships than to corporations. *Chocola, supra* at 243 ("Subchapter S corporations enjoy unique characteristics that provide a compelling analogy to partnerships, which produce apportionable business income in the hands of member partners . . . ."); *Tetlak v Village of Bratenahl*, 92 Ohio St 3d 46, 48; 748 NE2d 51 (2001) (stating that subchapter S "treat[s] corporate income, losses, deductions, and credits as if incurred by individual shareholders in a manner akin to the tax treatment of partnerships"), citing *Bufferd v Internal Revenue Comm'r*, 506 US 523, 524-525; 113 S Ct 927; 122 L Ed 2d 306 (1993). Shareholders of an S corporation are taxed on the basis of their pro rata shares of all items of corporate income and loss, regardless of whether the income or loss is separately computed. 26 USC 1366(a). Similarly, when it is necessary to compute a shareholder's annual gross income, it is calculated as his pro rata share of the corporation's gross income. 26 USC 1366(c). As the Ohio Supreme Court observed in *Tetlak*, *supra* at 49, S corporations are not taxed as C corporations; rather, taxable income is computed essentially as if the S corporation were an individual. Therefore, shareholder income is characterized as if it originated from whatever source generated the income for the corporation. *Id.*; 26 USC 1366(b).

For these reasons, I conclude that a work-loss claim of a sole shareholder and sole employee of an S corporation is subject to a factual inquiry concerning the actual amount of lost income from work. In a given case, I may not disagree with the majority of my colleagues that the W-2 wages of an employee of an S corporation may be comparable to the wages of an employee of a C corporation and will be the appropriate

measure of loss of income from work. The facts in *this* case, however, reveal a sole shareholder operating his S corporation essentially as a sole proprietorship. *Here,* plaintiff does not offer a principled argument that his gross income and operating expenses fail to reflect the most accurate measure of his actual income from work. Rather, he advocates a rule treating W-2 wages as the measure of loss of income from work under all circumstances simply because he is an employee of a corporation.

By adopting such a rule, the majority treats otherwise similarly situated sole proprietors differently on the mere basis of whether they choose to incorporate. Further, contrary to the majority's assertion, *ante* at 10, I do not think that my position requires a "de facto piercing of the corporate veil" in any traditional sense. Rather, I recognize that plaintiff's profits or losses as the sole shareholder and sole proprietor of an S corporation may bear on whether he lost income from work as a matter of fact. Moreover, to any extent my view may be cast as requiring us to pierce the corporate veil, it is not at all clear that doing so would be inappropriate under these circumstances. As I have observed on more than one occasion, this Court has failed to establish clear standards for piercing the corporate veil. See *L & R Homes, Inc v Jack Christenson Rochester, Inc*, 475 Mich 853 (2006) (CORRIGAN, J., dissenting). As the Court of Appeals observed in *Kline v Kline*, 104 Mich App 700, 702-703; 305 NW2d 297 (1981), this Court has historically treated corporations and sole shareholders "as one for certain purposes," in part because the "fiction of a corporate entity different from the stockholders themselves was introduced for convenience and to serve the ends of justice, but when it is invoked to subvert the ends of justice it should be and is disregarded by the

courts." "Each case involving disregard of the corporate entity rests on its own special facts." *Id.* at 703.[1]

Most significantly, a rule treating W-2 wages as the measure of loss of income from work under all circumstances is not consistent with the no-fault act's intent to compensate for the actual loss of work-related income caused by an accident. The no-fault act "is not designed to provide compensation for all economic losses suffered as a result of an automobile accident injury." *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 245; 293 NW2d 594 (1980). Michigan courts have consistently engaged in factual inquiries to determine the true measure of an

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[1] The *Kline* Court's full discussion follows:

> Complete identity of interest between sole shareholder and corporation may lead courts to treat them as one for certain purposes. *Williams v America Title Ins Co*, 83 Mich App 686; 269 NW2d 481 (1978). Where the corporation is a mere agent or instrumentality of its shareholders or a device to avoid legal obligations, the corporate entity may be ignored. *People ex rel Attorney General v Michigan Bell Telephone Co*, 246 Mich 198, 205; 224 NW 438 (1929). A court may look through the veil of corporate structure to avoid fraud or injustice. *Schusterman v Employment Security Comm*, 336 Mich 246; 57 NW2d 869 (1953). The community of interest between corporation and shareholders may be so great that, to meet the purposes of justice, they should be considered as one and the same. *L A Walden & Co v Consolidated Underwriters*, 316 Mich 341, 346; 25 NW2d 248 (1946). When the notion of a corporation as a legal entity is used to defeat public convenience, justify a wrong, protect fraud or defend crime, that notion must be set aside and the corporation treated as the individuals who own it. *Paul v Univ Motor Sales Co*, 283 Mich 587, 602; 278 NW 714 (1938). The fiction of a corporate entity different from the stockholders themselves was introduced for convenience and to serve the ends of justice, but when it is invoked to subvert the ends of justice it should be and is disregarded by the courts. *Paul, supra*. A court's treatment of a corporate entity clearly rests on notions of equity, whether it is an action at law or at equity. Each case involving disregard of the corporate entity rests on its own special facts. *Brown Bros Equip Co v State Hwy Comm*, 51 Mich App 448; 215 NW2d 591 (1974). [*Id*. at 702-703.]

injured person's compensable accident-related losses. For instance, in *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 150; 350 NW2d 233 (1984), the plaintiff's injuries from a car accident would have prevented him from working for a period of 28 months. During that period, however, he suffered a heart attack that disabled him from work for an indefinite amount of time. *Id.* This Court examined the language of former MCL 500.3107(b), a predecessor of MCL 500.3107(1)(b), both versions of which nearly are identical to § 1(a)(5)(ii) of the Uniform Motor Vehicle Accident Reparations Act (UMVARA). *Id.* at 151. We observed that, "by adopting the language of such a model act, it is evident that the Legislature 'was cognizant of, and in agreement with, the policies which underlie the model acts' language'." *Id.,* quoting *Miller v State Farm Mut Automobile Ins Co*, 410 Mich 538, 559; 302 NW2d 537 (1981). Accordingly, we found the comments to § 1(a)(5) of the UMVARA relevant to Michigan's act. *MacDonald*, *supra* at 151. The relevant comments read:

> "Work loss", as are the other components of loss, is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury. On the other hand, an employed person who loses time from work he would have performed had he not been injured has suffered work loss * * *. Work loss is not restricted to the injured person's wage level at the time of injury. For example, an unemployed college student who was permanently disabled could claim loss, at an appropriate time after the injury, for work he would then be performing had he not been injured. Conversely, an employed person's claim for work loss would be appropriately adjusted at the time he would have retired from his employment." [*Id.*, quoting the comments to § 1(a)(5) of the UMVARA, found in 14 ULA 46-47.]

Both the clear language of former MCL 500.3107(b) and the comments to the UMVARA led the *MacDonald* Court to conclude "that work-loss benefits are available to compensate only for that amount that the injured person would have received had his automobile accident not occurred." *Id.* at 152. The plaintiff's wages before the accident were not an automatic, true measure of his ongoing loss. Rather, the plaintiff "would have worked and earned wages for two weeks, until the date of his heart attack. After that date plaintiff would have earned no wage even had the accident not occurred and, therefore, [he was] ineligible for work-loss benefits after that date under § 3107(b)." *Id.* The import of the *MacDonald* Court's decision was to "allow insurers to use the act as it was intended and *avoid paying compensation not due the claimant*." *Id.* at 154 (emphasis added).

This Court employed similar reasoning, and relied on *MacDonald,* to hold in favor of the plaintiff in *Marquis v Hartford Accident & Indemnity (On Remand)*, 444 Mich 638; 513 NW2d 799 (1994). There, the plaintiff was injured in an accident and alleged that her resulting temporary injury caused her to lose her job. During her period of disability, her job was offered to a permanent replacement employee. She was then unable to find a job that paid a similar amount. *Id.* at 640. She alleged that, although her period of disability had ended, she qualified for full work-loss benefits during the statutory three-year period because, but for the accident, she would have remained employed in her previous position. *Id.* at 642. This Court agreed that, although the availability of lower-paying work could be considered in terms of the plaintiff's obligation to mitigate her damages, she had created a genuine issue of material fact regarding whether the accident was the but-for cause of her loss of income at a higher wage. *Id.* at 649-650.

In sum, this Court has consistently condoned careful factual inquiry regarding the true measure of actual income lost as a direct result of an automobile accident. I also find it striking that Justice KELLY herself employed reasoning similar to that of the *MacDonald* and *Marquis* courts as the author of the Court of Appeals opinion in *Kirksey.* In *Kirksey,* she was presented with a plaintiff independent contractor who was injured while working for a trucking company. *Kirksey, supra* at 13-14. At the time of his injury, the plaintiff had the option of working for a second trucking company, which guaranteed him more hours and pay, if the first company was unable to fulfill its promises of more hours and certain benefits. *Id.* at 13. The plaintiff claimed that, because the first company offered him reduced hours at the time of his injury, the amount of his loss of income from work should not have been based on his earnings at the time of the accident. Rather, because he would have returned to work full-time at the second company but for his accident, his benefits should have been based on his earnings during his previous work with the second company. *Id.* at 14. Judge KELLY recognized that wages alone are not always a measure of loss of income from work; rather, an independent contractor such as the plaintiff could seek work-loss benefits because "work loss includes not only lost wages, but also lost profit which is attributable to personal effort and self-employment." *Id.* at 17. I note that this comment directly reflects the comments to § 1(a)(5) of the UMVARA, which comments state, in part: "Work loss includes not only lost wages, but lost profit which is attributable to personal effort in self-employment (as distinguished from profit attributable from investment) . . . . [T]he issue is *whether claimed work loss is justly attributable to the injury.*" 14 ULA 47 (emphasis added). In *Kirksey*, Judge KELLY held that the plaintiff's

earnings at the time of his accident were not necessarily the true measure of his loss of income as a result of the accident. *Kirksey, supra* at 16. Rather, if a jury were to find that, absent his injury, the plaintiff would have earned a higher income from the second company, his loss of income from work might be premised on that higher income. *Id.*

I am unable to square the majority's holding in this case with Michigan jurisprudence, including *MacDonald, Marquis,* and *Kirksey.* The clear import of the no-fault act and these cases interpreting it is that an injured plaintiff may recover work-loss benefits on the basis of his *actual* loss of income, as reflected by the factual record.[2] Accordingly, I cannot agree with the majority's decision to establish a rule that, just because a sole proprietor incorporates his business, he will be treated differently than a sole proprietor with the same actual income and losses.[3] I would hold that plaintiff did not meet his burden to prove his actual amount of work

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[2] Because actual loss as a matter of fact is the central inquiry, Justice KELLY's attempt in her concurring opinion to distinguish the *Kirksey* plaintiff on the basis that he was an independent contractor, *ante* at 15, is inapposite. Further, a hypothetical example involving an independent contractor illustrates my overall point. What if an independent contractor, such as the one in *Kirksey,* chooses to incorporate and file as an S corporation for tax or liability reasons, thereby becoming the sole shareholder, sole proprietor, and sole employee of a company that hired out his services? As a factual matter, how would his actual income earned from work change as a mere result of his changing his legal status? Why would his actual W-2 wages automatically become a more accurate measure of his income upon incorporation?

[3] Farm Bureau Mutual Insurance Company of Michigan raises a similar problem in its amicus curiae brief. It notes that injured, self-employed farmers may not be able to prove actual loss of income after an automobile accident. Therefore, farmers may elect to add replacement-labor endorsements to their no-fault policies. Such endorsements require an insurer to pay for farmer replacement labor in the event of a disabling accident. Farm Bureau reasonably asks why plaintiff should receive

loss merely by submitting his yearly W-2 wage amounts. Rather, because defendant showed that plaintiff operated his S corporation at a loss, defendant created a genuine issue of material fact concerning the amount, if any, of plaintiff's actual loss of income from work. I would reverse the Court of Appeals judgment affirming summary disposition under MCR 2.116(C)(10) in plaintiff's favor and remand this case to the trial court. I would further require plaintiff to offer proof on remand of the true measure of income from work that is necessary to put him in the same, but no better, position than the one he occupied before his accident.

MARKMAN, J., concurred with CORRIGAN, J.

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replacement wages for work he performed that resulted in a loss when he is not required to elect and pay for a comparable endorsement.

CITY OF DETROIT v AMBASSADOR BRIDGE COMPANY

Docket No. 132329. Argued October 2, 2007 (Calendar No. 3). Decided May 7, 2008.

The city of Detroit brought an action in the Wayne Circuit Court against the Ambassador Bridge Company, doing business as Detroit International Bridge Company (DIBC), seeking an injunction to enforce a city zoning ordinance in order to stop several DIBC construction projects related to the Ambassador Bridge. The city cited concerns regarding increases of truck exhaust and noise. The court, James J. Rashid, J., ultimately held that the DIBC is a federal instrumentality for the limited purpose of facilitating traffic across the bridge, which supported the federal purpose of free-flowing interstate and foreign commerce, and that the federal government's demonstrated intent to control the entire bridge complex preempted the city's zoning ordinance. The Court of Appeals, HOEKSTRA, P.J., and WILDER and ZAHRA, JJ., reversed, concluding that the trial court's finding concerning interstate and international commerce was clearly erroneous and that federal law did not preempt the zoning ordinance because the federal government did not intend to exercise exclusive control over the bridge. *Detroit Int'l Bridge Co v Detroit*, unpublished opinion per curiam, issued September 14, 2006 (Docket Nos. 257369 and 257415). The DIBC applied for leave to appeal, which the Supreme Court granted. 477 Mich 1064 (2007).

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

The DIBC is a federal instrumentality for the limited purpose of facilitating traffic flow across the Ambassador Bridge and is immune from any state law or local regulation that directly conflicts with that federal purpose, including the particular application of the city's zoning ordinance at issue in this case.

1. Federal preemption under the Supremacy Clause occurs when a state law or local regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It can occur when a state law or local regulation prevents a private entity from carrying out a federal function that

Congress requires the entity to perform. A private entity is a federal instrumentality when acting in furtherance of the applicable federal purpose.

2. A part-time federal actor is a limited federal instrumentality that is immune from state laws and local regulations when acting in furtherance of a limited federal purpose and only when (1) its actions are within the scope of the federal purpose Congress has assigned to it and (2) the state law or local regulation, if applied, would sufficiently restrict the private entity's federal purpose.

3. There is no bright-line rule for determining if a private actor is a federal instrumentality. Under the three-part test of *United States v Michigan*, 851 F2d 803 (CA 6, 1988), a court must consider (1) the function for which the private actor claiming immunity from local regulations or state laws was established, (2) whether the private actor continues to serve that function, and (3) the significance of the federal control exerted on, and the federal involvement with, the private actor. The essential question is whether the private actor's actions were so closely associated with a federal purpose that it should be immune from local regulations or state laws that inhibit that purpose.

4. Under the test of *Name.Space, Inc v Network Solutions, Inc*, 202 F3d 573 (CA 2, 2000), a federal instrumentality has status-based immunity, which is absolute immunity, but a limited federal instrumentality has only conduct-based immunity that is less than absolute and that is evaluated by looking to the nature of the activity challenged rather than the identity of the private entity.

5. The essential question in this case is whether Congress intended to give the DIBC the limited authority to carry out a unique federal purpose such that the DIBC is immune from state or local regulation when carrying out that purpose. The tests articulated by *United States v Michigan* and *Name.Space* provide the correct analysis under the unique facts of this case involving a claim of limited federal-instrumentality immunity.

6. The free flow of interstate and foreign commerce is a long-recognized federal purpose. The trial court found that the DIBC projects would increase traffic volume over the bridge and reduce traffic delays, and those findings were not clearly erroneous. Applying the tests described above to this case favors a conclusion that the DIBC has federal-instrumentality status, limited to actions that are clearly and directly associated with facilitating the flow of traffic across the Ambassador Bridge. The DIBC's monetary interest and motivations related to profit from bridge tolls and duty-free sales are irrelevant to that status.

7. The application of the city's zoning ordinance sufficiently inhibits the DIBC's federal purpose and is not merely incidental. Because the ordinance would effectively stop the DIBC's actions related to its federal purpose, the DIBC is immune from that local regulation. On remand to the trial court, that court must enter an order enjoining the enforcement of the zoning ordinance.

Justice CORRIGAN, concurring, joined in the majority's analysis and wrote separately to emphasize the limited scope of the DIBC's federal-instrumentality status with regard to its commercial operation of fueling stations and similar activities less directly related to taking tolls or facilitating bridge traffic. Because the city did not challenge the existence of the fueling station itself, the trial court properly focused on whether the station's reconfiguration, rather than its existence, furthered the DIBC's federal purpose. The DIBC may not engage in unfettered expansion or relocation of its current activities simply because the expansion or relocation aids traffic flow. The activity itself must be related to the DIBC's federal purpose for it to be immune from local regulation. Analysis of limited, conduct-based immunity requires an examination of the facts underlying each action challenged. All local regulation is not automatically preempted with respect to the DIBC's immune activities. The city retains the traditional police power to protect its citizens' health and safety and may impose health and safety regulations to the extent that those regulations do not inhibit the DIBC's ability to carry out its federal purpose.

Reversed and remanded to the trial court.

CONSTITUTIONAL LAW — FEDERAL PREEMPTION — COMMERCE — INTERSTATE COMMERCE — PRIVATE ACTORS — FEDERAL INSTRUMENTALITIES.

Federal preemption may occur when a state law or local regulation prevents a private entity from carrying out a federal function that Congress required it to perform; when acting in furtherance of the applicable federal purpose, the private entity is a federal instrumentality; a part-time federal actor is a limited federal instrumentality that is immune from state laws and local regulations only when acting in furtherance of a limited federal function and only when (1) its actions are within the scope of the federal purpose Congress assigned to it and (2) the state law or local regulation, if applied, would sufficiently restrict the private entity's federal purpose.

John E. Johnson, Jr., Corporation Counsel, and *Linda D. Fegins*, Senior Assistant Corporation Counsel, for the plaintiff.

Jeffrey T. Stewart, William R. Seikaly, and *Steptoe & Johnson LLP* (by *Richard Willard*, *David Coburn*, and *Catherine Sevcenko*), for the defendant.

Amici Curiae:

Barris, Sott, Denn & Driker, P.L.L.C. (by *Daniel M. Share* and *Tiffany L. Robinson*), for the Michigan Municipal League, Bagley Housing Association, Bridgewatch Detroit, Mexicantown Community Development Corporation, Ste. Anne's Catholic Church, Southwest Detroit Business Association, Inc., People's Community Services for Metropolitan Detroit, and the International Municipal Lawyers Association.

CAVANAGH, J. This case presents us with an invitation to second-guess the trial court's factual findings that construction projects on the Ambassador Bridge Plaza would alleviate traffic congestion and facilitate interstate and foreign commerce. Because the trial court, after conducting a four-week bench trial and delivering a 20-page opinion, did not rely on clearly erroneous facts, we decline that invitation. Accordingly, we reverse the judgment of the Court of Appeals because the Detroit International Bridge Company (DIBC) is a federal instrumentality for the limited purpose of facilitating traffic over the Ambassador Bridge and, as such, is immune from the zoning regulation of the city of Detroit that would preclude construction projects furthering this limited federal purpose.

I. FACTS AND PROCEDURE

The city of Detroit seeks to enforce its zoning ordinance on the DIBC to stop the DIBC's construction projects located in and around the Ambassador Bridge's

footprint.[1] Part of the Ambassador Bridge sits on land owned by the DIBC that is within the city's geographical boundaries. The DIBC is a for-profit, private company that has a unique relationship with the federal government. In 1921, Congress gave the DIBC the authority to construct, maintain, and operate the Ambassador Bridge and its approaches. Ambassador Bridge authorization act, PL 66-395, 41 Stat 1439. This authorizing statute requires that the bridge's private operator (the DIBC) also comply with the Bridge Act of 1906, 33 USC 491 *et seq*. The Bridge Act of 1906 applies to all bridges over navigable waters, and it requires all bridge operators to obtain the approval of the United States Secretary of Transportation regarding the "plans and specifications and the location of such bridge and accessory works" before commencing construction of a new bridge or construction on an old bridge or its accessories. 33 USC 491.

In late 2000, the DIBC was working with the several federal agencies that operate in and around the bridge to gain approval for the installation of new tollbooths for cars and trucks, a diesel fuel station for its duty-free plaza, and truck weighing stations.[2] The federal agencies initially refused to allow the projects, citing concerns about the projects' plans and locations. Eventually, after making changes suggested by those federal

[1] The Ambassador Bridge is an international bridge that connects Detroit, Michigan, and Windsor, Ontario. The trial court found that the bridge is the "largest commercial crossing in North America. It carries approximately thirty percent (30%) of more than $1 billion per day in daily trade between the United States and Canada."

[2] At that time, the tollbooths were located on the Canadian side of the Ambassador Bridge. With the proposed change, the tollbooths would be located outside the customs holding area on the American side of the bridge. The city voiced concern that this could cause vehicles to back up on the American side after leaving customs but before paying the bridge-use toll.

agencies, the DIBC gained the federal government's approval for the projects.[3] Next, the DIBC requested the city's approval to begin construction. The city denied the request, citing its zoning ordinance, and refused to issue variances, citing concerns regarding increased truck exhaust and noise. Nonetheless, the DIBC went forward with its projects. As a result, the city's building inspectors visited the DIBC's construction sites and issued several citations for violations related to the construction.

In February 2001, the city filed an injunctive action against the DIBC to stop the construction. After a four-week bench trial, the trial court orally ruled that the DIBC was immune from the zoning ordinance because of its status as a federal instrumentality. The trial court planned to prepare a written decision, but, given the events of 9/11 and border security concerns, the court suggested that the parties enter extended negotiations, to which they agreed. After the negotiations failed, the court delivered a written decision in July 2004. The court again ruled that the DIBC was immune from the ordinance as a federal instrumentality. In addition, the trial court held that the city's zoning ordinance was preempted by the federal government's demonstrated intent to control the entire bridge complex.[4]

The city appealed. The Court of Appeals reversed on both grounds. First, relying on *Detroit Int'l Bridge Co v American Seed Co*, 249 Mich 289; 228 NW 791 (1930),

[3] The federal government implicitly approved the projects in that it initially disapproved the projects, but, after the DIBC adopted its recommendations, the federal government no longer disapproved the projects, and the DIBC then began and completed the construction projects.

[4] In the interim, the projects were completed in August 2001.

and *Int'l Bridge Co v New York*, 254 US 126; 41 S Ct 56; 65 L Ed 176 (1920), the Court of Appeals held that the trial "court's finding that DIBC was constructed for the purpose of facilitating interstate and international commerce is clearly erroneous" and that the DIBC could not be a federal instrumentality. *Detroit Int'l Bridge Co v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2006 (Docket Nos. 257369 and 257415), p 7. The Court of Appeals also held that the city's zoning ordinance was not preempted by federal law because the federal government did not intend to exercise exclusive control over the bridge. *Id*. at 11-12.

II. STANDARD OF REVIEW

This case involves an issue of federal preemption of state law and local regulation, which involves statutory interpretation. *Philadelphia v New Jersey*, 430 US 141, 142; 97 S Ct 987; 51 L Ed 2d 224 (1977). Statutory interpretation is a question of law, which we review de novo. *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000). In addition, we review the trial court's factual findings that support its legal holdings for clear error. MCR 2.613(C); *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). A trial court's factual findings are clearly erroneous only when the reviewing court 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).

III. ANALYSIS

"The doctrine of federal preemption has its origin in the Supremacy Clause of article VI, cl 2, of the United

States Constitution, which declares that the laws of the United States 'shall be the supreme Law of the Land . . . .' " *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds by *Sprietsma v Mercury Marine*, 537 US 51 (2002). Preemption occurs "when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Wisconsin Pub Intervenor v Mortier*, 501 US 597, 605; 111 S Ct 2476; 115 L Ed 2d 532 (1991) (citations omitted). Preemption can occur when a state law or local regulation prevents a private entity from carrying out a federal function that Congress has tasked it with performing. See *Hancock v Train*, 426 US 167, 178-179; 96 S Ct 2006; 48 L Ed 2d 555 (1976), citing *Johnson v Maryland*, 254 US 51, 57; 41 S Ct 16; 65 L Ed 126 (1920). A private actor takes on the title of "federal instrumentality" when acting in furtherance of the applicable federal function. *Union Joint Stock Land Bank of Detroit v Kissane*, 277 Mich 668, 670; 270 NW 178 (1936); *Mount Olivet Cemetery Ass'n v Salt Lake City*, 164 F3d 480, 486 (CA 10, 1998); *Fed Land Bank of Wichita v Kiowa Co Bd of Comm'rs*, 368 US 146, 149, 151; 82 S Ct 282; 7 L Ed 2d 199 (1961). Thus, federal instrumentality status can be limited to apply only when the private actor is acting in furtherance of the federal purpose that made it a federal instrumentality. See *Kissane*, 277 Mich at 669-672 (accepting that a federally chartered bank was a federal instrumentality, but holding that the bank was not immune from a state law that did not affect its federal purpose). Furthermore, being a "federal instrumentality" is not an all-or-nothing status; a private actor may be a federal instrumentality for one set of actions, while not being a federal instrumentality during a separate set of actions. *Mendrala v Crown Mortgage Co*, 955 F2d 1132, 1139

(CA 7, 1992) (noting that because a private actor is not a federal instrumentality for one purpose "does not preclude a determination that it is a federal instrumentality for other purposes").

We refer to part-time federal actors as limited federal instrumentalities because they are only immune from state laws and local regulations when they are acting in furtherance of the limited federal purpose that served as the impetus for granting them federal-instrumentality status. Also, "[d]esignating an entity a federal instrumentality colors the typical preemption analysis by requiring the court to presume, in the absence of clear and unambiguous congressional authorization to the contrary, that Congress intended to preempt state or local regulation of the federal instrumentality." *Mount Olivet,* 164 F3d at 486, citing *Don't Tear It Down, Inc v Pennsylvania Avenue Dev Corp*, 206 US App DC 122, 129-130; 642 F2d 527 (1980); see also *Hancock v Train*, 426 US at 167, 178-179; *Mayo v United States*, 319 US 441, 446–448; 63 S Ct 1137; 87 L Ed 1504 (1943). And, in this case, there is no such congressional authorization of local regulation. However, despite the presumption noted above, a limited federal instrumentality is immune from state and local regulation only when (1) its actions are within the scope of the federal purpose Congress has assigned to it and (2) the state law or local regulation, if applied, would sufficiently restrict the private entity's federal purpose. See *James v Fed Reserve Bank of New York*, 471 F Supp 2d 226, 242 (ED NY, 2007).

In this case, the trial court primarily relied on federal-instrumentality preemption in holding that the DIBC was immune from the city's zoning ordinance. Indeed, the trial court found that the DIBC was a federal instrumentality for the limited purpose of facili-

tating traffic across the Ambassador Bridge, which supports the federal purpose of free-flowing interstate and foreign commerce.

Accordingly, we must first decide whether the DIBC is a limited federal instrumentality. On that issue, the United States Supreme Court has stated that "[i]t is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.' " *Lebron v Nat'l Railroad Passenger Corp*, 513 US 374, 378; 115 S Ct 961; 130 L Ed 2d 902 (1995) (citations omitted). Thus, there is no bright-line rule for determining if a private actor is a federal instrumentality. *Mount Olivet*, 164 F3d at 486. As a result, courts have applied numerous tests in determining federal-instrumentality status. *Id*. For example, in *United States v Michigan*, 851 F2d 803, 806 (CA 6, 1988), the court considered three factors: (1) the function for which the private actor claiming immunity was established, (2) whether that private actor continues to serve that function, and (3) the significance of the federal control exerted on, and the federal involvement with, the private actor. This is one example of the factor-based approach to the federal-instrumentality analysis.

In addition, some federal courts have applied a variation of the *United States v Michigan* test when the private entity is only claiming to be a limited federal instrumentality. For example, the court in *Name.Space, Inc v Network Solutions, Inc*, 202 F3d 573, 581-582 (CA 2, 2000), differentiated between "conduct-based immunity" and "status-based" immunity in evaluating the federal-instrumentality status of a private entity that was operating under a contract with a government agency. While evaluating the entity's immunity from a Sherman Act antitrust suit, the court in *Name.Space* noted that a federal instrumentality has status-based

immunity, which is absolute immunity, when "the federal government or its agencies directly own and/or exercise plenary control over the [private] entity . . . ." *Id*. at 581. And, alternatively, a limited federal instrumentality has immunity that is less than absolute under a "conduct-based instrumentality doctrine." *Id*., citing *Southern Motor Carriers Rate Conference, Inc v United States*, 471 US 48, 58-59; 105 S Ct 1721; 85 L Ed 2d 36 (1985). The court in *Name.Space* held that such limited conduct-based immunity could be evaluated by "looking to the 'nature of the activity challenged, rather than the identity of the defendant' . . . ." *Name.Space,* 202 F3d at 581, citing *Southern Motor Carriers,* 471 US at 58-59. Finally, the court gave the private entity federal-instrumentality immunity that was limited to its acts that were required under its contract with the government agency. *Name.Space*, 202 F3d at 582.

We acknowledge that the court in *Name.Space* was dealing with the slightly different issue of governmental immunity from antitrust suits. Further, courts that have analyzed the general federal-instrumentality issue have used several variations of the factors used by the court in *United States v Michigan*, and additional factors in some instances.[5] The essential question to be answered in this case is: Did Congress intend to give the private actor the limited authority to carry out a unique federal purpose such that the private actor is immune from state or local regulation when it is carrying out that purpose? Because we are convinced that applying the factors from *United States v Michigan* in conjunction with the "conduct-based" analysis used by the court

[5] See *Mendrala*, 955 F2d at 1136 (CA 7, 1992) (reviewing these factors: "(1) the federal government's ownership interest in the entity; (2) federal government control over the entity's activities; (3) the entity's structure; (4) government involvement in the entity's finances; and (5) the entity's function or mission").

in *Name.Space* will answer this question, we believe that it is the correct analysis for the unique facts of the present case involving a claim of limited federal-instrumentality immunity based on the Supremacy Clause.

As a preliminary matter, we note that this case involves the long-recognized federal purpose of free-flowing interstate and foreign commerce. The Ambassador Bridge is distinctly related to that federal purpose, given that it is a conduit of transportation, and thus commerce, between Canada and the United States. This is not disputed by the parties and was accepted by both lower courts. The dispute in this case concerns whether the DIBC has been tasked to further that federal purpose to the extent necessary for it to be recognized as a limited federal instrumentality. That question initiates the hybrid test discussed earlier.

First, when we apply the test from *United States v Michigan*, it becomes clear that the trial court understood this issue as being laden with pivotal factual disputes in its description of the case as "unique" on its facts. With that understanding, the trial court dutifully conducted a four-week trial. The facts were hotly contested at trial. Indeed, both parties produced numerous witnesses and voluminous evidence to support their claims, and each vigorously cross-examined its opponent's witnesses and evidence. As a result, the court issued a thorough, 20-page opinion that relied heavily on its factual findings. The trial court made several important findings of fact regarding the bridge's operation and its surrounding property:

(1) In 2000, approximately 3.5 million trucks and 9 million passenger cars crossed the bridge.

(2) The bridge complex is an enclosed area separated from its surroundings by fences, brick walls, and barbed wire.

(3) The DIBC, under federal supervision, controls all of the few entrance and exit points to the complex.

(4) The DIBC and the federal government each owns property within the bridge complex.

(5) Several federal agencies share control over the bridge complex: United States Customs and Border Protection, United States Immigration and Customs Enforcement, the General Services Administration, and the Department of Agriculture.

(6) The federal government has plenary control over the bridge complex: "[I]f it is in the compound, it is under federal control." Trial court opinion, p 9.

(7) All DIBC personnel are under federal government control. They must report to the government before leaving the complex.

(8) Federal employees at the bridge complex are charged with enforcing federal laws, maintaining border security, controlling immigration, and conducting customs missions. They have no responsibility for regulating or facilitating traffic flow over the bridge.

(9) The DIBC is solely responsible for regulating and facilitating traffic flow over the bridge.

The trial court also made several findings of fact regarding the DIBC's proposed construction projects and their effect on bridge traffic:

(1) The DIBC had proposed three construction projects: (a) new toll booths for cars, (b) changes in the location and number of diesel pumps, and (c) new tollbooths for trucks.

(2) Traffic delays due to backups on the bridge were a serious problem to the steady flow of traffic across the bridge.

(3) Commercial delivery trucks were being delayed for hours on several regular occasions.

(4) Large automobile manufacturers were suffering acute economic losses as a result of delayed just-in-time deliveries.

(5) These delays were caused, in part, by too few tollbooths.

(6) The DIBC's proposed construction projects would increase traffic flow over the bridge and reduce traffic delays.

(7) All federal agencies within the bridge complex were involved in the planning, locating, and designing processes of all DIBC construction plans (present and past).

The trial court applied the test espoused by the court in *United States v Michigan* to these facts. After a review for clear error, we decline to reverse any of the trial court's factual findings. However, we do recognize that the evidence the city proffered at trial contradicted several of these findings. Indeed, before this Court, the city persuasively marshaled the testimony of two federal employees who work in the bridge complex. Their testimony contradicted the DIBC's contentions that the proposed construction would reduce traffic delays and that the federal government overtly controlled or mandated the construction projects. Furthermore, the city makes a strong factual argument that federal control over the DIBC is attenuated at best because the federal government only exercises negative control (or veto power) over the proposed projects.

But those factual assertions were better argued before the trial court under a preponderance of the evidence standard. Those factual arguments face review by this Court for clear error, which means the city must

leave us with the definite and firm conviction that a mistake has been made in the factual basis that the trial court relied on. *In re Miller*, 433 Mich at 337. The city has not met its burden of proving that the trial court's factual findings were clearly erroneous because each of those findings was supported by valid evidence and testimony the DIBC presented that belied the city's factual arguments. Simply put, we will not answer the city's call for us to retry the credibility of competing evidence and witnesses' testimony simply because the city lost in what is a unique and close factual contest. Therefore, we accept the trial court's factual findings and proceed to review de novo the legal rulings below.

The first legal question is whether, under the *United States v Michigan* test, the DIBC is a federal instrumentality. The first factor of that test asks for what function the DIBC was established and whether that function advances a federal purpose. Applying this factor to this case is somewhat like putting a square peg into a round hole because the DIBC was in existence before the Ambassador Bridge's commission.[6] Nonetheless, in this case, it is reasonable to apply this factor by asking what function served as the impetus for the DIBC to enter into its current interaction with the federal government.[7]

The DIBC's interaction with the federal government is tied to the federal purpose of the Ambassador Bridge, which is ostensibly facilitating the flow of interstate and

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[6] In actuality, the DIBC's predecessor existed before the bridge's commission, but we see no error in viewing the DIBC and its corporate predecessor as one for the purposes of this case because the act authorizing the bridge does just that.

[7] See *Johnson*, 254 US at 57, holding that federal-instrumentality immunity applied to a federal employee who obviously existed (because he had been born) before he gained federal-instrumentality status by being hired by the government as a mail carrier.

foreign commerce. Indeed, for commerce purposes, Congress directed the DIBC to "construct, maintain, and operate" the bridge. PL 66-395, 41 Stat 1439. Thus, if the DIBC is tasked to build, operate, and maintain the bridge, and if the bridge was made for the federal purpose of free-flowing commerce, then the function that served as the impetus for the DIBC's interaction with the federal government was the federal purpose of free-flowing interstate and foreign commerce. Therefore, this factor favors federal-instrumentality status for the DIBC.

The second factor asks whether the DIBC continues to serve that function. The DIBC is still maintaining and operating the Ambassador Bridge, which necessarily furthers the federal purpose of free-flowing interstate and foreign commerce. Thus, this factor favors federal-instrumentality status for the DIBC.

The third factor evaluates the significance of the federal control exerted on, and the federal involvement with, the DIBC. Relying on the facts found by the trial court, we agree with that court's legal holding that "there is a strong and substantial level of Federal control and involvement with the DIBC within the Bridge Complex," such that this factor favors federal-instrumentality status for the DIBC.

The trial court's factual findings support this legal conclusion. The federal government maintains strict control over the compound. The trial court stated that "if it is in the compound, it is under federal control." The compound is maintained as a sterile area that is not open to the public for common usage. By federal edict, all entering traffic that is not associated with a federal agency or the DIBC must continue on to Canada. United States customs can randomly search any vehicle or person in the compound, including all DIBC workers.

The federal agencies do not allow any DIBC personnel to photograph any portion of the compound. The federal agencies exercise veto power over all construction projects in the compound. When the DIBC began planning the construction projects in question, it was required, as with any such project, to gain the federal agencies' approval. Those agencies denied the DIBC's initial requests for approval. The DIBC then adopted federally mandated modifications and began the construction projects. Thus, the federal government, having the power to preclude the DIBC's construction projects, at least implicitly approved the projects' final design and construction. This is most evident in the physical structures' existence today. In light of these facts, the trial court stated that "[t]he evidence in this case establishes that the overall effective and efficient management of the bridge is only accomplished through the cooperative mutual effort and coordinated activity of the DIBC and the various federal agencies maintaining a presence at the bridge complex." Therefore, this third factor favors federal-instrumentality status for the DIBC.

Regarding this third factor, we note that the city and the Court of Appeals, in suggesting deficient federal control for federal-instrumentality status, make much of the fact that the DIBC is financially independent from the federal government. They argue that the DIBC is simply a moneymaking private citizen whose interest is purely in moving more traffic in order to gain more profit from tolls, the sale of duty-free goods, and fuel dispensing. In essence, they believe that the DIBC cannot metamorphose itself into being a federal instrumentality on the basis of a financially driven decision that has a coincidentally beneficial effect on an unrelated federal purpose. They support this argument by noting that the federal agencies in the bridge compound

never mandated the DIBC's proposed changes and that, in fact, those agencies have expressed ambivalence toward the projects' going forward.

We disagree with those arguments.

Again, federal-instrumentality status is not necessarily an all-encompassing status for all of the private actor's activities. In that regard, the DIBC's monetary interest and motivations are irrelevant to its federal-instrumentality status. What is relevant is that the DIBC is acting in furtherance of a federal purpose. The trial court relied on record evidence that showed that the construction projects were motivated by an attempt to facilitate bridge traffic: the new, separate tollbooths were successful attempts to separate automobiles and trucks, and the diesel-pump project allowed diesel-powered trucks to fuel more efficiently in a location separate from that for gasoline-driven automobiles. Also, the old diesel location required 53-foot-long semi-trucks to negotiate a 90-degree turn, whereas the new location allowed for a straighter and more efficient system of fueling. Accordingly, as stated earlier, we accept the trial court's finding that the DIBC, irrespective of its financial motives, is trying to facilitate bridge traffic by means of these projects.

Additionally, the fact that the federal agencies at the bridge complex did not mandate the projects is irrelevant because those agencies are directed to control and regulate federal purposes that are distinct from the free-flowing-traffic purpose, such as customs, immigration control, and border security. This explains the agencies' ambivalence toward the projects; the agencies are unconcerned with any traffic-facilitation projects unless such projects inhibit their distinct federal purposes. Yet, as previously noted, foreign and interstate traffic over the bridge is a federal purpose. Thus, what

is relevant here is whether the DIBC was acting in furtherance of that federal purpose. In accepting the trial court's statement that "[t]here was sufficient evidence presented by DIBC for the [c]ourt to conclude that DIBC's proposed construction will have a positive impact on traffic flow and reduce delays for traffic at the bridge," we necessarily accept that such an action was in furtherance of the DIBC's federal mandate to maintain and operate the bridge.

With all three factors favoring federal-instrumentality status, we next apply the conduct-based test used by the court in *Name.Space*. Like the instrumentality in *Name.Space*, the DIBC does not have status-based immunity, which is absolute immunity, because it is only tasked to conduct a limited federal purpose. Thus, like the instrumentality in *Name.Space*, the DIBC has conduct-based immunity, which applies only to its conduct that furthers its federal purpose. As discussed earlier, Congress has required the DIBC to build, operate, and maintain the bridge. Thus, like the instrumentality in *Name.Space*, which had immunity for conduct that it was required to do under its contract with the federal agency, the DIBC has immunity for its conduct in the operation and maintenance of the Ambassador Bridge. While operating the bridge, the DIBC must keep the flow of bridge traffic at an optimal level. Thus, the DIBC's conduct-based immunity extends to its conduct that facilitates bridge traffic.

Therefore, under both the test in *United States v Michigan* and the conduct-based test in *Name.Space*, the trial court correctly concluded that the DIBC is an instrumentality of the federal government for the limited purpose of facilitating traffic flow over the bridge.

We note that the DIBC's status as a federal instrumentality is limited to actions that are clearly and directly associated with the facilitation of traffic across the Ambassador Bridge. Accordingly, the DIBC may not fit its non-traffic-facilitative actions into this status. This issue could be described as evaluating the scope of the federal instrumentality's immunity. This issue is particularly important in cases of limited federal instrumentalities, such as this case, because immunity extends only to acts that are within the scope of instrumentality's federal purpose. While we do not attempt to list all the actions that do or do not fall within the DIBC's scope of immunity, we agree with the trial court that the DIBC's construction projects are within its scope of immunity.

The trial court's factual findings are compelling on this issue. It held that the volume of bridge traffic was problematically low, that the construction projects were meant to increase that volume, and that the projects accomplished that goal. Therefore, under a conduct-based immunity test, the DIBC's construction projects were within the scope of its limited federal-instrumentality immunity because they were directly motivated by the DIBC's federal purpose and they actually worked to promote that purpose. Finally, we caution that there is a line where this immunity stops because the instrumentality's act is outside the scope of its federal purpose; however, the DIBC's construction projects have not crossed the line in this case.

But our analysis does not end by declaring the DIBC a limited federal instrumentality and holding that its construction projects were actions within its scope of immunity. Indeed, "where an entity with federal instrumentality status claims immunity from a particular state exaction, the proper test is whether that exaction

will interfere with the entity's federal function." *James*, 471 F Supp 2d at 242. And, if the city's ordinance does interfere with the DIBC's limited federal purpose, we must analyze the magnitude of that interference because federal instrumentalities are not "insulated from incidental or nonburdensome local requirements." *Don't Tear It Down*, 206 US App DC at 130-131, citing *Kleppe v New Mexico*, 426 US 529, 543; 96 S Ct 2285; 49 L Ed 2d 34 (1976), *Evansville-Vanderburgh Airport Auth Dist v Delta Airlines, Inc*, 405 US 707, 720-721; 92 S Ct 1349; 31 L Ed 2d 620 (1972), *Wilson v Cook*, 327 US 474, 486-488; 66 S Ct 663; 90 L Ed 793 (1946), and *Johnson*, *supra* at 56.

Justice Holmes made this point clear in his opinion in *Johnson*, 254 US at 56. As discussed earlier, the defendant in *Johnson* was an employee of the United States Postal Service who challenged his conviction for driving a motor vehicle without a state-issued driver's license. *Id*. at 55. In reversing the defendant's conviction, the Court held that, as "instruments of the United States," federal employees, like the defendant, were immune from the state's requirement of obtaining a driver's license before conducting their federal purposes. *Id*. at 57. However, Justice Holmes also cautioned that

> an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. . . . It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets." [*Id*. at 56.]

In other words, the defendant in *Johnson* was immune from state or local regulations that sufficiently inhibited his federal purpose, but he was not immune from

local regulations that merely incidentally affected his operation as a federal instrumentality.

This case presents an example of a sufficient inhibition of an instrumentality's federal purpose; the local regulation's effect is not merely incidental. Indeed, application of the city's ordinance would effectively stop the DIBC's construction projects. Furthermore, if the ordinance had applied to the DIBC, the traffic problems on the bridge would have persisted. Therefore, because the city's ordinance would have completely stopped the DIBC's actions, which were within the scope of its federal purpose, the DIBC is immune from that local regulation as a limited federal instrumentality.

The city makes two claims in arguing that its ordinance does not interfere with the DIBC's federal purpose such that preemption is required. First, in May 2007, the city issued a variance to the DIBC that purportedly allowed the construction projects at issue here; therefore, it argues that preemption analysis is rendered moot. We disagree. 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 City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), citing *In re Midland Publishing*, 420 Mich 148, 152 n 2; 362 NW2d 580 (1984). Thus, while the issue is moot because the DIBC's authority to undertake the construction projects is no longer at issue with respect to the variance, we conclude that the legal question is justiciable because it is likely to arise again and avoid judicial review. As the DIBC aptly points out, the variance has many amorphous conditions concerning noise, smoke, and odor, all of which effectively give the city unrestricted authority to revoke the variance. If

the city later revokes the variance and applies its zoning ordinance to the DIBC, and if the DIBC challenges that application of the ordinance, the city could simply reissue the variance and stop the DIBC's challenge by claiming mootness. Also, this issue resolves the legal dispute concerning the operation of the busiest international border in the state; therefore, it is clearly an issue of public concern. Thus, we find this issue justiciable.

Next, the city contends that the ordinance primarily restricts the DIBC's business expansion and that any restriction on the projects is incidental to the effect on bridge traffic. The city supports this by noting that the bridge can still operate without these construction projects, as it did in the past. Our response is twofold. First, we reiterate that the DIBC's economic interests in these projects are of no moment. What is relevant is whether application of the city's ordinance sufficiently hinders the DIBC in carrying out its federal purpose. Second, the city's argument that limiting the bridge to its preconstruction state merely incidentally affects bridge traffic misses the point. The city fails to acknowledge that the federal government's interest lies in sustaining free-flowing commerce by increasing bridge traffic above its preconstruction, problematic level. Instead, the city wrongly contends that the preconstruction level of traffic, or commerce, was acceptable. But that argument is not supported by the trial court's factual findings. Therefore, this argument is of no avail to the city.

Accordingly, the DIBC, as a limited federal instrumentality, is immune from the city's ordinance as it applies to the construction projects before us.

Finally, the Court of Appeals reliance on *American Seed Co* and *Int'l Bridge Co* is misplaced. Those cases

simply stand for the fact that international bridges are not so pervasively controlled by federal law that field preemption will always apply to invalidate any state or local regulation of them. In other words, both the state and federal governments have interests in international bridges. But that truism does not affect our ruling today. Indeed, those opinions did not analyze federal-instrumentality preemption. Moreover, our decision today, while accepting that the city does have some interest in (and regulatory authority over) the Ambassador Bridge, only holds that the city has gone too far in inhibiting the DIBC's limited federal purpose. We say nothing to disturb the venerable holdings of the *American Seed Co* and *Int'l Bridge Co*.

Because we are satisfied that the trial court was correct in its federal-instrumentality analysis, and because we believe that analysis provides an adequate basis for our ruling today, we see it as prudential not to evaluate the rulings of the trial court or the Court of Appeals regarding any other preemption theories.

IV. CONCLUSION

After accepting the facts established by the trial court, we affirm the judgment of the trial court, reverse the judgment of the Court of Appeals, and hold that the DIBC is a federal instrumentality for the limited purpose of facilitating traffic flow across the Ambassador Bridge and is, therefore, immune from any state law or local regulation that directly inhibits that purpose. Further, we affirm the trial court's holding that this particular application of the city's zoning ordinance inhibits the DIBC's federal purpose. However, we choose not to formulate an arbitrary bright-line rule concerning future conflicts between the DIBC, in its limited federal-instrumentality status, and state or

local regulation. We trust the trial courts to examine whether a state law or local regulation directly inhibits the DIBC's unique and limited federal-instrumentality status in any future disputes.

The judgment of the Court of Appeals is reversed, and the case is remanded to the trial court for the entry of an injunction consistent with this opinion.

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

CORRIGAN, J. (*concurring*). I concur in Justice CAVANAGH's analysis. I write separately to emphasize the limited scope of the federal-instrumentality status of the Detroit International Bridge Company (DIBC) with regard to its commercial operation of fueling stations and similar activities that are less directly related to taking tolls or facilitating bridge traffic. I also write to underscore Justice CAVANAGH's point that even activities that are related to the DIBC's federal purpose are not entirely immune from local regulation.

As Justice CAVANAGH states, "the DIBC is an instrumentality of the federal government for the limited purpose of facilitating traffic flow over the bridge." *Ante* at 47. The trial court reasonably concluded that the new configuration of the diesel station aided traffic flow. Further, the city does not appear to have argued that the DIBC wrongly maintained a station in its previous location or violated local zoning requirements *merely* by slightly increasing the number of pumps. Accordingly, I agree with the trial court's result and this Court's reasons for affirming that result.

I would simply emphasize, first, that the record does not establish the extent to which maintaining a diesel fueling station *at all* relates to the DIBC's federal

purpose.[1] Rather, because the city did not challenge the existence of the station itself, the trial court correctly focused on whether the station's *reconfiguration*—not its *existence*—furthered the DIBC's federal purpose. Therefore, I find it worth noting that the DIBC may not engage in unfettered expansion or movement of its current activities simply because expansion or relocation aids traffic flow; rather, the activity to be relocated or the expansion of that activity must *itself* be related to the DIBC's federal purpose in order for it to be immune from full regulation by the city. I highlight Justice CAVANAGH's conclusion that, in analyzing limited, conduct-based immunity, the facts underlying each action challenged must be examined to ensure that the action does not cross the "line where this immunity stops because the instrumentality's act is outside the scope of its federal purpose[.]" *Ante* at 48.

Second, I would emphasize that all local regulation is not automatically preempted with respect to the DIBC's immune activities. Justice CAVANAGH notes that the city issued a variance to the DIBC that included amorphous conditions concerning noise, smoke, and odor at the DIBC's site. The conditions effectively give the city unrestricted authority to revoke the variance. *Ante* at 50. Because the variance gives the city the same broad power to inhibit the DIBC's federally mandated activities as did the zoning ordinance, the variance would be similarly preempted. But because the city seeks, in part,

[1] Perhaps commercial trucks' use of the bridge—which may include idling and delays as a result of federal activities including customs inspections—is significantly facilitated by on-site access to diesel fuel. Perhaps the DIBC derives profit from its fueling operation that offsets the costs of maintaining the bridge and, therefore, enables tolls to remain at affordable levels. Nonetheless, because the city challenged only the reconfiguration of the fueling station, the exact nature of the station's relationship to the DIBC's federal purpose is not at issue.

to regulate public health and safety, including local air quality, I note that the city retains the traditional police power to protect the health and safety of its citizens.[2] The city may certainly impose health and safety regulations to the extent that those regulations do not inhibit the DIBC's ability to carry out its federal purpose.

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[2] As the United States Supreme Court observed in *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), "the extent of the burden [from local regulation] that will be tolerated will of course depend on the nature of the local interest involved . . . ." The state's traditional police power to protect the health and safety of its citizens is unquestioned. The Supreme Court has observed:

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." [*Huron Portland Cement Co v Detroit*, 362 US 440, 443-444; 80 S Ct 813; 4 L Ed 2d 53 (1960) (citation omitted).]

Similarly, see *Gen Motors Corp v Tracy*, 519 US 278, 306-307; 117 S Ct 811; 136 L Ed 2d 761(1997); *Head v New Mexico Bd of Optometry Examiners*, 374 US 424, 428-429; 83 S Ct 1759; 10 L Ed 2d 983 (1963).

NATIONAL PRIDE AT WORK, INC v GOVERNOR

Docket Nos. 133429, 133554. Argued November 6, 2007 (Calendar No. 3). Decided May 7, 2008.

National Pride at Work, Inc., and numerous individuals who are employees of public employers and the same-sex domestic partners of those employees brought an action in the Ingham Circuit Court against the Governor, seeking a declaratory judgment that Const 1963, art 1, § 25, as added by Proposal 04-2 (the amendment), does not prohibit public employers from offering health-care benefits to employees' same-sex domestic partners. The plaintiffs added the city of Kalamazoo as a defendant after the city announced that it would not extend those benefits in future contracts. The plaintiffs moved for summary disposition. After the Attorney General submitted a motion on the Governor's behalf seeking dismissal of the plaintiffs' claims, the Governor obtained separate counsel and filed a brief opposing dismissal and supporting the plaintiffs. The Attorney General then intervened as a defendant. The court, Joyce Draganchuk, J., granted the plaintiffs summary disposition, concluding that the amendment does not prohibit public employers from entering into agreements to provide domestic-partner benefits because health-care benefits are not among the statutory rights or benefits of marriage and the criteria for same-sex domestic-partner benefits do not approach the legal status of marriage. Thus, the court concluded that the public employers were not recognizing a marriage or similar union in violation of the amendment. The Attorney General appealed. The Court of Appeals, HOEKSTRA, P.J., and WILDER and ZAHRA, JJ., reversed, concluding that the amendment prohibits public employers from recognizing same-sex unions for any purpose. 274 Mich App 147 (2007). The Governor and the plaintiffs filed separate applications for leave to appeal, which the Supreme Court granted. 478 Mich 862 (2007).

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

The amendment prohibits public employers from recognizing a same-sex domestic partnership as a union similar to marriage for any purpose, including for the purpose of providing health-insurance benefits.

1. The amendment prohibits the recognition of a domestic partnership as a marriage or as a union that is similar to marriage. The fact that a public employer does not refer to or characterize a domestic partnership as a marriage or a union similar to a marriage does not mean that the employer is not recognizing the partnership as a marriage or a union similar to a marriage.

2. A union need not result in all the same legal rights and responsibilities that result from a marriage in order to constitute a union similar to a marriage. The dissimilarities between a marriage and a domestic partnership pertain to the legal effects these relationships have rather than to the nature of the marital and domestic-partnership unions themselves. Domestic partnerships are unions similar to marriage because marriages and domestic partnerships are the only relationships defined in Michigan in terms of both gender and the lack of a close blood connection.

3. When public employers provide domestic partners health-insurance benefits on the basis of the domestic partnership, they are providing legal significance to the partnership, and, thus, are recognizing the partnership.

4. A single agreement can be recognized within the state of Michigan as a marriage or similar union for any purpose, and that single agreement is the union of one man and one woman. A domestic partnership does not constitute such a recognizable agreement, and, thus, cannot be recognized for any purpose, including for the purpose of providing health-insurance benefits.

5. Extrinsic evidence cannot be used to contradict a constitutional amendment's unambiguous language.

Affirmed.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that the language of the amendment itself prohibits nothing more than the recognition of same-sex marriages or similar unions. Additionally, the circumstances surrounding the adoption of the amendment, including statements by the amendment's proponents that the amendment was about marriage and would not affect benefits, strongly suggest that Michigan voters did not intend to prohibit public employers from offering health-care benefits to their employees' same-sex partners. The benefit programs at issue in this case do not recognize same-sex marriages or unions similar to marriage, nor do they grant same-sex couples the rights, responsibilities, or benefits of marriage. Health-insurance coverage is a benefit of employment rather than marriage, and the amendment does not prohibit public employers from providing the benefits of employment.

CONSTITUTIONAL LAW — SAME-SEX DOMESTIC PARTNERS — EMPLOYMENT — HEALTH INSURANCE BENEFITS — MARRIAGE — COLLEGES AND UNIVERSITIES — MUNICIPAL CORPORATIONS — STATE.

The Michigan Constitution prohibits public employers from recognizing a same-sex domestic partnership as a union similar to marriage for any purpose, including for the purpose of providing health-insurance benefits (Const 1963, art 1, § 25).

Mark Granzotto, P.C. (by *Mark Granzotto*), *Deborah A. Labelle, Jay D. Kaplan, Michael J. Steinberg, Kary L. Moss, Pepper Hamilton LLP* (by *Scott L. Gorland*, *Thomas P. Wilczak, Amanda J. Shelton*, and *Kurt A. Kissling*), and *Nancy S. Katz* for National Pride at Work, Inc., and others.

Susan I. Leffler, *D. J. Pascoe*, and *Robert A. Dietzel*, Assistant Attorneys General, for the Governor.

Michael A. Cox, Attorney General, *Henry J. Boynton*, Assistant Solicitor General, and *Eric Restuccia* and *Joseph E. Potchen*, Assistant Attorneys General, for the Attorney General.

Amici Curiae:

Stephen K. Postema, City Attorney, for the city of Ann Arbor.

Gloria A. Hage, *Louis A. Lessem*, *Catherine Dehlin*, *Eileen K. Jennings*, *Paul J. Tomasi*, *William C. Collins*, and *Kenneth A. McKanders* for the University of Michigan Regents, the Wayne State University Board of Governors, the Central Michigan University Board of Trustees, the Northern Michigan University Board of Control, Michigan Technological University, Saginaw Valley State University, and the Eastern Michigan University Board of Regents.

Dan Sherrick and *Georgi-Ann Bargamian* for International Union, UAW; and UAW Local 6000.

Gregory, Moore, Jeakle, Heinen & Brooks, P.C. (by *Gordon A. Gregory* and *Scott A. Brooks*), *Robert A. Sedler*, and *Rachel Levinson* for the Michigan Conference of the American Association of University Professors.

Stephen M. Crampton and *Law Office of LaRae G. Munk, PC* (by *LaRae G. Munk*), for the American Family Association of Michigan.

David & Wierenga, P.C. (by *James R. Wierenga*), *Benjamin W. Bull*, *Brian Raum*, and *Dale Schowengerdt* for the Michigan Family Forum.

Thomas More Law Center (by *Patrick T. Gillen*) for Citizens for the Protection of Marriage.

Mayer Brown LLP (by *Stephen Sanders*) for various law professors at Michigan public universities.

Theresa Kelly and *Robert A. Noto* for Michigan State University.

Cynthia Ann Paul for Michigan Pride at Work, Service Employees International Union Local 517M, the Michigan chapter of the AFL-CIO, Office and Professional Employees International Union Local 459, and the Lansing Association of Human Rights.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson* and *Daniel J. Schulte*), for the Michigan State Medical Society.

Theresa J. Alderman, *Arthur R. Przybylowicz*, and *White, Scheider, Young & Chiodini, P.C.* (by *Michael M. Shoudy* and *Dena M. Lampinen*), for the Michigan Education Association.

Dickinson Wright PLLC (by *Henry M. Grix*), *James P. Madigan, David S. Buckel*, and *Kenneth D. Upton, Jr.*, for the Lambda Legal Defense and Education Fund, Inc., the Human Rights Campaign, the Human Rights Campaign Foundation, the Triangle Foundation, Michigan Equality, the Women Lawyers Association of Michigan, and Parents, Families & Friends of Lesbians & Gays, Inc.

MARKMAN, J. We granted leave to appeal to consider whether the marriage amendment, Const 1963, art 1, § 25, which states that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose," prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners. Because we agree with the Court of Appeals that providing such benefits does violate the marriage amendment, we affirm its judgment.

I. FACTS AND HISTORY

The marriage amendment, Const 1963, art 1, § 25, was approved by a majority of the voters on November 2, 2004, and took effect as a provision of the Michigan Constitution on December 18, 2004. At that time, several public employers, including state universities and various city and county governments, had policies or agreements in effect that extended health-insurance benefits to their employees' qualified same-sex domestic partners. In addition, the Office of the State Employer (OSE) and the United Auto Workers Local 6000 (UAW) had reached a tentative agreement to include same-sex domestic-partner health-insurance benefits in the benefit package for state employee members of the union. However, on December 2, 2004, the OSE and the

UAW agreed not to submit the proposed contract to the Civil Service Commission until after there had been a court determination that the language of the proposed contract did not violate the marriage amendment.

On March 16, 2005, in response to a state representative's request for an opinion regarding the marriage amendment's effect on the city of Kalamazoo's ability to provide same-sex domestic-partner health-insurance benefits to its employees, the Attorney General issued a formal opinion, concluding that the city's policy did violate the amendment. The Attorney General asserted that "Const 1963, art 1, § 25 prohibits state and local governmental entities from conferring benefits on their employees on the basis of a 'domestic partnership' agreement that is characterized by reference to the attributes of a marriage." OAG, 2005-2006, No 7,171, p 17 (March 16, 2005).

On March 21, 2005, plaintiffs[1] filed this declaratory judgment action against the Governor, seeking a declaration that the marriage amendment does not bar public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners. After the city of Kalamazoo announced its intention not to provide same-sex domestic-partner health-insurance benefits to its employees for contracts

[1] Plaintiff National Pride at Work, Inc., is a nonprofit organization of the American Federation of Labor–Council of Industrial Organizations. The remaining plaintiffs are employees of the city of Kalamazoo, the University of Michigan, Michigan State University, Eastern Michigan University, Wayne State University, the Clinton/Eaton/Ingham County Community Mental Health Board, or the state of Michigan and those employees' same-sex partners. Because the benefit plans of Eastern Michigan University, Wayne State University, and the Eaton/Clinton/Ingham Community Mental Health Board are not part of the record, they are not discussed. Likewise, this opinion does not address whether private employers can provide health-insurance benefits to their employees' same-sex domestic partners.

beginning in January 2006 absent a court ruling that such benefits do not violate the marriage amendment, plaintiffs added the city of Kalamazoo as a defendant. The Attorney General, acting on behalf of the Governor, moved to dismiss plaintiffs' suit. The Governor obtained separate counsel, who withdrew the motion to dismiss and filed a brief supporting plaintiffs. The Attorney General then intervened in his own right and adopted the brief that he had initially filed on the Governor's behalf as his own.

The trial court granted plaintiffs' motion for summary disposition and declared that the marriage amendment does not bar public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners. The court held that health-insurance benefits do not constitute one of the "benefits of marriage." Unpublished opinion of the Ingham Circuit Court, issued September 27, 2005 (Docket No. 05-368-CZ), p 7. The court further held that the "criteria [used by the public employers] also do not recognize a union 'similar to marriage' " because the "criteria, even when taken together, pale in comparison to the myriad of legal rights and responsibilities accorded to those with marital status." *Id.* at 9.

The Attorney General appealed and moved for a stay. The Court of Appeals granted the motion for a stay and reversed the trial court, declaring that the marriage amendment does bar public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners. *Nat'l Pride at Work, Inc v Governor*, 274 Mich App 147; 732 NW2d 139 (2007). The Court of Appeals held that "a publicly recognized domestic partnership need not mirror a marriage in every respect in order to run afoul of article 1, § 25 because the amendment plainly precludes recognition

of a 'similar union for any purpose.' " *Id.* at 163. "All the plans listed establish criteria for eligibility that are similar to those for marriage." *Id.* at 164. "[T]he agreement between the employee and the dependent constitutes a union similar to marriage, because with the agreement (as with a marriage), the employer has a legal obligation to recognize the union and provide benefits to the eligible dependent (as with a spouse)." *Id*. Finally,

> [t]he requirement that an employee prove the existence either of a written domestic-partnership agreement or an agreement between the employee and the dependent to be jointly responsible for basic living and household expenses, in order to establish eligibility by the partner or dependent for insurance coverage, constitutes recognition by the public employer of a 'similar union for any purpose,' i.e., the purpose of extending to domestic partners and dependents the benefit of insurance coverage equivalent to coverage that is extended to spouses. [*Id.* at 165.]

Plaintiffs and the Governor appealed, and this Court granted the applications for leave to appeal. 478 Mich 862 (2007).

II. STANDARD OF REVIEW

A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558; 737 NW2d 476 (2007). Questions of constitutional interpretation are also reviewed de novo. *Id.*

III. ANALYSIS

A. DOMESTIC-PARTNERSHIP POLICIES

The tentative agreement reached by the OSE and the UAW would require domestic partners to meet the following criteria in order to receive health-insurance benefits:

> 1. Be at least 18 years of age.
>
> 2. Share a close personal relationship with the employee and be responsible for each other's common welfare.
>
> 3. Not have a similar relationship with any other person, and not have had a similar relationship with any other person for the prior six months.
>
> 4. Not be a member of the employee's immediate family as defined as employee's spouse, children, parents, grandparents or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles or cousins.
>
> 5. Be of the same gender.
>
> 6. Have jointly shared the same regular and permanent residence for at least six months, and have an intent to continue doing so indefinitely.
>
> 7. Be jointly responsible for basic living expenses, including the cost of food, shelter and other common expenses of maintaining a household. This joint responsibility need not mean that the persons contribute equally or in any particular ratio, but rather that the persons agree that they are jointly responsible.

The tentative agreement also provides: "In order to establish whether the criteria have been met, the employer may require the employee to sign an Affidavit setting forth the facts and circumstances which constitute compliance with those requirements."

The city of Kalamazoo's "Domestic Partner Benefits Policy," incorporated in its collective-bargaining agreements, provided health-insurance benefits to the domestic partners of the city's employees who met the following criteria:

> For the purposes of the City of Kalamazoo's program, the definition and use of the term *domestic partner* shall only include couples of the same sex. To be considered as domestic partners, the individuals must:

> A. Be at least 18 and mentally competent to enter into a contract;
>
> B. Share a common residence and have done so for at least six (6) months;
>
> C. Be unmarried and not related by blood closer than would prevent marriage;
>
> D. Share financial arrangements and daily living expenses related to their common welfare;
>
> E. File a statement of termination of previous domestic partnership at least six (6) months prior to signing another Certification of Domestic Partnership. [Emphasis in the original.]

The city also required the employee and his or her domestic partner to sign a notarized certification of domestic partnership that affirmed these criteria. In addition, they were required to provide evidence of "mutual economic dependence," such as a joint lease or mortgage, and evidence of a "common legal residence," such as driver's licenses or voter's registrations. Finally, the city's policy provided: "It is the intent of this program to provide insurance coverage and other benefits to domestic partners of the City of Kalamazoo identical to those provided to spouses of City employees."

For a domestic partner to be eligible for health-insurance benefits under the University of Michigan's "Same-Sex Domestic Partner Policy," the employee and his or her partner must:

> * Be of the same sex; and
>
> * Not be legally married to another individual; and
>
> * Have registered or declared the Domestic Partnership in the manner authorized by a municipality or other government entity;[2] and

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[2] The city of Ann Arbor's "Declaration of Domestic Partnership" requires the partners to "declare the following to be true":

* Have allowed at least six months to pass since the dissolution of a previous same-sex domestic partnership in the manner authorized by a municipality or other government entity.

Michigan State University provided health-insurance benefits to its employees' domestic partners if the employee and the domestic partner:

1. are [the] same-sex and for this reason are unable to marry each other under Michigan law,

2. are in a long-term committed relationship, have been in the relationship for at least 6 months, and intend to remain together indefinitely,

3. are not legally married to others and neither has another domestic partner,

4. are at least 18 years of age and have the capacity to enter into a contract,

5. are not related to one another closely enough to bar marriage in Michigan,

6. share a residence and have done so for more than 6 months,

7. are jointly responsible to each other for the necessities of life, and

8. provide a signed "partnership agreement" that obligates each of the parties to provide support for one another, and provides for substantially equal division,

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1. We are in a relationship of mutual support, caring and commitment.

2. We share the common necessities of life.

3. We are not related by blood in a manner that would bar marriage in the State of Michigan.

4. We are not married or in any other domestic partnership.

5. We are at least 18 years of age and otherwise competent to enter into a contract.

> upon termination of the relationship, of earnings during the relationship and any property acquired with those earnings.[3]

B. MARRIAGE AMENDMENT

The marriage amendment, Const 1963, art 1, § 25, provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

The primary objective in interpreting a constitutional provision is to determine the original meaning of the provision to the ratifiers, "we the people," at the time of ratification. Justice COOLEY has described this rule of "common understanding" in this way:

> For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. [Cooley, Constitutional Limitations (1st ed), p 66.]

Thus, the primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law. This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the

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[3] When we use the term "domestic partnership" in this opinion, we refer to a partnership that satisfies the criteria contained in one of the domestic-partnership policies described in this opinion.

time of ratification. *Wayne Co v Hathcock,* 471 Mich 445, 468-469; 684 NW2d 765 (2004).

C. "SIMILAR UNION"

Plaintiffs argue that "the *only* thing that is prohibited by the [marriage] amendment is the recognition of a same-sex relationship *as a marriage*" and that the public employers here are not recognizing a domestic partnership "as a marriage." Plaintiff's brief on appeal (Docket No. 133554), p 23 (emphasis in the original). We respectfully disagree. First, the amendment prohibits the recognition of a domestic partnership "as a marriage *or similar union* . . . ." That is, it prohibits the recognition of a domestic partnership as a marriage or as a union that is similar to a marriage. Second, just because a public employer does not refer to, or otherwise characterize, a domestic partnership as a marriage or a union similar to a marriage does not mean that the employer is not recognizing a domestic partnership as a marriage or a union similar to a marriage. Cf. *id.* at 26 ("In providing benefits to the same-sex partners of their employees, these employers have not *declared* the same-sex partnership to be a marriage or anything similar to marriage.") (emphasis added).[4]

The pertinent question is not whether public employers are recognizing a domestic partnership as a mar-

[4] Plaintiffs seem to argue that if a public employer had provided health-insurance benefits to spouses, and had defined "spouses" to include domestic partners, this would violate the amendment, but because the public employers here did not refer to domestic partners in this manner, there is no violation. See plaintiffs' brief on appeal (Docket No. 133554), pp 27-29. We do not agree that whether the amendment is violated is a function of what label a public employer chooses to place on the beneficiaries of the benefits. Instead, the only pertinent question is whether the public employer is recognizing a domestic partnership as a union similar to marriage for any purpose.

riage or whether they have declared a domestic partnership to be a marriage or something similar to marriage; rather, it is whether the public employers are recognizing a domestic partnership as a union similar to a marriage. A "union" is "something formed by uniting two or more things; combination; . . . a number of persons, states, etc., joined or associated together for some common purpose." *Random House Webster's College Dictionary* (1991). Certainly, when two people join together for a common purpose and legal consequences arise from that relationship, i.e., a public entity accords legal significance to this relationship, a union may be said to be formed. When two people enter a domestic partnership, they join or associate together for a common purpose, and, under the domestic-partnership policies at issue here, legal consequences arise from that relationship in the form of health-insurance benefits. Therefore, a domestic partnership is most certainly a union.

The next question is whether a domestic partnership is similar to a marriage. Plaintiffs and the dissent argue that because the public employers here do not bestow upon a domestic partnership *all* the legal rights and responsibilities associated with marriage,[5] the partnership is not similar to a marriage. Again, we respectfully disagree. "Similar" means "having a likeness or resemblance, [especially] in a general way; having qualities in common[.]" *Random House Webster's College Dictionary* (1991); see also *White v City of Ann Arbor,* 406 Mich 554, 572-574; 281 NW2d 283 (1979). A union does

[5] For example, the right to hold property as tenants by the entirety, MCL 557.71; an equal interest in property of every kind acquired during the marriage, MCL 557.204; the right to pension and retirement benefits accrued during the marriage, MCL 552.18; the right to claim an exemption on taxes for spousal inheritance, MCL 205.202; and the right to spousal veterans' benefits, MCL 32.49d and MCL 36.31.

not have to possess *all* the same legal rights and responsibilities that result from a marriage in order to constitute a union "similar" to that of marriage. If the marriage amendment were construed to prohibit only the recognition of a union that possesses legal rights and responsibilities identical to those that result from a marriage, the language "or similar union" would be rendered meaningless, and an interpretation that renders language meaningless must be avoided. *Sweatt v Dep't of Corrections*, 468 Mich 172, 183; 661 NW2d 201 (2003) (opinion by MARKMAN, J.). Further, the dissimilarities identified by plaintiffs are not dissimilarities pertaining to the *nature* of the marital and domestic-partnership unions themselves, but are merely dissimilarities pertaining to the *legal effects* that are accorded these relationships. However, given that the marriage amendment prohibits the recognition of unions similar to marriage "for any purpose," the pertinent question is not whether these unions give rise to all the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage "for any purpose."[6]

For these reasons, we respectfully disagree with the trial court's conclusion that the "criteria [used by the

[6] Indeed, we agree with plaintiffs and the dissent that marriages and domestic partnerships are dissimilar in many respects. Marriages give rise to many legal rights and responsibilities that domestic partnerships do not. However, we believe the pertinent question for purposes of the marriage amendment is not whether these relationships give rise to identical, or even similar, legal rights and responsibilities, but whether these relationships are similar in nature in the *context* of the marriage amendment. The dissent, *post* at 99-100 n 50, fails to recognize that the pertinent question here is not whether marriages and domestic partnerships are similar in the abstract, but whether these relationships are similar *for purposes of* the marriage amendment, i.e., for the purpose of a constitutional provision that prohibits the recognition of unions similar to marriage "for any purpose." If they are, then there can be *no* legal cognizance given to the similar relationship.

public employers] . . . do not recognize a union 'similar to marriage' " because the "criteria, even when taken together, pale in comparison to the myriad of legal rights and responsibilities accorded to those with marital status." Unpublished opinion of the Ingham Circuit Court, issued September 27, 2005 (Docket No. 05-368-CZ), p 9. Instead, we agree with the Court of Appeals that "a publicly recognized domestic partnership need not mirror a marriage in every respect in order to run afoul of article 1, § 25 because the amendment plainly precludes recognition of a 'similar union for any purpose.' " *Nat'l Pride*, 274 Mich App at 163.[7]

All the domestic-partnership policies at issue here require the partners to be of a certain sex, i.e., the same sex as the other partner.[8] Similarly, Michigan law requires married persons to be of a certain sex, i.e., a different sex from the other. MCL 551.1 ("Marriage is inherently a unique relationship between a man and a

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[7] Plaintiffs argue that the marriage amendment was adopted in response to *Baker v State,* 170 Vt 194; 744 A2d 864 (1999), in which the Vermont Supreme Court held that that state is constitutionally required to extend to same-sex couples in a civil union *all* the same benefits and protections that are provided to married couples. Thus, plaintiffs contend that the amendment only prohibits the establishment of "civil unions" that confer the same rights and obligations as does a marriage. However, as explained earlier, a union does not have to confer all the same rights and obligations as does a marriage in order to be "similar" to a marriage. Moreover, it is no less plausible that the amendment was adopted in response to a series of judicial decisions holding that public employers can extend health-insurance benefits to employees' domestic partners. See, e.g., *Tyma v Montgomery Co,* 369 Md 497; 801 A2d 148 (2002); *Heinsma v City of Vancouver,* 144 Wash 2d 556; 29 P3d 709 (2001); *Lowe v Broward Co,* 766 So 2d 1199 (Fla App, 2000); *Crawford v Chicago,* 304 Ill App 3d 818; 710 NE2d 91 (1999); *Slattery v New York City,* 266 AD2d 24; 697 NYS2d 603 (1999); *Schaefer v City of Denver,* 973 P2d 717 (Colo App, 1998).

[8] Indeed, the Michigan State University policy specifically states that the partners must be of the "same-sex and for this reason are unable to *marry* each other under Michigan law[.]" [Emphasis added.]

woman.").[9] In addition, each of the domestic-partnership policies at issue in this case requires that the partners not be closely related by blood.[10] Similarly, Michigan law requires that married persons not be closely related by blood. MCL 551.3[11] and MCL 551.4.[12] Although there are, of course, many different types of relationships in Michigan that are accorded legal significance—e.g., debtor-creditor, parent-child, landlord-tenant, attorney-client, employer-employee—marriages and domestic partnerships appear to be the only such relationships that are defined in terms of *both*

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[9] See also MCL 551.1 ("A marriage contracted between individuals of the same sex is invalid in this state."); MCL 551.2 ("[M]arriage is a civil contract between a man and a woman . . . ."); MCL 551.3 ("A man shall not marry . . . another man."); MCL 551.4 ("A woman shall not marry . . . another woman."); MCL 551.272 ("This state recognizes marriage as inherently a unique relationship between a man and a woman, . . . and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.").

[10] Three of these policies specifically refer to blood relationships that would prevent "marriage." The city of Kalamazoo's policy provides that the partners cannot be "related by blood closer than would prevent marriage[.]" The University of Michigan's policy provides that the partners cannot be "related to each other by blood in a manner that would bar marriage[.]" Michigan State University's plan provides that the partners cannot be "related to one another closely enough to bar marriage in Michigan[.]"

[11] MCL 551.3 provides:

> "A man shall not marry his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree, or another man."

[12] MCL 551.4 provides:

> "A woman shall not marry her father, brother, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or cousin of the first degree, or another woman."

gender and the lack of a close blood connection.[13] As discussed earlier, "similar" means "having a likeness or resemblance, [especially] in a general way; having qualities in common[.]" *Random House Webster's College Dictionary* (1991). Marriages and domestic partnerships share two obviously important, and apparently unique (at least in combination), qualities in common.[14]

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[13] At oral arguments, despite being asked several times to provide an example of another relationship in Michigan defined in terms of both gender and the lack of a close blood connection, plaintiffs' counsel was unable to do so.

[14] Although we believe that these are the core qualities that make marriages and domestic partnerships similar, these relationships are similar in other respects as well. For instance, marriages and domestic partnerships are relationships that only two people may enter into. See MCL 551.5 ("No marriage shall be contracted whilst either of the parties has a former wife or husband living, unless the marriage with such former wife or husband, shall have been dissolved."); OSE policy (domestic partners must "[n]ot have a similar relationship with any other person, and not have had a similar relationship with any other person for the prior six months"); City of Kalamazoo policy (domestic partners must "[f]ile a statement of termination of previous domestic partnership at least six (6) months prior to signing another Certification of Domestic Partnership"); University of Michigan policy (domestic partners must "[h]ave allowed at least six months to pass since the dissolution of a previous same-sex domestic partnership in the manner authorized by a municipality or other government entity"); Michigan State University policy (domestic partners must not be "legally married to others [or have] another domestic partner").

In addition, persons involved in either marital or domestic-partnership relationships must undertake obligations of mutual support. See MCL 750.161(1) ("[A] person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse . . . is guilty of a felony . . . ."); OSE policy (domestic partners must "[b]e jointly responsible for basic living expenses"); City of Kalamazoo policy (domestic partners must "[s]hare financial arrangements and daily living expenses related to their common welfare"); Michigan State University policy (domestic partners must be "jointly responsible to each other for the necessities of life"). Although the University of Michigan policy does not include a mutual-support obligation, it does require the partners to "[h]ave registered or declared the Domestic Partnership," and the city of Ann Arbor's "Declaration of Domestic Partnership" requires the parties to declare that "we are in a relationship of mutual support" and that "we sharethe common necessities of life."

Because marriages and domestic partnerships share

Further, both marital and domestic-partnership relationships require agreements or contracts as a precondition. See MCL 551.2 ("[M]arriage is a civil contract between a man and a woman, to which the consent of parties capable in law of contracting is essential."); OSE policy (domestic partners must "agree that they are jointly responsible" "for basic living expenses"); City of Kalamazoo policy (domestic partners must be "mentally competent to enter into a contract" and must sign a domestic-partnership agreement); University of Michigan policy (domestic partners must sign a domestic-partnership agreement); Michigan State University Policy (domestic partners must "provide a signed 'partnership agreement' "). See part III(E) of this opinion.

Additionally, both marital and domestic-partnership relationships have a minimum age requirement. See MCL 551.51 ("A marriage in this state shall not be contracted by a person who is under 16 years of age . . . ."); OSE policy (domestic partners must "[b]e at least 18 years of age"); City of Kalamazoo policy (domestic partners must "[b]e at least 18"); Michigan State University policy (domestic partners must be "at least 18 years of age"). Although the University of Michigan's policy does not include an age requirement, it does require the partners to "[h]ave registered or declared the Domestic Partnership," and the city of Ann Arbor's "Declaration of Domestic Partnership" requires the parties to be "at least 18 years of age . . . ."

Further, both marriages and domestic partnerships are relationships of an indefinite duration. That is, they are both ongoing relationships that continue until one of the parties takes affirmative action to terminate the relationship. See MCL 552.6 (one must file a complaint for divorce in order to dissolve a marriage); OSE policy (domestic partners must "jointly share[] the same . . . residence . . . and have an intent to continue doing so indefinitely"); City of Kalamazoo policy (domestic partners must "[f]ile a statement of termination of previous domestic partnership . . . prior to signing another Certification of Domestic Partnership"); University of Michigan policy, (domestic partners must "[h]ave allowed at least six months to pass since the dissolution of a previous same-sex domestic partnership in the manner authorized by a municipality or other government entity"); Michigan State University policy (domestic partners must be "in a long-term committed relationship, have been in the relationship for at least 6 months, and intend to remain together indefinitely").

Finally, it seems relevant that all but one of the domestic-partnership policies at issue here require the partners to share a common residence, a circumstance typically defining the marital relationship as well. See OSE policy (domestic partners must "share[] the same regular and

these "similar" qualities, we believe that it can fairly be said that they "resembl[e]" one another "in a general way." Therefore, although marriages and domestic partnerships are by no means identical, they are similar. Because marriages and domestic partnerships are the only relationships in Michigan defined in terms of both gender and lack of a close blood connection, and, thus, have these core "qualities in common," we conclude that domestic partnerships are unions similar to marriage.[15]

D. "RECOGNIZED"

The next question concerns whether public employers are truly recognizing a domestic partnership as a union similar to marriage when they provide health-insurance benefits to domestic partners on the *basis of* the partnership. "Recognize" is defined as "to perceive or acknowledge as existing, true, or valid[.]" *Random House Webster's College Dictionary* (1991). When a public employer attaches legal consequence to a relationship, that employer is clearly "recognizing" that relationship. That is, by providing legal significance to a relationship, the public employer is acknowledging the validity of that relationship. When public employers provide domestic partners health-insurance benefits on

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permanent residence"); City of Kalamazoo policy, (domestic partners must "[s]hare a common residence"); Michigan State University policy (domestic partners must "share a residence").

[15] It is noteworthy in this regard that the city of Kalamazoo's policy specifically states that "[i]t is the intent of this program to provide insurance coverage and other benefits to domestic partners of the City of Kalamazoo identical to those provided to *spouses* of City employees." (Emphasis added.) Indeed, each of the four policies at issue here specifically refers to marriage or spouses, and the Michigan State University policy specifically refers to *marriage* in three different provisions. If domestic partnerships are not similar to marriage, why would there be the need in each of these agreements to invoke marriage as an apparently analogous or comparable institution?

the basis of the domestic partnership, they are without a doubt recognizing the partnership.[16]

E. "ONLY AGREEMENT"

The next question concerns whether public employers are recognizing an "agreement" when they provide health-insurance benefits to domestic partners. An "agreement" is "the act of agreeing or of coming to a mutual arrangement." *Id.* The city of Kalamazoo's, the University of Michigan's, and Michigan State University's policies require putative partners to sign a domestic-partnership agreement. The OSE's policy requires partners to "agree that they are jointly responsible" "for basic living expenses . . . ." Obviously, if two people have decided to sign a domestic-partnership agreement or have agreed to be jointly responsible for basic living expenses, they have come to a mutual arrangement.[17] Therefore, public employers recognize an agreement when they provide health-insurance benefits to domestic partners on the basis of a domestic partnership.

However, the marriage amendment specifically states that the "only" agreement that can be recognized as a marriage or similar union is the union of one man and

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[16] Plaintiffs themselves acknowledge that public employers recognize a domestic partnership by providing health-insurance benefits to their employees' domestic partners on the basis of the partnership. See plaintiffs' brief on appeal (Docket No. 133554), p 26 ("What these employers have *recognized* . . . is that a relationship exists between one of their employees and another individual."; "in *recognizing* the existence of that relationship and making that relationship the basis for the employment related benefits which are at issue"; "[T]hese institutions may be giving *recognition* to the relationship that exists between their employees and their partners.") (emphasis added and omitted).

[17] In addition, all the policies except the University of Michigan's require partners to live together. When two people decide to live together, they have clearly reached a "mutual arrangement."

one woman. "Only" means "the single one . . . of the kind; lone; sole[.]" *Random House Webster's College Dictionary* (1991). Therefore, a single agreement can be recognized within the state of Michigan as a marriage or similar union, and that single agreement is the union of one man and one woman. A domestic partnership does not constitute such a recognizable agreement.

F. "FOR ANY PURPOSE"

Furthermore, the marriage amendment specifically prohibits recognizing "for any purpose" a union that is similar to marriage but is not a marriage. "Any" means "every; all[.]" *Id*. Therefore, if there were any residual doubt regarding whether the marriage amendment prohibits the recognition of a domestic partnership for the purpose at issue here, this language makes it clear that such a recognition is indeed prohibited "for any purpose," which obviously includes for the purpose of providing health-insurance benefits. Whether the language "for any purpose" is essential to reach the conclusion that health-insurance benefits cannot be provided under the instant circumstances, or merely punctuates what is otherwise made clear in the amendment, the people of this state could hardly have made their intentions clearer.

G. "BENEFITS OF MARRIAGE"

The marriage amendment begins with a statement of its purpose that is effectively a preamble: "To secure and preserve the benefits of marriage for our society and for future generations of children . . . ." Plaintiffs argue that the marriage amendment does not prohibit public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners because health-insurance benefits do not con-

stitute a benefit of marriage.[18] However, the marriage amendment contains more than just a statement of purpose. In full, it states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." The latter—the operative—part of this provision sets forth how the ratifiers intended to go about achieving the purposes set forth in the first part, "secur[ing] and preserv[ing] the benefits of marriage . . . ." This operative part specifies that public employers must not recognize domestic partnerships for any purpose. That is, the first part of the amendment states its purpose, and the second part states the means by which this purpose is to be achieved. Doubtless, there are those who would disagree about the efficacy of achieving the former purpose by the latter means. However, it is not for this Court to decide whether there are superior means for "secur[ing] and preserv[ing] the benefits of marriage," or indeed whether the means chosen in the

[18] Reasonable people doubtlessly can disagree regarding whether health-insurance benefits are or are not a benefit of marriage. On the one hand, one can argue that health-insurance benefits are not a benefit of marriage because they arise out of the employer-employee relationship rather than the marital relationship, as demonstrated by the fact that not all married couples have health-insurance benefits. On the other hand, one can argue that they are a benefit of marriage, as demonstrated by the fact that a significant number of people obtain such benefits from their spouses' employers while they would be unable to obtain such benefits if they were not married. Resolution of this disagreement depends, in part, on whether the term "benefit of marriage" implies an *exclusive* benefit or merely a *typical* benefit. Nonetheless, for the reasons set forth in this part of our opinion, we believe that the people have resolved this disagreement, or at least rendered it moot, in the operative part of the amendment. There, it is made clear that domestic partnerships will not be given legal cognizance "for any purpose," including presumably for the purpose of providing health-insurance benefits.

amendment are ineffectual or even counterproductive. The people of this state have already spoken on this issue by adopting this amendment.[19] They have decided to "secure and preserve the benefits of marriage" by ensuring that unions similar to marriage are not recognized in the same way as a marriage for any purpose.[20]

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[19] It is also of some interest that the preamble concerning the benefits of marriage was not even on the ballot when the amendment was ratified. The only language on the ballot was the operative part of the amendment. Although we cannot conclude from this fact that the people did not adopt the entire amendment, such a ballot presentation seems to underscore the traditional view of preamble provisions. See n 20 *infra*.

[20] This view of the preamble is consistent with the well-established rule that "the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous . . . ." *Yazoo & M V R Co v Thomas,* 132 US 174, 188; 10 S Ct 68; 33 L Ed 302 (1889); see also *Coosaw Mining Co v South Carolina,* 144 US 550, 563; 12 S Ct 689; 36 L Ed 537 (1892) ("While express provisions in the body of an act cannot be controlled or restrained by the . . . preamble, [it] may be referred to when ascertaining the meaning of a [provision] which is susceptible of different constructions."). That is, a " 'preamble no doubt contributes to a general understanding of a [provision], but it is not an operative part of the [provision],' " and " '[w]here the enacting or operative parts of a [provision] are unambiguous, the meaning of the [provision] cannot be controlled by language in the preamble.' " *Nat'l Wildlife Federation v EPA,* 351 US App DC 42, 57-58; 286 F3d 554 (2002) (citations omitted); see also *United States v Emerson,* 270 F3d 203, 233 n 32 (CA 5, 2001) (" '[T]hough the preamble cannot control the enacting part of a [provision], which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it.' ") (citation omitted); *Planned Parenthood of Minnesota v Minnesota,* 910 F2d 479, 482-483 (CA 8, 1990); *White v Investors Mgt Corp,* 888 F2d 1036, 1042 (CA 4, 1989); *Atlantic Richfield Co v United States,* 764 F2d 837, 840 (Fed Cir, 1985); *Hughes Tool Co v Meier,* 486 F2d 593, 596 (CA 10, 1973). Similarly, see *Parker v Dist of Columbia,* 375 US App DC 140, 159-160; 478 F3d 370 (2007) (reasoning that the preamble of the Second Amendment ["[a] well regulated Militia, being necessary to the security of a free State,"] could not override the clear substantive guarantee of the Second Amendment ["the right of the people to keep and bear Arms, shall not be infringed"]), cert gtd *sub nom Dist of Columbia v Heller,* ___ US ___; 128 S Ct 645 (2007); see also *Jacobson v Massachusetts*, 197 US 11, 22; 25 S

H. EXTRINSIC EVIDENCE

Plaintiffs and the dissent argue that Citizens for the Protection of Marriage, an organization responsible for placing the marriage amendment on the 2004 ballot and a primary supporter of this initiative during the ensuing campaign, published a brochure that indicated that the proposal would not preclude public employers from offering health-insurance benefits to their employees' domestic partners. However, such extrinsic evidence can hardly be used to contradict the unambiguous language of the constitution. *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000) ("[R]eliance on extrinsic evidence was inappropriate because the constitutional language is clear."). As Justice COOLEY explained:

> The object of construction, as applied to a written constitution, *is to give effect to the intent of the people in adopting it*. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. . . . "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the [lawgiver] should be intended to mean what they have plainly expressed, and consequently no room is left for construction." [Cooley, Constitutional Limitations (1st ed), p 55 (emphasis in the original), quoted in *American Axle,* 461 Mich at 362.]

When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited, and, as discussed earlier, the language of the marriage amendment is unambiguous.[21]

Ct 358; 49 L Ed 643 (1905) (holding that the preamble of the United States Constitution is not a source of governmental power).

[21] Contrary to the dissent's contention, *post* at 95 n 34, the fact that the amendment does not explicitly state that public employers are prohibited from providing health benefits to their employees' domestic partners does not mean that the amendment is "ambiguous." That is, the fact that

In *Michigan Civil Rights Initiative v Bd of State Canvassers,* 475 Mich 903, 903 (2006) (MARKMAN, J., concurring), in which it was alleged that numerous petition signatures had been obtained in support of placing the Michigan Civil Rights Initiative (MCRI) on the ballot by circulators who misrepresented the MCRI, it was emphasized that "the signers of these petitions did not sign the oral representations made to them by circulators; rather, they signed written petitions that contained the actual language of the MCRI." Similarly, the voters here did not vote for or against any brochure produced by Citizens for the Protection of Marriage; rather, they voted for or against a ballot proposal that contained the actual language of the marriage amendment.[22]

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a constitutional provision does not explicitly set forth every specific action that is prohibited does not mean that such a provision is ambiguous. If that were the case, almost all constitutional provisions would be rendered ambiguous. Rather, as this Court explained in *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004):

> [A] provision of the law is ambiguous only if it "irreconcilably conflict[s]" with another provision or when it is *equally* susceptible to more than a single meaning. In lieu of the traditional approach to discerning "ambiguity"—one in which only a few provisions are truly ambiguous and in which a diligent application of the rules of interpretation will normally yield a "better," albeit perhaps imperfect, interpretation of the law—the dissent would create a judicial regime in which courts would be quick to declare ambiguity and quick therefore to resolve cases and controversies on the basis of something other than the words of the law. [Citation omitted; emphasis in the original.]

[22] As an aside, this brochure did not render a verdict on the instant controversy. Rather, it stated:

> Marriage is a union between a husband and wife. Proposal 2 will keep it that way. This is not about rights or benefits or how people choose to live their life. This has to do with family, children and the way people are. It merely settles the question once and for all what marriage is—for families today and future generations.

Moreover, like the Citizens for the Protection of Marriage, the Michigan Civil Rights Commission issued a statement asserting:

> If passed, Proposal 2 would result in fewer rights and benefits for unmarried couples, both same-sex and heterosexual, by banning civil unions and overturning existing domestic partnerships. Banning domestic partnerships would cause many Michigan families to lose benefits such as health and life insurance, pensions and hospital visitation rights.[23]

We do not read this language as resolving that the marriage amendment would not prohibit domestic partners from obtaining health-insurance benefits. Moreover, statements made by other supporters of the amendment stated that partnership benefits would, in fact, be prohibited by the amendment. See amicus curiae brief of the American Family Association of Michigan, pp 6-8.

In addition to the brochure, plaintiffs and the dissent rely on statements made by counsel for Citizens for the Protection of Marriage to the Board of State Canvassers in which he apparently asserted that the amendment would not prohibit public employers from providing health-insurance benefits to domestic partners. *Post* at 92-93, quoting the transcript of the August 23, 2004, hearing before the board, reproduced in the Governor's appendix (Docket No. 133429), p 68a. Whatever the accuracy of this characterization, cf. amicus curiae brief of the American Family Association of Michigan, p 8 n 2, it should bear little repeating that the people ultimately did not cast their votes to approve or disapprove counsel's, or any other person's, statements concerning the amendment; they voted to approve or disapprove the language of the amendment itself.

Moreover, given that the "Board of State Canvassers . . . has the authority only to 'ascertain if the petitions have been signed by the requisite number of qualified and registered electors,' " *Michigan Civil Rights Initiative*, 475 Mich at 903 (MARKMAN, J., concurring), quoting MCL 168.476(1), we are not sure why the dissent places particular emphasis, *post* at 92 n 22, on the fact that this statement was made before the Board of State Canvassers.

[23] Other opponents made similar statements concerning the adverse consequences of the amendment. See, generally, amicus curiae brief of the American Family Association of Michigan, pp 9-12. The dissent contends that "[i]t is reasonable to assume that the public relied heavily on the proponents of the amendment to explain its meaning and scope."

Therefore, all that can reasonably be discerned from the extrinsic evidence is this: before the adoption of the marriage amendment, there was public debate regarding its effect, and this debate focused in part on whether the amendment would affect domestic-partnership benefits. The people of this state then proceeded to the polls, they presumably assessed the actual language of the amendment in light of this debate, and a majority proceeded to vote in favor.[24] The role of this Court is not to determine

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Post at 96 n 35. We see no basis for this argument. Contrary to the dissent, it is no more likely that the voters relied on proponents' views rather than opponents' views of the amendment. Indeed, one might conceivably think that at least some of the people would be significantly more likely to rely on an assessment of the amendment from an official agency of the government than from a private organization with an obvious stake in the passage of the amendment. Similarly, it might be expected that at least some might be influenced by the characterizations of newspapers such as the *Detroit Free Press*, in which its political columnist stated in a question-answer format on September 13, 2004:

> *Q*. What about employee benefits accorded to domestic partners and their dependents by some municipalities and public universities?
>
> *A*. Proponents and opponents of the amendment say they would be prohibited to the extent they mimic benefits for married employees.

Because we cannot read voters' minds to determine whose views they relied on and whose they ignored—and because in the end this would not be relevant—we must look to the actual language of the amendment. The dissent inadvertently illustrates the principal infirmity of reliance upon legislative history, namely that it affords a judge essentially unchecked discretion to pick and choose among competing histories in order to select those that best support his own predilections. In relying on what she describes as the "wealth of extrinsic information available," *post* at 95 n 34, the dissenting justice refers only to information supporting her own viewpoint, while disregarding the abundant "wealth of extrinsic information" that does not.

[24] It perhaps can also be discerned that supporters of legislative and constitutional initiatives often tend to downplay the effect of such initiatives during public debate, while opponents tend to overstate their effect.

who said what about the amendment before it was ratified, or to speculate about how these statements may have influenced voters. Instead, our responsibility is, as it has always been in matters of constitutional interpretation, to determine the meaning of the amendment's actual language.[25]

When the dissent accuses the majority of "condon-[ing] and even encourag[ing] the use of misleading tactics in ballot campaigns," *post* at 102, we can only surmise from this that the dissent believes that this Court must defer in its constitutional interpretations, not to the language of the constitution, but to myriad statements from private individuals and organizations, some of which may have ascribed meanings to the constitution utterly at odds with its actual language. We do not believe the people of this state have acquiesced in this delegation of judicial responsibility from the courts to private interest groups.

I. OTHER STATES

Finally, none of the decisions from other states on which plaintiffs rely is helpful because none involves

[25] The dissent chastises us for failing to consider extrinsic evidence, given that we considered such evidence in *People v Nutt*, 469 Mich 565, 588-592; 677 NW2d 1 (2004), and *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156-160; 665 NW2d 452 (2003). *Post* at 95 n 34. In those cases, we considered the Official Record of the Constitutional Convention and the Address to the People. These are hardly comparable to campaign statements made by private organizations. Further, we recognized in those cases that "constitutional convention debates and the *Address to the People* . . . are . . . not controlling." *Lapeer Co Clerk*, 469 Mich at 156. To say the least, neither case stands for the dissent's apparent proposition that any stray bit of historical flotsam or jetsam can serve as guidance in giving meaning to the constitution. In a similar vein, the dissent would trump the actual language of the constitution by relying on a telephone survey conducted three months before the election that indicated that a majority of those surveyed were not opposed to domestic-partnership benefits.

the specific language contained in Michigan's marriage amendment. See, e.g., *State v Carswell,* 114 Ohio St 3d 210; 871 NE2d 547 (2007) (constitutional provision, Ohio Const art 15, § 11, providing: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions."); *Knight v Superior Court of Sacramento Co,* 128 Cal App 4th 14; 26 Cal Rptr 3d 687 (2005) (statute, Cal Fam Code 308.5, providing that "[o]nly marriage between a man and a woman is valid or recognized in California"); *Devlin v Philadelphia,* 580 Pa 564; 862 A2d 1234 (2004) (statute, 23 Pa Cons Stat 1704, providing that "marriage shall be between one man and one woman"); *Tyma v Montgomery Co,* 369 Md 497; 801 A2d 148 (2002) (statute, Md Code Ann Fam Law 2-201, providing that "[o]nly a marriage between a man and a woman is valid in this State"); *Heinsma v City of Vancouver,* 144 Wash 2d 556; 29 P3d 709 (2001) (statute, Wash Rev Code 26.04.010(1), providing that "[m]arriage is a civil contract between a male and a female"); *Lowe v Broward Co,* 766 So 2d 1199 (Fla App, 2000) (statute, Fla Stat 741.212[1], providing that "[m]arriages between persons of the same sex entered into in any jurisdiction . . . are not recognized for any purpose in this state"); *Crawford v Chicago,* 304 Ill App 3d 818; 710 NE2d 91 (1999) (statute, 750 Ill Comp Stat 5/201, providing that a marriage is valid if it is "between a man and a woman"); *Slattery v New York City,* 266 AD2d 24; 697 NYS2d 603 (1999) (statute, NY Dom Rel Law 12, providing that "the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife"); *Schaefer v City of Denver,* 973 P2d 717 (Colo App, 1998) (statute, Colo Rev Stat 14-2-104[1][b], providing that a marriage is valid if it is "only between one man and one woman"). As the

Washington Court of Appeals explained, "Michigan's marriage amendment is unique from other jurisdictions because it prohibits the recognition of not only same-sex marriages, but also 'similar unions.' " *Leskovar v Nickels,* 140 Wash App 770, 780; 166 P3d 1251 (2007). "Washington's marriage statute prohibits marriage by 'persons other than a male and a female.' It is distinct from Michigan's marriage amendment, and does not prohibit the recognition of 'similar unions for any purpose.' " *Id.*

The same is true of all the cases cited by plaintiffs—each is interpreting a provision of law that is simply too different from Michigan's marriage amendment to be of persuasive value in determining how this state's amendment should be interpreted.

IV. CONCLUSION

The trial court held that providing health-insurance benefits to domestic partners does not violate the marriage amendment because public employers are not recognizing domestic partnerships as unions similar to marriage, given the significant distinctions between the legal effects accorded to these two unions. However, given that the marriage amendment prohibits the recognition of unions similar to marriage "for any purpose," the pertinent question is not whether these unions give rise to all of the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage "for any purpose." Recognizing this and concluding that these unions are indeed being recognized as similar unions "for any purpose," the Court of Appeals reversed. We affirm its judgment.[26]

[26] Because the other issues addressed by the Court of Appeals were not appealed in this Court, we do not address them.

That is, we conclude that the marriage amendment, Const 1963, art 1, § 25, which states that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose," prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners.

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

KELLY, J. (*dissenting*). The issue we decide is whether the so-called "marriage amendment"[1] of the Michigan Constitution prevents public employers from voluntarily providing health benefits to their employees' same-sex domestic partners. The majority has determined that it does. I disagree.

First, the language of the amendment itself prohibits nothing more than the recognition of same-sex marriages or similar unions. It is a perversion of the amendment's language to conclude that, by voluntarily offering the benefits at issue, a public employer recognizes a union similar to marriage. Second, the circumstances surrounding the adoption of the amendment strongly suggest that Michigan voters did not intend to prohibit public employers from offering health-care benefits to their employees' same-sex partners. The majority decision does not represent "the law which the people have made, [but rather] some other law which the words of the constitution may possibly be made to express."[2] Accordingly, I dissent.

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[1] Const 1963, art 1, § 25.

[2] *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884).

THE UNDERLYING FACTS

On November 2, 2004, a majority of Michigan voters chose to amend the Michigan Constitution to add § 25 to article 1.[3] This amendment is sometimes termed the "marriage amendment." It provides:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

At the time the amendment was adopted, several public employers in the state had policies that extended health-care benefits to their employees' same-sex domestic partners. Also, the Office of the State Employer had negotiated an agreement that was to provide domestic-partner benefits to some state employees.[4]

In March 2005, in response to an inquiry, the Attorney General issued a formal opinion that concluded that the amendment prohibited public employers from granting benefits to their employees' same-sex partners.[5] Five days after the Attorney General issued the opinion, National Pride At Work, Inc., which is a constituency group of the AFL-CIO, and 41 individuals[6] filed the instant lawsuit against Governor Granholm. The lawsuit sought a declaratory judgment that the

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[3] The amendment became effective December 18, 2004.

[4] After the amendment was passed, the interested parties entered into an agreement not to submit the proposed contract to the Civil Service Commission until a court determined whether the benefits were lawful.

[5] OAG, 2005-2006, No 7,171, p 9 (March 16, 2005).

[6] Plaintiffs include employees of (1) the state of Michigan, (2) the city of Kalamazoo, (3) the University of Michigan, (4) Michigan State University, (5) Eastern Michigan University, (6) Wayne State University, and (7) the Eaton/Clinton/Ingham Community Mental Health Board.

amendment does not prohibit public employers from providing the benefits.[7]

The Attorney General, acting on the Governor's behalf, moved to dismiss the suit on the basis that plaintiffs lacked standing. The Governor then obtained separate counsel and withdrew the motion. She proceeded to file a brief supporting plaintiffs' position. This prompted the Attorney General to intervene as a defendant.

Plaintiffs moved for summary disposition, arguing that the amendment does not prohibit public employers from voluntarily providing the benefits at issue. The trial court agreed and granted the motion. The court found that the amendment does not prohibit the benefits because "[b]y voluntarily providing domestic partner health care benefits to an employer-defined group of people, the Plaintiffs' employers are not 'recognizing a marriage or similar union.' "[8]

The Attorney General appealed the trial court's decision in the Court of Appeals and moved for a stay. The Court of Appeals granted the stay and, in a unanimous published opinion, reversed the trial court's decision. The panel concluded that the amendment prohibited public employers from granting health benefits to their employees' same-sex domestic partners.[9]

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[7] Shortly after plaintiffs filed the suit, the city of Kalamazoo indicated that it would not provide benefits to same-sex domestic partners beginning in 2006 unless a court ruled them lawful. In response, Kalamazoo was added to the instant lawsuit as a defendant.

[8] *Nat'l Pride at Work, Inc v Governor*, unpublished opinion of the Ingham Circuit Court, issued September 27, 2005 (Case No. 05-368-CZ). The trial court did not consider the standing issue because the Attorney General did not raise the issue after the Governor withdrew her motion.

[9] *Nat'l Pride at Work, Inc v Governor*, 274 Mich App 147; 732 NW2d 139 (2007).

This Court granted leave to appeal to consider the issue.[10]

TWO KEY CONSIDERATIONS

As always, when interpreting the Michigan Constitution, this Court's "duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express."[11] The initial step in determining what law the people have made is to examine the specific language used. In so doing, " ' "it is not to be supposed that [the people] have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." ' "[12] And, since our task is a search for intent, it is often necessary to "consider the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish."[13]

THE CIRCUMSTANCES SURROUNDING THE ADOPTION OF THE AMENDMENT

Beginning in 1993 with the Hawaii Supreme Court case of *Baehr v Lewin*,[14] a number of state courts and state legislatures joined in a national discussion on the constitutionality of barring same-sex marriages. In *Baehr*, the court held that Hawaii's statute limiting

[10] 478 Mich 862 (2007).

[11] *Harding*, 53 Mich at 485.

[12] *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) (citations omitted).

[13] *Federated Publications, Inc v Michigan State Univ Bd of Trustees*, 460 Mich 75, 85; 594 NW2d 491 (1999).

[14] *Baehr v Lewin*, 74 Hawaii 530; 852 P2d 44 (1993).

marriage to one man and one woman was presumptively unconstitutional under the Hawaii Constitution. It held that the state had the burden of showing a compelling state interest in limiting marriage to male/female unions.[15] Following *Baehr*, the Vermont Supreme Court issued a decision in 1999 ordering the state legislature to create a legal form that would afford same-sex couples a status similar to that of married couples.[16] Then, in 2003, in the famous case of *Goodridge v Dep't of Pub Health*,[17] the Massachusetts Supreme Judicial Court held that barring two people of the same sex from marrying violated the equal protection guarantees of the Massachusetts Constitution.[18] That same year, the California Legislature granted registered domestic partners "the same rights, protections, and benefits . . . as are granted to and imposed upon spouses."[19]

It was against this background that the Michigan Christian Citizens Alliance commenced an initiative to amend the Michigan Constitution to bar same-sex marriage. The alliance formed the Citizens for the Protection of Marriage committee (CPM) "in response to the debate taking place across the country over the definition of marriage."[20] The committee's stated goal was to place the issue of same-sex marriage on the ballot so that Michigan voters would have the ultimate say in the matter.[21]

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[15] *Id*. at 580.

[16] *Baker v State*, 170 Vt 194, 197-198; 744 A2d 864 (1999).

[17] *Goodridge v Dep't of Pub Health*, 440 Mass 309; 798 NE2d 941 (2003).

[18] *Id*. at 312, 342.

[19] Cal Fam Code 297.5(a).

[20] Plaintiff's appendix (Docket No. 133554), p 95c, reproducing a CPM webpage no longer available online.

[21] *Id*.

During CPM's campaign, concerns arose regarding exactly what the amendment would prohibit. CPM attempted to address these concerns at an August 2004 public certification hearing before the Board of State Canvassers.[22] Specifically, CPM addressed whether the amendment, which it had petitioned to place on the ballot, would bar public employers from providing benefits to their employees' same-sex domestic partners. CPM's representative, attorney Eric E. Doster, assured the board that it would not. Mr. Doster stated:

> [T]here would certainly be nothing to preclude [a] public employer from extending [health-care] benefits, if they so chose, as a matter of contract between employer and employee, to say domestic dependent benefits . . . [to any] person, and it could be your cat. So they certainly could extend it as a matter of contract.
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> * * *
>
> [A]n employer, as a matter of contract between employer and employee, can offer benefits to whomever the employer wants to. And if it wants to be my spouse, if it wants to be my domestic partner—however that's defined under the terms of your contract or my cat, the employer can do that . . . .[23]

Mr. Doster reiterated this point several times throughout the proceedings.

> I'd hate to be repetitive, but again, that's a matter of contract between an employer and employee. And if the employer wanted to do that, offer those benefits, I don't see how this language affects that. If the language just said "marriage" or "spouse," then I would agree with you. But

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[22] In order for a proposal to be placed on the ballot, the Board of State Canvassers must certify it. MCL 168.476. Thus, the certification hearing was a very important step for CPM.

[23] The Governor's appendix (Docket No. 133429), p 67a-68a, reproducing the transcript of the August 23, 2004, hearing.

> there's nothing in this language that I would interpret that would say that that somehow would go beyond that.[24]

In its campaign to win over voters, CPM made a number of additional public statements that were consistent with Mr. Doster's testimony before the Board of State Canvassers. For example, Marlene Elwell, the campaign director for CPM, was quoted in *USA Today* as stating that "[t]his has nothing to do with taking benefits away. This is about marriage between a man and a woman."[25] Similarly, CPM communications director Kristina Hemphill was quoted as stating that "[t]his Amendment has nothing to do with benefits . . . . It's just a diversion from the real issue."[26]

CPM also made clear on its webpage that it was "not against anyone, [CPM is] for defining marriage as the **union of one man and one woman. Period**."[27] Instead, CPM contended that its reason for proposing the amendment was its belief that "[n]o one has the right to redefine marriage, to change it for everyone else. Proposal 2 will keep things as they are and as they've been. And by amending Michigan's constitution, we can settle this question once and for all."[28]

CPM even distributed a brochure that asserted that the amendment would not affect any employer health-benefit plan already in place. The brochure stated:

> **Proposal 2 is *Only* about Marriage**

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[24] *Id*. at 69a.

[25] Charisese Jones, *Gay marriage on ballot in 11 states*, USA Today, October 15, 2004, p A.3.

[26] John Burdick, *Marriage issue splits voters*, Holland Sentinel, October 30, 2004.

[27] Plaintiffs' appendix (Docket No. 133554), reproducing a CPM webpage no longer available online.

[28] CPM's brochure, Protect Marriage, reproduced in the Governor's appendix (Docket No. 133429), p 30a.

> Marriage is a union between a husband and wife. Proposal 2 will keep it that way. This is not about rights or benefits or how people choose to live their life. This has to do with family, children and the way people are. It merely settles the question once and for all what marriage is—for families today and future generations.[29]

It can be assumed that the clarifications offered by CPM, the organization that successfully petitioned to place the proposal on the ballot, carried considerable weight with the public. Its statements certainly encouraged voters who did not favor a wide-ranging ban to vote for what they were promised was a very specific ban on same-sex marriage.

And a poll conducted shortly before the election indicates that CPM's public position was in line with public opinion. The poll results indicated that, whereas the public was in favor of banning same-sex marriage, it was not opposed to employer programs granting benefits to same-sex domestic partners.

In an August 2004 poll of 705 likely voters,[30] 50 percent of respondents favored the amendment while only 41 percent planned to vote against it. But 70 percent specifically disapproved of making domestic partnerships and civil unions illegal.[31] Sixty-five percent disapproved of barring cities and counties from providing domestic-partner benefits.[32] And 63 percent

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[29] *Id*.

[30] For full poll results, see the August 3, 2004, letter from Lake Snell Perry & Associates, Inc., to interested parties, reproduced as exhibit 10 of the amici curiae brief on appeal of various law professors at Michigan public universities.

[31] Twenty-four percent approved of making domestic partnerships and civil unions illegal.

[32] Twenty-seven percent approved of barring cities and counties from providing domestic-partner benefits.

disapproved of prohibiting state universities from offering domestic-partner benefits.[33]

Accordingly, the circumstances surrounding the adoption of the amendment indicate that the lead proponents of the amendment worked hard to convince voters to adopt it.[34] CPM told voters that the "marriage amendment" would bar same-sex marriage but would not prohibit public employers from providing the ben-

[33] Twenty-nine percent approved of prohibiting state universities from offering domestic-partner benefits.

[34] The majority claims that I rely on extrinsic sources to trump the amendment's language. As I will explain in more detail, my interpretation is consistent with the amendment's language, not a trump card.

The majority attempts to justify its disregard of the extrinsic sources available by concluding that the "marriage amendment" is unambiguous. As can be discerned by any reader of the amendment, the vague language used is ambiguous in regard to the resolution of the question presented by this case. Clearly, the amendment does not unambiguously state whether public employers are barred from providing health benefits to their employees' same-sex partners. It says nothing about these benefits. Accordingly, it is necessary to engage in judicial construction to resolve that question.

Since the amendment is ambiguous in regard to the proper resolution of the issue presented, I disagree with the majority's choice to ignore the extrinsic sources available. Because our goal is to discern the law that the people have made, when extrinsic sources exist that shed light on this intent, I believe it is essential to consider them. And given that every United States Supreme Court justice sitting today considers sources outside the language in ascertaining the correct interpretation of a constitutional provision, my methods are hardly unusual. Accordingly, contrary to the majority's allegations, it is not a "delegation of judicial responsibility from the courts to private interest groups" to consider these extrinsic sources. *Ante* at 84. It is a widely accepted means of interpretation.

But, my personal disagreement with the majority's methodology aside, I find remarkable its decision to turn a blind eye to the wealth of extrinsic information available. Consider the majority's recent forays into constitutional interpretation: The majority did not hesitate to consult outside sources when interpreting a constitutional provision in *People v Nutt*, 469 Mich 565, 588-592; 677 NW2d 1 (2004), and in *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156-160; 665 NW2d 452 (2003). Though the majority protests my characterization of its actions in these cases, the simple

efits at issue. It is reasonable to conclude that these statements led the ratifiers to understand that the amendment's purpose was limited to preserving the traditional definition of marriage.[35] And it seems that a majority of likely voters favored an amendment that would bar same-sex marriage but would go no further. Therefore, this Court's majority errs by holding that the amendment not only bars same-sex marriage but also prohibits the benefits at issue. The error of the majority decision is confirmed by examining the amendment's language.

THE LANGUAGE OF THE "MARRIAGE AMENDMENT"

The "marriage amendment" provides:

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fact remains that its modus operandi is to consider extrinsic sources in some cases but not in others. The seemingly inconsistent approaches of the majority are baffling.

[35] It has been pointed out that, before the election, opponents of the amendment suggested that the amendment would prohibit the benefits at issue. These statements are relevant. But it does not follow that the opponents' suggestion coupled with the election results shows that the people actually intended to prohibit the benefits. First, in determining a law's meaning, one logically assumes that the statements of its drafters and lead supporters carry more weight than the concerns of those who voted against it. Second, it was the opponents' suggestion that prompted the proponents to publicly state that the amendment would not bar the benefits at issue. Because the proponents' statements were in response to the opponents' suggestion, the statements become even stronger indicators of voter intent. The opponents' suggestion indicates that there was confusion regarding what the amendment would prohibit. It is reasonable to assume that the public relied heavily on the proponents of the amendment to explain its meaning and scope.

The majority is "perplexed" by my conclusion that it is reasonable to afford the statements of the proponents more weight than the statements of the opponents. It appears that they do not agree with me that, if one wishes to understand the meaning of an author's words, the best source is the author himself. The best source is not the author's critics. Similarly, I believe it reasonable to conclude that, in deciding what the amendment's language meant, the people turned to the organization that proposed the amendment. They did not turn to the organizations that were opposed to its approval.

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.[36]

It has two parts. The first lists the amendment's purpose: "[t]o secure and preserve the benefits of marriage for our society and for future generations of children . . . ." The second discusses how that purpose is to be accomplished. Both are relevant in determining whether public employers are prohibited from providing the benefits at issue in this case.

The "marriage amendment" undertakes to accomplish its purpose of protecting the benefits of marriage by providing that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Through this language, the amendment prohibits the recognition of same-sex "[1] marriage or [2] similar union[s]."

It is clear that the employee-benefit programs at issue do not recognize same-sex marriage. Therefore, if the programs violate the amendment, it must be by recognizing a union similar to marriage. For a union to be "similar" to marriage, it must share the same basic characteristics or qualities of a marriage.[37] Thus, in deciding whether the public employers violate the amendment by providing the benefits at issue, we must first consider what a marriage entails.

Marriage has been called "the most important relation in life . . . ."[38] It "is a coming together for better or

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[36] Const 1963, art 1, § 25.

[37] See OAG, 2005-2006, No 7,171, pp 14-15 (March 16, 2005).

[38] *Maynard v Hill*, 125 US 190, 205; 8 S Ct 723; 31 L Ed 654 (1888).

for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[39]

"[B]ut [marriage] is not a pure private contract. It is affected with a public interest and by a public policy."[40] Therefore, the state retains control to define and regulate the marriage union. It does so by defining who is qualified to marry,[41] what must be done for a marriage to take place,[42] and the methods for the solemnification and dissolution of marriage.[43]

And the state confers many rights, benefits, and responsibilities solely as the result of a marriage. As the United States Supreme Court has said, "[t]he relation once formed, the law steps in and holds the parties to various obligations and liabilities."[44] It would take pages to list each of the state statutes that name legal rights and responsibilities that stem from a marriage. Examples of a few are: Each spouse has an equal right to property acquired during the marriage.[45] Each spouse has the right to pension and retirement benefits accrued during the marriage.[46] Each spouse has the right to invoke spousal immunity to prevent the other spouse's testimony.[47] And each has the right to damages

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[39] *Griswold v Connecticut*, 381 US 479, 486; 85 S Ct 1678; 14 L Ed 2d 510 (1965).

[40] *Hess v Pettigrew*, 261 Mich 618, 621; 247 NW 90 (1933).

[41] See MCL 551.1; MCL 551.3; MCL 555.4; MCL 551.5; MCL 551.51.

[42] See MCL 551.101 through 551.103.

[43] See MCL 551.7; MCL 551.9; MCL 551.15; MCL 552.104; MCL 552.6 *et seq*.

[44] *Maynard*, 125 US at 211.

[45] MCL 557.204.

[46] MCL 552.18.

[47] MCL 600.2162.

for the wrongful death of his or her spouse.[48] In addition, there are more than 1,000 federal laws conferring even more benefits and privileges on married couples.[49]

Accordingly, it is obvious that there are two separate elements to marriage: There is the private bond between two people, which the state recognizes by solemnifying the marriage. And there are the benefits, rights, and responsibilities that the state confers on individuals solely by virtue of their status of being married. Both elements are necessary and important components of marriage. Hence, for a union to be similar to marriage, it must mirror more than the manner in which the private bond is recognized. It must also carry with it comparable benefits, rights, and responsibilities.[50]

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[48] MCL 600.2922(3)(a).

[49] See plaintiffs' appendix (Docket No. 133554), pp 16c-17c, reproducing a January 31, 1997, letter from Barry R. Bedrick, Associate General Counsel, General Accounting Office, to the Honorable Henry Hyde, Chairman of the United States House Judiciary Committee, pp 1-2.

[50] It is by relying exclusively on the personal commitments expressed in the domestic-partnership agreements that the majority determines that the benefit programs at issue violate the amendment. The majority attempts to justify its disregard of the legal incidents that flow from the marital status by relying on the language "for any purpose." It concludes that, because of this language, a union can be similar to marriage even if it carries with it none of the rights, benefits, or responsibilities of marriage. This is preposterous. The language "for any purpose" does not modify the word "similar." It modifies the word "recognize": "the union of one man and one woman in marriage shall be the only agreement *recognized* as a marriage or similar union *for any purpose*." (Emphasis added.) Thus, it is error to conclude that the phrase "for any purpose" alters the word "similar." In any event, as already discussed, the word "similar" requires a comparison of essentials. Essential aspects of a marriage include the legal incidents that flow from it. Therefore, it is not I who misreads the meaning of the word "similar" but the majority. It distorts the amendment's language when it concludes that, in deciding whether a union is similar to marriage, the framers intended we consider solely the personal commitments expressed by individuals. The majority's holding contradicts the amendment's express purpose: "To secure and preserve the benefits of marriage for our society and for future generations of children . . . ." This language indicates that the amend-

The employer benefit programs at issue do not grant same-sex couples the rights, responsibilities, or benefits of marriage. The most that can be said is that the programs provide health-insurance coverage to same-sex partners. But health coverage is not a benefit of marriage. Although many benefits are conferred on the basis of the status of being married, health benefits are not among them. Notably absent is any state or federal law granting health benefits to married couples. Instead, the health coverage at issue is a benefit of employment. And the fact that the coverage is conferred on the employee's significant other does not transform it into a benefit of marriage; the coverage is also conferred on other dependents, such as children.

But even if health coverage were a benefit of marriage, it is the only benefit afforded to the same-sex couples in this case. The same-sex couples are not granted any of the other rights, responsibilities, or benefits of marriage. It is an odd notion to find that a union that shares only one of the hundreds of benefits that a marriage provides is a union similar to marriage. It follows that the amendment is not violated because the employee-benefit programs do not constitute recognition of same-sex "marriage or [a] similar union."[51]

Determining that the amendment does not prohibit public employers from providing health benefits to same-sex domestic partners is consistent with the pur-

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ment's drafters and ratifiers did not ignore the important—perhaps more important—rights, benefits, and responsibilities of marital status. Nor did they intend to equate the sacred benefits of marriage with the mundane benefits of employment.

[51] This conclusion is consistent with the decisions of other state courts that have considered whether providing benefits to same-sex partners violates state laws regulating marriage. E.g., *Slattery v New York City*, 266 AD2d 24; 697 NYS2d 603 (1999); *Tyma v Montgomery Co*, 369 Md 497; 801 A2d 148 (2002); *Lowe v Broward Co*, 766 So 2d 1199 (Fla App, 2000).

pose explicitly expressed in the amendment. The amendment's stated purpose is "[t]o secure and preserve the benefits of marriage for our society and for future generations of children[.]" As discussed earlier, the state is not required to provide health benefits to spouses. Therefore, it makes no sense to find that health benefits are benefits of marriage just because some public employers voluntarily provide those benefits to spouses. Instead, the health benefits at issue are benefits of employment. The amendment's stated purpose does not protect or restrict employment benefits. Therefore, barring public employers from providing the benefits at issue does nothing to further the purpose of the amendment. This is another fact that weighs in favor of my interpretation.

The Attorney General makes much of the fact that the amendment uses the phrase "for any purpose." The Attorney General contends that, as long as one benefit is provided to same-sex couples in the same way that it is provided to married couples, the amendment is violated. The majority accepts this argument. The majority's interpretation of the amendment is problematic because it essentially reads the word "similar" out of the amendment. It construes the amendment to read: "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or union for any purpose."

The amendment does not prohibit the state from recognizing the validity of same-sex unions for any purpose. It prohibits the state from recognizing a same-sex marriage or a same-sex union that is similar to a marriage for any purpose. Accordingly, unless the state recognizes a same-sex marriage or a same-sex union that is similar to a marriage, the "for any purpose" language has no application. The majority fails to recognize this point.

CONCLUSION

The majority decides that the "marriage amendment" prevents public employers from voluntarily entering into contractual agreements to provide health benefits to their employees' same-sex domestic partners. Its decision is contrary to the people's intent as demonstrated by the circumstances surrounding the adoption of the amendment and as expressed in the amendment's language. For those reasons, I must dissent.

Furthermore, by proceeding as it does, the majority condones and even encourages the use of misleading tactics in ballot campaigns by ignoring the extrinsic evidence available to it. CPM petitioned to place the "marriage amendment" on the ballot, telling the public that the amendment would not prohibit public employers from offering health benefits to their employees' same-sex domestic partners. Yet CPM argued to this Court that the "plain language of Michigan's Marriage Amendment" prohibits public employers from granting the benefits at issue.[52] Either CPM misrepresented the meaning of the amendment to the State Board of Canvassers and to the people before the election or it misrepresents the meaning to us now. Whichever is true, this Court should not allow CPM to succeed using such antics. The result of the majority's disregard of CPM's preelection statements is that, in the future, organizations may be encouraged to use lies and deception to win over voters or the Court. This should be a discomforting thought for us all.

CAVANAGH, J., concurred with KELLY, J.

[52] Amicus curiae brief on appeal of Citizens for the Protection of Marriage, p 1.

PEOPLE v OSANTOWSKI

Docket No. 134244. Decided May 7, 2008.

A Macomb Circuit Court jury convicted Andrew P. Osantowski of making a terrorist threat, MCL 750.543m, using a computer to commit a crime, MCL 752.796, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with a series of e-mails and Internet chat room messages. For the convictions of making a terrorist threat and using a computer to commit a crime, the court, Matthew S. Switalski, J., sentenced the defendant to concurrent prison terms of 30 months to 20 years. At sentencing, the prosecution had argued that 100 points should be assessed for offense variable 20 (OV 20) of the sentencing guidelines, MCL 777.49a, because the defendant had threatened to use an incendiary or explosive device. That score would have increased the recommended minimum sentence range under the guidelines to 57 to 95 months. The court disagreed, concluding that a score of 100 points for OV 20 would be appropriate only if the threats themselves qualified under the statute as acts of terrorism. Finding that they did not in this case, the court assessed no points for OV 20. The Court of Appeals, O'CONNELL, P.J., and SAAD and TALBOT, JJ., reversed and remanded the case to the trial court, directing the court to assess 100 points for OV 20 and to resentence the defendant accordingly. 274 Mich App 593 (2007). The defendant applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant leave to appeal or take other peremptory action. 480 Mich 961 (2007).

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

A court may assess 100 points for OV 20 under MCL 777.49a(1)(a) only if the defendant's threats also constituted acts of terrorism.

1. The statute directs the court to assess 100 points for OV 20 if the defendant committed an act of terrorism by using or threatening to use any of the substances or devices listed in MCL 777.49a(1)(a). The statute uses the definition of "act of terrorism" found in MCL 750.543b(a): a willful and deliberate act (1) that

would be a violent felony, (2) that the defendant knows or has reason to know is dangerous to human life, and (3) that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

2. The plain language of MCL 777.49a requires that the use or threatened use of the substance or device must constitute the means by which the defendant committed an act of terrorism. While a threat may constitute an act of terrorism if it meets the criteria of MCL 750.543b(a), not all threats are acts of terrorism.

3. The defendant would not have known or had reason to know that his messages to another teenager in another state were themselves dangerous to human life, and he did not actually intend his threats to intimidate or coerce a civilian population or influence or affect the conduct of government. Thus, the defendant did not commit an act of terrorism, and the trial court's decision to assess zero points for OV 20 was not clearly erroneous. The portion of the Court of Appeals judgment addressing OV 20 must be reversed, and the trial court's score for OV 20 must be reinstated.

Reversed in part and remanded for further proceedings.

Justice KELLY concurred in the result only.

Justice WEAVER, joined by Justice YOUNG, dissented from the majority's reversal of the portion of the judgment of the Court of Appeals that remanded this case to the trial court for resentencing. She would affirm that portion of the judgment for the reasons the Court of Appeals stated in its opinion.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — TERRORISM — THREATS.

A sentencing court calculating the recommended minimum sentence range under the sentencing guidelines for a defendant convicted of making a terrorist threat may assess 100 points for offense variable 20 (terrorism) only if the defendant's threats also constituted acts of terrorism (MCL 750.543b[a]; MCL 777.49a[1][a]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Attorney, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marla R. McCowan*) for the defendant.

CORRIGAN, J. This case poses the question whether a score of 100 points is appropriate for offense variable 20 (OV 20), which addresses terrorism, when a defendant threatens to cause harm using certain substances or devices but his threats, themselves, do not constitute *acts* of terrorism as defined by MCL 750.543b(a). We conclude that scoring 100 points pursuant to MCL 777.49a(1)(a) is inappropriate under these circumstances because that statute plainly requires the offender to have "*committed an act of terrorism by* using or threatening to use" one of the enumerated substances or devices. Accordingly, we reverse in part the judgment of the Court of Appeals and reinstate the Macomb Circuit Court's judgment of sentence. In all other respects, we deny defendant's application for leave to appeal the Court of Appeals judgment because we are not persuaded that this Court should review the remaining issues presented.

A jury convicted defendant of making a terrorist threat, MCL 750.543m, using a computer to commit a crime, MCL 752.796, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The convictions stemmed from a series of e-mail or Internet chat room messages that defendant sent in 2004 when he was a high school student in Clinton Township. The messages, which he sent to a 16-year-old girl living in Washington State, included defendant's threats to commit "mass murder" at his school and his assertions that he possessed various firearms and was in the process of building pipe bombs. The girl reported the threats to her father, a law enforcement officer, who alerted the Clinton Township Police Department. A search of defendant's home con-

[1] Defendant also pleaded guilty to several counts of receiving and concealing stolen firearms, MCL 750.535b.

ducted pursuant to a search warrant uncovered weapons and materials for making pipe bombs, among other items.

Upon sentencing defendant for the convictions, the trial court calculated the recommended minimum sentence range under the sentencing guidelines as 24 to 40 months. It sentenced defendant within this range to 30 months' to 20 years' imprisonment for both the conviction for making a terrorist threat and the conviction for the use of a computer during a crime. The sentences were to run concurrently with each other and consecutively to the mandatory sentence of two years for felony-firearm.[2] At sentencing, the prosecutor had argued that 100 points should have been scored for OV 20 because defendant had threatened to use an incendiary or explosive device; as a result, defendant's recommended minimum sentence range would have increased to 57 to 95 months. The trial court disagreed, concluding that a score of 100 points was appropriate only if the threats themselves also met the criteria to qualify as *acts* of terrorism. The court found that defendant's threats did not amount to acts of terrorism and that a score of zero points was appropriate for OV 20.

In a published opinion, the Court of Appeals reversed, concluding that defendant's threats to use an incendiary or explosive device required a score of 100 points. The panel remanded the case, directing the trial court to score 100 points for OV 20 and to resentence defendant accordingly.[3] We ordered oral argument to address "whether, under MCL 777.49a, a threat must *itself* constitute an 'act of terrorism,' as defined by MCL

[2] The court imposed concurrent 18-month to 10-year prison sentences for defendant's plea-based convictions of receiving and concealing stolen firearms.

[3] *People v Osantowski,* 274 Mich App 593; 736 NW2d 289 (2007).

750.543b, in order for 100 points to be assessed under offense variable 20." 480 Mich 961 (2007).

We review de novo questions of statutory interpretation. *People v Buehler,* 477 Mich 18, 23; 727 NW2d 127 (2007). "[T]he primary goal of statutory construction is to give effect to the Legislature's intent." *People v Stone,* 463 Mich 558, 562; 621 NW2d 702 (2001). "To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed." *Id.*

MCL 777.49a(1) directs the court to assess points for OV 20 under the following circumstances:

> (a) The offender committed an act of terrorism by using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device ..... 100 points
>
> (b) The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device ..... 50 points
>
> (c) The offender supported an act of terrorism, a terrorist, or a terrorist organization ..... 25 points
>
> (d) The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization ..... 0 points

Subsection 2(a) of this statute, MCL 777.49a(2)(a), specifies that "act of terrorism" means that term as defined in MCL 750.543b. MCL 750.543b(a), in turn, provides:

> "Act of terrorism" means a willful and deliberate act that is all of the following:
>
> (*i*) An act that would be a violent felony[4] under the laws of this state, whether or not committed in this state.
>
> (*ii*) An act that the person knows or has reason to know is dangerous to human life.
>
> (*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

The prosecution argues that the trial court's interpretation of OV 20 effectively deletes the phrase "threatening to use" from MCL 777.49a(1). It claims that the relevant portions of OV 20 must apply to threats to use the enumerated items without regard to whether those threats also constitute *acts* of terrorism. The prosecution suggests that, to any extent that the statute's language does not clearly yield this result, the statute is inartfully worded. It also asserts that, had the Legislature intended for OV 20 to apply only to convictions for *acts* of terrorism, MCL 750.543f, it would have provided that OV 20 should not be scored for convictions of making terrorist *threats*, such as defendant's, under MCL 750.543m. We disagree.

The plain language of MCL 777.49a establishes that, for a score of 100 or 50 points to be appropriate, the offender must have "*committed an act of terrorism by*

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[4] A "violent felony," for purposes of MCL 750.543b(a)(*i*), is

> a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device. [MCL 750.543b(h).]

using or threatening to use" one of the enumerated substances or devices. MCL 777.49a(1)(a) and (b) (emphasis added). Thus, the use or threatened use must constitute the *means* by which the offender committed an *act* of terrorism. The statute does not state, for instance, that it applies if the offender "committed an act of terrorism by using or threatening to use, *or threatened to use*," the enumerated items. The statute also specifically provides that, for purposes of scoring OV 20, "act of terrorism" means that term as defined by MCL 750.543b. Under MCL 750.543b, a threat *may* constitute an act of terrorism; acts of terrorism must be violent felonies as defined by MCL 750.543b(h), which specifies that a violent felony is one that includes as an element the "*threatened use* of physical force . . . or the . . . *threatened use* of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device." But not all threats are acts of terrorism, even if they qualify as violent felonies. To constitute an act of terrorism, a threat must be a violent felony and *also* must itself be "a willful and deliberate act" that the offender "knows or has reason to know is dangerous to human life" and "that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion." MCL 750.543b(a).

The distinction between bare threats of terrorism and threats that constitute acts of terrorism is also evident from the fact that each is a separately defined offense. Knowing and premeditated *acts* of terrorism are punishable by life in prison under MCL 750.543f ("A person is guilty of terrorism when that person knowingly and with premeditation commits an act of terror-

ism."). Threats or false reports of terrorism are separately defined as 20-year felonies under MCL 750.543m, which provides in pertinent part:

> (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

Thus, an offender may *threaten* to commit an act of terrorism, MCL 750.543m(1)(a), without *committing* an act of terrorism or being guilty of terrorism, MCL 750.543b(a); MCL 750.543(f)(1).

For these reasons, a score of 100 points for OV 20 is justified only when a defendant's threats also constitute acts of terrorism. MCL 777.49a(1)(a) (stating that a defendant must have "*committed an act of terrorism by* using or threatening to use" one of the enumerated substances or devices). The plain language of the statute requires this result. The prosecution's claim that our interpretation reads the phrase "threatening to use" out of the statute is without merit. Rather, this phrase is necessary to convey the Legislature's intent that *all* acts of terrorism involving the enumerated items must be scored, without regard to whether a particular act of terrorism consisted of actual use of an item or a mere threat to use the item.

Finally, we also find no merit in the prosecution's claim that our interpretation would be correct only if the Legislature had directed trial courts not to score OV 20 *at all* when calculating the guidelines for convictions under MCL 750.543m for merely making terrorist threats or false reports of terrorism. The prosecution

asserts that, if only acts of terrorism qualify for scoring, OV 20 would apply only to convictions under MCL 750.543f for such acts. To the contrary, OV 20 meaningfully applies to convictions for threats and false reports under MCL 750.543m in at least two ways. First, the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense. A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence. *People v Drohan,* 475 Mich 140, 142-143; 715 NW2d 778 (2006). A defendant may plead guilty—perhaps pursuant to a plea deal resulting from an original charge of terrorism—merely to making a terrorist threat, MCL 750.543m, or a jury may find him guilty beyond a reasonable doubt of such a threat. But, if a preponderance of the evidence supports a finding that the defendant's threat *also* constituted an *act* of terrorism, in the sentencing phase the court may impose a score of 50 or 100 points for OV 20. Second, OV 20 does not address only acts of terrorism. Rather, a defendant may receive 25 points if he "supported an act of terrorism, a terrorist, or a terrorist organization." MCL 777.49a(1)(c). Accordingly, a defendant convicted under MCL 750.543m merely of making a terrorist threat may receive points under OV 20 even if the record does not support a conclusion that he committed an act of terrorism; his threat may qualify as an act of support, justifying a score of 25 points.

Here, defendant was charged with and convicted under MCL 750.543m of making a terrorist threat. The sentencing court concluded that his threats did not themselves constitute acts of terrorism and, therefore, declined to score any points for OV 20. We review for clear error a court's finding of facts at sentencing. *People v Babcock,* 469 Mich 247, 264; 666 NW2d 231 (2003). The record shows that defendant succeeded only

in sending electronic messages to a teenager living in another state. The recipient's father, who happened to be a law enforcement officer in Washington, notified Michigan authorities. The prosecution correctly observes that, as a result of this notification, activities at defendant's high school were disrupted. But we cannot agree with the prosecution that these facts require the conclusion that defendant's threats constituted acts of terrorism for purposes of scoring OV 20. We accept the trial court's ruling that defendant did not commit an act of terrorism. Defendant would not "know[] or ha[ve] reason to know" that his e-mail messages to another teenager were *themselves* "dangerous to human life," MCL 750.543b(a)(*ii*). Nor did defendant actually intend his e-mailed threats to another teenager "to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion," MCL 750.543b(a)(*iii*). Therefore, the court's decision to score zero points for OV 20 was not clearly erroneous.

For these reasons, we reverse the portion of the Court of Appeals judgment addressing OV 20 and reinstate the trial court's score of zero points for OV 20 and judgment sentencing defendant to 30 months' to 20 years' imprisonment for the crimes of making a terrorist threat and using a computer to commit a crime. We remand this case to the Macomb Circuit Court for further proceedings consistent with this opinion. In all other respects, we deny leave to appeal.

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

KELLY, J. I concur in the result only.

WEAVER, J. (*dissenting*). I dissent from the majority's reversal of the portion of the Court of Appeals judgment

that remanded the case to the trial court for resentencing. I would affirm that portion of the judgment for the reasons the Court of Appeals stated in its opinion.

YOUNG, J., concurred with WEAVER, J.

PEOPLE v DENDEL

Docket No. 132042. Decided May 28, 2008. Amended 481 Mich 1201.

Katherine S. Dendel was convicted of second-degree murder in the Jackson Circuit Court, Chad C. Schmucker, J. Experts for the prosecution testified that Paul M. Burley, the defendant's live-in partner, had died as the result of an insulin injection, and the court determined that the defendant had killed Burley by injecting him with the insulin. The defendant moved for a new trial, arguing that defense counsel had deprived her of a fair trial by failing to conduct a reasonable investigation into the cause of Burley's death. The court denied the motion, and the Court of Appeals remanded the case for a hearing under *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant's counsel had provided ineffective assistance. At the *Ginther* hearing, the defendant's appellate counsel presented an expert witness who disagreed with many of the conclusions of the prosecution's expert witnesses and testified that Burley had died of an overdose of morphine, one of the many medications Burley was taking for multiple diseases. The trial court rejected the defendant's claim of ineffective assistance of counsel, concluding that the defendant had not been prejudiced by her trial counsel's failure to call an expert witness to refute the opinions of the prosecution's experts. Noting the amount of circumstantial evidence that indicated the defendant's guilt, the trial court explained that the outcome of the trial would not have been different if the defendant's trial counsel had offered the expert testimony. The Court of Appeals, BORRELLO, P.J., and SAAD, J., (WILDER, J., dissenting), reversed in an unpublished opinion per curiam, issued July 18, 2006 (Docket No. 247391). The Court of Appeals concluded that defense counsel's failure to consult with and present the testimony of appropriate medical experts to address the central issue in the case, the cause of Burley's death, was clearly deficient in light of the prevailing professional norms and that, but for that deficiency, there was a reasonable probability of a different outcome. The prosecution applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 477 Mich 1012 (2007).

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

The failure of the defendant's trial counsel to produce an expert to refute the testimony of the prosecution's experts that Burley had died of an insulin overdose did not constitute ineffective assistance of counsel under the test of *Strickland v Washington*, 466 US 668 (1984). Under *Strickland*, a defendant alleging ineffective assistance of counsel must show that defense counsel's performance was deficient, that is, that counsel made errors so serious that he or she was not performing as the counsel guaranteed by the Sixth Amendment. The defendant must also show that this performance prejudiced the defense. To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The defendant failed to demonstrate that her counsel's failure to produce an expert witness prejudiced her because there is no indication that the trial court would have accepted the testimony of the defendant's expert over that of the prosecution's experts and there was other strong circumstantial evidence supporting the defendant's guilt. The trial court correctly held that, in light of the strong circumstantial evidence, it was not reasonably probable that the outcome would have been different had a defense expert testified to refute the testimony of the prosecution's witnesses.

Justice CORRIGAN, concurring, agreed with the majority's conclusion that the defendant was not denied the effective assistance of counsel because the defendant failed to show that she was prejudiced by her counsel's performance, but wrote separately to express her conclusion that the defendant also failed to satisfy the other *Strickland* requirement for an ineffective-assistance claim: that her counsel's performance was constitutionally deficient. The defendant's counsel reasonably advanced the theory that Burley had injected himself with insulin because it was consistent with the defendant's wishes and her previous statements to the police. The defense theory pursued did not require the defendant's counsel to dispute the opinions of the prosecution's experts. Nonetheless, defense counsel did consult experts, who did not refute those opinions. The defendant's counsel had no reason to believe that further investigation would produce an expert who might question the cause of death proposed by the prosecution's experts, and he was not required to repeatedly consult experts.

Counsel's representation was adequate at the time and under the circumstances and should not be evaluated now with the benefit of hindsight.

Reversed and remanded for consideration of remaining appellate issues.

Justice KELLY, joined by Justice CAVANAGH, dissenting, would hold that the defendant is entitled to a new trial because there is a reasonable possibility that she is innocent and her trial counsel's performance deprived her of her only viable defense. The prosecution's case hinged on the cause of death. Had the defendant's counsel challenged the cause of death, the trial court would have been left with two reasonable alternatives: (1) to decide that the evidence showed that the defendant had killed Burley or (2) to conclude that Burley had killed himself intentionally or accidentally. While there was circumstantial evidence tending to show that the defendant had a guilty mind, other evidence presented at trial tended to show that Burley died of a noncriminal act and that the defendant's actions had innocent explanations. Thus, the defendant demonstrated that, but for counsel's deficient performance, she would have had a viable defense and, thus, a reasonable chance of being acquitted. Because the defendant satisfied the *Strickland* test, the judgment of the Court of Appeals should be affirmed.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Valerie R. Newman*) for the defendant.

CORRIGAN, J. Defendant, an insulin-dependent diabetic, was convicted of second-degree murder for injecting the victim, her live-in partner, with a lethal dose of insulin. The Court of Appeals reversed her conviction and remanded for a new trial after concluding that defense counsel was ineffective for failing to produce an expert to refute the testimony of the prosecution's experts that the victim died from an insulin overdose. We reverse the judgment of the Court of Appeals and

remand to the Court of Appeals to consider the remaining issues presented by the parties on appeal.[1] Defense counsel was not ineffective under the test of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), because defendant did not prove that she was prejudiced by her counsel's failure to produce an expert witness. The Court of Appeals erred in holding that defense counsel could have presented an expert witness who would have refuted the testimony of the prosecution's experts to the extent that defendant's acquittal would have been reasonably probable. Further, the trial court correctly held that, in light of the strong circumstantial evidence of defendant's guilt, it was not reasonably probable that the outcome would have been different had a defense expert testified.

I. FACTUAL BACKGROUND

Defendant and the victim, Paul Michael Burley, were in a long-term relationship and had lived together for years. Burley had been taking numerous medications for several serious illnesses, including an infection with human immunodeficiency virus (HIV), herpes, hepatitis B and C, epilepsy, ataxia, neuropathy, chronic obstructive pulmonary disease, severely impaired vision, dementia, lymphoma, and throat cancer. Burley was not, however, diabetic. By defendant's own account, Burley was a difficult person to care for. Defendant was solely responsible for making sure that Burley took his medications and for tending to his everyday needs.

Defendant's relationship with Burley's family was strained, partly by what she perceived as the family's failure to help with Burley's care. Before Burley's

[1] Because the Court of Appeals held that defendant received ineffective assistance of counsel at trial, it declined to address the remainder of the issues presented by defendant's appeal and the prosecutor's cross-appeal.

death, defendant had told his sister that "if something happens to your brother, your family won't know what hit you." About one week before Burley's death, defendant, frustrated with Burley's demands, also told Burley's sister, "I can't take this" and "I feel like giving him a shot of insulin." As an insulin-dependent diabetic, defendant had access to insulin and knew how to inject it. Defendant also knew how insulin metabolizes and that no trace of insulin would remain in Burley's blood after an insulin injection.

Defendant had expressed her frustration with caring for Burley to a Family Independence Agency (FIA) employee. Less than a week before Burley's death, defendant e-mailed the FIA employee to seek help with caring for Burley. Defendant told the employee that she could not manage all of Burley's demands on her own. During a subsequent telephone conversation, defendant again stated that she was frustrated and concerned that the situation was deteriorating and that she no longer knew how to manage Burley. The FIA employee suggested that defendant have Burley evaluated at a mental-health facility or have him placed in respite or hospice care.[2] The FIA employee testified that defendant had never before expressed any problems with caring for Burley.

During the week leading up to Burley's death, defendant sought help from the Department on Aging. The department representative told defendant that she did not qualify for help because both she and Burley were not 60 years old. The representative suggested that defendant instead contact hospice services. Defendant replied that hospice services would not help because Burley was not yet near death.

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[2] The FIA employee testified that as long as Burley was competent, the FIA could not compel defendant to put Burley in a nursing home.

Defendant's caregiving situation took another turn for the worse the day before he died. On March 14, 2002, a visiting nurse had been assigned to assist defendant and educate her in the proper methods of care. She visited five times, but, on the day before Burley's death, the nurse terminated her services because Burley had been uncooperative. When the nurse told defendant that she was terminating her services, defendant became "quite tearful and upset." Defendant told the nurse that she did not know how long she could continue caring for Burley.

At 3:00 a.m. on the day of Burley's death, defendant called 911, reporting that Burley had been hallucinating and running around with a butter knife. Defendant asked the police to come take Burley to a mental institution. When the police arrived, Burley was sitting calmly in a chair. He told the officers that he was fine and that there was no problem. The police decided to leave Burley at home because he was not a threat to himself or others. One officer testified that defendant was visibly upset with Burley and the police. Defendant also later admitted that she was frustrated with the officers' decision and that she was hoping for relief because she was at her "wit's end."

Defendant contended that later that day she discovered Burley slumped over on the couch and unresponsive. She testified that, because Burley was cold and covered with purple blotches, she thought he might be dead. Rather than calling 911, however, she instead called a friend, who arrived and contacted 911. While the police and emergency personnel were removing Burley's body from the house, one of Burley's sisters telephoned. Defendant answered the phone, but quickly ended the conversation without telling her that Burley had died.

During the next several days, defendant spoke with several of Burley's siblings. She never informed them of his death, but instead falsely told them that he had been hospitalized. One of the victim's sisters described a 74-minute conversation with defendant two days after Burley's death. She testified that defendant was "very upbeat" and "nonchalant" in her discussion of topics ranging from Burley's health to antique jewelry. During this conversation, defendant laughed while describing an alleged incident when Burley had wandered away from the apartment complex and become lost. Yet defendant never mentioned Burley's death.

Defendant wanted Burley's body cremated without an autopsy being performed. Although an autopsy was performed despite defendant's wishes, defendant had Burley's body cremated before his family learned about his death. When a police detective incorrectly told defendant that the medical examiner had detected insulin in Burley's body, defendant called him a liar and explained that insulin could not be detected in the human body after death because it breaks down and depletes naturally.

After defendant's arrest, she told police detectives that Burley had injected himself with insulin. During a later interview with a police detective, defendant said, "That poor dear, he killed himself for me." She told the detective that despite Burley's severely impaired vision and problems with holding things, he could inject himself with insulin.[3] Defendant also told defense counsel that Burley had killed himself by an insulin injection and that she wanted him to pursue this theory of defense at trial. Defendant also testified that Burley had mental problems and that he had "talked suicide

[3] Defendant also suggested the unlikely scenario that if Burley had not injected the insulin himself, perhaps someone had broken into her apartment, found her insulin and syringe, and given Burley the shot.

for 10, 15 years." She had informed two of Burley's doctors of his suicidal intentions.

Defendant was charged with first-degree murder. The prosecution theorized at the bench trial that defendant injected the victim with a lethal dose of insulin on April 2, 2002. The prosecution presented two expert witnesses, Dr. Bernardino Pacris[4] and Dr. Michael Evans,[5] who testified that the evidence supported the theory that Burley had died from an insulin injection rather than from natural causes or an overdose of one of his medications.[6] Defense counsel Joseph Filip argued that Burley had died either by injecting himself with insulin or from the side effects of numerous medications prescribed for him. Defense counsel did not present any expert testimony to rebut the testimony of the prosecution's experts.

The trial court found defendant guilty of the lesser-included offense of second-degree murder. Defendant moved for a new trial, arguing that Filip had deprived her of a fair trial by failing to conduct a reasonable investigation into the cause of Burley's death. The trial court denied the motion. The Court of Appeals remanded for a *Ginther*[7] hearing to determine whether Filip had provided ineffective assistance.

At the *Ginther* hearing, appellate defense counsel called Dr. Laurence Simson,[8] who testified that the

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[4] Dr. Pacris is an Oakland County medical examiner and a former Jackson County forensic pathologist who has been qualified as an expert witness in more than 100 trials.

[5] Dr. Evans is the president and chief executive officer of AIT Laboratories, the former state toxicologist for Indiana, and a professor of toxicology who has testified as an expert in 35 states.

[6] We discuss Dr. Pacris's and Dr. Evans's trial testimony in detail in part III(A) of this opinion.

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[8] Dr. Simson is a forensic pathology consultant and a former professor of pathology, an Ingham County pathologist, and a national consultant in forensic pathology to the Surgeon General of the United States Air Force.

evidence did not support the view that Burley had died from an insulin overdose. Dr. Pacris defended his trial testimony that Burley had died of hypoglycemic shock caused by insulin.[9] The trial court rejected defendant's claim of ineffective assistance of counsel. Instead, it found that defense counsel's performance had been objectively reasonable. The court concluded that defendant had not been prejudiced by Filip's failure to call an expert forensic pathologist to rebut the opinions of the prosecution's experts. The court explained why the outcome of the trial would not have been different if the defense had offered Dr. Simson's testimony:

> And if the case was just, . . . the police had a dead body and you have Dr. Pacris and Dr. Simson, that would be one thing. It wasn't that. If there was a lot of other testimony, of statements and other witnesses and other things that pointed in that direction, it would have made the testimony of Dr. Evans and Dr. Pacris not as . . . clear. But I don't know that I can say that there's a reasonable probability that the outcome would have been different. There was still—there was other evidence, . . . admittedly all circumstantial, but there was a lot of other evidence. I am not convinced that that has been established, that it's reasonably probable that the outcome would have been different . . . .

A divided Court of Appeals reversed and remanded for a new trial. The majority summarized its holding as follows:

> Defense counsel's failure to consult with and present the testimony of appropriate medical experts to address the central issue in this case, the cause of Burley's death, was clearly deficient in light of prevailing professional norms and, but for that deficiency, there is a reasonable probability that the outcome of defendant's trial would have been

[9] We discuss Dr. Simson's and Dr. Pacris's *Ginther* hearing testimony in detail in part III(A) of this opinion.

> different. [*People v Dendel*, unpublished opinion per curiam, issued July 18, 2006 (Docket No. 247391), p 3.]

The Court of Appeals majority explained that, despite Dr. Pacris's testimony that Burley had died from insulin shock, Filip failed to consult a forensic pathologist or Burley's doctors regarding the cause of Burley's death. The majority held that Filip's failure to consult an informed expert who could have refuted Dr. Pacris's conclusions essentially amounted to a concession that Burley had died from insulin shock. Because it was unlikely that Burley administered the insulin himself, in light of his physical limitations, the trial court was left to conclude that defendant administered the insulin that caused Burley's death. The majority noted that the *Ginther* hearing had demonstrated that a qualified pathologist (Dr. Simson) would have (1) refuted Dr. Pacris's conclusion that Burley died from insulin shock and (2) provided an alternative, noncriminal explanation for Burley's death. The majority concluded: "Trial counsel's failure deprived defendant of a substantial defense, and there is a reasonable probability that this would have made a difference in the outcome of the trial." *Dendel*, *supra* at 4.

Judge WILDER dissented, rejecting the conclusion that defendant had been prejudiced by counsel's performance. He relied on the trial court's conclusion that even if Filip had introduced Dr. Simson's testimony, the court would nonetheless have found defendant guilty in light of the weight of the evidence. This evidence supporting defendant's guilt included the following: defendant had the opportunity to inject the insulin, defendant admitted being aware that no trace of insulin would be found in Burley's blood after his death, defendant was under considerable stress in trying to care for Burley by herself, and defendant not only failed

to inform Burley's family of his death, but she apparently hid it from the family. Judge WILDER also noted that nothing established that Dr. Simson was more credible than Dr. Pacris. Moreover, Dr. Simson concededly could not rule out insulin shock as the cause of death. Judge WILDER stated that the effect of expert testimony depends on the fact-finder's evaluation of credibility, and the fact-finder in this case had expressly determined that Dr. Simson's testimony would not have changed the result of the trial.

The prosecution appealed, arguing that the Court of Appeals had erred in holding that defendant was entitled to a new trial on the basis of ineffective assistance of counsel. This Court heard oral argument on whether to grant the application or take other peremptory action.

II. STANDARD OF REVIEW

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law. *Id.*

III. ANALYSIS

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), this Court explained the test for determining whether a defendant has been denied the effective assistance of counsel:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify

reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).[10]

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[10] The dissent accuses us of misunderstanding defendant's burden under the prejudice prong of *Strickland*. Yet, ironically, it is the dissent, not us, that applies the wrong standard. The dissent states: "Because defendant has shown that her trial counsel's performance deprived her of a substantial defense, she has met her burden of showing prejudice, unless other evidence rendered this defense unbelievable." *Post* at 147. The dissent fails to recognize that to demonstrate prejudice, a defendant "must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra* at 600. Instead, the dissent erroneously suggests that prejudice is presumed if defendant was deprived of one of several theories of defense. Contrary to the dissent's assertion, that a defense attorney performed deficiently in presenting a viable defense does not *automatically* require the conclusion that there is a reasonable probability that the result of the proceeding would have been different absent counsel's deficient performance. The dissent does not explain why there is a reasonable probability that she would have been acquitted had defense

We conclude that defendant has failed to demonstrate that she was prejudiced by Filip's performance.[11]

A. THE EXPERT TESTIMONY

Dr. Pacris testified at trial that he performed an autopsy on Burley on April 3, 2002. Dr. Pacris initially concluded that Burley had died from natural causes. But because a police officer told Dr. Pacris that he suspected that Burley might have been injected with insulin, which can be fatal to a nondiabetic, Dr. Pacris sent Burley's fluids to AIT Laboratories to be tested for insulin, glucose, and C-peptide levels. The tests revealed that Burley's glucose level was zero and that his insulin and C-peptide levels were normal. Dr. Pacris explained that, although the glucose levels in a person's bodily fluids drop immediately after the person dies, the complete lack of glucose in Burley's vitreous fluids was consistent with a finding that Burley had been injected with insulin.[12] He found acute tubular necrosis in the kidneys and dead cells in the proximal tubules of the

counsel presented expert testimony to support the theory that Burley died of a morphine or multiple-drug overdose. Justice KELLY also mentions repeatedly that she thinks that defendant might be innocent. But the guilt or innocence of the accused is a matter to be decided by the fact-finder, not the appellate courts. Defendant is not entitled to relief unless she satisfies *Strickland*'s test for prejudice.

[11] The dissent argues that Filip's performance was deficient because he failed to present an expert to challenge the prosecution's theory regarding the cause of death. The dissent's argument is misplaced. The majority does not conclude that defendant failed to show that counsel's performance was deficient. Rather, the majority concludes only that defendant was not denied the effective assistance of counsel, because she failed to show that she was prejudiced by counsel's performance. This aspect of the dissent's argument appears directed at the concurrence, not the majority opinion.

[12] An insulin injection causes a nondiabetic's glucose level to drop to a dangerous level, depriving the brain of necessary glucose. The person's brain will then shut down, and the person will become comatose.

brain, which are usually seen in people who have suffered hypoglycemic shock. Dr. Pacris ultimately concluded that the cause of death was complications from hypoglycemia, which can be caused by an insulin injection.[13] In reaching this conclusion, he relied more on his anatomical findings and the circumstances surrounding the death rather than on the toxicological findings. Specifically, he relied on microscopic hypoxic[14] changes in Burley's brain in concluding that Burley must have been comatose for at least 12 hours before he died at 4:00 p.m. on April 2, 2002. He testified that hypoxic changes to the brain, including red neurons on the hippocampus, are only manifested if the person has been comatose for about 12 hours. Because this conclusion was inconsistent with defendant's story that Burley had been alive and conscious at noon on that day, Dr. Pacris concluded that defendant's story "doesn't jive."

Dr. Evans also testified at trial for the prosecution. He testified that if glucose had been present in Burley's system, it would have disproved death by insulin injection. The lack of any glucose in Burley's vitreous fluids supported the theory that Burley had been injected with insulin. Further, although the level of morphine in Burley's blood was very high, it might not be lethal to someone who had built up a tolerance for it.

At the *Ginther* hearing, Dr. Simson disagreed with the conclusions of Dr. Pacris and Dr. Evans. He testified that Burley's vitreous and blood glucose levels had been

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[13] Although Dr. Pacris did not find a needle mark on Burley's body, he explained that insulin is injected by means of a hypodermic needle, which normally does not leave a visible mark on the body.

[14] "Hypoxic" is defined as "[d]enoting or characterized by hypoxia." *Stedman's Medical Dictionary* (26th ed). "Hypoxia" refers to a "[d]ecrease below normal levels of oxygen in inspired gases, arterial blood, or tissue . . . ." *Id*.

confused in the reports and in the testimony introduced at trial. Dr. Simson opined that the pathological and toxicological findings did not support the view that Burley had died of hypoglycemic shock caused by an insulin overdose. He opined that because a person's vitreous glucose level can drop to zero after he dies, the lack of glucose in Burley's vitreous fluids did not prove that he died of hypoglycemic shock. Dr. Simson further opined that the necrosis of the proximal tubules in Burley's brain and the acute tubular necrosis in the kidneys could be attributed to postmortem changes rather than hypoglycemic shock. That is, Dr. Simson responded to Dr. Pacris by arguing that the anatomical changes observed in Burley's body may have been attributable to decomposition, rather than an insulin overdose. Dr. Simson also testified that the normal reddish-brown color of the kidneys was inconsistent with kidneys that had undergone hypoglycemic shock. Dr. Simson opined that he would have concluded that Burley had died of a multiple-drug overdose, primarily caused by a high level of morphine. He explained that Burley's morphine level at the autopsy was approximately three times the therapeutic limit, meaning that his morphine level would have been even higher if, as Dr. Pacris testified, Burley had been comatose for 12 hours before his death. Dr. Simson conceded, however, that he had seen cases of much higher levels of morphine in the blood.[15] Dr. Simson also acknowledged that the evidence was "not inconsistent with hypoglycemic

[15] The therapeutic level for morphine is 30 to 100 nanograms per milliliter of blood. The laboratory report stated that Burley had a morphine level of 328 nanograms per milliliter. Dr. Simson testified that he had seen cases as high as 800 to 900 nanograms of morphine per milliliter. The laboratory report listed the lethal level of morphine at 200 to 2,300 nanograms per milliliter, indicating that there have been cases of morphine levels up to 2,300 nanograms per milliliter.

shock" and that he could not rule out the possibility that insulin overdose was the cause of death.

Dr. Pacris defended his trial testimony that Burley had died of hypoglycemic shock caused by insulin. In response to Dr. Simson's *Ginther* hearing testimony, Dr. Pacris first testified that, in reaching the conclusion that Burley died from an insulin injection, he had principally relied on the changes observed in the brain and kidneys, rather than Burley's low glucose level. Dr. Pacris then testified that the necrosis of the proximal tubules in Burley's brain and the acute tubular necrosis in the kidneys could not be attributed to postmortem changes because there was no evidence that the body was decomposing.[16] Dr. Pacris noted that the necrosis in Burley's brain had occurred solely in the third and fourth layers of the cortex and that the remainder of the cortex had not yet decomposed. This difference indicated that the changes in the third and fourth layers of the cortex were not caused by general decomposition, as suggested by Dr. Simson, because some necrosis would have been found in the remainder of the cortex if the changes observed were due to general decomposition. Moreover, Dr. Pacris noted that there are microscopic differences between cells that are simply decomposing and cells that have been altered before death by changes due to lack of glucose in the body. According to Dr. Pacris, the microscopic changes observed in Burley's kidneys reflected a lack of glucose in the blood before death, rather than general decay after death. In short, Dr. Pacris responded to Dr. Simson by arguing that the specific changes observed in Burley's body were incompatible with Dr. Simson's theory that the changes were caused simply by decomposition. Moreover, Dr. Pacris

[16] Dr. Pacris referred to the decomposition of the body tissues as "autolysis."

explained that the normal reddish-brown color of the kidneys, which Dr. Simson had found important, was not inconsistent with Dr, Pacris's microscopic finding that the kidneys had acute tubular necrosis caused by hypoglycemic shock. Furthermore, Dr. Pacris testified that although Burley had a high level of morphine in his system, he could not have died from a morphine overdose. He explained that death from a morphine overdose is instantaneous. The person does not initially become comatose. A morphine overdose was inconsistent with the hypoxic changes in Burley's brain that indicated he had been comatose for 12 hours before death. Although Burley's morphine level was three times the therapeutic limit, this amount of morphine might not be fatal to a person who had developed a tolerance to the drug, as Burley had.

After hearing the testimony of Dr. Simson and Dr. Pacris, the trial court concluded that Dr. Simson's testimony would not have changed the outcome of the trial. By declining to conclude that Dr. Simson's testimony had effectively refuted the testimony of Dr. Pacris, the trial court implicitly held that Dr. Simson was not more credible than the prosecution's experts. "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). We review a trial court's determination of credibility for clear error. *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *Bynum v EASB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

The Court of Appeals stated that Dr. Simson's testimony would have "refuted [Dr. Pacris's] conclusions

that Burley died as a result of an insulin overdose . . . ." *Dendel*, *supra* at 4. Hence, the Court of Appeals implicitly concluded that the trial court had committed clear error by failing to find Dr. Simson more credible than Dr. Pacris and Dr. Evans. However, unlike the Court of Appeals panel, we see no reason to disturb the trial court's implicit finding on the credibility of the expert witnesses; the testimony does not clearly demonstrate that one expert witness was more credible than another. Although Dr. Simson opined that the pathological and toxicological findings did not support the view that Burley had died of hypoglycemic shock, Dr. Pacris defended his position at the *Ginther* hearing by offering legitimate reasons for his findings and for discounting Dr. Simson's theory that the relevant changes in Burley's body were due simply to general decomposition. Dr. Simson did not respond to Dr. Pacris's rebuttal of his testimony. It is also significant that Dr. Simson conceded the possibility that Burley had died from insulin overdose. Thus, Dr. Simson did not conclusively refute Dr. Pacris's testimony that Burley had died of an insulin overdose. We are not "left with the definite and firm conviction" that the trial court erred in finding that Dr. Simson was not more credible than Dr. Pacris and Dr. Evans.

Further, defendant's own statements supported the theory of the prosecution's experts regarding the cause of Burley's death. After defendant's arrest, she told both police detectives and defense counsel that Burley had injected himself with insulin. These statements were inconsistent with Dr. Simson's theory of death, but were consistent with the testimony of the prosecution's experts that Burley had died of an insulin overdose.[17]

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[17] The dissent argues that the defense theory that Burley killed himself by an insulin injection is "a highly unlikely occurrence given his

For all these reasons, we have no cause to believe that if Dr. Simson had testified at trial, the trial court would have given more weight to his testimony than that of the prosecution's experts. We conclude that defendant did not establish a "reasonable *probability*" that the outcome of the trial would have been different had Dr. Simson testified. *Strickland, supra* at 694 (emphasis added).[18]

B. OTHER CIRCUMSTANTIAL EVIDENCE

We also conclude that the trial court did not err when it held at the *Ginther* hearing that, even if Filip had called an expert to rebut the testimony of Dr. Pacris and Dr. Evans, "there was a lot of other evidence" supporting defendant's conviction and that the outcome of the trial would have been the same. Even if Dr. Simson had testified, the strong circumstantial evidence supported the theory that defendant had given Burley an insulin injection.

Burley was difficult to care for because of his multiple health problems, which included dementia. Defendant was under a great deal of stress as Burley's sole

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debilitated physical condition . . . ." *Post* at 146. Although this may or may not be true, defendant herself, who presumably knew Burley's physical capabilities better than anyone else, told the police detectives that Burley was physically able to inject himself with insulin and had in her opinion done so. Thus, it was reasonable for defense counsel to argue that Burley had injected himself with insulin.

[18] As discussed, the trial court, which was the finder of fact at the bench trial, stated at the *Ginther* hearing that the outcome of the trial would *not* have changed if Dr. Simson had testified. Because we review de novo the trial court's determination of prejudice, however, the fact-finder's determination on that issue at the *Ginther* hearing is not binding on the appellate courts. We underscore that the test for prejudice is an objective test and that appellate courts should not simply defer to the trial court's judgment regarding prejudice, even if the trial court was the fact-finder at the original trial, as in this case.

caregiver.[19] Frustrated by Burley's demands, defendant had considered giving him a shot of insulin, which she knew could be lethal and would be difficult to detect in a deceased person. When her caregiving situation became worse, defendant unsuccessfully attempted to obtain assistance in caring for Burley from several sources. Less than 24 hours before Burley's death, defendant became "quite tearful and upset" when the nurse assisting defendant terminated her services because Burley had been uncooperative. Defendant admitted that she was at her "wit's end" in the middle of that night when the police declined to take Burley away after he caused a disturbance. In light of the facts leading up to Burley's death, the trier of fact could reasonably conclude that this nighttime incident caused defendant to finally snap and follow through with her idea to inject Burley with insulin. This finding would be consistent with Dr. Pacris's testimony that hypoxic changes in Burley's brain indicated that he had fallen into a coma from insulin-induced hypoglycemic shock at about 4:00 a.m., shortly after the police left.

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[19] The dissent supports its assertion that defendant does not have "the behavioral profile of a cold-blooded killer," *post* at 148, by stating that defendant financially supported Burley while he was ill. The dissent mischaracterizes the couple's financial situation. In fact, defendant received $730 monthly from the FIA to care for Burley and Burley's social security disability benefits of $530 monthly. As Burley's caregiver, she was entitled to live in government-subsidized housing. Although Burley's family and the FIA urged defendant to place Burley into a nursing home, hospice care, or some other program that would furnish Burley with better medical care, defendant declined to do so, explaining to Burley's sister that if she were to put Burley into a nursing home, she would lose her housing, the FIA benefits, and Burley's income. On the other hand, if Burley were to die, defendant would gain some financial security: defendant was the sole beneficiary of six life insurance policies that she had taken out on Burley, worth approximately $25,000 at the time of Burley's death. Thus, the evidence suggests that defendant may have had financial motivations for rendering care to Burley.

The trier of fact could also infer that defendant's actions after Burley's death demonstrated her guilty state of mind and her attempt to cover up the crime. Defendant testified that when she suspected that Burley might be dead, she did not contact 911, but instead called a friend to come over. Defendant lied to Burley's family about his condition and hid his death from the only persons who might have questioned the cause of death and recalled her threat to inject him with insulin.[20] Moreover, defendant managed to have Burley's body cremated before Burley's family could question the cause of death. She had also wanted Burley's body cremated without an autopsy being performed,[21] but was unable to prevent the autopsy. This circumstantial evidence regarding defendant's state of mind further supports the prosecution's theory that defendant murdered Burley.

Considering all this strong circumstantial evidence of defendant's guilt, we hold that the trial court did not err in concluding that defendant would have been convicted of second-degree murder even if Dr. Simson had challenged the conclusions of the expert witnesses for the prosecution.[22]

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[20] The dissent suggests that defendant did not tell Burley's family about his death because she, not Burley's family members, had cared for Burley toward the end of his life. Although we cannot know with certainty defendant's motives, defendant's failure to inform Burley's family of his death was sufficiently unusual to support an inference that defendant acted with a guilty state of mind.

[21] We do not disagree with the dissent's assertion that a decision to cremate a loved one, by itself, is not unusual. But the decision to have a loved one cremated *before the victim's family knows about the death and before an autopsy can be performed* supports an inference of a guilty state of mind.

[22] The dissent states:

> [H]ad defense counsel challenged the cause of death, the finder of fact would have been left with two reasonable alternatives: (1) to decide that the evidence showed that defendant killed Burley or

IV. CONCLUSION

Defense counsel was not ineffective for failing to produce an expert at trial who would rebut the testimony of the prosecution's experts that Burley died from an insulin overdose. Defendant was not prejudiced by Filip's failure to produce an expert witness because there is no indication that the trial court would have accepted the testimony of defendant's expert over that of the prosecution's experts and there was other strong circumstantial evidence to support defendant's guilt. Therefore, we reverse the judgment of the Court of Appeals and remand to the Court of Appeals to consider the remaining issues.

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

CORRIGAN, J. (*concurring*). I concur with the majority's conclusion that defendant was not denied the effective assistance of counsel because she failed to show that she was prejudiced by counsel's performance. I write separately because, in my opinion, defendant also failed to satisfy the other requirement of an ineffective-assistance claim: to show that counsel's performance was constitutionally deficient. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel Joseph Filip reasonably

(2) to conclude that Burley killed himself, intentionally or accidentally, possibly to spare his loving companion of nearly 30 years the burden of his continuing care. [*Post* at 150.]

Yet Filip's decision not to present an expert witness challenging the conclusions of the prosecution's expert witnesses regarding the cause of death left the fact-finder with *the same* reasonable alternatives. The only difference is that Filip chose to argue that Burley killed himself with insulin, not morphine or some other drug. This was a viable defense that Filip energetically pursued.

decided to advance the theory that the victim, Paul Michael Burley, died from injecting himself with insulin. Filip's decision to pursue a suicide defense was not deficient because it logically flowed from defendant's statements to the detectives and to counsel. In light of this defense, defense counsel did not need to challenge the testimony of the prosecution's experts that Burley died of hypoglycemic shock caused by insulin.

" '[T]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.' " *Johnston v Singletary*, 162 F3d 630, 642 (CA 11, 1998) (citation omitted). A defense counsel's decision regarding trial strategy is not demonstrably deficient if the defendant directed that strategy. *Keith v Mitchell*, 455 F3d 662, 672 (CA 6, 2006). "[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta v California*, 422 US 806, 820; 95 S Ct 2525; 45 L Ed 2d 562 (1975). In *United States v Wellington*, 417 F3d 284, 289 (CA 2, 2005), the Court of Appeals for the Second Circuit explained that the lawyer's role is to advocate for his client and follow his client's wishes if possible:

> It is the "role of the lawyer [to be] a professional advisor and advocate," *Lefcourt v. United States*, 125 F.3d 79, 86 (2d Cir.1997) (quoting *In re Shargel*, 742 F.2d 61, 62-63 (2d Cir.1984)), not to usurp his " 'client's decisions concerning the objectives of representation,' " *see Jones v. Barnes*, 463 U.S. 745, 753 n. 6, 103 S.Ct. 3308, 77 L Ed.2d 987 (1983) (recognizing that, where ethically and legally possible, " ' lawyer shall abide by a client's decisions concerning the objectives of representation' ") (quoting ABA Model Rules of Prof'l Conduct R. 1.2(a)); *Wallace* [*v Davis*, 362 F3d 914, 920 (CA 7, 2004)] ("By respecting [his client's] wishes, counsel not only abided by ethical requirements (lawyers are *agents*, after all) but also furnished the quality of assistance that the

> Constitution demands.") (emphasis in original); *cf. Faretta v. California*, 422 U.S. 806, 820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.").

In *Wellington*, the Second Circuit rejected the defendant's argument that his trial counsel was ineffective because, as a result of counsel's following the defendant's instructions, counsel pursued a strategy that, in the absence of the defendant's instructions, might have constituted professional error. The Court explained:

> [T]o the extent that defendant instructed his counsel to pursue a course of action that defendant now complains of, there was no abridgement—constructive or otherwise—of defendant's Sixth Amendment right to effective assistance of counsel. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) ("[A] defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.") (citations omitted) (emphasis in the original); *see also Coleman v. Mitchell*, 268 F.3d 417, 448 n. 16 (6th Cir. 2001) ("[C]ounsel was not ineffective for following the defendant's clear and informed instruction.")[1]; *Frye v. Lee*, 235 F.3d 897, 906-07 (4th Cir. 2000) (observing that if the Court were to hold that defense counsel "rendered

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[1] In *Coleman v Mitchell*, 268 F3d 417, 448 (CA 6, 2001), the Court of Appeals for the Sixth Circuit held:

> If the record indicated a clear, informed assertion by Petitioner that he did not wish his counsel to present any mitigation evidence in Petitioner's behalf, case law may have supported the district court's conclusion that counsel, merely respecting the informed wishes of a client, *need not have investigated or presented any evidence* in connection with Petitioner's background at the penalty phase of the trial. [Emphasis added.]

> ineffective assistance [by acceding to the defendant's instructions not to present] . . . mitigation evidence, [the Court] would be forcing defense lawyers in future cases to choose between Scylla and Charybdis"); *Autry v. McKaskle*, 727 F.2d 358, 360-61 (5th Cir. 1984) (rejecting claim of ineffective assistance of counsel for failure to investigate and present evidence at sentencing phase where defendant had instructed his attorney not to fight the death penalty) . . . . [*Wellington, supra* at 289.]

By arguing that Burley had injected himself with insulin, Filip reasonably pursued a theory of defense that was consistent with defendant's wishes and her previous statements to the police regarding Burley's death. Specifically, defendant told the police detectives that Burley had injected himself with insulin. She also stated at a later interview: "That poor dear, he killed himself for me." Defendant, the person who knew Burley's physical capabilities the best, told a detective that despite Burley's severely impaired vision and problems with holding things, he could inject himself with insulin. Before trial, defendant told Filip that Burley had killed himself by an insulin injection and that she wanted him to pursue this defense theory at trial. Defendant also testified that Burley had mental problems and that he had "talked suicide for 10, 15 years." She testified that she had informed two of Burley's doctors of his suicidal intentions. In light of defendant's statements and wishes, it was reasonable for Filip to argue at trial that Burley had died by a self-administered insulin injection, rather than by a morphine overdose. This is especially so when Filip knew that the prosecution had two well-qualified expert witnesses, Dr. Bernardino Pacris and Dr. Michael Evans, whose anticipated testimony supported the theory that Burley died from an insulin overdose. As Filip testified

at the *Ginther*[2] hearing, his primary theory of defense, that Burley took his own life by taking insulin, did not require him to dispute the opinions of the prosecution's experts. Thus, Filip's decision not to present an expert was reasonable in light of his theory of defense.

Second, even though defendant wanted Filip to pursue a defense theory that avoided challenging the conclusions of the prosecution's experts, Filip nonetheless had consulted two doctors regarding the cause of Burley's death. He first talked to a local general practitioner, who referred him to an endocrinologist,[3] Dr. Halsey.[4] Dr. Halsey's views did not refute Dr. Pacris's opinion that Burley died from an insulin overdose. Because consultation with two doctors revealed nothing that would cause Filip to question the conclusions of the prosecution's experts, he reasonably ended the investigation at that point. He had no reason to believe that further investigation would lead to the discovery of an expert who might question Burley's cause of death.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [*Strickland, supra* at 690-691.]

Defendant, in appellate hindsight, essentially faults Filip for failing to find the "right" expert. A defense

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[2] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

[3] Endocrinology is the study of the glands and hormones of the body and their related disorders. Thus, an endocrinologist would be familiar with insulin shock as a cause of death.

[4] Dr. Halsey's first name is not mentioned in the transcript of the *Ginther* hearing.

attorney is not required to repeatedly consult experts until he finds one who will support a certain theory. "Although attorneys can always do more in preparation for a trial," the failure to do so does not mean that they are ineffective. *Mason v Mitchell*, 320 F3d 604, 618 (CA 6, 2003).

"Judicial scrutiny of counsel's performance must be *highly deferential*" and should refrain from second-guessing counsel's chosen trial strategy. *Strickland*, *supra* at 689 (emphasis added). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Id.* at 690 (emphasis added). "A reviewing court must not evaluate counsel's decisions with the benefit of hindsight." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), citing *Strickland, supra* at 689. Defense counsel's strategic choices were constrained by defendant's actions. Defendant has failed to show that, given what Filip knew at the time, Filip's decision not to challenge the testimony of the prosecution's experts that Burley had died from an insulin overdose was not a matter of sound trial strategy. See *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland, supra* at 689 (stating that a defendant must " 'overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy" ' "). Because Filip's representation was adequate at the time and under the circumstances known to him, it was sufficient to pass constitutional muster.

In sum, I conclude in the majority opinion that defense counsel was not ineffective because his performance did not prejudice defendant, and four other justices support that conclusion. I separately conclude that counsel was not ineffective because his perfor-

mance was not constitutionally deficient for failing to produce an expert to refute the prosecution's experts. Filip had no reason to challenge the testimony of the prosecution's experts, given defendant's theory of defense and her own prior statements to the police regarding the cause of death. Moreover, Filip sufficiently investigated other theories.

Accordingly, I conclude that defendant has not established a Sixth Amendment ineffective-assistance claim.

KELLY, J. (*dissenting*). The majority reverses the Court of Appeals decision and reinstates defendant's conviction after concluding that defendant failed to demonstrate that her trial counsel's performance prejudiced her. Because there is a reasonable possibility that defendant is innocent and her counsel's performance deprived her of her only viable defense, I believe she is entitled to a new trial. Accordingly, I dissent from the majority's reinstatement of the guilty verdict.

THE FACTS

This case involves the death of a gravely ill man. At the time of his death, Paul Burley had been involved in a relationship with defendant, Katherine Dendel, since 1975. Burley had suffered from many illnesses including hepatitis B, hepatitis C, herpes, chronic obstructive pulmonary disease, throat cancer, an infection with human immunodeficiency virus (HIV), neuropathy, and epilepsy. Due to his poor health, Burley was frequently hospitalized and required constant care while at home, care that defendant provided.

The day of Burley's death began with a phone call to the police. At approximately 3:00 a.m., defendant called to report that Burley was running back and forth in the house with a knife. But by the time the police arrived, all was calm. Defendant told the police that she was not

concerned that Burley would injure her, but was concerned that, given his impaired mental state, he might injure himself. Concluding that Burley was not a threat to himself or to anyone else at that time, the police took no action.

Later in the morning, defendant left the house to perform errands. She also made inquiries about placing Burley in a nursing home. She had made numerous similar inquiries before. Defendant returned home, fed Burley his lunch, and performed other errands, including inquiring further about placing Burley in a nursing home. At approximately 5:00 p.m., she checked on Burley and found him in a comatose state. She telephoned Aida Winters, her friend, for assistance and moments later, having ascertained that Burley was dead, summoned the police. Defendant was hysterical and continued in that state while the police and ambulance workers took away Burley's body.

Initially, the Oakland County medical examiner, Dr. Bernardino Pacris, concluded that Burley died of natural causes. However, after he spoke with the police officers who were investigating the death, Dr. Pacris revisited his findings. He then concluded that the cause of death was an insulin injection, although he found no needle mark. Burley did not have a prescription for insulin. It should be noted, however, that defendant was a diabetic. The process by which Dr. Pacris determined the cause of death was founded on an anatomical basis and the circumstances surrounding the death rather than on toxicological findings.

Defendant was charged with first-degree murder. At trial, Dr. Pacris and Dr. Michael Evans[1] testified for the prosecution. Both Drs. Pacris and Evans concluded that

[1] Dr. Evans was a professor of toxicology and is the president and chief executive officer of AIT Laboratories.

the evidence supported a theory that Burley died of an insulin overdose. In closing argument, the prosecutor argued that, given Burley's numerous physical ailments, he was unable to prepare insulin for administration and inject himself with it. The prosecution also attempted to show that the circumstances surrounding the death gave rise to a suspicion of murder.

Defense counsel argued, on the other hand, that Burley either took his own life or died from natural causes. However, counsel did not present evidence to counter the prosecution's medical experts, who concluded that Burley died of an insulin overdose. This was despite the fact that counsel had successfully petitioned for the appointment of an expert for the defense.

Ultimately, the court convicted defendant of second-degree murder. Relying on the prosecution's medical testimony, the court found that Burley died of an insulin overdose. The court credited the prosecution's argument and found it not believable that the gravely ill Burley was physically capable of injecting himself with a lethal dose of insulin.

Defendant appealed her conviction in the Court of Appeals. On its own motion, the Court appointed new counsel for her and remanded the case for a *Ginther*[2] hearing to determine whether defendant had received effective assistance of counsel at trial. Among the witnesses at the hearing were defendant's former counsel and a forensic pathologist, Dr. Laurence Simson,[3] who was an expert witness brought in by defendant's newly appointed appellate counsel.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] Dr. Simson is a forensic pathology consultant, a former professor of pathology, an Ingham County pathologist, and a national consultant in forensic pathology to the Surgeon General of the United States Air Force.

Defendant's former counsel testified that he (1) never consulted an independent forensic pathologist, (2) never had the body tested for the presence of insulin, (3) spoke only briefly with his own general practitioner regarding the cause of death and was referred to an endocrinologist, Dr. Halsey, (4) spoke with Dr. Halsey but took no notes of the conversation, (5) did no research into Dr. Halsey's expertise, (6) did not give either the general practitioner or the endocrinologist Burley's medical records to review, and (7) did not speak to the physician who treated Burley during his last hospitalization.

The forensic pathologist, Dr. Simson, testified that there was a lack of significant evidence that Burley died of an insulin overdose. Instead, he concluded that Burley died of a multiple-drug overdose. He based his conclusion on the fact that Burley had a lethal level of morphine in his system along with therapeutic levels of several other drugs.

At the *Ginther* hearing, Dr. Pacris was questioned about his trial testimony that Burley died of an insulin overdose. He was asked if he had considered that a lethal dose of morphine was found in Burley's body. He testified that he had based his conclusion that Burley did not die of a morphine overdose on his assumption that Burley had developed a tolerance to the drug. But he admitted that he had not checked to learn how much morphine Burley had been using.

At the conclusion of the hearing, Judge Chad C. Schmucker, who also presided at the bench trial, found that defense counsel had not provided ineffective assistance. He found that counsel's brief consultations with Drs. Burgess and Halsey were all that was required of him. He also concluded that, even if counsel's performance had been deficient, defendant could not show prejudice.

In a split, unpublished decision, the Court of Appeals reversed defendant's conviction.[4] The majority determined that, in light of the pivotal nature of the medical evidence, it was unreasonable for defense counsel to have consulted only briefly with the two doctors. It was unreasonable for him not to have furnished the physicians with documentation regarding Burley's medical history or the circumstances surrounding his death. And because defense counsel's deficient performance deprived defendant of a substantial defense, the majority held that there was a reasonable probability that it adversely affected the outcome of the trial.

The dissenting judge emphasized the prejudice prong of the test for ineffective assistance of counsel. He found no reason to conclude that the trial judge had clearly erred in concluding that defendant could not show prejudice.

The prosecution applied for leave to appeal in this Court. We heard oral argument on the application on October 3, 2007.[5]

THE SUFFICIENCY OF DEFENSE COUNSEL'S LEGAL REPRESENTATION

The standard for ineffective assistance of counsel is the same under both the Michigan and federal constitutions.[6] A defendant must show that defense counsel's performance was objectively unreasonable and that this performance prejudiced the defense.[7] In this case, the

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[4] *People v Dendel,* unpublished opinion per curiam, issued July 18, 2006 (Docket No. 247391).

[5] 477 Mich 1012 (2007).

[6] *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994).

[7] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

majority reinstates defendant's conviction after deciding that defendant cannot show prejudice.

To demonstrate prejudice, one must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[8]

Here, the prosecution's case hinged on the cause of death. The prosecution contended that defendant died of an insulin overdose, and it presented evidence to support this theory. The prosecutor argued that defendant was physically incapable of injecting himself with insulin. By failing to counter this theory, defense counsel left the finder of fact with two choices: It could find (1) that Burley killed himself by insulin overdose, a highly unlikely occurrence given his debilitated physical condition, or (2) that defendant killed Burley by administering a fatal dose of insulin. Thus, by failing to counter the prosecution's theory of the cause of death, defense counsel left defendant with no viable defense.

By contrast, defense counsel could have challenged the prosecution's theory of the cause of death, providing the trier of fact with a meaningful choice. Evidence could have been presented that Burley died from a different cause, such as a multiple-drug overdose, as Dr. Simson concluded. This would have been particularly effective in light of the fact that Dr. Pacris did not immediately identify the cause of death as an insulin overdose. Dr. Pacris considered the possibility of an insulin overdose only after the police informed him that they suspected Burley might have died from an insulin injection. Furthermore, Dr. Pacris did not check into Burley's use of morphine, despite the fact that Burley

[8] *Id.* at 694.

died with a large amount of morphine in his system. Importantly, unlike insulin, which is injected, morphine is available in pill form, and there was evidence that Burley had access to morphine pills.

Burley could have self-administered a fatal dose of morphine, either accidentally or intentionally.[9] Thus, had defense counsel challenged the cause of death, the finder of fact could have concluded that Burley died of a noncriminal act. Defendant's appellate counsel demonstrated that trial counsel easily could have found an expert witness to refute the prosecution's theory regarding the cause of death. It follows that the trial attorney's failure to adequately investigate and pursue the viable theory that Burley died of a noncriminal act deprived defendant of a substantial defense.[10]

Because defendant has shown that her trial counsel's performance deprived her of a substantial defense, she has met her burden of showing prejudice, unless other evidence rendered this defense unbelievable.[11] The

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[9] At oral argument, I specifically inquired whether it is easier to self-administer morphine than it is to self-administer insulin. My concern was this: If it is unreasonable to conclude that defendant self-administered a fatal dose of insulin, why would it be reasonable to conclude that he self-administered a fatal dose of morphine? The answer that defendant's counsel gave was that it is much easier to administer morphine because, unlike insulin, Burley's "morphine was pills, and there was testimony that [Burley] had a large number of pills available to him and that he had access to those pills." It is this difference that makes a self-administered overdose of morphine believable but a self-administered overdose of insulin by a man in Burley's condition unbelievable.

[10] The majority criticizes me for explaining how trial counsel's performance was deficient. It claims that this portion of my argument is "misplaced." *Ante* at 126 n 10. I disagree. In this case, the two prongs of the test for ineffective assistance of counsel are inextricably linked. I cannot explain how defendant was prejudiced without explaining how defense counsel's performance was deficient.

[11] The majority claims that I apply the wrong standard by presuming prejudice. I do no such thing. In order to meet her burden of showing

record reveals that, had defendant presented Dr. Simson's testimony at trial, the evidence would have supported either of two competing theories of the cause of death. As the majority points out, there was circumstantial evidence that tended to show a guilty mind. The majority discusses only this evidence. But it ignores the evidence that tends to show that Burley died of a noncriminal act.

This evidence is that defendant and Burley had a relationship that had lasted nearly 30 years. During this period, Burley suffered from many illnesses, including an HIV infection. As Burley battled these ailments, defendant stood by his side, providing him with needed care. Defendant was not only Burley's companion and caregiver during this period, she was his financial support. He had not been gainfully employed since the mid-1980s.[12] Hers is hardly the behavioral profile of a cold-blooded killer.

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prejudice, defendant had to show that defense counsel's deficient performance undermined confidence in the outcome. Accordingly, if defendant shows that counsel's performance deprived her of a viable defense, she has shown prejudice. This is because a viable defense equates to a reasonable chance at acquittal. Thus, I do not presume prejudice. Rather, I consider whether her counsel's performance deprived defendant of a viable defense. If so, a new trial is required because there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. On the other hand, if the defense defendant was deprived of was unbelievable, she would not be entitled to a new trial because she could not show prejudice.

[12] The majority suggests that I ignore evidence that defendant may have had an improper motive in caring for Burley. That is not true. I recognize that the circumstantial evidence pointed in different directions. I focus on the evidence that tended to show that Burley died of a noncriminal act because the majority fails to address this evidence at all. This is error because, when considering whether defendant was prejudiced, it is necessary to consider the totality of the circumstances surrounding Burley's death.

The evidence also tended to show that Burley's mental health had deteriorated and that he was possibly abusing morphine and other drugs. In fact, defendant had to call the police on the day Burley died because he was brandishing a knife, arousing her concern that he might hurt himself. And there was evidence that defendant had hidden drugs from Burley to prevent him from overdosing himself. Also, she had contacted numerous sources in the period before Burley's death in an attempt to get him the 24-hour, 7-day-a-week care he required.

There are also innocent explanations for the acts to which the majority attributes sinister motives. Because defendant, not Burley's family members, tended Burley toward the end of his life, it is not surprising that defendant was not eager to inform his family of his death. This is especially likely in light of the fact that, as defendant testified, she felt the family had turned its back on Burley.[13]

Nor does the fact that defendant was exasperated with providing Burley constant care render her a murderer. And defendant's decision to call a friend before summoning the police after discovering Burley in a comatose state is understandable. Defendant could have been overwhelmed by shock and sadness at discovering her longtime companion near death. It is even more reasonable to attribute an innocent explanation to this behavior when one considers that defendant had prearranged for the friend to assist her if Burley died. Nor was defendant's decision to cremate Burley unusual, since cremation is a common alternative to burial

[13] There was evidence that Burley's family intentionally avoided him after he contracted an HIV infection. For example, he was no longer invited to family gatherings, such as Easter celebrations and Super Bowl parties.

in this country, especially for those who have suffered from debilitating ailments. Finally, the fact that defendant understood insulin's effect on the body is not surprising in light of the fact that she is a diabetic.

The nonmedical evidence surrounding the death could support a finding that Burley died of a noncriminal act. Accordingly, had defense counsel challenged the cause of death, the finder of fact would have been left with two reasonable alternatives: (1) to decide that the evidence showed that defendant killed Burley or (2) to conclude that Burley killed himself, intentionally or accidentally, possibly to spare his loving companion of nearly 30 years the burden of his continuing care. The strategy employed by defense counsel left defendant with no viable defense, whereas another strategy could have resulted in an acquittal. Hence, confidence in the outcome has been undermined sufficiently to require a new trial. Accordingly, I would affirm the Court of Appeals decision.

The majority disagrees with me and reinstates defendant's conviction. In so doing, the majority opinion seems to misapprehend defendant's burden. It would seem to require defendant to prove that she is actually innocent of the crime in order to be entitled to relief. Even though defendant might be innocent, this is not the standard. The standard is "a probability sufficient to undermine confidence in the outcome."[14] Because defense counsel's performance deprived defendant of a viable, reasonable, and believable defense, the standard was met in this case.

CONCLUSION

The Court of Appeals decision to vacate defendant's conviction did not hang on what some people term "a

[14] *Strickland*, 466 US at 694.

legal technicality." Instead, there is a very real possibility that defendant is innocent of the crime of which she has been convicted. Yet her counsel never gave the finder of fact a realistic option of returning a verdict of not guilty. By effectively conceding the cause of death, counsel deprived defendant of her only viable defense. The Court of Appeals correctly reversed defendant's conviction and remanded the case for a new trial. I would affirm its judgment.

CAVANAGH, J., concurred with KELLY, J.

PEOPLE v CANNON

Docket No. 131994. Argued December 4, 2007 (Calendar No. 1). Decided June 4, 2008.

A Saginaw Circuit Court jury convicted Trumon D. Cannon of conspiracy to commit armed robbery, MCL 750.157a and 750.529, in connection with his role in the robbery of a restaurant. When calculating the defendant's recommended minimum sentence range under the sentencing guidelines, the court, Lynda L. Heathscott, J., assessed 15 points, the maximum allowed, for offense variable 10 (OV 10), which concerns the exploitation of a vulnerable victim, MCL 777.40, after concluding that the defendant's actions had constituted predatory conduct. The Court of Appeals, DONOFRIO, P.J., and O'CONNELL and SERVITTO, JJ., affirmed the defendant's conviction in an unpublished opinion per curiam, issued July 25, 2006 (Docket No. 259532). The defendant sought leave to appeal, which the Supreme Court granted to consider the scope of predatory conduct as defined for OV 10 and whether the trial court properly assessed 15 points for that conduct. 478 Mich 861 (2007).

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

The focus of OV 10, including the assessment of points for predatory conduct, is on the exploitation of vulnerable victims. A sentencing court should assess points under OV 10 only when it is readily apparent that a victim was vulnerable, that is, susceptible to injury, physical restraint, persuasion, or temptation. In the case of predatory conduct, the sentencing court must also determine if the defendant engaged in conduct before the commission of the offense that the defendant directed at a victim for the primary purpose of victimization. Conduct before the offense is not predatory if its main purpose is something other than making a potential victim an actual victim. For conduct to be predatory, it must be for the primary purpose of causing the person to suffer from an injurious action or to be deceived. To determine whether a court may properly assess 15 points under OV 10 for predatory conduct, the court must consider these analytical questions: (1)

whether the defendant engaged in conduct before committing the offense, (2) whether the defendant directed the conduct at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and (3) whether victimization was the defendant's primary purpose for engaging in the conduct. If the court can answer all these questions in the affirmative, it may properly assess 15 points under OV 10. In this case, neither the trial court nor the Court of Appeals properly analyzed whether, before committing the offense, the defendant engaged in conduct directed at a vulnerable victim for the primary purpose of victimization.

Court of Appeals judgment vacated in part; case remanded to the trial court for further proceedings.

Justice CAVANAGH, concurring in part and dissenting in part, agreed that points should be assessed for OV 10 only when the offender has exploited a vulnerable victim. Because the Court is authorized to determine both the interpretation and application of the sentencing guidelines, however, he would review the record to determine whether there was evidence that the defendant exploited a vulnerable victim. Doing so would provide guidance for the bench and bar on the application of the proper interpretation of OV 10. If the Court were to determine that the defendant did not exploit a vulnerable victim, there would be no need to reach the matter of how to assess points for predatory conduct. Thus, he joined all but the two parts of the majority's opinion addressing that matter and remanding the case.

SENTENCES — GUIDELINES — ROBBERY — OFFENSE VARIABLES — PREDATORY CONDUCT.

A court scoring offense variables under the sentencing guidelines may assess points for offense variable 10 (OV 10), which concerns the exploitation of vulnerable victims, only when it is readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation; in addition to these requirements, a court may assess points under OV 10 for predatory conduct only if, before committing the offense, the defendant engaged in conduct directed at a victim for the primary purpose of victimization; preoffense conduct is not predatory if its main purpose is something other than making a potential victim an actual victim: to be predatory, the conduct must be for the primary purpose of causing the person to suffer from an injurious action or to be deceived (MCL 777.40).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *J. Thomas Horiszny*, Assistant Prosecuting Attorney, for the people.

Patrick K. Ehlmann for the defendant.

KELLY, J. At issue in this case is whether the trial court properly assessed 15 points for predatory conduct under offense variable ten (OV 10) when it calculated defendant's sentencing guidelines range.[1] We conclude that both lower courts failed to apply the correct test in scoring OV 10. Therefore, we remand the case to the trial court to reconsider whether to assess 15 points for predatory conduct under OV 10 and to resentence defendant if it assesses no points.

FACTS AND PROCEDURAL HISTORY

Defendant entered a Burger King restaurant in the city of Saginaw. His codefendants, Maurice Mayes and Larry Hibler, immediately followed him inside. At the time, there were four employees on duty and no customers in the restaurant. Mayes and Hibler went into the bathroom while defendant approached the counter. Defendant, appearing nervous, stood near the counter, but did not place an order. Mayes and Hibler then emerged from the bathroom with bandannas covering their faces. They jumped over the counter and attempted to gather the restaurant employees into one place. Hibler displayed a gun.

Defendant did not appear surprised by their actions. He moved closer to the front of the restaurant, pulled a hood over his head, and began pacing back and forth, looking out the windows. While Mayes and Hibler

[1] MCL 777.40.

ordered the restaurant manager to open the safe and the cash registers and removed the cash, one employee escaped into the freezer and called the police. Defendant, Mayes, and Hibler fled as the police approached. All three were apprehended shortly afterwards. In the parking lot of a nearby business, the police found a stolen pickup truck with an open door and three coats in the back.

Defendant was convicted of conspiracy to commit armed robbery.[2] When the guidelines range was being calculated at sentencing, the prosecutor asserted that 15 points should be assessed under OV 10 for engaging in predatory conduct. The prosecutor argued that the predatory conduct consisted of waiting in a truck at a neighboring business until no customers remained in the restaurant, then committing the robbery. According to the prosecutor, the three men had targeted the restaurant and planned their actions to victimize the restaurant employees. Defense counsel objected, arguing that these actions did not constitute predatory conduct under the statute. The trial court agreed to assess points for predatory conduct. It reasoned that defendant's conduct was predatory because defendant could have signaled Mayes and Hibler to stop the robbery.

On appeal, the Court of Appeals affirmed that decision:

> The evidence suggests that defendant and his coconspirators selected a time, place, and manner in which to commit this robbery to maximize the vulnerability of the victims and minimize their chances of getting caught. The trial court heard evidence that the offenders planned the crime in advance, parked their car alongside the restaurant in a separate parking lot where they would not be seen,

[2] MCL 750.157a; MCL 750.529.

> selected defendant to act as the lookout, and waited until the restaurant was devoid of customers so that the employees were alone, in order to facilitate the commission of the offense. Accordingly, defendant's acts satisfied the criteria for predatory conduct within the meaning of the statute. Defendant thus fails to show that the trial court commit [sic] clear error in scoring fifteen points against defendant on OV 10. [*People v Cannon*, unpublished opinion per curiam of the Court of Appeals, issued July 25, 2006 (Docket No. 259532), p 5.]

We granted leave to appeal to consider the scope of predatory conduct as defined in OV 10 and whether the trial court properly assessed 15 points for predatory conduct in this case.

EXPLOITATION OF A VULNERABLE VICTIM IS A PREREQUISITE TO THE ASSESSMENT OF POINTS UNDER OV 10

The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo.[3] Our analysis begins with the language of MCL 777.40:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved ..... 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ..... 5 points

[3] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

(d) The offender did not exploit a victim's vulnerability ..... 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

Reading this statute as a whole,[4] we conclude that the central subject is the assessment of points for the exploitation of vulnerable victims. The statute applies when exploitive conduct, including predatory conduct, is at issue. The statute does not use the word "vulnerable" in the subsections directing the assessment of points for particular circumstances. Nor does the subsection specifically directing the assessment of 15 points for predatory conduct refer to exploitation.

However, the Legislature's focus is clearly stated by subsection 1, which provides that "[o]ffense variable 10 is exploitation of a vulnerable victim."[5] The intent to assess points for the exploitation of vulnerable victims

[4] To ascertain legislative intent, we read the statutory provisions to produce a harmonious whole. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993).

[5] MCL 777.40(1).

is also demonstrated by the fact that the statute assigns zero points when the "offender did not exploit a victim's vulnerability."[6]

Subsection 3(c) defines victim "vulnerability,"[7] and subsection 2 clarifies that the "mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability."[8] These subsections would be meaningless if vulnerability of the victim were not necessary for the assessment of points under OV 10. "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory."[9]

Thus, we conclude that points should be assessed under OV 10 only when it is readily apparent that a victim was "vulnerable," i.e., was susceptible to injury, physical restraint, persuasion, or temptation.[10] Factors to be considered[11] in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or

[6] MCL 777.40(1)(d).

[7] MCL 777.40(3)(c).

[8] MCL 777.40(2).

[9] *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

[10] MCL 777.40(3)(c).

[11] The absence of one of these factors does not preclude a finding of victim vulnerability when determining whether it is appropriate to assess 15 points for predatory conduct. Rather, the evidence must show merely that it was readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c).

unconscious.[12] The mere existence of one of these factors does not automatically render the victim vulnerable.[13]

The same statutory language that led us to conclude that the victim's vulnerability is a requirement under the statute also leads us to conclude that exploitation is required. Points are assessed under OV 10 for "exploitation of a vulnerable victim."[14] If the Legislature had not intended that exploitation be shown for the assessment of points under OV 10, it would not have expressly stated that zero points are to be assessed when the "offender did not exploit a victim's vulnerability."[15]

The subsections of the statute directing the assessment of 5 and 10 points explicitly require the sentencing judge to determine if the offender "exploited a victim."[16] The subsection directing the assessment of points for "predatory conduct," however, does not explicitly require the sentencing judge to determine if the offender exploited a victim.[17] Rather, the sentencing judge must determine if there was "preoffense conduct directed at a victim for the primary purpose of victimization."[18] Nonetheless, preoffense conduct directed at a victim for the primary purpose of victimization inherently involves some level of exploitation. Thus, we conclude that points may be assessed under OV 10 for exploitation of a vulnerable victim when the defendant has engaged in conduct that is considered predatory under the statute.

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[12] MCL 777.40(1)(b) and (c).

[13] MCL 777.40(2).

[14] MCL 777.40(1).

[15] MCL 777.40(1)(d).

[16] MCL 777.40(1)(b) and (c).

[17] MCL 777.40(1)(a).

[18] MCL 777.40(3)(a).

PREDATORY CONDUCT DEFINED

In determining whether to assess 15 points for "predatory conduct," the sentencing judge must first determine whether there was "preoffense conduct."[19] The use of prefix "pre" in the term "preoffense" indicates that, to be considered predatory, the conduct must have occurred before the commission of the offense.

In addition, the conduct must have been "directed at a victim" before the offense was committed.[20] A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim. However, a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim. Contrast that with an individual who intends to shoplift and watches and waits for the opportunity to commit the act when no one is looking. The individual has not directed any action at a victim.

The Court of Appeals decision in *People v Kimble*[21] is instructive on this point. There, the defendant and his accomplices were looking for a vehicle to steal so they could remove and sell the wheel rims. To that end, they drove for an hour searching for a vehicle with valuable wheel rims.[22] Once they spotted one, they followed the driver, watched as she entered her driveway at home, then shot her and stole her vehicle.[23] Once the defendant in *Kimble* targeted the vehicle's owner, his act of following her and waiting for the opportunity to strike was conduct directed at a victim.

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[19] *Id.*

[20] *Id*.

[21] *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), aff'd on other grounds 470 Mich 305 (2004).

[22] *Id*. at 274.

[23] *Id.* at 274-275.

In addition, preoffense conduct must have been directed at a victim "for the primary purpose of victimization."[24] "Victimize" is defined as "to make a victim of."[25] Thus, the statute mandates that preoffense conduct not be considered predatory if its main purpose is other than making the potential victim an actual victim. "Victim" is defined as "1. a person who suffers from a destructive or injurious action or agency . . . . 2. a person who is deceived or cheated . . . ."[26] "Predatory conduct" under the statute is behavior that precedes the offense, directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived.

We find the Court of Appeals opinion in *People v Apgar*[27] particularly helpful in illustrating this point. In *Apgar*, the defendant and his accomplices invited the victim to accompany them to a store.[28] They drove around for more than two hours while forcing the victim to smoke marijuana.[29] They then took her to an unfamiliar house, where the defendant sexually assaulted her.[30] Clearly, the preoffense conduct of driving the victim around while forcing her to smoke marijuana was undertaken to make the victim an easier target for the sexual assault. Thus, it was done for the primary purpose of victimization.

To aid lower courts in determining whether 15 points are properly assessed under OV 10, we set forth the following analytical questions:

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[24] MCL 777.40(3)(a).

[25] *Random House Webster's College Dictionary*.

[26] *Id.*

[27] *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004).

[28] *Id*. at 323.

[29] *Id*. at 323-324.

[30] *Id*. at 324.

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40.

In this case, neither the trial court nor the Court of Appeals properly analyzed whether defendant engaged in preoffense conduct directed at a vulnerable victim for the primary purpose of victimization.[31]

CONCLUSION

In drafting OV 10, the Legislature did not intend that 15 points be assessed for preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection. Rather, the focus of OV 10, including the assessment of points for predatory conduct, is on the exploitation of vulnerable victims.

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[31] The trial court did not properly assess whether the Burger King workers in this case were "vulnerable victim[s]" for purposes of MCL 777.40. Contrary to the partial dissent, we conclude that it would be prudent for the trial court to reexamine this issue with the guidance provided by this opinion. We are not prepared to say that every case involving the armed robbery of fast-food restaurant workers involves or does not involve vulnerable victims. On remand, the trial court will have the opportunity to consider the factors of MCL 777.40(1)(b) and (c) and to determine whether the workers in this case can properly be characterized as vulnerable victims or "susceptible to injury, physical restraint, persuasion, or temptation."

Because the lower courts failed to properly apply OV 10 to the facts of this case, we vacate that portion of the Court of Appeals judgment concerning the scoring of that offense variable. We remand this case to the trial court to reconsider whether defendant engaged in predatory conduct as defined in OV 10 and for resentencing if he did not.

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

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree that points should only be assessed for offense variable 10 (OV 10), MCL 777.40, when the offender has exploited a vulnerable victim. However, unlike the majority, I would apply this rule to the facts of this case. "[T]he proper interpretation and *application* of the legislative sentencing guidelines . . . are legal questions that this Court reviews de novo." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004) (emphasis added). Now that we have clarified the proper interpretation of OV 10, I would review the record in this case to determine whether there was evidence that defendant exploited a vulnerable victim. Our determination of this issue is not only authorized, but prudent. We have the same record evidence before us that the trial court will have on remand; moreover, our application of the proper interpretation would serve as useful guidance for the bench and bar.

If this Court were to determine that defendant did not exploit a vulnerable victim, it would be unnecessary to reach the matter of how to assess points for predatory conduct. Thus, I join the majority's opinion, except for the parts entitled "Predatory Conduct Defined" and "Conclusion."

LEMMEN v LEMMEN

Docket No. 135405. Decided June 4, 2008.

Lance N. Lemmen sought a divorce from Barbara Lemmen in the Ottawa Circuit Court. The court, Jon Hulsing, J., entered a divorce judgment that included provisions requiring the plaintiff to pay the defendant child support and spousal support. The plaintiff appealed and sought a stay. The defendant cross-appealed, raising the issue of child support. The Court of Appeals granted a stay. The defendant subsequently moved in the trial court for increases in child support and spousal support, and the trial court scheduled hearings on the motions. The plaintiff filed an emergency motion in the Court of Appeals, seeking to enforce the stay. The Court of Appeals, SMOLENSKI, P.J., and BANDSTRA and MARKEY, JJ., granted the motion, but permitted the trial court to consider motions to modify any provisions of the divorce judgment pertaining to child support and spousal support, citing MCR 7.208(A)(4) and MCL 552.17(1) and 552.28. Unpublished order, entered October 29, 2007 (Docket No. 279832). The trial court then granted the defendant's motion to increase child support without requiring a change in circumstances, but denied her motion to modify the spousal support. The plaintiff filed another emergency motion in the Court of Appeals. In an unpublished order, entered December 26, 2007, the Court vacated portions of the trial court's order, including the modification of child support, indicating that the trial court could modify the award only upon a showing of changed circumstances. The plaintiff filed an application for interlocutory appeal.

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

MCR 7.208(A) provides generally that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted. MCR 7.208(A)(4), however, allows exceptions to this rule "as otherwise provided by law." MCL 552.17(1) authorizes a trial court to modify judgments concerning child support if the circumstances of the parents or the needs of the children have changed. MCL 552.28 similarly authorizes a trial court to modify the amount of spousal support necessary if the

circumstances of either party have changed. MCL 552.17(1) and 552.28 satisfy the exception set forth in MCR 7.208(A)(4), allowing the trial court to amend an order or judgment concerning child or spousal support during an appeal.

Affirmed.

DIVORCE — CHILD SUPPORT — SPOUSAL SUPPORT — APPEAL — MODIFICATION OF JUDGMENTS.

A trial court may modify an order or judgment concerning child support after a claim of appeal is filed or leave to appeal is granted if the circumstances of the parents or the needs of the children have changed, and may modify an order or judgment concerning spousal support after a claim of appeal is filed or leave to appeal is granted if the circumstances of either party have changed (MCL 552.17[1], MCL 552.28; MCR 7.208[A][4]).

Mark F. Haslem, *James W. Zerrenner*, *Matthew G. Reens*, and *Roger W. Boer* for the plaintiff.

Rhoades McKee PC (by *Gregory G. Timmer*, *Connie R. Thacker*, and *Mark S. Pendery*) for the defendant.

MEMORANDUM OPINION. At issue here is whether MCL 552.17(1) and MCL 552.28 fall within an exception to the rule of MCR 7.208(A) that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted. In lieu of granting leave to appeal, we affirm the Court of Appeals and hold that the statutes are exceptions "otherwise provided by law," MCR 7.208(A)(4), with regard to child and spousal support if the trial court finds that there has been a change in circumstances.

MCR 7.208(A) provides:

> Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except
>
> (1) by order of the Court of Appeals,
>
> (2) by stipulation of the parties,

> (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> (4) as otherwise provided by law.

MCL 552.17(1) provides:

> After entry of a judgment concerning annulment, divorce, or separate maintenance and on the petition of either parent, the court may revise and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children, as the circumstances of the parents and the benefit of the children require.

MCL 552.28 provides:

> On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to [MCL 552.17], the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

Under MCR 7.208(A)(4), a trial court can only amend a judgment after a claim of appeal has been filed or leave to appeal has been granted if an exception is "otherwise provided by law." MCL 552.17(1) and MCL 552.28 authorize a trial court to modify judgments concerning child or spousal support after entry of the judgment. In general, a trial court may modify child or spousal support after the judgment has entered if there is a change in circumstances. *Havens v Havens-Anthony*, 335 Mich 445, 451; 56 NW2d 346 (1953). MCL 552.17(1) and MCL 552.28 do not specifically state that the trial court may modify support after a claim of appeal has been filed or leave to appeal has been granted, nor do

they limit the trial court's authority to modify to instances in which the appeals process is complete. Rather, MCL 552.17(1) and MCL 552.28 provide courts with a broad grant of authority to modify spousal and child support orders under the appropriate circumstances. Therefore, MCL 552.17(1) and MCL 552.28 satisfy the exception in MCR 7.208(A)(4) allowing a trial court to amend an order or judgment during an appeal "as otherwise provided by law."

The language found in MCL 552.17(1), "as the circumstances of the parents and the benefit of the children require," suggests that the purpose of allowing modification of a final judgment regarding child support is to ensure the welfare of the children when the circumstances of the parents or the needs of the children have changed. The language found in MCL 552.28, "may make any judgment respecting any of the matters that the court might have made in the original action," allows the trial court to reassess the amount of spousal support that is necessary after a judgment has entered. There would be no need to adjust the amount of spousal support unless there had been a change in the circumstances of either party. Therefore, to require the trial court to wait to make modifications until after an appeal is completed is contrary to the plain language of the statutes and would defeat their purpose, which is to enable the trial court to make modifications to child and spousal support orders when such modifications are necessary. The appeals process might take several years to complete. If there is a change in circumstances that would affect the needs of one of the parties or their children, or the ability of one of the parties to pay, the trial court should not, and does not, have to wait until that time has passed to modify a support order.

Affirmed.

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

KUZNAR v RAKSHA CORPORATION

Docket No. 132203. Argued October 3, 2007 (Calendar No. 5). Decided June 11, 2008.

Judith and Joseph Kuznar brought a negligence action in the Wayne Circuit Court against Raksha Corporation, doing business as Crown Pharmacy, and Raksha's employee, Valerie Randall. The complaint alleged that Randall, who was not a licensed pharmacist and was not acting under the supervision of a pharmacist, had refilled a prescription for Judith Kuznar using tablets that were eight times the dosage prescribed and that the increased dosage had caused injury to Judith Kuznar. The defendants moved for summary disposition, arguing that the plaintiffs' complaint was for medical malpractice rather than ordinary negligence and that the statute of limitations for medical malpractice barred the action. The court, Louis F. Simmons, Jr., J., denied the motion, and the defendants appealed by leave granted. The Court of Appeals, KELLY, P.J., and MARKEY and METER, JJ., affirmed. 272 Mich App 130 (2006). The Court of Appeals held that the action was properly classified as a claim of ordinary negligence because the pharmacy was not a licensed health facility or agency and Randall was not a licensed pharmacist. The Court of Appeals therefore concluded that the plaintiffs' action was timely under the three-year limitations period for ordinary negligence. The defendants sought leave to appeal, which the Supreme Court granted. 477 Mich 1097 (2007).

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

A pharmacy is neither a licensed health facility or agency nor a licensed health-care professional and thus cannot be directly liable for medical malpractice. A pharmacy can be directly liable for ordinary negligence for operating without a licensed pharmacist on site and for allowing a nonpharmacist to dispense medications. A nonpharmacist employee of a pharmacy is neither a licensed health-care professional nor an employee or agent of a licensed health facility or agency.

1. To be a medical-malpractice claim, the claim must allege an action (1) that occurred within the course of a professional

relationship and (2) that poses questions of medical judgment outside the realm of common knowledge and experience.

2. A professional relationship exists if a person or an entity capable of committing medical malpractice was subject to a contractual duty to render professional health-care services to a person. MCL 600.5838a(1) allows medical-malpractice claims against a licensed health-care professional, a licensed health facility or agency, or an employee or agent of a licensed health facility or agency.

3. The Court of Appeals correctly concluded that, under MCL 600.5838a(1)(a) and MCL 333.20106(1), a pharmacy is not a licensed health facility or agency and cannot be directly liable for medical malpractice in that capacity. Nor can a pharmacy's employee or agent be liable for medical malpractice as an employee or agent of a licensed health facility or agency. Therefore, Randall and the pharmacy cannot be liable for medical malpractice on this basis.

4. Unlike a pharmacist, who is a licensed health-care professional, a pharmacy is not a licensed health-care professional under MCL 600.5838a(1)(b). Thus, the pharmacy in this case could not have had a professional relationship with the plaintiffs, and the plaintiffs' direct claim against the pharmacy cannot sound in medical malpractice because it fails the first requirement for a medical-malpractice claim.

5. While MCL 333.1106(2) and MCL 333.17711(1) permit a nonpharmacist to operate a pharmacy, MCL 333.17741 requires that a pharmacy open for business have a licensed pharmacist physically present on site and that the pharmacist control and supervise pharmacy services. The plaintiffs essentially alleged that the pharmacy operated in violation of MCL 333.17741. Thus, the pharmacy could be directly liable under ordinary-negligence principles for violating that statute, and this claim is subject to a three-year period of limitations. The plaintiffs timely filed their ordinary-negligence claim against the pharmacy.

6. The plaintiffs alleged that Randall was not a licensed pharmacist, and the defendants presented no documentary evidence to disprove this allegation. Given the allegations in the plaintiffs' complaint, Randall cannot be liable for medical malpractice. Rather, she is directly liable for her own ordinary negligence in filling the prescription, and the pharmacy is vicariously liable for the ordinary negligence of its employee. The trial court properly denied the defendants' motion for summary disposition.

Affirmed and remanded to the trial court for further proceedings.

1. DRUGGISTS — PHARMACIES — LICENSED HEALTH FACILITIES OR AGENCIES — MEDICAL MALPRACTICE.

A pharmacy is neither a licensed health facility or agency nor a licensed health-care professional and cannot be directly liable for medical malpractice; the employees and agents of a pharmacy cannot be liable for medical malpractice as employees or agents of a licensed health facility or agency (MCL 333.20106[1]; MCL 600.5838a[1][a], [b]).

2. DRUGGISTS — PHARMACIES — NEGLIGENCE.

A pharmacy open for business must be under the personal charge of a licensed pharmacist, and a pharmacy can be directly liable for ordinary negligence by operating without a licensed pharmacist on site and allowing a nonpharmacist to dispense medications (MCL 333.17741).

Kanter & Knapp, P.L.L.C. (by *Lesley F. Knapp* and *Robert J. Kanter*), for the plaintiffs.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Karen M. Daley* and *Jeffrey R. Clark*), for the defendants.

Amici Curiae:

Mark R. Bendure, Law Offices of Nadia Ragheb, P.C. (by *Nadia Ragheb*), *Charfoos & Christensen, P.C.* (by *David R. Parker*), and *Sachs Waldman, P.C.* (by *Linda Turek*), for the Michigan Justice Association.

Jesse C. Vivian for the Michigan Pharmacists Association.

KELLY, J. Plaintiffs Judith and Joseph Kuznar sued Raksha Corporation, doing business as Crown Pharmacy (hereafter Crown Pharmacy), and its nonpharmacist employee Valerie Randall for negligence in refilling a prescription that resulted in injury to Judith. The

issue is whether the two-year statutory period of limitations for medical malpractice[1] or the three-year period for ordinary negligence[2] applies to plaintiffs' claims.

We affirm the Court of Appeals conclusion that a pharmacy is not a licensed health facility or agency. In addition, we conclude that a pharmacy is not a licensed health-care professional. We hold, therefore, that a pharmacy cannot be directly liable for medical malpractice. But it can be directly liable for ordinary negligence for operating without having a licensed pharmacist on site and for allowing a nonpharmacist to dispense medications. Hence, plaintiffs' claims of direct negligence on the part of the pharmacy are timely under the three-year period of limitations for ordinary negligence.

Because the pharmacy is not a licensed health facility or agency, the defendant nonpharmacist employee was not an employee of such a facility or agency. Neither was she a licensed health-care professional. As a consequence, plaintiffs' claims alleging negligence by the nonpharmacist employee and vicarious liability for that negligence by the pharmacy may also proceed under the three-year statute of limitations for ordinary negligence.

We affirm the judgment of the Court of Appeals and remand the case to the circuit court for proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On November 11, 2000, Joseph Kuznar took a prescription for Mirapex, 0.125 mg, to be refilled at Crown Pharmacy. His wife, Judith, was taking the medication

[1] MCL 600.5805(6).

[2] MCL 600.5805(10).

on her physician's orders to control the symptoms of restless leg syndrome. Defendant Valerie Randall refilled the prescription with 1 mg tablets of Mirapex, each tablet thus containing eight times the prescribed dosage. Randall was a Crown Pharmacy employee who was not a licensed pharmacist and was not acting under the supervision of a pharmacist.[3]

Judith Kuznar took one of the 1 mg Mirapex tablets in the afternoon and two in the early evening of November 13, 2000. She became dizzy, agitated, and nauseated in the evening and lost consciousness during the night. At the Botsford General Hospital emergency room, her symptoms were determined to be an adverse reaction to the excessive dosage of Mirapex.

On October 7, 2003, the Kuznars filed a negligence lawsuit against both Crown Pharmacy and Randall.[4] In count 17 of the complaint, plaintiffs alleged that Crown Pharmacy owed a duty to exercise reasonable care through its agents and employees when dispensing medications. In count 18, plaintiffs alleged that Crown Pharmacy owed a duty to avoid foreseeable injury when dispensing medications. In count 19, plaintiffs alleged that the pharmacy breached these duties by:

> a. Failing to dispense the appropriate medication dosage and refilling a prescription instead with eight times the prescribed dosage.
>
> b. Failing to timely recognize the error made in dispensing medications.
>
> c. Allowing persons other than a licensed pharmacist to refill prescriptions.

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[3] These are plaintiffs' allegations in the complaint. We accept them as true for purposes of defendants' motion for summary disposition under MCR 2.116(C)(7) and (8). Defendants characterize Randall as a pharmacy technician.

[4] Joseph Kuznar's claims are derivative.

> d. Failing to have a licensed pharmacist available on site to oversee, supervise and control the actions of persons not pharmacists who refilled prescription[s].

In counts 22 to 24, plaintiffs alleged that Randall had a duty not to dispense medication if she was not a licensed pharmacist. Alternatively, plaintiffs alleged, she had a duty "to adhere to a standard of care to which she is held to avoid foreseeable injury in dispensing medications." In count 25, plaintiffs alleged that Randall breached these duties by:

> a. Dispensing medication which she was not qualified to dispense as she was not a licensed pharmacist.
>
> b. Failing to dispense the appropriate medication dosage and refilling a prescription instead with eight times the prescribed dosage.
>
> c. Failing to timely recognize the error made in dispensing medications.
>
> d. Failing to consult with a licensed pharmacist before dispensing medications.

On August 9, 2004, defendants moved for summary disposition under MCR 2.116(C)(7) and (8). They contended that, because Randall was employed at a licensed health facility or agency, the complaint sounded in medical malpractice rather than in ordinary negligence. Defendants argued that the complaint failed to state a claim for ordinary negligence and was barred by the two-year statute of limitations for medical malpractice. The circuit court denied the motion without explanation.

The Court of Appeals affirmed the circuit court's denial of defendants' motion for summary disposition.[5] It pointed out that, under MCL 600.5838a(1), a medical malpractice claim can be brought against a "licensed health facility or agency" as defined in article 17 of the

[5] *Kuznar v Raksha Corp*, 272 Mich App 130; 724 NW2d 493 (2006).

Public Health Code.[6] Because the licensure requirement applicable to pharmacies appears in article 15 of the code,[7] and not in article 17, the Court of Appeals concluded that a pharmacy is not a "licensed health facility or agency" subject to medical malpractice claims.

The Court of Appeals noted that pharmacists are licensed health-care professionals subject to medical malpractice claims under MCL 600.5838a(1)(b). However, Randall was not a licensed pharmacist, and neither was Crown Pharmacy. The Court noted that MCL 600.5838a(1) contemplates that the negligent acts of unlicensed agents or employees of licensed health facilities or agencies may be subject to medical malpractice claims. But because a pharmacy is not a "licensed health facility or agency," the Court opined, no medical malpractice had occurred in this case. The Court of Appeals concluded that plaintiffs' complaint was timely under the three-year limitations period for ordinary negligence.[8]

II. STANDARD OF REVIEW

Defendants sought leave to appeal in this Court. We review decisions on motions for summary disposition de novo.[9] Such motions are properly granted under MCR 2.116(C)(7) when a statute of limitations bars a claim. In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents spe-

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[6] MCL 333.20101 *et seq*.

[7] MCL 333.16101 *et seq*.

[8] MCL 600.5805(10).

[9] See *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

cifically contradict it.[10]

Summary disposition is proper under MCR 2.116(C)(8) if the nonmoving party "has failed to state a claim on which relief can be granted." Such claims must be " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' "[11] In reviewing the outcome of a motion under MCR 2.116(C)(8), we consider the pleadings alone.[12] We accept the factual allegations in the complaint as true and construe them in a light most favorable to the nonmoving party.[13]

We also review questions of statutory interpretation de novo.[14] Our main goal in doing so is to give effect to the intent of the Legislature. When a statute specifically defines a given term, that definition alone controls.[15] The meaning accorded to undefined terms is determined in part by their placement in the statute and their purpose in the statutory scheme.[16]

III. ANALYSIS

A. THE *BRYANT* REQUIREMENTS FOR MEDICAL MALPRACTICE

In *Bryant*, this Court held that, to be subject to the requirements for asserting medical malpractice, a claim must allege an action that (1) occurred within the

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[10] *Id*. We note that defendants based their motion for summary disposition exclusively on plaintiffs' complaint.

[11] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (citation omitted).

[12] *Id*.

[13] *Id*.

[14] *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

[15] *Id*. at 35.

[16] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

course of a professional relationship and (2) poses questions of medical judgment outside the realm of common knowledge and experience.[17]

A professional relationship exists if a person or an entity capable of committing medical malpractice was subject to a contractual duty to render professional health-care services to the plaintiff.[18] Under the common law, only physicians and surgeons were potentially liable for medical malpractice. But in MCL 600.5838a(1), the Legislature expanded the scope of those who could be liable for medical malpractice.[19] It provided for medical malpractice claims to be brought against "a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency . . . ."[20]

The primary issue in this case is whether the pharmacy technician and the pharmacy are covered by MCL 600.5838a(1). We conclude that they are not. Because the professional relationship test is not satisfied, we need not consider whether the complaint poses questions of medical judgment that would require expert testimony.[21]

B. A LICENSED HEALTH FACILITY OR AGENCY

The Court of Appeals correctly applied the relevant statutes in determining that licensed health facilities and agencies are those licensed under article 17 of the

[17] *Bryant*, 471 Mich at 422.

[18] *Id*.

[19] *Id*. at 420 n 8.

[20] MCL 600.5838a(1).

[21] *Bryant*, 471 Mich at 423.

Public Health Code.[22] Article 17, entitled "Facilities and Agencies," provides its own definition of what is a health facility or agency in the form of a list. The list does not include pharmacies.[23] All the entities listed do more than just dispense medication. They provide in- or out-patient or residential or emergency medical care or treatment. MCL 333.20115(1) allows the promulgation of administrative rules to "further define" this list. Neither party has identified any administrative expansion of the list.

Under the statutory definition, a pharmacy is not a licensed health facility or agency and cannot be directly liable for medical malpractice in that capacity. Nor can its agents and employees be liable for medical malpractice as agents or employees of a licensed health facility

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[22] MCL 600.5838a(1)(a).

[23] MCL 333.20106(1) provides that "health facility or agency" means

> (a) An ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service.
>
> (b) A clinical laboratory.
>
> (c) A county medical care facility.
>
> (d) A freestanding surgical outpatient facility.
>
> (e) A health maintenance organization.
>
> (f) A home for the aged.
>
> (g) A hospital.
>
> (h) A nursing home.
>
> (i) A hospice.
>
> (j) A hospice residence.
>
> (k) A facility or agency listed in subdivisions (a) to (h) located in a university, college, or other educational institution.

or agency. The Court of Appeals correctly held that Randall and Crown Pharmacy cannot be liable for medial malpractice under this rationale.

C. A LICENSED HEALTH-CARE PROFESSIONAL

Defendants and the Michigan Pharmacists Association urge us to hold that a pharmacy is a licensed health-care professional. We decline to do so.

A licensed health-care professional is "an individual licensed or registered under article 15 of the public health code . . . and engaged in the practice of his or her health profession in a . . . business entity."[24] The flaw in defendants' proposition is that the Public Health Code defines "individual" to mean "a natural person."[25] Article 15 defines a "pharmacist" as "an individual licensed under this article to engage in the practice of pharmacy."[26] However, it does not define a pharmacy as an individual or a natural person.

Instead, "pharmacy" is defined as "a building or a part of a building in which the practice of pharmacy is conducted."[27] MCL 333.17711(1) provides that "a person shall not engage in the practice of pharmacy unless licensed or otherwise authorized by this article." The Public Health Code defines "person" in relevant part as "an individual, partnership, cooperative, association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity."[28] Although a business entity can operate a licensed pharmacy, there

[24] MCL 600.5838a(1)(b).

[25] MCL 333.1105(1).

[26] MCL 333.17707(2).

[27] MCL 333.17707(4).

[28] MCL 333.1106(2).

is no requirement that a business entity operating as a pharmacy must consist solely of licensed health-care professionals.

Rather, the standards for the operation of a pharmacy provide:

> (1) A pharmacy shall not be operated unless licensed by this part.
>
> (2) A pharmacy open for business shall be under the personal charge of a pharmacist.[29] A pharmacist shall not simultaneously have personal charge of more than 1 pharmacy. The person to whom a pharmacy license is issued and the pharmacists on duty are responsible for compliance with federal and state laws regulating the distribution of drugs and the practice of pharmacy. Pharmacy services shall be conducted under the control and personal charge of a pharmacist.
>
> (3) A penalty for violation of this part does not affect the pharmacy license of other than the place of business where the violation occurred.[30]

These standards make clear that a license to operate a pharmacy can be issued to a nonpharmacist. But the holder of the pharmacy license cannot open a pharmacy for business unless a licensed pharmacist is physically present on site. Because a pharmacy may be operated by a nonpharmacist, a pharmacy and a pharmacist are not the same thing. Whereas a pharmacist is a licensed health care professional, a pharmacy is not.[31]

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[29] "Personal charge" means the immediate physical presence of a pharmacist. MCL 333.17707(1).

[30] MCL 333.17741.

[31] Defendants rely on two Court of Appeals cases for their claim that a pharmacy is a licensed health-care professional. See *Becker v Meyer Rexall Drug Co*, 141 Mich App 481; 367 NW2d 424 (1985); *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250; 506 NW2d 562 (1993). In each case, a pharmacy was sued when a pharmacist incorrectly filled a

Since Crown Pharmacy was not a licensed health-care professional, it could not have had a professional relationship with plaintiffs. Because plaintiffs' direct claim against the pharmacy fails the first prong of *Bryant*'s two-pronged test, it cannot sound in medical malpractice.

In count 19(c) and (d) of the complaint, plaintiffs alleged that Crown Pharmacy allowed nonpharmacists to refill prescriptions. They asserted that Crown did not have a licensed pharmacist on site to oversee, supervise, and control the activities of nonpharmacists. Plaintiffs essentially alleged that the holder of the pharmacy license in this case operated the pharmacy in violation of MCL 333.17741.[32] These are allegations of direct liability on the part of Crown Pharmacy.[33] Because the pharmacy itself is not a licensed health-care professional, its direct liability for violations of the statute lies in ordinary negligence. The claims in count 19(c) and (d) of the complaint are subject to the three-year

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prescription. Neither *Becker* nor *Simmons* specifically analyzed the distinction between a claim against a pharmacy and a claim against a pharmacist.

[32] "The fact that a person has violated a safety statute may be admitted as evidence bearing on the question of negligence." *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 86; 393 NW2d 356 (1986); cf. *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995) (holding that a drug addict was not entitled to a recovery on the basis of the pharmacists' alleged violation of the controlled-substance provisions of the Public Health Code because these provisions are not meant to protect persons who fraudulently obtain drugs).

[33] Plaintiffs have not identified any officers or agents of Raksha Corporation responsible for the alleged violation of its statutory duty to operate the pharmacy only under the supervision of a pharmacist. However, because a corporation is a legal person, it is sufficient for the purposes of the complaint to allege its actions or failures as a legal person. See *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 478; 424 NW2d 478 (1988), citing *Jones v Martz & Meek Constr Co, Inc*, 362 Mich 451, 455; 107 NW2d 802 (1961).

statutory period of limitations for ordinary negligence and are not barred by the expiration of it.

The remaining allegations in plaintiffs' complaint concern Randall's direct liability for her own negligence in refilling the prescription and Crown Pharmacy's vicarious liability for the negligence of its employee.[34] Plaintiffs alleged that Randall was not a licensed pharmacist, and defendants have presented no documentary evidence to disprove this allegation.[35]

On the basis of the allegations in plaintiffs' complaint, Randall cannot be liable in medical malpractice. Rather, she is directly liable for her own ordinary negligence, and Crown Pharmacy is vicariously liable for the ordinary negligence of its employee.

IV. CONCLUSION

A pharmacy is neither a licensed health facility or agency nor a licensed health-care professional and cannot be directly liable for medical malpractice. Hence, under the law, Crown Pharmacy was incapable of committing medical malpractice.

Plaintiffs alleged that the prescription was refilled by a nonpharmacist employee of Crown Pharmacy without the supervision of a pharmacist. Defendants have presented no evidence to the contrary. A nonpharmacist employee of a licensed pharmacy is neither a licensed

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[34] See *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-295; 731 NW2d 29 (2007) ("Vicarious liability . . . rests on the imputation of the negligence of an agent to a principal. . . . [T]o succeed on a vicarious liability claim, a plaintiff need only prove that an agent has acted negligently.").

[35] For the first time in this Court, defendants argued that, by virtue of refilling the prescription, Randall held herself out as a licensed health-care professional, as defined in MCL 600.5838a(1). We decline to consider this argument because defendants did not make it in the lower courts.

health-care professional nor an employee or agent of a licensed health facility or agency.

Accordingly, plaintiffs' claims of direct liability against Randall and Crown Pharmacy and their claims for vicarious liability against Crown Pharmacy sound in ordinary negligence. Because plaintiffs have stated valid claims of ordinary negligence, the trial court properly denied defendants' motion for summary disposition under MCR 2.116(C)(8). The claims are not barred by the applicable three-year statute of limitations, and so the court also properly denied defendants' motion for summary disposition under MCR 2.116(C)(7).

Accordingly, we affirm the judgment of the Court of Appeals and remand the case to the Wayne Circuit Court for further proceedings.

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

DEPARTMENT OF TRANSPORTATION v TOMKINS

Docket No. 132983. Argued December 4, 2007 (Calendar No. 3). Decided June 11, 2008.

The Michigan Department of Transportation (MDOT) brought an action under the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., in the Kent Circuit Court against Rodney and Darcy Tomkins, seeking to take a small strip of their land for use in a county road overpass to be constructed above a new state highway. The parties agreed that the strip of land was valued at $3,800, but the defendants sought additional damages that resulted from the project, such as dust, dirt, noise, vibration, smell, and proximity to the highway. The court, George S. Buth, J., on MDOT's motion in limine, ruled that MCL 213.70(2), which excludes compensation for the general effects of a project for which property is taken that are experienced by the general public or by property owners from whom no property is taken, is clear and constitutional, and precludes the defendants from presenting evidence of the general effects of the project in determining just compensation for the property taken. The defendants appealed. The Court of Appeals, WHITBECK, C.J., and BANDSTRA and MARKEY, JJ., held that MCL 213.70(2), as applied in partial taking cases, impermissibly conflicts with the established constitutional meaning of "just compensation," which requires consideration of all factors affecting the market value of the remaining parcel. The Court of Appeals remanded the case to determine whether the land taken was used in an integral and inseparable part of the highway construction project, which would entitle the defendants to just compensation that accounts for all relevant factors affecting the market value of the remaining parcel. 270 Mich App 153 (2006). After the circuit court determined on remand that a question of fact existed regarding this issue, the Court of Appeals again remanded for the trier of fact to consider expert testimony regarding the proper just compensation for the diminution in value of the remaining property, and denied the plaintiff's motion for reconsideration. The plaintiff filed an application for leave to appeal with the Supreme Court, which the Supreme Court granted. 478 Mich 903 (2007).

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

The presumption of constitutionality of MCL 213.70(2), the statutory provision specifically excluding compensation for the general effects of a project for which property is taken that are experienced by the general public or by property owners from whom no property is taken, has not been overcome in light of the paucity of evidence indicating that, before 1963, those sophisticated in the law understood that just-compensation damages included "general effects" damages and given contrary indications from caselaw and secondary sources predating the present state constitution. Thus, the circuit court properly relied on MCL 213.70(2) to exclude evidence of "general effects" damages attributable to the M-6 highway.

1. The phrase "just compensation" is a complex legal term of art and, as such, cannot be interpreted merely by construing it carefully. Rather, the entire taking provision of the Michigan Constitution has a technical meaning that must be discerned by examining the purpose and history of the power of eminent domain. Accordingly, the phrase "just compensation" must be given the same meaning that those sophisticated in the law gave it when the 1963 constitution was ratified. The fact that, before 1963, juries were entrusted with the task of determining just compensation does not mean that jurors had the unfettered discretion to define the term rather than applying the technical, legal meaning of the term in accordance with the court's instructions.

2. The general principle that a court should leave the individual whose land was taken in as good a position as if the land had not been taken when awarding just compensation does not settle the specific question whether those sophisticated in the law when the 1963 constitution was ratified relied on that principle to include "general effects" damages in just-compensation awards. There is no clear indication in any reported Michigan case that such damages were ever awarded before 1963. On the contrary, pre-1963 caselaw holding that a property owner in a partial taking is not entitled to consequential damages arising from the taking of another person's property, together with secondary sources concerning the scope of damages recoverable for a partial taking, indicates that those sophisticated in the law before 1963 understood that the "general effects" of a taking that are felt by the public are not compensable in a partial taking. The cases on which the defendants rely do not explicitly endorse the principle that "general effects" damages are compensable in such cases; rather,

they focus on diminution or severance damages that were specific and unique to the remaining parcel, not effects that were felt generally by the public. Accordingly, because there is no clear indication that "just compensation" included "general effects" damages before the 1963 constitution was ratified, and because statutes are presumed constitutional, the statutory provision excluding such damages when determining just compensation is not unconstitutional.

Reversed and remanded to the circuit court.

Justice WEAVER, joined by Justices CAVANAGH and KELLY, dissenting, would hold that the Legislature, by imposing limits on what compensation a property owner could receive for a partial direct taking, violated the Michigan Constitution's guarantee of just compensation for property taken by the government, because the proper process for determining the amount of just compensation is left to a trier of fact. Further, "just compensation" should not be considered a legal term of art when it has long been readily and reasonably understood to be that amount of money that puts the property owner in as good a position as if the land had not been taken, which is a principle that encompasses "general effects" damages.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Raymond O. Howd* and *Patrick F. Isom*, Assistant Attorneys General, for the plaintiff.

Rhoades McKee (by *Scott J. Steiner*) for the defendants.

Amici Curiae:

Patrick J. Wright for the Mackinac Center for Public Policy.

Hubbard, Fox, Thomas, White & Bengtson, P.C. (by *Geoffrey H. Seidlein* and *Stacy L. Hissong*) for the Michigan Association of County Drain Commissioners.

Miller, Canfield, Paddock and Stone, P.L.C. (by *William J. Danhof* and *Jeffrey S. Aronoff*), for the Michigan Municipal League, the Michigan Association of Counties, the Michigan Townships Association, the County

Roads Association of Michigan, and the Michigan Municipal Electric Association.

Ackerman Ackerman & Dynkowski (by *Alan T. Ackerman* and *Darius W. Dynkowski*) for other affected landowners.

YOUNG, J. This case involves a partial taking of defendants' property in connection with the construction of the M-6 highway. We are asked in this case to examine the scope of damages permitted under the phrase "just compensation" in article 10, § 2 of the 1963 Michigan Constitution. In addition to the fair market damages associated with the land taken, defendants also sought damages associated with the dust, dirt, noise, and related general effects of the M-6 project. However, the Uniform Condemnation Procedures Act (UCPA)[1] specifically excludes compensation for the "general effects" of a project for which property is taken that are experienced by the general public or by property owners from whom no property is taken.[2] The circuit court excluded general effects damages but the Court of Appeals reversed, holding that the UCPA's limitation on damages was unconstitutional because it conflicted with the established constitutional meaning of "just compensation."

Given the paucity of evidence indicating that, before 1963, those sophisticated in the law understood that just-compensation damages included "general effects" damages and contrary indications from pre-1963 caselaw and secondary sources, we conclude that the presumption of the constitutionality of MCL 213.70(2) has not been overcome and hold that it is constitutional.

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[1] MCL 213.51 *et seq*.

[2] MCL 213.70(2).

Thus, the circuit court properly relied on MCL 213.70(2) to exclude evidence of "general effects" damages attributable to the M-6 highway. We reverse the Court of Appeals and remand to the circuit court for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL HISTORY

In connection with its construction of the M-6 limited-access freeway serving southern portions of Kent County, plaintiff Michigan Department of Transportation (MDOT) determined that it was necessary to condemn a portion of defendants' two-acre parcel fronting Kenowa Avenue. The M-6 project called for MDOT to construct several bridge overpasses to accommodate existing roads such as Kenowa Avenue that would otherwise have been interrupted by the new freeway. MDOT estimated that it was necessary to take a portion of defendants' land, approximately 49 feet by 120 feet, in order to construct the elevated overpass at Kenowa.

After defendants rejected MDOT's offer of $4,200 for the strip of land, MDOT initiated a condemnation action under the UCPA in July 2001.[3] Experts for both parties agreed that the strip of land had a fair market value of $3,800. However, defendants also sought an additional $48,200 in damages to the remaining property that defendants' appraiser attributed to the "dust, dirt, noise, vibration, and smell" of nearby M-6.

On January 23, 2004, MDOT filed a motion in limine or, in the alternative, a motion for summary disposition

[3] MDOT also named Byron Center State Bank and Chase Mortgage as defendants. However, they were later dismissed with prejudice by the circuit court's May 2004 final judgment, which stated that these parties "shall not receive any compensation or other amounts arising out of MDOT's acquisition of property in this proceeding." They are not part of this appeal.

under MCR 2.116(C)(8), seeking to exclude any evidence of the "general effects" damages. Because the parties' experts agreed on the fair market value of the condemned property, MDOT argued it was entitled to summary disposition if the "general effects" evidence was excluded. In March 2004, the circuit court granted MDOT's motion, relying on MCL 213.70(2), and later entered a final judgment awarding defendants $3,800 as full compensation for the taking as well as statutory attorney fees and interest.

The Court of Appeals reversed the circuit court, holding that the exclusion of "general effects" damages in MCL 213.70(2) was unconstitutional because it impermissibly conflicted with the established constitutional meaning of "just compensation."[4] The panel concluded that "*any* and *all* factors relevant to market value [must] be taken into consideration when determining the difference in the remaining property's value before and after the taking."[5]

In addition, the panel, citing *Campbell v United States*,[6] and decisions from other jurisdictions interpreting *Campbell*,[7] held that in a partial taking, " '[w]here the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land.' "[8] The Court of Appeals remanded to the circuit court to

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[4] *Dep't of Transportation v Tomkins*, 270 Mich App 153, 166; 715 NW2d 363 (2006).

[5] *Id.*

[6] 266 US 368; 45 S Ct 115; 69 L Ed 328 (1924).

[7] *Andrews v Cox*, 129 Conn 475; 29 A2d 587 (1942); *City of Crookston v Erickson*, 244 Minn 321; 69 NW2d 909 (1955).

[8] *Tomkins*, 270 Mich App at 168, quoting *Andrews*, 129 Conn at 482.

evaluate whether the overpass construction was "integral and inseparable" to the M-6 project. On remand, the circuit court found that a question of fact existed regarding this issue. Consequently, the Court of Appeals again remanded to the circuit court "to allow the trier of fact to consider the experts' testimony regarding the proper just compensation for the diminution in value of the remainder (that is, the portion of the Tomkins parcel left over after the government taking) that takes into account all relevant factors affecting its market value." It subsequently denied MDOT's motion for reconsideration.

MDOT filed an application for leave to appeal, which this Court granted.[9]

II. STANDARD OF REVIEW

Questions of constitutional interpretation and statutory interpretation are questions of law reviewed de novo by this Court.[10] This Court also reviews de novo a trial court's decision to grant a motion for summary disposition.[11]

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[9] 478 Mich 903 (2007). The order granting leave to appeal, in addition to inviting amici to move for leave to file briefs, asked the parties to address:

> (1) what was the ratifiers' common understanding of the phrase "just compensation" when they ratified Const 1963, art 10, § 2, and was it commonly understood that "just compensation" in inverse condemnation cases was different than "just compensation" in direct, partial taking cases; and (2) whether § 20(2) of the Uniform Condemnation Procedures Act, MCL 213.70(2), impermissibly conflicts with this established meaning of "just compensation." [*Id*.]

[10] *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005); *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

[11] *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 65; 729 NW2d 500 (2007).

III. RULES OF STATUTORY AND CONSTITUTIONAL INTERPRETATION

It is axiomatic that statutory language expresses legislative intent. "A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.' "[12] Where the statute unambiguously conveys the Legislature's intent, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case."[13] Statutes are presumed constitutional, and this Court exercises the power to declare a law unconstitutional with extreme caution, never exercising it where serious doubt exists with regard to the conflict.[14]

When interpreting our state constitution, this Court seeks the original meaning of the text to the ratifiers, the people, at the time of ratification.[15] Technical legal terms must be interpreted in light of the meaning that those sophisticated in the law would have given those terms at the time of ratification.[16]

IV. ANALYSIS

In *Silver Creek*, this Court observed that the doctrine of eminent domain, the power of the government to take private property for a public use and with just compensation, is firmly established in both our federal

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[12] *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass)*, 468 Mich 109, 113; 659 NW2d 597 (2003), quoting *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).

[13] *In re Certified Question*, 468 Mich at 113.

[14] *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

[15] *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004).

[16] *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 376; 663 NW2d 436 (2003).

and state constitutions.[17] Dating back to the earliest days of statehood, Michigan's various constitutions, including the most recent 1963 iteration, have reserved this power to the state.[18] Const 1963, art 10, § 2 states, in relevant part, that "[p]rivate property shall not be taken for public use without just compensation . . . ."

The Legislature enacted the UCPA in 1980 to make uniform the statutes that govern the exercise and

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[17] *Id.* at 374.

[18] Every Michigan Constitution has included a provision requiring just compensation for a taking. While Michigan was still a territory, its 1835 Constitution stated that "[t]he property of no person shall be taken for public use, without just compensation therefor." Const 1835, art 1, § 19. This provision carried forward into statehood. See Const 1850, art 18, § 14 ("The property of no person shall be taken for public use without just compensation therefor."); see also Const 1908, art 13, § 1 ("Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.").

Under the 1850 and 1908 constitutions, the necessity of the taking and the compensation were to be determined by a jury of 12 freeholders. The 1908 Constitution also allowed for a panel of commissioners to resolve these questions. See, e.g., Const 1850, art 18, § 2 ("When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders . . . or by not less than three commissioners, appointed by the court of record, as shall be prescribed by law . . . ."); Const 1908, art 13, § 2 ("When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than 3 commissioners appointed by a court of record as shall be prescribed by law . . . . "). This language was not carried forward into Const 1963, art 10, § 2.

Also, Michigan voters approved a 2006 ballot proposal that amended Const 1963, art 10, § 2. However, the amendment, passed after the condemnation suit was initiated in this case, is not applicable to the constitutional question presented here.

procedure of eminent domain. Consistent with the constitutional mandate to award "just compensation," the UCPA similarly demands that individuals receive "just compensation" when their property is taken by the government.[19] When we interpret the UCPA in light of art 10, § 2, we must remember that "to the degree the Constitution has been construed to outline the nature of 'just compensation,' the statute must be similarly construed because no act of the Legislature can take away what the Constitution has given."[20] Thus, the Legislature, through the UCPA or any other statute, cannot lower the constitutional minimum of "just compensation" established by the people who ratified the 1963 Constitution.

In *Silver Creek*, we recognized that the phrase "just compensation" cannot be interpreted "merely by a careful reading of the phrase."[21] Indeed, this Court has held that "the *whole* of art 10, sec 2 has a technical meaning that must be discerned by examining the 'purpose and history' of the power of eminent domain."[22] "Just compensation" falls into the category of words and phrases that is not capable of definition merely by reference to a dictionary. Rather, it is a phrase freighted with constitutional significance in our jurisprudence, specifically in the law of eminent domain. Thus, we concluded in *Silver Creek* that, as a technical legal term of art, we are required to give the phrase "just compensation" the same meaning given by those sophisticated in the law when 1963 Const, art 10,

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[19] MCL 213.55(1).

[20] *Silver Creek*, 468 Mich at 374.

[21] *Id*. at 375.

[22] *Hathcock*, 471 Mich at 471 (emphasis in original).

§ 2 was ratified in 1963.[23] However, we cautioned elsewhere that arriving at a fixed meaning of "just compensation" before 1963 is complicated by the reality that in the past this phrase was "a legal term of art of enormous complexity."[24] The aptness of this observation is self-evident in this case.

The provision of the UCPA at issue in this case is MCL 213.70, which sets out the process for determining fair market value. It was amended by the Legislature in 1996, and the amendment, among other revisions, added subsection 2. This subsection states:

> The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation. To the extent that the detrimental effects of a project are considered to determine just compensation, they may be offset by consideration of the beneficial effects of the project.

MCL 213.70(2) separates the "general effects of a project for which property is taken" from a "special effect of the project" on the property that on its own would constitute a taking under art 10, § 2. Under the statute, "general effects" damages are "not [to] be considered in determining just compensation."[25]

In this case, if the statute were applied to the partial taking of defendants' property, defendants could not be

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[23] *Silver Creek*, 468 Mich at 376.

[24] *Hathcock*, 471 Mich at 470.

[25] The statute also permits the detrimental effects of the project to be offset by the project's beneficial effects to determine just compensation.

compensated for the "dust, dirt, noise, vibration, and smell" created by M-6. These are general effects of the construction of M-6 that, in varying degrees, are experienced by the general public and property owners from whom no property has been taken. For example, any one of defendants' neighbors whose property was not taken to construct M-6 would experience the same general effects of M-6 as defendants. We must decide whether the Legislature's exclusion of these "general effects" damages contravenes the constitutional minimum of just compensation established by Const 1963, art 10, § 2.

The Court of Appeals described the basic rule of damages in a partial taking as the value of the property taken plus the remaining portion's decrease in value that is attributable to the use made of the property taken.[26] It held that the decrease or diminution in value of the remaining portion is determined by calculating the difference between the fair market value of the remaining property before and after the taking.[27] In order to do this, the panel held that this Court's precedent required that " '*any* evidence that would tend to affect the market value of the property as of the date of condemnation is relevant . . . .' "[28] The Court of Appeals concluded that this broad, inclusive method of calculating the remaining parcel's diminished fair market value must take into consideration the general effects of the project for which the property was taken.

Defendants and their supporting amici curiae like-

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[26] *Tomkins*, 270 Mich App at 159, citing *In re Widening of Fulton Street*, 248 Mich 13, 20-21; 226 NW 690 (1929).

[27] *Tomkins*, 270 Mich App at 159, citing *Dep't of Transportation v Sherburn,* 196 Mich App 301, 305; 492 NW2d 517 (1992).

[28] *Tomkins*, 270 Mich App at 159-160, quoting *Dep't of Transportation v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999) (emphasis in original).

wise focus their attention on language in this Court's decisions before 1963 indicating that in a partial taking the "decreased value of the residue of the parcel on account of the use made of the land taken is also allowable as compensation."[29] Under this pre-1963 formula for damages in a partial taking, defendants contend that the "use made of" their condemned strip of land was the construction of the M-6 highway, which included the Kenowa Avenue overpass. Defendants reason that they are entitled to compensation for the decreased value of the remainder of their property attributable to the dust, noise, vibration, smell, and similar disturbances created by M-6.

The Court of Appeals also held that there is a distinction between liability in inverse condemnation cases[30] and damages in direct, partial condemnation cases. In *Spiek v Dep't of Transportation*,[31] this Court held that "[t]he right to just compensation, in the context of an inverse condemnation suit for diminution in value caused by the alleged harmful affects [sic] to property abutting a public highway, exists only where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." The Court of Appeals declined to apply the rule of *Spiek* to this case because it held that *Spiek* was

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[29] *In re Widening of Michigan Ave, Roosevelt to Livernois (Parcel 68)*, 280 Mich 539, 548-549; 273 NW 798 (1937) (citations omitted); see also *In re Widening of Bagley Avenue*, 248 Mich 1, 5; 226 NW 688 (1929).

[30] See *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989) ("An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use 'without the commencement of condemnation proceedings.' Under Michigan law, a 'taking' for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property.") (Internal citation omitted.)

[31] 456 Mich 331, 348; 572 NW2d 201 (1998).

carefully limited to inverse condemnation cases where there had been no direct or physical invasion of the landowner's property.[32] In addition, the panel declined to follow the reasoning of *State v Schmidt*,[33] a Texas Supreme Court case cited in *Spiek* that rejected the argument that damages are different in inverse and direct condemnation cases, noting that many other states had reached a conclusion opposite the Texas Supreme Court.[34]

The Court of Appeals also distinguished *In re Petition of State Hwy Comm'r* (*State Hwy Comm'r v Busch)*,[35] which MDOT claimed was crucial to grasping the pre-1963 understanding of "just compensation." The *Busch* Court, citing *Campbell v United States*,[36] stated that "[t]he general rule applied when part of a parcel of land is condemned is that just compensation does not include the diminution in the value of the remainder caused by the acquisition of the adjoining lands of others for the same undertaking."[37] The *Busch* Court

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[32] *Tomkins*, 270 Mich App at 162-163.

[33] 867 SW2d 769 (Tex, 1993).

[34] *Tomkins*, 270 Mich App at 164-166.

[35] 326 Mich 183; 40 NW2d 111 (1949).

[36] 266 US 368, 45 S Ct 115, 69 L Ed 328 (1924). In *Campbell*, the United States government took possession of 1.81 acres belonging to Campbell's roughly 70-acre parcel that would be part of a proposed federal nitrate plant. The government took possession of a number of parcels to accumulate the needed 1,300 acres for the plant. After erecting a few buildings and other miscellaneous structures, the government abandoned the project. The Supreme Court held that Campbell was not entitled to damages to his remaining property that were due to the acquisition of adjoining lands belonging to others. It held that "[t]he rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking." *Id.* at 372.

[37] *Busch*, 326 Mich at 189.

held that property owners could not be compensated for the effect of the taking of their neighbors' property on their remaining parcel even though the property was taken for the same road construction project.[38] The Court of Appeals below distinguished *Busch* on the basis that defendants were not directly claming damages from the taking of their neighbor's land but, rather, for the diminution of value to their own property caused by the partial taking of their property for the M-6 freeway.[39]

After considering the Court of Appeals' reasons for ruling that MCL 213.70(2) is unconstitutional, we are persuaded that it erred. First, the rule on which the Court of Appeals relied is no more than a statement of general principles. It is true that a guiding principle when awarding just compensation in a condemnation suit is to "neither enrich the individual at the expense of the public nor the public at the expense of the individual" but to leave him "in as good a position as if his lands had not been taken."[40] Thus, in a partial taking, the formula to calculate the fair market value of the remainder parcel must account for the fact that damages will vary from case to case, depending on the unique circumstances of each taking. Restoring the individual to his position before the taking will require a flexible, case-by-case approach to damages.

However, mere recitation of these principles calling for flexibility does not settle the matter.[41] The particular question posed here is whether those sophisticated in

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[38] *Id*. at 188.

[39] *Tomkins*, 270 Mich App at 163. The Court of Appeals refers to *Busch* as *In re Ziegler*.

[40] *In re State Hwy Comm'r*, 249 Mich 530; 229 NW 500 (1930).

[41] The Court of Appeals also cited caselaw decided by this Court and the Court of Appeals after 1963, which is not helpful to determining the ratifiers' common understanding except to the extent that the cases cited and relied on pre-1963 caselaw.

the law in 1963 relied on these principles to include "general effects" damages in a just-compensation award. The reality is that there is a paucity of pre-1963 Michigan caselaw that definitively establishes a clear answer to this question.[42] A pregnant fact acknowledged by the parties is that there is no indication in any reported Michigan case that "general effects" damages were ever awarded before 1963.[43]

Defendants and their supporting amici curiae cite numerous cases that they argue support the proposition

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[42] This Court has held that the Address to the People and the constitutional convention debates are at times relevant to determining the meaning of particular provisions to the ratifiers. *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 655-656; 698 NW2d 350 (2005); *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The Address to the People stated that the decision to eliminate the procedures for eminent domain proceedings found in the 1908 Constitution "clearly indicates that proper procedures for the acquisition of private property for public use are to be determined by the legislature and that compensation for such property must be determined in proceedings in a court of public record." In addition, the convention delegates' rejection of a proposal to *broaden* the scope of eminent domain to property that was either "taken *or damaged*" suggests that the ratifiers did not intend to alter the state of Michigan's pre-1963 eminent domain jurisprudence. 2 Official Record, Constitutional Convention 1961, pp 2580-2602. However, neither of these points sheds much light on the question whether "general effects" damages fall within the pre-1963 established definition of "just compensation." Thus, resort to either of these interpretive aids is of limited value.

[43] One amicus suggests the absence of caselaw on this question is due to the fact that, under earlier constitutions and condemnation statutes, the condemning agency was permitted to discontinue the taking before confirmation of the verdict. See *Detroit v Empire Dev Co*, 259 Mich 524, 526; 244 NW 150 (1932). If the just-compensation award was excessive, it was routine practice, according to amicus, for the condemning agency simply to walk away or find another way to accomplish the project. Thus, amicus speculates that an excessive award, particularly one involving "general effects" damages, would rarely be the subject of an appeal. However, in the absence of any reported pre-1963 cases explicitly addressing the availability of "general effects" damages, a contrary conclusion that "general effects" damages were never recoverable is equally plausible.

that "general effects" damages were compensable before 1963.[44] These cases state many of the general principles for awarding just compensation in a partial taking cited by the Court of Appeals that we have already mentioned. However, none of these cases explicitly endorses the principle that "general effects" damages are compensable in a partial taking. Instead, these cases appeared to focus on diminution or severance damages that were specific and unique to the remaining parcel, and not effects that were felt generally by the public.[45]

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[44] See, e.g., *Port Huron & S-W R Co v Voorheis*, 50 Mich 506; 15 NW 882 (1883); *Barnes v The Michigan Air Line R*, 65 Mich 251; 32 NW 426 (1887); *Grand Rapids, L & D R Co v Chesebro*, 74 Mich 466; 42 NW 66 (1889); *Comm'rs of Parks and Boulevards of Detroit v Moesta*, 91 Mich 149; 51 NW 903 (1892); *Comm'rs of Parks and Boulevards of Detroit v Chicago, D & C Grand Trunk Junction R Co*, 91 Mich 291; 51 NW 934 (1892); *Fitzsimons & Galvin, Inc v Rogers*, 243 Mich 649; 220 NW 881 (1928); *Johnstone v Detroit, GH & M R Co*, 245 Mich 65; 222 NW 325 (1928); *In re Widening of Bagley Avenue*, 248 Mich 1; 226 NW 688 (1929); *In re State Hwy Comm'r*, 256 Mich 165, 239 NW 317 (1931); *In re Dillman*, 256 Mich 654; 239 NW 883 (1932); *In re Widening of Michigan Avenue, Roosevelt to Livernois (Parcel 68)*, 280 Mich 539; 273 NW 798 (1937); *In re Widening of Michigan Avenue (Rott's Appeal)*, 299 Mich 544; 300 NW 877 (1941); *In re Grand Haven Hwy*, 357 Mich 20; 97 NW2d 748 (1959); *State Hwy Comm'r v Eilender*, 362 Mich 697; 108 NW2d 755 (1961).

[45] For instance, in *Voorheis,* 50 Mich at 512-513*,* this Court set aside a just-compensation award that did not take into consideration the effect of the partial taking on the remainder of the owner's homestead where the homestead consisted of both the lot subject to the taking and several contiguous lots from which no property was taken. In *Barnes,* 65 Mich at 253, this Court held that landowners could not file a nuisance action based on a taking of property for which they had already received just compensation where the railroad took no action inconsistent with the original purpose of the taking. In *Moesta,* 91 Mich at 155, we held that the property owner was entitled to recover for loss occasioned by the interruption of its business. In *Chicago, D & C*, 91 Mich at 293, we held that the question whether land used for warehouse purposes was less valuable due to the taking should have been submitted to the jury. In *Johnstone,* 245 Mich at 84-85, this Court held that where a taking

One amicus curiae supporting defendants cites *State Hwy Comm'r v Schultz*,[46] as an example of "general effects" damages being awarded in a partial taking case before 1963. According to this Court's opinion, $300 of a $64,042.37 just-compensation award was attributed to "noise and disturbance."[47] The amicus argues that this brief mention of an award for "noise and disturbance" proves that before 1963 "general effects" damages were awarded routinely in partial takings.

We disagree with amicus that this is compelling evidence on which we could rest a conclusion that MCL 213.70(2) is unconstitutional. *Schultz* focused on the question whether the just-compensation award was erroneous because the jury took into consideration the existence of sand and gravel deposits on the land when the property had been used for farming purposes. This Court affirmed the award on the ground that it was supported by the evidence that the highest and best use of the property was for a gravel pit and that the amount

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violates or destroys a negative easement, the landowner is entitled to nominal damages for destruction of the easement and diminishment in value of the premises as a result of the use for which the property is taken. In *In re Bagley Ave*, 248 Mich at 6-7, we held that the jury was properly instructed that it could award damages to reconstruct the remaining portions of buildings partially taken by the city. In *In re Widening of Michigan Avenue*, 280 Mich at 551-552, this Court upheld a just-compensation award that was given in part to a lessee of the condemned property. In *In re Grand Haven Hwy*, 357 Mich at 26-32, this Court upheld a just-compensation award that took into account that the property owner was forced to move its entire facility to a new location as a result of the taking.

In short, all these cases were either inapposite to the issue in this case or they reviewed just-compensation awards that did not include "general effects" damages but, rather, included damages that were specific and unique to the property subject to the partial taking.

[46] 370 Mich 78; 120 NW2d 733 (1963).

[47] *Id.* at 83.

and value of the available mineral deposits were relevant factors for the jury to consider. Certainly the loss of the value of the mineral deposits was a specific injury to the property. *Schultz* is a fragile foundation on which to rest the alleged unconstitutionality of MCL 213.70(2).[48]

Second, we disagree with the Court of Appeals interpretation of *Spiek*. The Court of Appeals relied on two scholarly articles to conclude that liability in inverse condemnation and direct, partial condemnation cases is necessarily different and that the rule of damages from *Spiek* must be limited to the former.[49] One problem with

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[48] Also, defendants' reliance on pre-1963 language that property owners in a partial taking are entitled to compensation for the "use made of the land taken" does not prove that just compensation for that use would include "general effects" damages. The "use made of the land taken" could cause damage to the remaining property that is unique to that property and has nothing to do with general effects felt by the public.

[49] Pesick, *Eminent domain: Calculating just compensation in partial taking condemnation*, 82 Mich B J 37-38 (2003) (citing 2A *Nichols on Eminent Domain* § 6.08[2] [rev ed 1993] and *Silver Creek* to conclude that "any attempt to employ [inverse condemnation's rule of liability in an actual taking] conflicts with the established meaning of constitutional 'just compensation' that requires property owners to be compensated for the difference in a property's value before and after the taking, and runs headlong into the Michigan Supreme Court's requirement that just compensation must take into account 'all factors relevant to market value.' "); Ackerman & Yanich, *Just compensation and the framers' intent: A constitutional approach to road construction damages in partial taking cases*, 77 U Det Mercy L R 241, 254 (2000) (asserting that "[b]ecause the court in *Spiek* was careful to limit its holding to cases not involving a direct or physical invasion of a landowner's property, the ruling has no applicability to eminent domain cases involving partial takings. Thus, *Spiek* does not abrogate the general rule regarding recovery of severance damages so as to require that damages be 'different in kind' from those suffered by other nearby landowners in order to be compensable."). The Ackerman article cited two pre-1963 decisions, *Rogers, supra*, and *Fulton Street, supra*, for the general rule of damages in partial taking cases. None of these supports a clear basis for recovery of "general effects" damages in partial takings before 1963.

the panel's conclusion is that *Spiek* likely addressed only inverse condemnation claims because that was the specific claim brought by the plaintiff. That the holding in *Spiek* was limited in that respect does not mean that those sophisticated in the law before 1963 applied a separate rule of damages for an actual, partial taking. As noted below, there is some counter-indication that the rule of damages in *Spiek* was not limited only to inverse condemnation cases.[50]

There is no dispute that an inverse condemnation claim and an actual, partial taking differ in form. An inverse condemnation claim is not initiated by the government entity under the UCPA because it has not appropriated a property interest for public use. Thus, the property owner must establish that the government's actions amounted to a constitutional "taking" of property. In an actual taking, liability for the taking has been conceded and the question is one of damages or "just compensation." However, despite these formal differences, our review of pre-1963 caselaw does not suggest that "general effects" damages were treated differently in an actual, partial taking and an inverse

[50] Also, the panel's observation that a number of other states have recognized a distinction between damages in these two types of cases, and its decision to favor those jurisdictions, is unhelpful where other states' eminent domain provisions are sometimes worded differently. For instance, the Court of Appeals cited *City of Crookston v Erickson*, 244 Minn 321, 325; 69 NW2d 909 (1955), for the rule that "it is sufficient that the damage is shown to have been caused by the taking of part of [the] property even though it is damage of a type suffered by the public as a whole." However, Minnesota's Constitution states in article 1, § 13, that "private property shall not be taken, *destroyed or damaged* for public use without just compensation therefor, first paid or secured." (Emphasis added.) Const 1963, art 10, § 2 does not require just compensation where private property is destroyed or damaged without a taking. As noted in n 38, *supra*, the delegates to the 1961 Constitutional Convention declined to add this type of broad language to Michigan's eminent domain provision.

condemnation case. Indeed, as discussed below, there is some evidence that this Court applied principles from inverse condemnation to direct, partial takings cases before the 1963 Constitution was ratified.[51] Thus, although we do not necessarily rely on *Spiek* to uphold MCL 213.70(2), we disagree with the Court of Appeals conclusion that the rule of *Spiek* does not apply to partial takings.

Further, unlike the Court of Appeals, we find *Busch*, *supra*, helpful in answering whether MCL 213.70(2) is constitutional. *Busch* was decided before 1963 and certainly informed the understanding of those sophisticated in the law. The *Busch* Court denied the property owners compensation for "the diminution in value of the remainder caused by the acquisition of the adjoining lands of others for the same undertaking."[52] *Busch* reflected a commonsense limitation on damages in a partial taking that a property owner is not entitled to consequential damages arising from the taking of *another* individual's property. Thus, to the extent that MCL 213.70(2) precludes "general effects" damages in a partial taking of defendants' property arising from the acquisition of neighboring property for the M-6 freeway, it is entirely consistent with the pre-1963 common understanding of "just compensation" informed by *Busch*.

We find additional guidance from this Court's plurality decision in *State Hwy Comm'r v Watt*,[53] an instance where a particular type of "general effect" damage—diminution in value attributable to the diversion of

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[51] *State Hwy Comm'r v Watt*, 374 Mich 300, 314; 132 NW2d 113 (1965) (partial taking case citing *Buhl v Fort Street Union Depot Co*, 98 Mich 596 [1894], an inverse condemnation case).

[52] *Busch*, 326 Mich at 189.

[53] 374 Mich 300; 132 NW2d 113 (1965).

traffic—was held to be not compensable under the 1908 Constitution.[54] In *Watt*, the state highway commission took a strip of land on the east side of Watt's property for highway purposes. The existing highway ran along the west side and northwest corner of Watt's property where he operated a motel. Watt argued that as part of his just compensation he was entitled to the diminution in value of his remaining property attributable to the diversion of traffic from the old US-131, and from his motel, to the new US-131. The trial court declined to confirm the award that had compensated Watt for traffic diversion. This Court affirmed the trial court in a four-to-three decision. Chief Justice KAVANAGH authored the opinion, joined by Justices SMITH and O'HARA, holding that damages for diversion of traffic were not compensable in a partial taking.[55] The opinion, quoting at length from a dissenting opinion in a Kansas Supreme Court case that decided a similar issue, concluded that " ' "[t]he change in traffic flow in such a case is the result of the exercise of the police power or the incidental result of a lawful act, and is not the taking or damaging of a property right." ' "[56]

Justice KAVANAGH's opinion also addressed the possibility that the state highway commission would later build a cul-de-sac near Watt's property and potentially cut off highway access. Regarding whether the possible

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[54] The Ackerman article cited by the Court of Appeals acknowledged *Watt* as a case where this Court held that diminution in value due to traffic diversion was not compensable but limited it as the sole exception to the rule.

[55] Justice BLACK concurred in the result. Thus, although a majority of this Court agreed on the result, only three justices agreed on a rationale. Justice KELLY authored a dissenting opinion joined by Justices DETHMERS and SOURIS. Justice ADAMS did not participate.

[56] *Watt*, 374 Mich at 311, quoting *Riddle v State Hwy Comm*, 184 Kan 603, 620; 339 P2d 301 (1959), quoting *State, ex rel Merritt v Linzell*, 163 Ohio St 97, 104; 126 NE2d 53 (1955).

construction of the cul-de-sac would presently entitle Watt to additional damages, Justice KAVANAGH wrote:

> The Fifth Amendment to the Federal Constitution and article 13 of the Michigan Constitution of 1908, under which appellants here claim a remedy, proscribe the taking of *private property* without just compensation. Compensable injury arises under those provisions, therefore, only from a taking of *property rights*.
>
> From a reading of the cases dealing with the problem, it is observed that the property-right injury to be found and redressed in cul-de-sac situations is the entire or material cutting-off of the access, of an abutting owner, to the general system of highways. *As will be noted later, it is only on that basis that an abutting owner can properly make the necessary claim of special damage,* i.e., *damage not incurred, in the same, greater or lesser degree, by the general public*.[57]

In view of defendants' claim that those sophisticated in the law before 1963 uniformly believed that "general effects" damages were compensable in a partial taking, *Watt* undercuts that thesis.[58] Moreover, there is an important similarity between a claim of damages for the diversion of traffic and a claim of damages for the "dust, dirt, noise, vibration, and smell" caused by a highway. Both are "general effects" damages felt by the general public that are incidental to the building of a highway.

Furthermore, in the absence of strong primary authority establishing a right to "general effects" damages in partial takings before 1963, a useful secondary source to which we turn to understand the pre-1963

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[57] *Watt*, 374 Mich at 312 (emphasis added).

[58] Although *Watt* was a plurality decision, its holding that diversion of traffic is not an element of damages in condemnation proceedings was reaffirmed by a clear majority of this Court in *State Hwy Comm'r v Gulf Oil Corp*, 377 Mich 309, 315; 140 NW2d 500 (1966), a case decided under the 1963 Constitution.

meaning of "just compensation" is the scholarly writings of our venerable Michigan Supreme Court Justice THOMAS M. COOLEY. Justice COOLEY noted the general rule that when the government undertakes a public work, there is no right to compensation if no legal right has been appropriated in the process:

> It is a general rule, however, that the mere fact that one suffers incidental loss in consequence of the undertaking and construction of a public work, where nothing to which he has a legal right is actually appropriated, can never give him a claim to compensation.[59]

Thus, according to Justice COOLEY, where there is such "incidental loss," it is *damnum absque injuria*—loss without injury.[60]

However, in a partial taking, Justice COOLEY wrote that "just compensation"

> may perhaps depend on the effect which the appropriation may have on the owner's interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition of the condition in which it may leave the remainder in respect to convenience of use . . . .[61]

Justice COOLEY elaborated on this rule of damages, noting that those benefits or damages felt generally by the public were *excluded* from the calculation. He wrote that "mere incidental injuries or benefits, like those suffered and received by the community at large, . . . are to be excluded altogether from the computation."[62] Similarly, in *Constitutional Limitations*, Justice COOLEY stated that

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[59] 1 Cooley, The General Principles of Constitutional Law in the United States of America (1880), p 337.

[60] *Id.* at 338.

[61] 1 Cooley, Constitutional Limitations (1st ed), p 565.

[62] General Principles, pp 341-342 (citations omitted).

> there must be excluded from consideration those benefits which the owner receives only in common with the community at large in consequence of his ownership of other property, and also those incidental injuries to other property, such as would not give to other persons a right to compensation, while allowing those which directly affect the value of the remainder of the land not taken; such as the necessity for increased fencing, and the like.[63]

These are, of course, only secondary authorities concerning the scope of damages recoverable for a partial taking. However, given the pervasive, perennial influence of Justice COOLEY's scholarly work on the development of Michigan law, these passages buttress the inference that those sophisticated in the law before 1963 understood that those "general effects" of a taking felt by the public are not compensable in a partial taking.

The reality is that there is negligible direct pre-1963 caselaw or other evidence that allows one to say with conviction that our ratifiers understood that a taking included recovery of "general effects" damages, while there is some evidence pointing to the opposite conclusion. Given the standard of review we must apply in a constitutional challenge to a statute, we conclude that there is insufficient evidence to overcome the presumption of constitutionality.

V. RESPONSE TO THE DISSENT

The essential challenge of the dissent is that "just compensation" is not a term of art but is an ordinary phrase with a "commonsense" understanding—one that before 1963, Michigan constitutions required a

[63] Constitutional Limitations, pp 569-570 (citations omitted).

jury of freeholders to determine.[64] The dissent obviously assumes that, because a jury is given the responsibility to apply a legal standard to a set of facts, the jury also has *unfettered* discretion to define that standard. This thesis cannot be squared with how juries function generally in our judicial system and raises the question whether the dissent believes that *any* claim of damages, even the most absurd, could be properly excluded from a determination of "just compensation" as a matter of law.[65]

Jurors in our system are instructed on the law; they do not determine the law. Thus, jurors are instructed by the court on the meaning of terms like "reasonable doubt," "duty," and "damages"—to name but a few such terms—all of which can be defined by laymen in a "commonsense way" but have legal meanings that diverge from their plain meaning. Thus, a jury cannot manufacture its own definition of "reasonable doubt" or any of the other similar legal constructs that we expect them to apply in any given case. It is not that juries are intellectually incapable of comprehending these concepts. Rather, we are recognizing that these terms and others have acquired technical, legal meanings over time, which a jury cannot abandon. Such is the case with "just compensation."

While the dissent purports to revere Justice COOLEY, it assiduously ignores Justice COOLEY on this critical

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[64] See also *Silver Creek,* 468 Mich at 375 n 10, and accompanying text (rejecting Justice WEAVER's argument that "just compensation" is "obvious on its face").

[65] Presumably, the dissent's view would preclude instructing a jury that "just compensation" does not include emotional damages. Moreover, the dissent's position cannot be squared with earlier Michigan caselaw that has placed limits on "just compensation" in partial takings, such as *Busch, supra*, and *Watt, supra*.

point. He stressed that the "common understanding" of a phrase in some cases *is* its technical meaning:

> [I]t must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the constitution speaks of an *ex post facto* law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense properly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.[66]

The dissent's position is also internally inconsistent. First, it endorses the "integral and inseparable" method of the Court of Appeals for determining whether "general effects" damages should be compensated, without acknowledging that that test would *not* place the property owner whose property is "separable" from the larger project in the same position he was in prior to the taking. This result is inconsistent with the dissent's guiding principle for awarding "just compensation." Further, the dissent fails to comment on the illogical outcome that results from its position when neighboring property owners suffer the same "general effects" damages but only one has experienced a partial

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[66] Constitutional Limitations, pp 59-60.

taking. Presumably, only the property owner who suffered the partial taking, of even the smallest portion of property, can be compensated for "general effects" damages while the next door neighbor, suffering the same "general effects" damages, gets nothing.[67] Certainly that result is an affront to principles of common sense and equity, over which the dissent claims exclusive domain, because it leaves one property owner in a better position than his neighbor for a common harm. Yet that is the result the dissent's position would compel by striking down MCL 213.70(2).

VI. CONCLUSION

Our decision is not a reflection of what this Court believes "just compensation" *should* encompass in a partial taking. Rather, we have been presented with a question of constitutional law requiring that we ascertain the common understanding of those sophisticated

[67] In *Spiek*, 456 Mich at 332-333, a unanimous opinion signed by the dissenting justices in this case, this Court held that "noise, dust, vibration, and fumes experienced by owners of property along an interstate freeway" do not constitute a compensable taking unless "the damages incurred are unique, special, or peculiar, or in some way different in kind or character from the effects incurred by all property owners who reside adjacent to freeways or other busy highways." Damages from the type of harm suffered by all persons adjacent to a highway are not recoverable even when the plaintiff suffers to a greater degree than other landowners; the harm *must* be different in character to be compensable. *Id*. at 339. The dissent would create an exception to *Spiek* and permit a property owner who suffers a partial taking to recover these exact types of "general effects" damages, even though adjacent property owners who have not experienced a partial taking but suffer the same general effects cannot recover damages. We are not, as the dissent suggests, upset that this outcome would be "unfair." *Post* at 218 n 11. Rather, we are simply noting that the dissent's constitutional exegesis is not self-evident, *a priori*, or intuitive, as it portrays the dissent. Its analysis, while framed as an appeal to "common sense," is anything but, as the dissenting justice's joinder in *Spiek* amply demonstrates.

in the law before 1963 believed this highly technical term of art to mean. Having done so, we have discovered no clear indication that "just compensation" included "general effects" damages before the ratification of our 1963 Constitution and thus hold that MCL 213.70(2) is constitutional. When the constitution places no limit on legislative prerogative, our Legislature is free to act to effectuate the policy of this state. Consequently, if it is desired that property owners in a partial taking be compensated for "general effects" damages, it is up to our Legislature to enlarge by statute the scope of "just compensation."

We reverse the Court of Appeals judgment and remand to the circuit court for further proceedings consistent with this decision.

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

WEAVER, J. (*dissenting*). I dissent from the majority opinion reversing the Court of Appeals judgment and holding that MCL 213.70(2) is constitutional. I would hold that the Legislature, by enacting MCL 213.70(2) and imposing limits on what compensation a property owner could receive upon a partial direct taking, violated the Michigan Constitution's guarantee of "just compensation" for property taken by the government, because the proper process for determining the amount of just compensation is left to a trier of fact. Accordingly, I would affirm the Court of Appeals judgment remanding the case to the circuit court for a trial to determine whether the defendants may receive damages to compensate for the diminution in value of their remaining property after the plaintiff took part of their property to complete a large road construction project.

Furthermore, I dissent with regard to the majority's constitutional analysis of the term "just compensation," because the majority's interpretation of "just compensation" as a legal term of art creates a circular analysis that seemingly abrogates the common understanding of "just compensation" before this Court's first analysis of "just compensation" as a legal term of art in *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367; 663 NW2d 436 (2003). I continue to disagree that "just compensation" is a legal term of art that only those learned in the law would have understood when the Michigan Constitution of 1963 was adopted by the people of this state.[1]

I. FACTS AND PROCEEDINGS

Plaintiff Michigan Department of Transportation (MDOT) initiated this condemnation action under the Uniform Condemnation Procedures Act (UCPA)[2] after the defendants, Rodney and Darcy Tomkins, rejected plaintiff's offer to buy a portion of the Tomkinses' land adjacent to Kenowa Avenue in Kent County. Plaintiff sought to buy the strip of land for use in extending Kenowa Avenue as an overpass over the new M-6 highway that plaintiff was constructing near defendants' property.

Experts for both plaintiff and defendants agreed that the market value of the strip of land at issue was $3,800. The defendants sought additional compensation of $48,200 for the diminution in value of their remaining parcel of land, caused by negative effects arising from the "dust, dirt, noise, vibration, and smell" of the nearby M-6 highway.

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[1] See my partial dissent in *Silver Creek*, 468 Mich at 382.

[2] MCL 213.51 *et seq*.

Plaintiff filed a motion in limine, arguing that evidence of the general effects of the M-6 highway project was precluded under MCL 213.70(2). Plaintiff also filed, in the alternative, a motion for summary disposition under MCR 2.116(C)(8), arguing that a claim for general-effects damages in a condemnation action is not a claim for which relief may be granted. The trial court granted plaintiff's motion in limine to exclude the evidence of general effects in the calculation of the defendants' just compensation.

Plaintiff filed a motion for summary disposition under MCR 2.116(C)(10). The defendants stipulated the entry of a final judgment for the value of the land taken, $3,800, plus statutory interest, expert fees, and attorney fees.

The Court of Appeals reversed the trial court's decision to grant plaintiff's motion in limine.[3] The Court of Appeals held that all relevant factors must be taken into account when determining the value of just compensation under the Michigan Constitution and, thus, it concluded that the preclusion of general-effects damages under MCL 213.70(2) violated the Michigan Constitution. The Court stated that in a partial taking "[w]here the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land."[4] While retaining jurisdiction, the Court of Appeals remanded the case to the trial court for the court to determine whether there was an issue of

[3] *Dep't of Transportation v Tomkins*, 270 Mich App 153; 715 NW2d 363 (2006).

[4] *Id*. at 168, quoting *Andrews v Cox*, 129 Conn 475, 482; 29 A2d 587 (1942).

fact with regard to whether the Kenowa Avenue overpass, for which the defendants' strip of land was taken, was "integral [to] and inseparable" from the M-6 construction project. On remand, the trial court concluded that there was an issue of fact. Thereafter, the Court of Appeals again remanded the case to the trial court to determine defendants' just compensation, taking into account all factors relevant to the market value of defendants' remaining property.

Plaintiff sought leave to appeal in this Court, and this Court granted leave.[5]

II. STANDARD OF REVIEW

Questions concerning the constitutionality of a statutory provision are subject to review de novo. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001).

III. THE CONSTITUTIONALITY OF MCL 213.70(2)

Article 10, § 2 of the 1963 Michigan Constitution secures the right of property owners to just compensation when the government takes land for public use. At the time of the instant condemnation suit, Const 1963, art 10, § 2 provided:[6]

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

This Court has held on a number of occasions that the just compensation provided in Const 1963, art 10, § 2 "must put the party injured in as good position as he

[5] 478 Mich 903 (2007).

[6] Const 1963, art 10, § 2 has since been amended by ballot initiative in 2006, but that amendment is not at issue in this case.

would have been if the injury had not occurred." *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961).[7]

In the instant case, plaintiff MDOT sought to directly take part of the defendants' property. In cases involving claims of partial taking, this Court has held that "just compensation" entitles the property owner to direct compensation for the value of the property taken, and consequential damages for the diminution in value of the remainder of the property owner's property.[8] "[A]ny evidence that would tend to affect the market value of the property as of the date of condemnation is relevant." *Dep't of Transportation v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999). The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion considering all the relevant facts in a particular case.[9]

The UCPA prescribes the manner in which just compensation is "first made or secured" pursuant to Const 1963, art 10, § 2. Section 20(2) of the UCPA, MCL 213.70(2), precludes property owners from including the general effects of a taking in the calculation of just compensation. The statute provides:

> The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be

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[7] See also *Wayne Co v Britton Trust*, 454 Mich 608, 622; 563 NW2d 674 (1997); *In re Edward J Jeffries Homes Housing Project*, 306 Mich 638, 650; 11 NW2d 272 (1943); *In re Widening of Bagley Ave*, 248 Mich 1, 5; 226 NW 688 (1929); *Fitzsimons & Galvin, Inc v Rogers*, 243 Mich 649, 664; 220 NW 881 (1928).

[8] *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 81; 222 NW 325 (1928); *In re Widening of Fulton Street*, 248 Mich 13, 20-21; 226 NW 690 (1929).

[9] *In re Widening of Bagley Ave*, 248 Mich at 4.

> considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation. To the extent that the detrimental effects of a project are considered to determine just compensation, they may be offset by consideration of the beneficial effects of the project.

The Court of Appeals correctly held that MCL 213.70(2) violated Const 1963, art 10, § 2.

Article 10, § 2 guarantees that a landowner will receive "just compensation" for a taking of that landowner's property. MCL 213.70(2), by partially limiting the compensation a landowner may receive in certain situations, decreases the amount of just compensation for landowners and, thus, it conflicts with the mandate of art 10, § 2 that "[c]ompensation shall be determined in proceedings in a court of record." The Legislature does not have the authority to take away, or limit, the right of just compensation that the Constitution has guaranteed to landowners.

The majority errs by ruling that MCL 213.70(2) is constitutional. The majority does not cite any authority the Legislature has to limit "just compensation." The majority states that acts of the Legislature are presumed constitutional. Instead of examining the text of the Constitution other than the words "just compensation," the majority looks only to pre-1963 cases interpreting "just compensation." By basing its opinion on the lack of precedent that would conflict with MCL 213.70(2), the majority ignores the language in the Constitution stating that the amount of compensation to be paid is a matter for the courts to decide. Furthermore, the majority disregards this Court's precedent

stating that just compensation is designed to return landowners to the position they were in before the taking took place.

With regard to the Court of Appeals remand order to the trial court to determine whether the Kenowa Avenue overpass was "integral [to] and inseparable" from the M-6 project, the Court of Appeals correctly decided the issue. The "integral and inseparable" method, adopted from the Connecticut Supreme Court's *Andrews* decision,[10] is a method of "sound judgment and discretion" that allows owners of land that was directly, but partially, taken to prove that their remaining property suffered diminution in value as a result of the taking.[11]

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[10] See n 4, *supra*.

[11] The "integral and inseparable" test offers courts a method of sound judgment and discretion in determining who may collect general-effects damages for partial takings because it ensures that compensation will only be awarded when a court finds that the general effects felt by the landowner arose from the taking of the landowner's property. Under the test, if the land taken was separable from the larger project, and thus did not contribute to the effects felt by the owner, then the owner will not be compensated for those effects not directly related to the taking. Also, while the majority may claim it unfair that a landowner whose property is partially taken may recover general-effects damages while neighboring landowners, whose property remains intact, will not recover the damages even when the neighbors feel the same or worse general effects, the test does not involve a question of fairness, but rather a determination of who may recover for the general effects under the Constitution. The Michigan Constitution draws a line by only providing that just compensation be awarded to the landowners whose property was taken. There is no mention of compensation for landowners whose property was not taken by the government. Furthermore, the "integral and inseparable" test does not create a taking claim where none existed. As this Court held in *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998), general effects cannot be used as the basis for a claim of a taking. However, once a direct taking has been established, just compensation is required to return the injured landowner to the position he or she enjoyed before the taking. In sum, the "integral and inseparable" test allows a jury to follow the Constitution by awarding just compensation to

In this case, the proper question in determining the amount of money required to return the defendants to their position before the taking is whether the project for which the defendants' land was taken contributed to the diminution of value of the remainder of the defendants' property.

Accordingly, I vote to affirm the Court of Appeals decision remanding the case for trial, and I support the reasons for the Court of Appeals decision.

IV. "JUST COMPENSATION" AS A TERM OF ART

In *Silver Creek*, a majority of justices held that the Constitution's term "just compensation" was a legal term of art that only those learned in the law could have understood when the Michigan Constitution was adopted in 1963.[12] I dissented from that holding because it wrongly limited the analysis of the term "just compensation" to the understanding of those learned in the law, even though the constitutions throughout Michigan's history left the determination of just compensation to other "freeholders" (landowners).[13] The majority's constitutional analysis in this case reveals the flaws inherent in an analysis limited to the understanding of those learned in the law.

The majority, sticking to the "learned in the law" form of analysis, looks only to past cases interpreting the "just compensation" provision of the Michigan Constitution. The majority holds that, because this

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those whose property was partially and directly taken, and the test allows the jury, in determining the amount of just compensation, to award damages that arise from the taking, in order to return the landowner to the same position the landowner enjoyed before the taking.

[12] 468 Mich at 375-376.

[13] See my discussion of "just compensation" in previous constitutions, *id*. at 385-386.

Court had not interpreted "just compensation" with regard to "general effects" damages, a person sophisticated in the law in 1963 would not have understood "just compensation" to include "general effects" damages. The majority then reasons that, because a person sophisticated in the law in 1963 would not have understood "just compensation" to include "general effects" damages, the Constitution's term "just compensation" does not include such damages. Thus, the majority concludes that the provision in MCL 213.70(2) precluding general-effects damages does not conflict with the Constitution and the statute is constitutional. I find the majority's reasoning to be deeply flawed because the majority only looks for a pre-1963 case on point, and when it finds that there is no case on point, it ignores the plain language of the Constitution and marginalizes other cases interpreting "just compensation."

In my *Silver Creek* dissent, I noted the long-established condemnation rule that " 'j]ust compensation' has long been readily and reasonably understood to be that amount of money that puts the property owner whose property is taken in as good, but not better, a financial position after the taking as the property owner enjoyed before the taking."[14] In the instant case, the majority disregards this rule because this Court had never specifically used it with regard to "general effects" damages. However, common sense dictates that if compensation for the "general effects" damages would serve to place the landowner in the position he or she was in before the taking, then "general effects" damages would be includable in "just compensation." But the majority's "legal term of art"

[14] 468 Mich at 384-385, citing *Britton Trust*, 454 Mich at 622; *In re Edward J Jeffries Homes Housing Project*, 306 Mich at 650; and *In re Widening of Bagley Ave*, 248 Mich at 5.

analysis only looks to the understanding of those "learned in the law." It does not look to the "common" understanding of the people who ratified the Constitution.

Rather than adhere to the majority's "legal term of art" analysis of "just compensation," this Court should return to Michigan's longstanding rule for interpreting the Michigan Constitution, as described by Justice COOLEY, under which

> [*t*]*he interpretation that should be given* [the Constitution] *is that which reasonable minds, the great mass of the people themselves, would give it*. ". . . [T]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding* . . . ."[15]

As I stated in my partial dissent in *Silver Creek*, 468 Mich at 383, "this Court should not engage in a method of constitutional construction that unnecessarily sidesteps the long-established primary rule of constitutional construction." Accordingly, I continue to dissent from the majority's "legal term of art" analysis of "just compensation."

V. CONCLUSION

I dissent from the majority opinion reversing the Court of Appeals judgment and holding that MCL 213.70(2) is constitutional. I would hold that the Legislature, by enacting MCL 213.70(2) and imposing limits on what compensation a property owner could receive upon a partial direct taking, violated the Michigan Constitution's guarantee of just compensation for

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[15] *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley, Constitutional Limitations, p 81 (emphasis in *Traverse City*).

property taken by the government, because the proper process for determining the amount of just compensation is left to a trier of fact. Accordingly, I would affirm the Court of Appeals judgment remanding the case to the trial court.

Furthermore, I dissent with regard to the majority's constitutional analysis of the term "just compensation," because the majority's interpretation of "just compensation" as a legal term of art creates a circular analysis that abrogates the common understanding of just compensation before this Court's first analysis of "just compensation" as a legal term of art in *Silver Creek*.

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

PEOPLE v REAM

Docket Nos. 134913 and 134925. Argued December 13, 2007. Decided June 11, 2008.

David G. Ream was convicted by a jury in the Oakland Circuit Court of first-degree felony murder, MCL 750.316(1)(b), and first-degree criminal sexual conduct (CSC I), MCL 750.520b(1), for fatally stabbing a woman in the abdomen and genital area. The court, Rae Lee Chabot, J., sentenced the defendant for both murder and CSC I, which was the predicate felony for the murder conviction. The Court of Appeals, FITZGERALD, P.J., and SAWYER and O'CONNELL, JJ., affirmed the defendant's felony-murder conviction and sentence but vacated the conviction and sentence for CSC I on the ground that it violated the constitutional protections against double jeopardy. Unpublished opinion per curiam, issued July 31, 2007 (Docket No. 268266). The defendant and the prosecutor each filed an application for leave to appeal with the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the applications or take other peremptory action. 480 Mich 935 (2007).

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

Convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not necessarily violate the multiple-punishments strand of the Double Jeopardy Clause of the United States and Michigan constitutions. Because each of the offenses for which the defendant was convicted has an element that the other does not, they are not the "same offense" and, therefore, the defendant may be punished for both. Accordingly, *People v Wilder*, 411 Mich 328 (1981), which held to the contrary, is overruled.

1. The language "same offense" has the same meaning in the context of the multiple-punishments strand as it does in the successive-prosecutions strand of the Double Jeopardy Clause. To determine whether two offenses are the "same offense" for double-jeopardy purposes, this Court applies the test set forth in *Blockburger v United States*, 284 US 299 (1932), which focuses on the

abstract statutory elements of the offenses rather than the particular facts of the individual case. If each offense contains an element that the other does not, the offenses are not the "same offense," and, thus, a defendant may be punished separately for each offense.

2. *Wilder*, which held that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony necessarily violates double-jeopardy protections, was wrongly decided because it did not apply the *Blockburger* same-elements test.

3. First-degree felony murder contains an element not included in first-degree criminal sexual conduct, namely, the killing of a human being. Similarly, first-degree criminal sexual conduct contains an element not necessarily included in first-degree felony murder, namely, a sexual penetration. First-degree felony murder does not necessarily require proof of a sexual penetration because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct. Because first-degree felony murder and first-degree criminal sexual conduct each contains an element that the other does not, they are not the "same offense" under either the United States Constitution or the Michigan Constitution, and, therefore, the defendant may be punished separately for each offense.

Reversed in part; conviction and sentence reinstated; defendant's application for leave to appeal denied.

Justice CAVANAGH, dissenting, would hold that multiple convictions for felony murder and the underlying felony violate constitutional double-jeopardy protections, stating that the majority's exclusive application of *Blockburger* to determine legislative intent by comparing the abstract statutory elements of a compound offense to one of its predicate offenses, rather than comparing the actual elements that comprised a defendant's conviction, runs afoul of valid United States Supreme Court precedent and does not adequately protect against double jeopardy when the abstract elements of a statute differ from the actual elements that can sustain a conviction under that statute.

Justice KELLY, dissenting, would affirm the judgment of the Court of Appeals because there is no evidence that the Legislature intended to permit convictions of both felony murder and the predicate felony, and agreed with Justice CAVANAGH that the majority misapplied *Blockburger* by failing to account for the unique properties of compound offenses. She wrote separately to indicate her continued adherence to the principles set forth in her dissenting opinion in *People v Smith*, 478 Mich 292 (2007)—specifically, that the previously overruled *People v Robideau*, 419

Mich 458 (1984), provided to Michigan citizens the appropriate protection against multiple punishments—and to express her disagreement with the majority's decision to overrule *Wilder*, which is consistent with the analysis set forth in *Robideau*.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FELONY MURDER — PREDICATE FELONY.

Convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the multiple-punishments strand of the Double Jeopardy Clause of the United States and Michigan constitutions if each of the offenses for which the defendant was convicted has an element that the other does not (US Const, Ams V, XIV; Const 1963, art 1, § 15).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Appellate Division Chief, and *Danielle Walton*, Assistant Prosecuting Attorney, for the people.

Shirley J. Burgoyne for the defendant.

MARKMAN, J. At issue here is whether convicting and sentencing a defendant for both first-degree felony murder and the predicate felony violates the "multiple punishments" strand of the Double Jeopardy Clause of the United States and Michigan constitutions. Following a jury trial, defendant was convicted and sentenced for first-degree felony murder and first-degree criminal sexual conduct, where the latter constituted the predicate felony for the former. The Court of Appeals affirmed defendant's first-degree felony-murder conviction and sentence, but vacated defendant's first-degree criminal sexual conduct conviction and sentence on double-jeopardy grounds. We conclude that convicting and sentencing a defendant for both felony murder and the predicate felony does not necessarily violate the "multiple punishments" strand of the Double Jeopardy Clause, and, thus, we overrule *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). Because each of the

offenses for which defendant was convicted has an element that the other does not, they are not the "same offense" and, therefore, defendant may be punished for both. Accordingly, we reverse the part of the Court of Appeals judgment that vacated defendant's first-degree criminal sexual conduct conviction and sentence, and we reinstate them. In addition, defendant's application for leave to appeal the judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

I. FACTS AND PROCEDURAL HISTORY

Defendant forced his 92-year-old neighbor into her bedroom, stripped her of her clothing, and killed her by stabbing her in the abdomen and genital area 23 times with a kitchen knife. Following a jury trial, defendant was convicted and sentenced for first-degree felony murder and first-degree criminal sexual conduct, where the latter was the predicate felony for the felony-murder conviction. The Court of Appeals affirmed defendant's felony-murder conviction and sentence, but vacated the criminal sexual conduct conviction and sentence on double-jeopardy grounds. Unpublished opinion per curiam, issued July 31, 2007 (Docket No. 268266). Both the prosecutor and defendant filed applications for leave to appeal in this Court. We heard oral argument on whether to grant the prosecutor's application or take other peremptory action permitted by MCR 7.302(G)(1). 480 Mich 935 (2007).

II. STANDARD OF REVIEW

A double-jeopardy challenge presents a question of constitutional law that this Court reviews de novo. *People v Nutt,* 469 Mich 565, 573; 677 NW2d 1 (2004).

III. ANALYSIS

Const 1963, art 1, § 15 states, "No person shall be subject for the same offense to be twice put in jeopardy."[1] The provision affords individuals "three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Nutt,* 469 Mich at 574. The first two protections comprise the "successive prosecutions" strand of double jeopardy, *id.* at 575, while the third protection comprises the "multiple punishments" strand. *People v Smith,* 478 Mich 292, 299; 733 NW2d 351 (2007).

In *Nutt,* 469 Mich at 576, a case involving the "successive prosecutions" strand, this Court explained that "[a]pplication of the same-elements test, commonly known as the '*Blockburger* test,'[2] is the well-established method of defining the Fifth Amendment term 'same offence.' " This test " 'focuses on the statutory elements of the offense.' " *Id.* (citation omitted). " 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.' " *Id.* (citation omitted). "In sum, offenses do

[1] Similarly, US Const, Am V states, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." This Court has explained that although we are not " 'bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution,' " "we have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15 as well." *People v Smith,* 478 Mich 292, 302 n 7; 733 NW2d 351 (2007), quoting *Harvey v Michigan,* 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).

[2] *Blockburger v United States,* 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

not constitute the 'same offense' for purposes of the 'successive prosecutions' strand of double jeopardy if each offense requires proof of a fact that the other does not." *Smith,* 478 Mich at 304.

In *Smith,* 478 Mich at 316, this Court further explained that the "the ratifiers intended that the term 'same offense' be given the same meaning in the context of the 'multiple punishments' strand of double jeopardy that it has been given with respect to the 'successive prosecutions' strand." Therefore, multiple punishments are authorized if " ' "each statute requires proof of an additional fact which the other does not . . . ." ' " *Id.* at 307, quoting *Blockburger v United States,* 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) (citation omitted).[3]

In *Wilder,* 411 Mich at 342, this Court held that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony violates the "multiple punishments" strand of the Double Jeopardy Clause. However, *Wilder* did not apply *Blockburger*'s same-elements test. Instead, the Court held that "[w]here the proof adduced at trial indicates that one offense is a necessarily or cognate lesser included offense of the other, then conviction of both the offenses will be precluded." *Id.* at 343-344. The Court then concluded that because the predicate felony is a "necessary element of every prosecution for first-degree felony murder," convicting and sentencing a defendant for both the felony murder and the predicate felony will always violate the Double Jeopardy Clause. *Id.* at 345.

[3] However, if "the legislature expressed a clear intention that multiple punishments be imposed," " ' "imposition of such sentences does not violate the Constitution," ' regardless of whether the offenses share the 'same elements.' " *Smith,* 478 Mich at 316, quoting *Missouri v Hunter,* 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983) (citation and emphasis omitted).

The Court proceeded to explain that "the fact that the elements of first-degree felony murder do not in every instance require or include the elements of armed robbery [the predicate felony in *Wilder*] does not mean the offense of armed robbery is not necessarily included in the felony murder here." *Id.* at 345. "Though theoretically arguable, such a position is irrelevant when the legal analysis depends not upon the theoretical elements of the offense but upon proof of facts actually adduced." *Id.* at 345-346.

However, this approach, as *Wilder* itself recognized, is inconsistent with *Blockburger*:

> [T]he test concerning multiple punishment under our constitution has developed into a broader protective rule than that employed in the Federal courts. Under Federal authority, the Supreme Court established the "required evidence" test enunciated in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See also its original expression in *Morey v Commonwealth*, 108 Mass 433 (1871). In *Blockburger*, the Court outlined their test:
>
> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 US [at] 304.
>
> This approach isolates the elements of the offense as opposed to the actual proof of facts adduced at trial. See *Harris v United States*, 359 US 19, 23; 79 S Ct 560; 3 L Ed 2d 597 (1959); *United States v Kramer*, 289 F2d 909, 913 (CA 2, 1961). Under this test, convictions of two criminal offenses arising from the same act are prohibited only when the greater offense necessarily includes all elements of the lesser offense. Accordingly, conviction of both offenses is precluded only where it is impossible to commit the greater offense without first having committed the lesser offense. From the perspective of lesser included offenses, the Supreme Court in cases concerning double

jeopardy has thus adhered to the common-law definition of such offenses. See *People v Ora Jones*, [395 Mich 379,] 387[; 236 NW2d 461 (1975)].

The Federal test in *Blockburger* can thus be distinguished from this Court's approach in two principal ways. First, we find the proper focus of double jeopardy inquiry in this area to be the proof of facts adduced at trial rather than the theoretical elements of the offense alone. Proof of facts includes the elements of the offense as an object of proof. Yet, the actual evidence presented may also determine the propriety of finding a double jeopardy violation in any particular case. See *People v Martin*, [398 Mich 303,] 309[; 247 NW2d 303 (1976)]; *People v Stewart*, [400 Mich 540,] 548[; 256 NW2d 31 (1977)]; *People v Jankowski*, [408 Mich 79,] 91[; 289 NW2d 674 (1980)].

Second, we have held that double jeopardy claims under our constitution may prohibit multiple convictions involving cognate as well as necessarily included offenses. *People v Jankowski*, [408 Mich at] 91. [*Wilder,* 411 Mich at 348-349 n 10.][4]

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[4] We are perplexed by Justice CAVANAGH's criticism that we "misappl[y] the *Blockburger* test," *post* at 244 , while at the same time asserting that he would "retain *Wilder*'s approach of relying 'not upon the theoretical elements of the offense but upon proof of facts actually adduced' in determining whether multiple convictions are permitted under the Double Jeopardy Clause," *post* at 251, quoting *Wilder,* 411 Mich at 346. In *Wilder*, the Court *itself* acknowledged that its decision was inconsistent with *Blockburger* because *Blockburger* looked to the abstract legal elements of the offenses, rather than to the specific facts alleged in a particular case. *Wilder,* 411 Mich at 348-349 n 10.

We are similarly perplexed by Justice KELLY's contention that *Wilder* is consistent with federal authority, *post* at 257, when *Wilder* itself stated that "the test concerning multiple punishment under our constitution has developed into a broader protective rule than that employed in the Federal courts." *Wilder,* 411 Mich at 348 n 10. Although *Wilder* stated, "The decision we reach in this case is fundamentally consistent with existing authority of the United States Supreme Court," it immediately proceeded to explain the differences between its decision and federal decisions, which differences go to the very heart of the question that is at issue here. *Wilder,* 411 Mich at 348-349.

Shortly after *Wilder* was decided, it was called into question by this Court's decision in *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984). Like the Court in *Wilder,* the Court in *Robideau* rejected the *Blockburger* test; however, it also rejected the *Wilder* test. In place of these tests, the *Robideau* Court, 419 Mich at 487, set forth "general principles" to be used to ascertain whether the Legislature intended to impose multiple punishments, such as "[w]here two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments." In addition, "[w]here one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Id.*

Robideau criticized *Wilder* for "appl[ying] a method of analysis taken from successive-prosecution cases [to a "multiple punishments" case] . . . and look[ing] to the facts of the case." *Robideau,* 419 Mich at 482. The Court explained:

> [P]rior decisions of this Court [such as *Wilder*] have applied a factual test in single-trial multiple-punishment cases, creating areas in which arguably the Legislature cannot now act. To the extent that those decisions interpret the prohibition against double jeopardy as a substantive limitation on the Legislature, we now disavow them. [*Id.* at 485.]

Therefore, *Robideau* appeared to overrule *Wilder*.[5]

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[5] Justice KELLY states that *Robideau* "noted that *Wilder*'s analysis did not expressly turn on legislative intent" and then accuses us of "stretch-[ing] this criticism to argue that *Robideau* impliedly overruled *Wilder*." *Post* at 261. However, as already discussed, and as any reader of *Robideau* can plainly see, this decision clearly said more about *Wilder* than Justice KELLY acknowledges. She further states that "*Robideau* emphasized that application of its principles to earlier double jeopardy decisions of this

Even assuming that *Robideau* did not expressly overrule *Wilder,* it did so implicitly. *Robideau* concluded that the Double Jeopardy Clause does not prohibit multiple punishments for convictions and sentences of both first-degree criminal sexual conduct, MCL 750.520b(1)(c) (penetration under circumstances involving any "other felony"), and the underlying "other felony" used to prove the first-degree criminal sexual conduct. That is, *Robideau* held that convicting and sentencing a defendant for both first-degree criminal sexual conduct and the predicate "other" felony does not violate the "multiple punishments" strand of the Double Jeopardy Clause. This conclusion is, of course, wholly at odds with *Wilder*'s conclusion that convicting and sentencing a defendant for both felony murder and the predicate felony violates the "multiple punishments" strand.[6] Therefore, *Robideau,* if not expressly, at least implicitly, overruled *Wilder*.[7]

This Court's recent decision in *Smith,* overruling *Robideau,* also called *Wilder* into question.[8] In *Smith,* 478 Mich at 318-319, we concluded that convicting and sentencing a defendant for both first-degree felony

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Court was unlikely to yield different results." *Post* at 261. However, *Robideau*'s principles led to a different result in that very case as compared to the result reached in *Wilder*. See n 6 *infra*.

[6] In light of this, we have no idea how Justice KELLY can argue that the result reached in *Wilder* is "consistent with the result dictated by *Robideau*." *Post* at 255, 262, 264, 265. In *Wilder,* the Court held that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony violates double jeopardy. In *Robideau,* the Court held that convicting and sentencing a defendant for both first-degree criminal sexual conduct and the predicate felony does not violate double jeopardy. These decisions are not at all consistent and, contrary to Justice KELLY's contention, *post* at 264-265 n 41, the differences in sentences applicable to those offenses do not render these decisions consistent.

[7] It is noteworthy that Justice CAVANAGH does not refer at all to *Robideau*. It has slipped down a memory hole.

[8] In her dissent, Justice KELLY restates a significant portion of her dissent in *Smith*. Rather than restating our response, we simply refer the reader to it. *Smith,* 478 Mich at 319-323.

murder (where the predicate felony was larceny) and the non-predicate felony of armed robbery does not violate the "multiple punishments" strand. We explained that *Robideau* was predicated on two propositions: "(1) Michigan's Double Jeopardy Clause afforded greater protections than the Double Jeopardy Clause of the United States Constitution, *Wilder*, [411 Mich] at 348 n 10; and (2) the *Blockburger* test did not account for Michigan's then-current recognition of 'cognate' lesser included offenses as 'lesser offenses' under a fact-driven analysis." *Smith,* 478 Mich at 314. *Wilder* was also based upon these propositions. However, as we explained in *Smith,* 478 Mich at 314-315:

> This conclusion that the Michigan Constitution affords greater protection than the Fifth Amendment has no basis in the language of Const 1963, art 1, § 15, the common understanding of that language by the ratifiers, or under Michigan caselaw as it existed at the time of ratification. Further, the concern expressed by the Court that *Blockburger* does not account for cognate lesser included offenses is no longer pertinent in light of *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002).[13]

> [13] In *Cornell*, we held that an offense is an "offense inferior to that charged in the indictment" for purposes of MCL 768.32(1) when " 'the lesser offense can be proved by the same facts that are used to establish the charged offense.' " *Cornell, supra* at 354 (citation omitted). In other words, an offense is the "same offense" for purposes of jury instructions if conviction of the greater offense necessarily requires conviction of the lesser offense.[9]

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[9] In *Cornell,* 466 Mich at 355, this Court held that MCL 768.32 "foreclose[s] consideration of cognate lesser offenses, which are only 'related' or of the same 'class or category' as the greater offense and may contain some elements not found in the greater offense," and *Wilder,* 411

In addition, as discussed earlier, both *Wilder* and *Robideau* rejected the *Blockburger* test for purposes of the "multiple punishments" strand.[10] However, in *Nutt,* 469 Mich at 591-592, this Court re-adopted the *Blockburger* test for purposes of the "successive prosecutions" strand of double jeopardy. And, in *Smith,* 478 Mich at 314-315, we concluded that there is no reason to apply a different test to the "multiple punishments" strand of double jeopardy:

> [N]othing in the language of the constitution indicates that the ratifiers intended to give the term "same offense" a different meaning in the context of the "multiple punishments" strand of double jeopardy than it has in the context of the "successive prosecutions" strand. In the absence of any evidence that the term "same offense" was intended by the ratifiers to include criminal offenses that do not share the same elements, we feel compelled to overrule *Robideau* and preceding decisions that are predicated on the same error of law, and to hold instead that *Blockburger* sets forth the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15.[11]

Mich at 345, recognized that "the underlying felony might be characterized as a cognate lesser included offense, not a necessarily included offense."

[10] Defendant concedes that *Blockburger*'s "same elements" test is applicable here.

[11] In *People v Harding,* 443 Mich 693, 712; 506 NW2d 482 (1993), this Court, using *Robideau*'s "general principles," concluded that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony violates the "multiple punishments" strand. However, as noted, *Robideau* was expressly overruled in *Smith*. On the other hand, because *Smith* involved a conviction and sentence for first-degree felony murder and a non-predicate felony, *Smith* did not address "*Wilder*'s holding that the constitution bars multiple punishments for first-degree felony murder and the predicate felony"; however, it did note that "*Wilder*'s focus on the 'proof of facts adduced at trial[]' seems questionable in light of the distinction between cognate lesser offenses and lesser included offenses dictated by the Court in *Cornell*." *Smith,* 478 Mich at 318 n 16.

Finally, *Wilder* was also based on the proposition that it is the facts of the case rather than the abstract legal elements that are determinative with regard to a double-jeopardy challenge. However, as the Court in *Wilder,* 411 Mich at 349 n 10, acknowledged, the *Blockburger* test focuses on the abstract legal elements.[12] *Blockburger*, 284 US at 304 (concluding that there was no double-jeopardy violation because "*upon the face of the statute*, two distinct offenses are created") (emphasis added). That is, " '[i]n applying the *Blockburger* rule, the United States Supreme Court has focused on the legal elements of the respective offenses, not on the particular factual occurrence which gives rise to the charges.' " *Smith*, 478 Mich at 309, quoting *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 395; 280 NW2d 793 (1979).[13]

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[12] As discussed earlier, the Court in *Wilder*, 411 Mich at 349 n 10, explained:

> [The *Blockburger* test] isolates the elements of the offense as opposed to the actual proof of facts adduced at trial. Under this test, convictions of two criminal offenses arising from the same act are prohibited only when the greater offense necessarily includes all elements of the lesser offense. Accordingly, conviction of both offenses is precluded only where it is impossible to commit the greater offense without first having committed the lesser offense. [Citations omitted.]

[13] In *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich at 397, this Court held that convicting and sentencing a defendant for both felony-firearm and the underlying felony does not violate the "multiple punishments" strand because "[i]t is possible, legally, to commit felony-firearm without committing second-degree murder." We explained, "[i]n applying the *Blockburger* rule, the United States Supreme Court has focused on the legal elements of the respective offenses, not on the particular factual occurrence which gives rise to the charges." *Id.* at 395. It is interesting that Justice CAVANAGH does not even mention *Wayne Co Prosecutor v Recorder's Court Judge.* As with *Robideau*, see n 7, this case has also fallen down a memory hole.

In *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975), the Court held that "the [*Blockburger*] test focuses on the statutory elements of the offense." However, in *Harris v Oklahoma,* 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), a "terse per curiam," *United States v Dixon,* 509 US 688, 698; 113 S Ct 2849; 125 L Ed 2d 556 (1993), that did not even mention *Blockburger,* the Court held that a subsequent prosecution for robbery with a firearm was barred by the "successive prosecutions" strand because the defendant had already been convicted of felony murder based on the robbery with a firearm. Subsequently, in *Whalen v United States,* 445 US 684, 694; 100 S Ct 1432; 63 L Ed 2d 715 (1980), expanding on *Harris,* the Court held that convicting and sentencing a defendant for both first-degree felony murder and rape, where the rape was the predicate felony, violated the "multiple punishments" strand because "proof of rape is a necessary element of proof of the felony murder." In *Albernaz v United States*, 450 US 333, 338; 101 S Ct 1137; 67 L Ed 2d 275 (1981), quoting *Iannelli,* 420 US at 785 n 17, the Court again held that " 'the [*Blockburger*] test focuses on the statutory elements of the offense.' " However, in *Grady v Corbin,* 495 US 508, 520; 110 S Ct 2084; 109 L Ed 2d 548 (1990), the Court, relying on *Harris* for the proposition that "a strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause" because *Blockburger* only requires "a technical comparison of the elements of the two offenses," expressly adopted the "same conduct" test that was used in *Harris* and *Whalen*—a test that is directly at odds with the notion that the focus is on the statutory elements.[14] However, the "same conduct"

[14] Justice CAVANAGH indicates that *Whalen* must not have been using the "same conduct" test because it did not specifically refer to the "same

test was explicitly abandoned in *Dixon,* 509 US at 704. Therefore, the *Blockburger* test once again is the controlling test for addressing double-jeopardy challenges, and " 'the [*Blockburger*] test focuses on the statutory elements of the offense.' " *Albernaz,* 450 US at 338, quoting *Iannelli,* 420 US at 785 n 17. See *Robideau,* 419 Mich at 475-478, which rejected *Harris* and *Whalen* even before *Dixon* was decided, relying on *Albernaz*.[15]

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conduct" test. *Post* at 247. We disagree. The fact that a court does not specifically proclaim its utilization of a particular test does not mean that it was not, in fact, employing that test. Even a perfunctory review of the Court's decision in *Whalen* indicates that it was using the "same conduct" test, as evinced by the fact that the Court focused on the defendant's *conduct* in that particular case, rather than the abstract legal *elements* of the offenses at issue.

[15] Although Justice CAVANAGH is correct that "none of the United States Supreme Court cases cited by the majority for the proposition that *Blockburger* compels a comparison of abstract statutory elements involves a compound offense such as Michigan's felony-murder statute," *post* at 245 (emphasis omitted), we do cite two Michigan Supreme Court cases for this proposition that *do* involve a compound offense. In *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich at 397, this Court, as discussed earlier, held that convicting and sentencing a defendant for both felony-firearm and the underlying felony does not violate the "multiple punishments" strand because "[i]t is possible, legally, to commit felony-firearm without committing second-degree murder." In addition, as also discussed above, this Court in *Robideau*, 419 Mich at 466, concluded that the Double Jeopardy Clause does not prohibit multiple punishments for convictions and sentences of both first-degree criminal sexual conduct, MCL 750.520b(1)(c) (penetration under circumstances involving any "other felony"), and the underlying "other felony" used to prove the first-degree criminal sexual conduct.

Justice CAVANAGH relies on three decisions to support his conclusion that *Whalen* remains controlling authority. However, only one of these decisions involved a compound offense such as Michigan's felony-murder statute. *Rutledge v United States*, 517 US 292; 116 S Ct 1241; 134 L Ed 2d 419 (1996), involved a lesser included offense and *Whalen* was merely cited for the proposition that convicting a defendant of both the greater offense and the lesser included offense violates double jeopardy. In *United States v Stafford,* 831 F2d 1479, 1483-1484 (CA 9, 1987), the court held that convicting the defendant of violating a statute that required proof of

Further, we must not lose sight of the fact that the *Blockburger* test is a tool to be used to ascertain legislative intent. *Missouri v Hunter,* 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983). Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements.[16]

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an "overt act in furtherance of the underlying unlawful activity" and the underlying unlawful activity did not violate double jeopardy because committing an overt act in furtherance of a crime is not the "same" as actually committing the crime. Finally, although *United States v Chalan,* 812 F2d 1302 (CA 10, 1987), did involve a compound offense, it was decided before *Dixon,* which expressly overruled the "same conduct" test that *Whalen* used, and it did not discuss whether only the abstract legal elements or the particular facts of the case should be considered.

[16] Contrary to Justice CAVANAGH's assertion, *post* at 244, 251-252, 254, we certainly do recognize that the *Blockburger* test is a tool to be used to ascertain legislative intent and that it is not the exclusive tool for doing this. As this Court explained in *Smith,* 478 Mich at 316:

> In interpreting "same offense" in the context of multiple punishments, federal courts first look to determine whether the legislature expressed a clear intention that multiple punishments be imposed. Where the Legislature does clearly intend to impose such multiple punishments, " 'imposition of such sentences does not violate the Constitution,' " regardless of whether the offenses share the "same elements." Where the Legislature has not clearly expressed its intention to authorize multiple punishments, federal courts apply the "same elements" test of *Blockburger* to determine whether multiple punishments are permitted. [Citations omitted; see also n 3 of this opinion.]

The dissenting justices, on the other hand, would turn our (and the United States Supreme Court's) double-jeopardy jurisprudence on its head by effectively holding that multiple punishments can only be imposed if the Legislature has expressly stated that multiple punishments for specific offenses are permitted. However, neither this Court nor the United States Supreme Court has ever adopted such a rule, and we will not do so here today. Instead, we continue to view the fact that the Legislature has authorized the punishment of two offenses that are not the "same offense," i.e., each offense includes an element that the other does not, as a relatively clear legislative intent to allow multiple punish-

Moreover, as we explained in *Nutt,* 469 Mich at 590, in adopting Const 1963, art 1, § 15, the ratifiers of our constitution intended our double-jeopardy provision to be construed consistently with the interpretation given to the Fifth Amendment by federal courts at the time of ratification. And, at the time of the ratification, federal courts had adopted the abstract legal elements test of *Blockburger*. *Blockburger,* 284 US at 304 (concluding that there was no double-jeopardy violation because *"upon the face of the statute*, two distinct offenses are created") (emphasis added); *Harris v United States,* 359 US 19, 23; 79 S Ct 560; 3 L Ed 2d 597 (1959) (concluding that there was no double-jeopardy violation because "the violation, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes") (emphasis omitted).

Finally, we note that a majority of the states focus on the abstract legal elements. Hoffheimer, *The rise and fall of lesser included offenses,* 36 Rutgers L J 351, 413-414 (2005); see, e.g., *Montana v Close,* 191 Mont

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ments. Although Justice CAVANAGH states that he would not require "an explicit reference to multiple punishments and consecutive sentencing," *post* at 254, we are at a loss as to how else the Legislature could sufficiently indicate to his satisfaction that multiple punishments are permitted given his conclusion that "[i]n the absence of clear legislative intent to the contrary, I would conclude that the Legislature did not intend to impose punishments for felony murder and its necessarily required predicate felony." *Post* at 254. Likewise, although Justice KELLY states that she "do[es] not suggest that the only way to discern whether the Legislature intended to permit multiple punishments is to find explicit language in the statute," *post* at 265 n 41, she repeatedly states that "the felony-murder statute contains no language indicating an intent to permit multiple punishments" and that "[n]o conclusive evidence can be discerned that the Legislature intended to permit convictions for both felony murder and the predicate felony." *Post* at 262, 263, 265. What short of an explicit reference would suffice under the standards of the dissenting justices?

229, 247; 623 P2d 940 (1981) (holding that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the "multiple punishments" strand).

For these reasons, we conclude that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the "multiple punishments" strand of the Double Jeopardy Clause if each offense has an element that the other does not.

In deciding whether to overrule precedent, we consider "(a) whether the earlier decision was wrongly decided, and (b) whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 757; 641 NW2d 567 (2002). With regard to the first inquiry, we believe, as we have already discussed, that *Wilder* was wrongly decided because it is inconsistent with the common understanding of "same offense." With regard to the second inquiry, we must examine "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." *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000). "[T]o have reliance[,] the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Id.* at 467. Overruling *Wilder* will disrupt no reliance interests because no person could conceivably have relied on that decision to his or her detriment. That is, we cannot conceive that anyone has committed a first-degree felony murder on the basis that, under *Wilder,* he or she could only be punished for the first-degree felony murder and not also

the predicate felony. Finally, failing to overrule *Wilder* would produce inconsistent rules regarding the meaning of the language "same offense" in Const 1963, art 1, § 15. For these reasons, assuming that there is still life left in *Wilder,* we expressly overrule *Wilder*.

In the instant case, defendant was convicted of both first-degree felony murder and first-degree criminal sexual conduct, where the latter constituted the predicate felony for the felony-murder conviction. The killing of a human being is one of the elements of first-degree felony murder. MCL 750.316(1)(b); *People v Carines,* 460 Mich 750, 758-759; 597 NW2d 130 (1999) (citation omitted). Sexual penetration is one of the elements of first-degree criminal sexual conduct. MCL 750.520b(1). First-degree felony murder contains an element not included in first-degree criminal sexual conduct, namely, the killing of a human being. Similarly, first-degree criminal sexual conduct contains an element not necessarily included in first-degree felony murder, namely, a sexual penetration. First-degree felony murder does not necessarily require proof of a sexual penetration because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct. First-degree felony murder is the killing of a human being with malice " 'while committing, attempting to commit, or assisting in the commission of *any* of the felonies specifically enumerated in [MCL 750.316(1)(b)].' " *Carines,* 460 Mich at 758-759 (emphasis added; citation omitted). Therefore, unlike first-degree criminal sexual conduct, first-degree felony murder does not necessarily require proof of a sexual penetration. That is, "[i]t is []possible to commit the greater offense [first-degree felony murder] without first committing the lesser offense [first-degree criminal sexual conduct]." *Cornell,* 466 Mich at 361. Because first-degree felony murder and first-degree criminal

sexual conduct each contains an element that the other does not, we conclude that these offenses are not the "same offenses" under either the Fifth Amendment or Const 1963, art 1, § 15, and, therefore, defendant may be punished separately for each offense.

IV. CONCLUSION

We conclude that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not necessarily violate the "multiple punishments" strand of the Double Jeopardy Clause, and, thus, we overrule *Wilder*. Because each of the offenses for which defendant was convicted, felony murder and first-degree criminal sexual conduct, contains an element that the other does not, they are not the "same offense" and, therefore, defendant may be punished for both. Accordingly, we reverse the part of the Court of Appeals judgment that vacated defendant's first-degree criminal sexual conduct conviction and sentence, and we reinstate defendant's first-degree criminal sexual conduct conviction and sentence. In addition, defendant's application for leave to appeal the judgment of the Court of Appeals is considered and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

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

CAVANAGH, J. (*dissenting*). Today, the majority overrules longstanding precedent and replaces it with a holding that will fail to preserve the constitutional protection against double jeopardy. The majority misapplies the test enunciated by *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932),

and, in doing so, unconstitutionally subjects defendant to multiple punishment for the same offense. Thus, I respectfully dissent.

The Double Jeopardy Clause of the Michigan and United States constitutions protects against both successive prosecutions and multiple punishments for the "same offense."[1] This case concerns the prohibition against imposing multiple punishments for the same offense. The United States Supreme Court has stated that in the multiple-punishment context, the interest that the Double Jeopardy Clause seeks to protect is " 'limited to ensuring that the total punishment did not exceed that authorized by the legislature.' " *Jones v Thomas*, 491 US 376, 381; 109 S Ct 2522; 105 L Ed 2d 322 (1989), quoting *United States v Halper*, 490 US 435, 450; 109 S Ct 1892; 104 L Ed 2d 487 (1989). Thus, the controlling matter is legislative intent, because it determines whether multiple convictions impermissibly involve the same offense for purposes of the protection against multiple punishment. *Whalen v United States*, 445 US 684, 688-689; 100 S Ct 1432; 63 L Ed 2d 715 (1980).[2] The Supreme Court has described the *Blockburger* test as a "rule of statutory construction to help determine legislative intent." *Garrett v United States*, 471 US 773, 778-779; 105 S Ct 2407; 85 L Ed 2d 764 (1985). In *Blockburger*, the Court held that "[t]he applicable rule is that, where the same act or transac-

[1] Const 1963, art 1, § 15; US Const, Ams V and XIV. See also *United States v Wilson*, 420 US 332, 343; 95 S Ct 1013; 43 L Ed 2d 232 (1975), quoting *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

[2] However, although the constitution grants the legislative branch exclusive authority to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, "[t]his is not to say that there are not constitutional limitations upon this power." *Whalen*, *supra* at 689 n 3.

tion constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, *supra* at 304.

This Court adopted *Blockburger*'s "same elements" test to determine whether multiple convictions would violate Michigan's Double Jeopardy Clause in *People v Smith*, 478 Mich 292, 296; 733 NW2d 351 (2007). I dissented in *Smith*, because I believed that the use of the *Blockburger* test alone is not always sufficient to safeguard the double-jeopardy protections of the United States and Michigan constitutions. I continue to oppose this Court's exclusive use of *Blockburger* to discern legislative intent, particularly in compound-offense cases. This case illustrates the error of the majority's treatment of *Blockburger*. The majority misapplies the *Blockburger* test by comparing the abstract elements of a compound offense to one of its predicate offenses, rather than comparing the actual elements that were established at trial and that actually comprise the defendant's convictions. In addition, the majority errs by accepting the result reached by its application of the *Blockburger* test without considering the fundamental matter of legislative intent.

The majority applies *Blockburger* to this case by comparing the abstract, statutory elements of felony murder with those of first-degree criminal sexual conduct (CSC-I).[3] MCL 750.316(1)(b); MCL 750.520b(1). It

[3] The felony-murder statute lists several offenses that may serve as predicate offenses to felony murder, such as arson, CSC-I, robbery, kidnapping, and child abuse, among many others; they constitute the abstract, statutory elements of felony murder. However, the predicate offenses are listed in the alternative, so proof of *all* the possible predicate felonies listed as elements in felony murder's statutory definition is not required to secure a conviction for felony murder.

observes that CSC-I contains the element of sexual penetration, while felony murder can be based on a different predicate offense that does not necessarily require proof of a sexual penetration. *Ante* at 241. The result of the majority's approach is that the compound offense of felony murder and the predicate offense of CSC-I are deemed not to be the "same offense" because they each contain an element that the other does not. In support of this method, the majority eagerly cites authority that stands for the proposition that the *Blockburger* test operates by comparing the abstract legal elements of the respective offenses under consideration, not the actual proof of facts adduced at trial. *Ante* at 235-237.

Significantly, *none* of the United States Supreme Court cases cited by the majority for the proposition that *Blockburger* compels a comparison of abstract statutory elements involves a compound offense such as Michigan's felony-murder statute.[4] *Id*. The Supreme

[4] *Iannelli v United States*, 420 US 770; 95 S Ct 1284; 43 L Ed 2d 616 (1975), involved convictions for conspiring to violate and violating a federal gambling statute. *Iannelli* did not rely on *Blockburger* to reach its conclusion, but rather, was convinced by "the history and structure of the Organized Crime Control Act of 1970," which "manifest[ed] a clear and unmistakable legislative judgment" to treat conspiracy to violate the act and the consummated crime as separate offenses. *Id*. at 791.

Albernaz v United States, 450 US 333; 101 S Ct 1137; 67 L Ed 2d 275 (1981), concerned convictions for conspiracy to import marijuana and conspiracy to distribute marijuana. The issue was whether consecutive sentences could be imposed under those two provisions when the convictions arose from participation in a single conspiracy with multiple objectives. *Id*. at 336-337.

Blockburger considered whether a defendant could be convicted under two different statutes for a single criminal act—in particular, where a single sale of drugs violated a provision that prohibited selling the drug other than in its original packaging, as well as a provision that prohibited selling the drug not in pursuance of a written order of the purchaser. *Blockburger, supra* at 301.

Court did not address *Blockburger*'s application to compound offenses until *Whalen*, which presented the opportunity to consider whether convictions for rape and for the killing of the same victim in the perpetration of rape could be sustained under the Double Jeopardy Clause. *Whalen*, *supra* at 685-686. The felony-murder statute at issue required proof of a killing and of the commission or attempted commission of one of six specified felonies, in the course of which the killing occurred.[5] *Id*. at 686. Rape was one of the specified felonies; it was also punishable separately under its own statutory provision. *Id*.

The Court relied on legislative history to determine that Congress intended the federal courts to apply the *Blockburger* test when construing the criminal provisions of the District of Columbia Code; thus, the Court applied the *Blockburger* test to the felony-murder and rape statutes. *Id*. at 692-693. Notably, the Court did not focus on the abstract statutory elements of these offenses, but, rather, compared the elements that were necessary to prove felony murder with those of the predicate felony. *Id*. at 694. It observed that "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Id*. at 693-694. Thus, "Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that 'each provision requires proof of a fact which the other does not.' " *Id*. at 693.

Moreover, the Court specifically rejected the argument that felony murder and rape were not the "same" offense under *Blockburger* simply because felony mur-

[5] The provisions at issue were part of the District of Columbia Code.

der does not *always* require proof of a rape, but can be based on one of the other enumerated felonies. *Id*. at 694. The Court stated:

> In the present case . . . proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it. [*Id*.]

In short, the Court unequivocally held that double-jeopardy analysis for compound offenses relies not on the abstract statutory elements of the offenses, but on the elements that actually comprise the convictions under consideration. Significantly, *Whalen* appeared to view its holding as consistent with *Blockburger*; it never indicated that it was departing from *Blockburger* or that it was using a "same conduct" test, as the majority suggests. *Ante* at 236. *Whalen* simply recognizes that in applying the *Blockburger* test to compound offenses, it is essential to consider the elements of the actual predicate offense involved, rather than merely to compare the abstract elements of the offenses—an approach that would overlook the actual relationship between the convictions. Given that this Court has adopted the *Blockburger* test, *Whalen*'s approach to applying the *Blockburger* test to compound offenses should guide this Court's application.

However, the majority implies that *Whalen* is no longer relevant authority. *Ante* at 237. To support its theory, the majority equates *Whalen*'s application of *Blockburger* with the "same conduct" test that was

adopted by *Grady v Corbin*, 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990), which was overruled by *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993).[6] But *Whalen*'s approach and the *Grady* "same conduct" test are meaningfully distinct; thus, it is erroneous to conclude that the overruling of *Grady* extends to *Whalen* as well. To begin with, *Grady* developed the "same conduct" test as a special accommodation for successive-prosecution cases *only,* while *Whalen* was a multiple-punishment case. *Grady*, *supra* at 520-521. Moreover, *Grady* indicated that the "same conduct" test was an additional inquiry to be made after the *Blockburger* test was applied, while *Whalen* simply described how to apply the *Blockburger* test to compound-offense cases. *Id*. at 521. Finally, unlike *Grady*, *Whalen* remained focused on the elements of the offenses, not the broader consideration of the conduct constituting the offenses. It is also noteworthy that when *Dixon* overruled *Grady*, it dismissed the notion that *Harris v Oklahoma*, 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), had been an antecedent to *Grady*. *Dixon*, *supra* at 706. *Harris* mirrored *Whalen*'s conclusion in the context of a successive-prosecution case, and the majority has asserted that *Harris* and *Whalen* both used the *Grady* "same conduct" test. But *Dixon* itself rejected the suggestion that *Harris* applied the "same conduct" test: "*Harris* never uses the word 'conduct,' and its entire discussion focuses on the *elements* of the two offenses. See, *e.g*., 433 U.S. at 682-683, n. (to prove felony murder, 'it was necessary for all the ingredients of the underlying felony' to be proved)." *Id*.

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[6] *Grady* describes the "same conduct" test as barring "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, *supra* at 521.

In sum, *Dixon* did not overrule *Whalen*, and none of the cases cited by the majority even hints that *Whalen*'s approach is inconsistent with the *Blockburger* test or with prevailing law. In fact, since *Whalen* was decided, a number of cases have followed or cited its rule.[7] The majority suggests that two arguably relevant Michigan cases I have not addressed in my dissent have fallen "down a memory hole," *ante* at 232 n 7; 235 n 13, but meanwhile, the majority engages in the truly Orwellian tactic of arguing that *Whalen* has been overruled and is not to be followed, though in fact it remains valid United States Supreme Court precedent.The statutory provisions discussed in *Whalen* are similar to the provisions under consideration in this case, and I find *Whalen*'s reasoning applicable here. Defendant was convicted of felony murder under MCL 750.316(1)(b), which provides:

> A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, arson, *criminal sexual conduct in the first, second, or third degree*, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree under section 145n, torture under section 85, or aggravated stalking under section 411i. [Emphasis added.]

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[7] See, e.g., *Rutledge v United States*, 517 US 292, 297 n 6; 116 S Ct 1241; 134 L Ed 2d 419 (1996); *United States v Stafford*, 831 F2d 1479, 1482 (CA 9, 1987); *United States v Chalan*, 812 F2d 1302, 1316-1317 (CA 10, 1987).

Defendant was also convicted of CSC-I, MCL 750.520b(1):

> 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 any of the following circumstances exists . . . .[8]

Like the District of Columbia felony-murder statute examined in *Whalen*, the Michigan felony-murder statute lists several offenses that may serve as the predicate offense for felony murder. The predicate offenses are listed in the alternative, so a conviction for felony murder does not *always* require proof of CSC-I. But even though defendant was convicted under a statute listing a number of other possible predicate felonies, his conviction did not require proof of the elements of *all* of the possible predicate felonies; it only required proof of the elements of CSC-I. The information charging defendant and the jury instructions from his trial specify that the felony-murder charge was based on CSC-I. In other words, in defendant's case, proof of all the elements of CSC-I was a necessary element of the felony-murder conviction. But applying the *Blockburger* test as the majority suggests—by comparing only the abstract statutory elements—will not reflect the reality that proof of CSC-I was necessarily included in defendant's felony-murder conviction. When the abstract elements of a statute differ from the actual elements that can sustain a conviction under that statute, basing a comparison on the abstract statutory elements will not adequately protect against double jeopardy.

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[8] The requisite circumstances are enumerated in MCL 750.520b(1)(a)-(h); in this case, the jury was required to find that defendant was armed at the time with a weapon or with any other object used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon. See MCL 750.520b(1)(e).

This Court recognized this shortcoming in *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981), and reached a conclusion that was consistent with *Whalen*. In *Wilder*, this Court held that conviction of both felony murder and the underlying felony of armed robbery violates the Double Jeopardy Clause of the Michigan Constitution. *Id*. at 352. We observed that "the fact that the elements of first-degree felony murder do not in every instance require or include the elements of armed robbery does not mean the offense of armed robbery is not necessarily included in the felony murder here." *Id*. at 345. For double-jeopardy analysis, " 'the question is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged, but whether, on the facts of the case at issue, it is.' " *Id*. at 346, quoting *People v Jankowski*, 408 Mich 79, 91; 289 NW2d 674 (1980). I would retain *Wilder*'s approach of relying "not upon the theoretical elements of the offense but upon proof of facts actually adduced" in determining whether multiple convictions are permitted under the Double Jeopardy Clause. *Id*. at 346. Thus, using the approach presented by *Wilder* and *Whalen*, the *Blockburger* test would indicate that convictions for both felony murder and the underlying CSC-I offense are not permissible because CSC-I contains no elements that are not also required for a felony-murder conviction.

Regardless of the method employed for comparing offenses for double-jeopardy purposes, legislative intent remains the determinative factor. The majority compounds its erroneous application of *Blockburger* by accepting its flawed result without considering the fundamental matter of legislative intent. After concluding that felony murder and CSC-I are not the same offense according to its construction of the *Blockburger*

test, the majority fails to consider whether this result resonates with discernable legislative intent. *Ante* at 238.

The United States Supreme Court has rejected the "application of *Blockburger* rule as a conclusive determinant of legislative intent, rather than as a useful canon of statutory construction . . . ." *Garrett, supra* at 779. Moreover, the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history; otherwise, the factual inquiry with regard to legislative intent would be transformed into a conclusive presumption of law. *Id*. In sum, the Court does not rely solely on *Blockburger* in determining whether multiple punishments are constitutionally prohibited; rather, the result of the *Blockburger* test is considered along with indications of legislative intent.

This procedure applies whether the outcome of the *Blockburger* test indicates that the offenses under consideration are the "same offense" or not. For example, in *Whalen*, the Court applied the *Blockburger* test and held that the two statutes in controversy proscribed the "same" offense. *Whalen*, *supra* at 694. Yet, the Court did not conclude its inquiry there; instead, it held that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Id*. at 692. The Court observed no clear appearance of congressional intent to impose cumulative punishments for the two offenses, so it held that cumulative punishments were not permitted. *Id*. at 695. Conversely, applying the *Blockburger* test in *Albernaz* resulted in the opposite conclusion from *Whalen*. There, the Court concluded that the two statutes at issue did not proscribe the same offense

under the *Blockburger* test because each provision required proof of a fact that the other did not. *Albernaz*, *supra* at 339. If the *Blockburger* test served as the exclusive means for determining legislative intent, the Court's inquiry would have ended there. But instead, the Court elaborated:

> The *Blockburger* test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. Nothing, however, in the legislative history which has been brought to our attention discloses an intent contrary to the presumption which should be accorded to these statutes after application of the *Blockburger* test. [*Id*. at 340.]

The Court deduced that because the results of the *Blockburger* test were confirmed by the absence of evidence of legislative intent to the contrary, cumulative punishments of those particular offenses were permissible. *Id*. at 343-344.

Similar to the conclusion reached by *Whalen* Court, I see no evidence of legislative intent to impose multiple punishments for violations of Michigan's felony-murder statute and the underlying felony. The felony-murder statute does not indicate that punishment for that offense should be imposed in addition to punishment for the underlying felony. By contrast, the felony-firearm statute, MCL 750.227b(2), provides:

> A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

While an explicit reference to multiple punishments and consecutive sentencing is not the only way the Legislature could evince its intent to impose multiple punishment, the felony-firearm statute provides an example of a clear indication of legislative intent to impose multiple punishments.[9] In the case of the felony-murder statute, there is no such indication. In the absence of clear legislative intent to the contrary, I would conclude that the Legislature did not intend to impose punishments for felony murder and its necessarily required predicate felony.

In conclusion, I disagree with the majority's application of *Blockburger*, which fails to account for the unique properties of compound and predicate offenses. I also dissent from the use of the *Blockburger* test as an exclusive means of discerning legislative intent for double-jeopardy purposes. I would retain *Wilder*'s holding that multiple convictions for felony murder and the underlying felony violate the Double Jeopardy Clause of the Michigan Constitution, and, accordingly, would affirm the Court of Appeals.

KELLY, J. (*dissenting*). With this case, the majority continues its unprecedented crusade to dismantle Michigan's historic double jeopardy jurisprudence.[1] I dissent.

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[9] The majority mischaracterizes my statement by stating that I effectively conclude "that multiple punishments can only be imposed if the Legislature has expressly stated that multiple punishments for specific offenses are permitted." *Ante* at 238 n 16. In fact, I have plainly stated to the contrary.

[1] See *People v Smith*, 478 Mich 292, 336-340; 733 NW2d 351 (2007) (KELLY, J., dissenting). As I explained in *Smith*, "there are few areas of the law in which the current Michigan Supreme Court majority has altered state law more than double jeopardy jurisprudence." *Id*. at 336. The justices who constitute the majority in this case are the justices who chipped away at the protections afforded by the Double Jeopardy Clause

I agree with Justice CAVANAGH that the majority misapplies *Blockburger v United States*[2] in this case by failing to account for the unique properties of compound offenses. I write separately because I continue to adhere to the principles set forth in my dissent in *People v Smith*.[3] As I explained in *Smith*, *People v Robideau*[4] provided the appropriate protection against multiple punishments in Michigan. *People v Wilder*[5] held that multiple convictions for felony murder and the predicate felony violate the Double Jeopardy Clause of the Michigan Constitution.[6] That holding is consistent with the result dictated by *Robideau*. Accordingly, I would retain *Wilder*'s holding. I would affirm the judgment of the Court of Appeals vacating defendant's first-degree criminal sexual conduct conviction.

THE MULTIPLE-PUNISHMENTS STRAND OF DOUBLE JEOPARDY JURISPRUDENCE

The Double Jeopardy Clause of the Michigan Constitution provides that "No person shall be subject for the same offense to be twice put in jeopardy."[7] The Double Jeopardy Clause of the United States Constitution similarly provides that "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or

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of the Michigan Constitution in *Smith*, *supra* at 324, *People v Davis*, 472 Mich 156, 169; 695 NW2d 45 (2005), and *People v Nutt*, 469 Mich 565, 596; 677 NW2d 1 (2004).

[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

[3] *Smith*, *supra* at 331-347 (KELLY, J., dissenting).

[4] *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984), overruled by *Smith*, *supra* at 315.

[5] *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981).

[6] Const 1963, art 1, § 15.

[7] *Id*.

limb . . . ."[8] The federal Double Jeopardy Clause is applicable to actions by the states.[9]

As I stated in *Smith*: "The Double Jeopardy Clause primarily offers three protections: it protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense."[10]

This case concerns the third double jeopardy protection: protection from multiple punishments for the same offense. The multiple-punishments strand of double jeopardy jurisprudence protects a defendant from the imposition of greater punishment than the Legislature intended.[11] Accordingly, the question whether a particular punishment is an impermissible "multiple" punishment can be determined only by ascertaining legislative intent.[12]

THIS COURT'S DECISION IN *PEOPLE V WILDER*

In *Wilder*, this Court addressed whether the defendant's right not to be subjected to multiple punishments for the same offense was violated. The defendant had been convicted and sentenced for both first-degree felony murder and the predicate felony of armed robbery.[13] As a matter of state constitutional law, *Wilder* held that the conviction for the predicate felony and felony murder violated the prohibition against double

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[8] US Const, Am V.

[9] *Benton v Maryland*, 395 US 784, 795-796; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

[10] *Smith*, *supra* at 335 (KELLY, J., dissenting).

[11] *Robideau*, *supra* at 485.

[12] *Id*. at 469.

[13] *Wilder*, *supra* at 336.

jeopardy.[14] In so holding, *Wilder* focused on the facts necessary for conviction.[15] The Court reasoned that the predicate felony was a lesser included offense of first-degree felony murder because first-degree felony murder could not have been committed without necessarily committing the predicate felony.[16] The *Wilder* Court observed that its decision was "fundamentally" consistent with federal authority.[17]

The *Blockburger* "same elements" test[18] adopted by the majority is only one means of ascertaining legislative intent.[19] As a rule of statutory construction, the same-elements test is not controlling "where, for example, there is a clear indication of contrary legislative intent."[20] In *Wilder*, this Court recognized that the basic *Blockburger* same-elements analysis was inadequate to protect against multiple punishments when dealing with compound crimes. Thus, as Justice CAVANAGH has thoroughly and persuasively explained, *Wilder* adopted what is essentially a modified version of the same-elements test applicable to compound crimes. Justice CAVANAGH's analysis makes clear that this approach is fundamentally consistent with federal authority.[21]

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[14] *Id*. at 347.

[15] *Id.* at 343-346.

[16] *Id*. at 364.

[17] *Id*. at 348-352.

[18] *Blockburger*, *supra* at 304.

[19] *Ante* at 252 (CAVANAGH, J., dissenting).

[20] *Albernaz v United States*, 450 US 333, 340; 101 S Ct 1137; 67 L Ed 2d 275 (1981).

[21] See *Whalen v United States*, 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980). In *Whalen*, the United States Supreme Court addressed whether convictions for both rape and the killing of the victim in the perpetration of the rape violated the defendant's double jeopardy rights. *Id*. at 685-686. The Court indicated that it was applying the *Blockburger*

THIS COURT'S DECISION IN *PEOPLE V ROBIDEAU*

This Court addressed the multiple-punishment strand of Michigan's Double Jeopardy Clause in 1984 when it decided *Robideau*.[22] It explicitly rejected use of the *Blockburger* test[23] and reasoned that, although *Blockburger*'s "creation of a presumption may make a court's task easier, it may also induce a court to avoid difficult questions of legislative intent in favor of the wooden application of a simplistic test."[24] Instead, this Court used the traditional means of determining legislative intent: the subject, language, and history of the statutes.[25]

In 2007, a majority of the Court used *Smith* to overrule *Robideau*.[26] I dissented from that decision.[27] I

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test. *Id*. at 693-694. However, *Whalen* did not focus on the abstract elements of the rape and felony-murder statutes. *Id*. Rather, the Court considered the elements necessary to prove felony murder and compared them with those necessary to prove the predicate offense. *Id*. at 694.

As I explain later, the federal double jeopardy analysis does not control how Michigan interprets its own constitutional prohibition against double jeopardy. Nevertheless, *Whalen* is important because it highlights the fact that the basic *Blockburger* same-elements analysis is inadequate as pertains to compound offenses. If it is to be used, it should be applied as it was in *Whalen.* The elements necessary to prove felony murder must be compared with the elements necessary to prove the predicate offense. The Court must then consider any other indicators of legislative intent. By failing to adopt this approach, the majority misapplies *Blockburger* in the context of a compound offense.

The majority claims to be "perplexed" by my assertion that *Wilder* is consistent with federal authority. *Ante* at 230 n 4. Yet *Wilder* clearly states that its decision is "fundamentally consistent with existing authority of the United States Supreme Court." *Wilder*, *supra* at 348-349.

[22] *Robideau*, *supra* at 458.

[23] *Id*. at 485-486.

[24] *Id*. at 486.

[25] *Id*.

[26] *Smith*, *supra* at 315.

continue to believe that *Robideau* was correctly decided for the reasons expressed in my dissenting opinion in *Smith*:

> In *Robideau*, this Court exhaustively reviewed federal caselaw concerning double jeopardy. *Robideau*, 419 Mich at 472-480. After concluding that federal jurisprudence offered no concrete guidance, this Court exhaustively reviewed Michigan caselaw concerning Michigan's Double Jeopardy Clause. *Id*. at 480-484. Similarly, this Court found that Michigan's double jeopardy analysis had not been consistent. *Id.* at 484.
>
> This Court noted that it had concluded in *White*[28] that the transactional approach was the correct standard to use with regard to successive prosecutions. *Id.* at 485. However, because different interests were involved, a different standard was needed for cases involving multiple punishments. *Id.* Accordingly, after conducting an extensive caselaw analysis, this Court explicitly rejected the *Blockburger* test, preferring instead traditional means of determining the intent of the Legislature: the subject, language, and history of the statutes. *Id.* at 486.
>
> *Robideau* was based on the Michigan Constitution and Michigan caselaw. The test in *Robideau* adequately safeguards a Michigan citizen's right to be free from multiple punishments for the same offense. As noted in *Robideau*, when multiple punishments are involved, the Double Jeopardy Clause is a restraint on the prosecution and the courts, not on the Legislature. *Id.* at 469. The test in *Robideau* ensures that the defendant does not receive more punishment than intended by the Legislature. Accordingly, it adequately protects the double jeopardy rights of Michigan citizens.
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> Moreover, the *Robideau* Court was free to use its own preferred methods of ascertaining judicial [sic: legislative] intent. As noted repeatedly throughout *Robideau*, the

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[27] *Id*. at 331-347 (KELLY, J., dissenting).

[28] *People v White*, 390 Mich 245; 212 NW2d 222 (1973), overruled by *Nutt*, *supra* at 591.

Blockburger test is simply a method for determining legislative intent. *Robideau*, 419 Mich at 473, 478, citing *Gore v United States*, 357 US 386; 78 S Ct 1280; 2 L Ed 2d 1405 (1958) (stressing that *Blockburger* was decided as a matter of legislative intent), and *Albernaz,* 450 US at 338 (noting that the *Blockburger* test was merely a means to determine legislative intent and that the presumption created by the *Blockburger* test could be rebutted by a clear indication of legislative intent to the contrary).

I believe this is the proper lens through which to view *Blockburger*: It is simply one of many methods by which a court can discern the Legislature's intent. It is not a definitive test that should, or could, be used in every case. Indeed, as noted by this Court in *Robideau*, "it would be quite contrary to established principles of federalism for the United States Supreme Court to impose on the states the method by which they must interpret the actions of their own legislatures." *Robideau*, 419 Mich at 486. Accordingly, the *Robideau* Court was within its authority to reject the *Blockburger* test and instead fashion a test that properly reflected the protections of the Michigan Constitution.

The majority believes that the constitution's ratifiers intended our double jeopardy provision to be construed consistently with the interpretation given the Fifth Amendment by federal courts at the time of ratification. I disagree. As I noted in my dissent in *Davis*, the sole concern in revisiting the Double Jeopardy Clause in our state constitution was to clarify that jeopardy attaches when a jury is sworn, as our courts had interpreted. *Davis,* 472 Mich at 181 (KELLY, J., dissenting).

In *Davis*, I also rejected the majority's claim that the people of Michigan intended to adopt the federal interpretation of the Double Jeopardy Clause. *Id.* Specifically, I did not agree with the majority that the ratifiers knew how the United States Supreme Court had interpreted the federal Double Jeopardy Clause and that they accepted it. *Id.* I did not agree that the ratifiers were willing to allow the federal government to interpret our constitution for us. *Id.* I continue to believe that my analysis in *Davis* was correct. Therefore, I continue to reject the majority's presumption

that the voters of our state intended that Michigan's Double Jeopardy Clause be interpreted exactly as the federal provision is interpreted.

The majority overturns *Robideau* also in the belief that the Michigan Constitution does not afford greater protections than does the Fifth Amendment of the United States Constitution. As an initial matter, I would note that the *Robideau* Court did not expressly base its decision on this assertion. Regardless, this Court has, for decades, determined that our constitutional prohibition against double jeopardy affords greater protection than does the Fifth Amendment. See, e.g., *Robideau*, 419 Mich at 507 n 5 (CAVANAGH, J., dissenting), citing *People v Wakeford*, 418 Mich 95, 105 n 9; 341 NW2d 68 (1983), *People v Carter*, 415 Mich 558, 582-584; 330 NW2d 314 (1982), *Wilder*, 411 Mich at 343-349, *People v Jankowski*, 408 Mich 79, 91-92, 96; 289 NW2d 674 (1980), and *White*. Accordingly, for the reasons I have stated, I continue to believe *Robideau* was correctly decided.[29]

THE RESULT REACHED IN *WILDER* IS NOT AT ODDS WITH *ROBIDEAU*

Robideau noted that *Wilder*'s analysis did not expressly turn on legislative intent.[30] The majority stretches this criticism to argue that *Robideau* impliedly overruled *Wilder*. I disagree. In fact, *Robideau* emphasized that application of its principles to earlier double jeopardy decisions of this Court was unlikely to yield different results.[31] *Robideau* only disavowed prior multiple-punishment cases to the extent that those decisions suggested that the prohibition against double jeopardy operates as a substantive limitation on the Legislature.[32] The result reached in *Wilder* is consistent

[29] *Smith*, *supra* at 341-344 (KELLY, J., dissenting).

[30] *Robideau*, *supra* at 482.

[31] *Id*. at 488 n 7.

[32] *Id*. at 485.

with the analysis dictated by *Robideau*. Using the traditional means of discerning legislative intent, I conclude that the Legislature did not intend to impose multiple punishments for first-degree felony murder and the predicate felony.

The starting point for determining legislative intent is the text of the statute.[33] Here, the felony-murder statute contains no language indicating an intent to permit multiple punishments.[34]

"A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature."[35] In *Robideau*, this Court noted that first-degree criminal sexual conduct and the predicate crimes of robbery and kidnapping carry the same penalties. This demonstrates, the Court reasoned, that the Legislature intended the crimes to be punished separately.[36] *Robideau* explained that this analysis is consistent with the result reached in *Wilder*:

> Since felony murder is punishable by a mandatory life sentence, while the predicate felonies are punishable by no more than a term of years up to life, it may be inferred that the Legislature intended to punish a defendant only once for committing both crimes. While someone in the process of committing a predicate felony has a real disincentive to commit murder (mandatory life) even absent the threat of dual convictions, the same person, assuming the predicate felony carries an up-to-life maximum penalty, would have no such disincentive to commit criminal sexual conduct *unless* dual convictions are imposed.[37]

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[33] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

[34] See MCL 750.316.

[35] *Robideau*, *supra* at 487.

[36] *Id*. at 488-489.

[37] *Id*. at 489 n 8 (emphasis in original).

Thus, the sanctions authorized by the Legislature for felony murder and the predicate felonies support a conclusion that the Legislature intended to punish a defendant only once.

It is true that prohibiting felony murder and prohibiting the predicate felonies generally protect different social norms. This raises an inference of a legislative intent to permit multiple punishments.[38] However, this inference is not conclusive evidence of legislative intent in light of the contrary inferences raised by the statutory language and authorized punishments.

As Justice RYAN stated in his concurring opinion in *Wilder*, the Double Jeopardy Clause works "as a particularized version of the rule of lenity."[39] This accords with *Robideau*'s holding that if "no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended."[40] No conclusive evidence can be discerned of the Legislature's intent to permit convictions for both felony murder and the predicate felony. Hence, the rule of lenity requires the conclusion that separate convictions were not intended.

The prosecution has suggested that the rule of lenity must be abandoned in light of the Legislature's adoption of MCL 750.2, which states:

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

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[38] *Id*. at 487.

[39] *Wilder*, *supra* at 364 (RYAN, J., concurring).

[40] *Robideau*, *supra* at 488.

It is not clear that the Legislature can dictate a rule of statutory construction to this Court. However, that issue need not be resolved here. This statutory rule aims to ensure that courts construe the criminal code in accordance with the Legislature's intent. If the felony-murder statute is construed according to the fair import of its terms, we must conclude that it does not permit multiple punishments. It contains no language evidencing a legislative intent to permit multiple punishments.

Moreover, construing the felony-murder statute to prohibit multiple punishments promotes justice by ensuring that offenders are not subjected to multiple punishments for the same offense. This construction also conforms to the law's objective of ensuring that those who commit felony murder are severely punished. The trial judge must sentence a defendant to a mandatory term of imprisonment for life when a defendant is convicted of felony murder. This is the most severe punishment permitted under Michigan law. The result reached in *Wilder* is consistent with the analysis set forth in *Robideau* and with MCL 750.2. The Legislature did not intend to impose multiple punishments for first-degree felony murder and the predicate felony.[41]

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[41] The majority proclaims that it cannot understand how the result reached in *Wilder* is consistent with *Robideau*. The consistency in the two hinges on the distinction between first-degree criminal sexual conduct and first-degree felony murder. *Robideau* examined the former, whereas *Wilder* examined the latter. Applying the double jeopardy analysis set forth in *Robideau* to these different statutes yields different results. *Robideau* held that multiple punishments are permissible for first-degree criminal sexual conduct and the predicate felony. This holding was largely premised on the fact that first-degree criminal sexual conduct and its predicate crimes carry the same penalties. *Robideau*, *supra* at 488-490. As *Robideau* explained, felony murder is distinguishable because it is punishable by a mandatory life sentence, whereas its predicate felonies are punishable by lesser sanctions. *Id*. at 489 n 8. This leads to different

CONCLUSION

I dissented from the majority's decision to overrule *Robideau* because *Robideau* provided the appropriate protection against multiple punishments in Michigan. Today, I dissent from the majority's decision to overrule *Wilder*'s holding that convictions for both felony murder and the predicate felony violate the Double Jeopardy Clause of the Michigan Constitution. The result reached in *Wilder* is consistent with the result reached under the analysis set forth in *Robideau*.[42] No conclusive evidence can be discerned that the Legislature intended to permit convictions of both felony murder and the predicate felony. The rule of lenity requires the conclusion that separate convictions were not intended. I would affirm the judgment of the Court of Appeals.

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inferences regarding legislative intent. As any reader of *Robideau* can see, it is the majority that fails to acknowledge what that decision actually says.

Also contrary to the majority's assertion, I do not suggest that the only way to discern whether the Legislature intended to permit multiple punishments is to find explicit language in the statute. Legislative intent must be discerned from the subject and history of the statute as well as from its language.

[42] I do not read *Wilder* as suggesting that the prohibition against double jeopardy operates as a substantive limitation on the Legislature. Whether a particular punishment is an impermissible "multiple" punishment can only be determined by ascertaining legislative intent. Therefore, the Legislature may amend the felony-murder statute to permit multiple punishments for felony murder and the predicate felonies.

STOKES v CHRYSLER LLC

Docket No. 132648. Decided June 12, 2008.

Fredie Stokes sought workers' compensation benefits for a disabling injury he sustained as a forklift driver for Chrysler LLC when it was known as DaimlerChrysler Corporation. A workers' compensation magistrate granted Stokes an open award of benefits, relying on *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997). The Workers' Compensation Appellate Commission (WCAC) remanded the case to the magistrate for reconsideration in light of the standard for disability under MCL 418.301(4) set forth in *Sington v Chrysler Corp*, 467 Mich 144 (2002), which had overruled *Haske* while this case was pending. The magistrate denied Chrysler's motion to compel Stokes to submit to an interview by Chrysler's vocational rehabilitation counselor and motion to adjourn to complete a transferable-skills analysis on Stokes. The magistrate determined that Stokes had met the *Sington* standard and again granted an open award of benefits. The WCAC affirmed. Chrysler appealed by leave granted, and the Court of Appeals, JANSEN and WHITE, JJ. (SAAD, P.J., dissenting), affirmed the award of benefits, but vacated several portions of the WCAC's opinion that the Court held were inconsistent with *Sington*. *Stokes v DaimlerChrysler Corp*, 272 Mich App 571 (2006). Chrysler sought leave to appeal, and the Supreme Court ordered oral argument on whether to grant the application or take other peremptory action. 477 Mich 1097 (2007).

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

A workers' compensation claimant has the burden of proving that he has a disability under MCL 418.301(4), and that burden never shifts to the employer. Once the claimant proves that he is disabled from all jobs within the claimant's qualifications and training, the burden of production shifts to the employer contesting the claim to come forward with evidence to challenge the claimant's proof of disability, and the employer is entitled to discovery before the hearing to enable it to meet this burden.

1. The *Sington* standard for establishing a prima facie case of disability under MCL 418.301(4) requires the claimant to prove a

work-related injury and that the injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. Thus, the claimant must show more than a mere inability to perform a previous job.

2. To establish the element of a reduction in wage-earning capacity in work suitable to a claimant's qualifications and training, the claimant must disclose all of his qualifications and training, including education, skills, experience, and training, regardless of whether they are relevant to the claimant's job at the time of the injury. Next, the claimant must prove what jobs he is qualified and trained to perform that are within the same salary range as the claimant's maximum earning capacity at the time of injury. The claimant must provide some reasonable means to assess employment opportunities within his maximum salary range to which his qualifications and training might translate. Third, the claimant must show that the work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay the claimant's maximum wage. Finally, the claimant must show that he cannot obtain any of the jobs identified as within the claimant's qualifications and training that he is capable of performing.

3. Once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. If discovery is necessary for the employer to sustain its burden of production and present a meaningful defense, the employer has a right to discovery, and if the employer hires an expert to challenge the claimant's proofs, that expert must be permitted to interview the claimant and present the employer's analysis or assessment.

4. The claimant, on whom the burden of persuasion continues to rest, may come forward with additional evidence to challenge the employer's evidence.

5. Stokes did not satisfy his burden of establishing a disability because he only presented evidence of an inability to perform his job as a forklift driver. Moreover, the inability of the expert to interview Stokes effectively denied Chrysler the opportunity to rebut Stokes's proofs. Given the inconsistent application of the *Sington* standard in the past, however, it would be equitable to allow Stokes an opportunity to present his proofs with the guidance provided by the Supreme Court majority opinion in this case.

Reversed in part and remanded to the magistrate for a new hearing.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the majority opinion creates new procedures, a heightened evidentiary standard, and compelled discovery for workers' compensation hearings that the language of the Worker's Disability Compensation Act, MCL 418.101 *et seq*., does not require, thus placing Michigan workers at significant risk. In particular, a claimant under the act will now be required to provide the equivalent of a transferable-skills analysis to show a limitation of the claimant's wage-earning capacity. Additionally, employers will now have a right to discovery, including the right of the employer's vocational expert to interview the claimant. This new right to compel discovery removes the broad discretion to require discovery that the act gave to workers' compensation magistrates. Stokes satisfied the requirements of MCL 418.301(4), and it was reasonable for the magistrate to conclude that Stokes had suffered a reduction in his wage-earning capacity.

Justice WEAVER, dissenting, joined Justice CAVANAGH's dissent, but wrote separately to highlight that her concurrence in *Sington* did not concur in, and differed from, the majority's view that the claimant always has the burden of proof. Justice WEAVER agreed with the Court of Appeals in this case that, once a claimant has established a disability by a preponderance of the evidence, the burden of going forward with the evidence shifts as the parties present their proofs. The burden of proving a disability remains with the claimant, but the burden of proof shifts back and forth as each party presents further evidence. She also concurred with Justice CAVANAGH that the holding in this case requires a claimant to provide a transferable-skills analysis to show a limitation of wage-earning capacity as proof of a disability, contrary to the requirements of MCL 418.301(4) and *Sington*.

1. WORKERS' COMPENSATION — DISABILITY — PROOF OF DISABILITY.

The standard for establishing a prima facie case of disability in a workers' compensation case requires the claimant to prove a work-related injury and that the injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training; the claimant must show more than a mere inability to perform a previous job. (MCL 418.301[4]).

2. WORKERS' COMPENSATION — DISABILITY — WAGE-EARNING CAPACITY.

To establish the element of a reduction in wage-earning capacity in work suitable to his qualifications and training, a workers' compensation claimant must (1) disclose all of his qualifications and

training, including education, skills, experience, and training, regardless of whether they are relevant to the claimant's job at the time of the injury; (2) prove what jobs he is qualified and trained to perform that are within the same salary range as the claimant's maximum earning capacity at the time of injury and provide some reasonable means to assess employment opportunities within his maximum salary range to which his qualifications and training might translate; (3) show that the claimant's work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay the claimant's maximum wage; and (4) show that he cannot obtain any of the jobs identified as within the claimant's qualifications and training that he is capable of performing. (MCL 418.301[4]).

3. WORKERS' COMPENSATION — DISABILITY — EVIDENCE — DISCOVERY.

Once a workers' compensation claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing; if discovery is necessary for the employer to sustain its burden of production and present a meaningful defense, the employer has a right to discovery, and, if the employer hires an expert to challenge the claimant's proofs, that expert must be permitted to interview the claimant and present the employer's analysis or assessment; the claimant, on whom the burden of persuasion continues to rest, may come forward with additional evidence to challenge the employer's evidence. (MCL 418.301[4]).

Daryl Royal and *Mancini, Schreuder, Kline & Conrad, P.C.* (by *Roger R. Kline*), for Fredie Stokes.

Lacey & Jones (by *Gerald M. Marcinkoski* and *Michael T. Reinholm*) for Chrysler LLC.

Amici Curiae:

Martin L. Critchell for the Michigan Self-Insurers' Association, the Michigan Manufacturers Association, and the Michigan Chamber of Commerce.

Bleakley, Cypher, Parent, Warren & Quinn, P.C. (by *Thomas H. Cypher*), for Alticor.

MARKMAN, J. We heard oral argument on defendant employer's application for leave to appeal to consider whether the burden-shifting analysis articulated by the Court of Appeals relieved claimant of the burden of proving that he was disabled from all jobs paying the maximum wages within his qualifications and training, as required by *Sington v Chrysler Corp,* 467 Mich 144; 648 NW2d 624 (2002). A workers' compensation claimant bears the burden of proving that he has a disability under MCL 418.301(4), and that burden does not shift to the employer. MCL 418.851. The claimant must show more than a mere inability to perform a previous job. Once the claimant proves that he is disabled from all jobs within the claimant's qualifications and training, the burden of production shifts to the employer contesting the claim to come forward with evidence to challenge the claimant's proof of disability, and the employer is entitled to discovery before the hearing to enable the employer to meet this production burden. Here, claimant did not sustain his burden of proving by a preponderance of the evidence that he was disabled from all jobs within his qualifications and training. However, given the inconsistent application of the *Sington* standard in the past, we believe that it would be equitable to allow claimant an opportunity to present his proofs with the guidance provided by this opinion. Accordingly, we reverse the Court of Appeals in part and remand the matter to the magistrate for a new hearing consistent with the procedures set forth in this opinion.

I. FACTS AND PROCEDURAL HISTORY

Claimant was a forklift driver for the employer from 1971 to 1999. During his last five years, claimant drove a forklift for about five hours a day and performed dispatch work by entering automotive part numbers on

a keyboard or relaying information over the telephone the rest of the day. Claimant increasingly felt pain in his neck and arms until he could no longer work in the fall of 1999. Claimant's physician opined that claimant's physical activity at work caused repetitive trauma to his cervical spine and aggravated his existing rheumatoid arthritis. On February 15, 2000, claimant had surgery on his cervical spine.

Claimant filed a petition for workers' compensation benefits based on a cervical spine disability. Both experts agreed that claimant was totally disabled from his job, but the employer's expert asserted that the sole cause of the disability was claimant's pre-existing rheumatoid arthritis. The magistrate granted claimant an open award of benefits, relying on *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628, 662; 566 NW2d 896 (1997), which defined "disability" as an injury that prevents the employee from performing any single job within his qualifications and training. The Workers' Compensation Appellate Commission (WCAC) affirmed the finding that claimant's disability was work-related, but remanded the case to the magistrate for reconsideration of the disability issue under the standard set forth in *Sington*, which overruled *Haske* during the pendency of this case.

Before the remand hearing, the employer filed a motion to compel claimant to submit to an interview by the employer's vocational rehabilitation counselor, but the magistrate denied the motion. At the remand hearing, the employer's vocational expert stated that he could not testify with regard to claimant's wage-earning capacity because he needed to complete a 'transferable-skills' analysis but had not met with claimant and had only been retained four days before the hearing. Defense counsel requested an adjournment or continuance

to allow the vocational expert to perform the analysis. The magistrate denied the employer's motion to adjourn because the employer had failed to provide its expert with any of the information already in the employer's possession.

At the remand hearing, claimant testified that he had graduated from high school but had no vocational training. Claimant attended college for brief periods both before and during his employment with the employer, but did not obtain a degree or certification. He had no typing or computer skills, and his only jobs before working for the employer consisted of driving a forklift for a refrigerator warehouse and stocking supplies and materials. Claimant had not worked since leaving his employment with the employer. The magistrate determined that claimant met the *Sington* standard for disability and again granted claimant an open award of benefits.

The WCAC affirmed, concluding that a claimant's qualifications and training consist of the claimant's previous jobs, how much the jobs paid, and the training the claimant received at those jobs. The WCAC stated that the claimant was not required to show other skills he possessed that might transfer to another job. The WCAC also concluded that the magistrate had not abused his discretion in denying the employer's request for an adjournment and that the magistrate did not have the authority to compel claimant to meet with the vocational expert.

The employer sought leave to appeal in the Court of Appeals, but also sought bypass review in this Court. We entered an order denying the bypass application, but directing the Court of Appeals to grant the application and issue its opinion by October 1, 2006. The order stayed the WCAC's opinion and stated that *Boggetta v*

Burroughs Corp, 368 Mich 600; 118 NW2d 980 (1962),[1] remained controlling authority. 475 Mich 875 (2006).

The Court of Appeals, in a split decision, affirmed the award of benefits, but vacated several portions of the WCAC opinion that were inconsistent with *Sington* and *Boggetta*, in particular discussions regarding loss of wages and partial disability. *Stokes v DaimlerChrysler Corp*, 272 Mich App 571, 588, 593-594, 597; 727 NW2d 637 (2006). The Court of Appeals held that suitable work "is not limited to the jobs on the employee's resume, but, rather, includes any jobs the injured employee could actually perform upon hiring." *Id*. at 588. However, the Court of Appeals then decided that the WCAC had not erred in holding that, "as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume" and held that such proofs "in addition to evidence of a work-related injury causing the disability" were adequate to establish a "prima facie case of disability." *Id*. at 589. The "prima facie case," in turn, was adequate to establish a compensable disability *unless* the employer established the existence of real jobs within the employee's training and experience that paid the maximum wage. *Id*. at 590. The Court of Appeals further stated that a transferable-skills analysis could be relevant in evaluating the claimant's qualifications and training, but was not required. *Id*. at 590-591. Finally, the Court of Appeals held that the magistrate possessed the authority to order discovery, but had not abused his discretion in concluding that an interview was unnecessary in this case because the

[1] In *Boggetta*, *supra* at 603, this Court quoted with approval the opinion of the Workmen's Compensation Appeal Board (WCAB), which stated that a hearing referee's responsibility is " 'broad enough to require the answering of interrogatories requested by one of the parties if such answers are necessary to a proper inquiry into the facts.' "

employer had sufficient information in the form of prior testimony to give to the vocational expert. *Id*. at 593-597.

The dissenting judge would have reversed the WCAC decision and remanded to the magistrate because the latter's actions "effectively prevented defendant from preparing and presenting a defense," the inquiry into whether claimant possessed any other transferable skills was improperly limited by considering only claimant's employment history, and the WCAC erroneously concluded that the employer had the burden of proving the existence of jobs within the claimant's qualifications and training. *Id*. at 598-601.

The employer sought leave to appeal in this Court. We directed the clerk to schedule oral argument on whether to grant the application or to take other peremptory action. 477 Mich 1097 (2007).

II. STANDARD OF REVIEW

Findings of fact made by the WCAC are conclusive in the absence of fraud. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). We review de novo questions of law in final orders of the WCAC. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000).

III. ANALYSIS

A. BURDEN OF PROOF TO ESTABLISH A DISABILITY

A claimant under the Worker's Disability Compensation Act (WDCA) must prove his entitlement to compensation and benefits by a preponderance of the evidence. MCL 418.851; *Aquilina v Gen Motors Corp*, 403 Mich 206, 211; 267 NW2d 923 (1978). MCL 418.301(4) provides:

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.[2]

Rea v Regency Olds/Mazda/Volvo, 450 Mich 1201, 1201 (1995), addressed the burden of proof required to establish a disability:

> It is not enough for the claimant claiming partial disability to show an inability to return to the same or similar work. If the claimant's physical limitation does not affect the ability to earn wages in work in which the claimant is qualified and trained, the claimant is not disabled.

Haske, supra at 662, overruled *Rea*, stating: "Where the employee has carried his burden of proving wage loss, he will, as a practical matter, have proven that he is unable to perform a single job within his qualifications and training, and, therefore, that he is disabled."

Subsequently, MCL 418.301(4) was examined thoroughly in *Sington, supra* at 155-159:

> As this language plainly expresses, a "disability" is, in relevant part, a limitation in "wage earning capacity" in work suitable to an employee's qualifications and training. The pertinent definition of "capacity" in a common dictionary is "maximum output or producing ability." *Webster's New World Dictionary* (3d College ed). Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training.

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[2] We do not address the issue of wage loss in this opinion, which, under MCL 418.301(4), is an issue entirely separate from the establishment of disability. Once a plaintiff makes a prima facie showing of disability, the plaintiff must also prove a wage loss. *Sington*, *supra* at 160 n 11.

> So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability.
>
> * * *
>
> [T]he language of § 301(4) requires a determination of overall, or in other words, maximum, wage earning capacity in all jobs suitable to an injured employee's qualifications and training.

Sington, supra at 161, continued by explicitly overruling the burden of proof set forth in *Haske* because it was inconsistent with MCL 418.301(4). At the same time, *Sington, supra* at 156-157, 161, reinstated the prior ruling of *Rea*, concluding that the procedure established in *Rea* was harmonious with the statute.

Thus, the standard for establishing a prima facie case of disability under *Sington* requires that the claimant prove a work-related injury, and that injury must result in a reduction of the claimant's maximum wage-earning capacity in work suitable to his qualifications and training. *Sington*, *supra* at 155. The WCAC has struggled in consistently applying this standard since *Sington*.

B. BURDEN OF PROOF SINCE *SINGTON*

Since *Sington*, lower courts and tribunals have closely analyzed a claimant's burden of proof, but the application of that standard has arguably been inconsistent. In *Kethman v Lear Seating Corp*, 2003 Mich ACO 205, p 6, the WCAC interpreted *Sington* to require the claimant to demonstrate

> 1. his work qualifications and training, and what jobs they translate to, and
>
> 2. that he has a work-related physical or mental impairment which does not permit him to perform jobs within his qualifications and training and that he has lost wages, and
>
> 3. that he is either unable to perform or cannot obtain employment at all those jobs within his qualifications and training that pay his maximum income, which are reasonably available.

The WCAC then stated that, after the claimant proves these three factors, the burden of going forward shifts to the employer, which may present evidence that there were jobs within the claimant's qualifications, training, and physical limitations that were reasonably available. *Id*. at 7. This analysis, in our judgment, constitutes an accurate summation of the *Sington* standard.

In *Peacock v Gen Motors Corp*, 2003 Mich ACO 274, p 19, the WCAC sought to define "qualifications and training," stating that this phrase encompasses formal education, work experience, special training, skills, and licenses. In addition, the WCAC described "suitable" jobs as a phrase that did not delimit the universe of potential jobs, but, rather, included "those jobs that afford a plaintiff an opportunity for consideration to be hired because he possesses the minimum experience, education, and skill." *Id*. at 20. The WCAC's definitions, in our judgment, again constitute accurate summations of these terms.

In *Riley v Bay Logistics, Inc*, 2004 Mich ACO 27, p 7, the WCAC attempted to harmonize existing caselaw by summarizing the *Sington* factors required to prove a threshold disability as follows:

> 1. Has plaintiff established the universe of jobs for which he is qualified and trained, and how much do they pay?

> 2. Has plaintiff established his work related physical or mental impairment, which does not permit him or her to perform jobs within his qualifications and training causing him to lose wages?
>
> 3. Has plaintiff established that he was either unable to perform (or obtain because such jobs were not reasonably available) all the jobs within his qualifications and training that pay his maximum wage (for the purpose of establishing his Section 301(4) threshold disability).

The WCAC also concluded that once the claimant establishes a prima facie case of disability, the burden of persuasion shifts to the employer. *Id*.

Numerous WCAC opinions have quoted the tests set forth in *Kethman* and *Riley*. However, these opinions have not always been consistent in their application of the *Sington* standard. There is a tendency to properly set forth the *Sington* standard, but then to apply the standard in a manner that effectively constitutes a reversion to *Haske*. One example is *Riley* itself, in which *Sington* was applied in a similar manner to that which occurred in the instant case.

While *Riley* scrupulously analyzed the *Sington* standard of proof, the application of that standard was less compelling. For example, the WCAC determined that the claimant's work-related physical restrictions precluded him from performing each job that he had done in the past. *Riley*, *supra* at 6, 8. Taking into account that the claimant had only a ninth-grade education and lacked formal training, the WCAC concluded that the claimant was unable to perform any job within his qualifications. *Id*. The WCAC then inferred that the claimant had thereby established that he could no longer perform the jobs that paid the maximum wage that may have been available. *Id*. at 8. However, the WCAC opinion did not discuss the possibility that the claimant possessed any skills that could transfer to

other job fields. In addition, there was no evidence presented regarding the availability of other jobs or the claimant's job search efforts.

The WCAC continued to address the application of the *Sington* standard in *Bacon v Bedford Pub Schools*, 2005 Mich ACO 47. The WCAC stated that a claimant carries the burden of establishing which jobs fall within the claimant's qualifications and training. *Id*. at 3. However, the WCAC determined that, because of the claimant's limited education and lack of job training, her testimony regarding her work history, education, and physical condition was sufficient to establish the universe of jobs that the claimant was qualified and trained to perform. *Id*. at 4, 7. This analysis, we believe, effected a reversion to the *Haske* standard in the name of *Sington*.

Similarly, in *Higgins v Delphi Automotive Sys*, 2005 Mich ACO 136, p 2, the claimant had testified at the hearing regarding her education, work experience, and inability to return to any of her previous jobs because of her work-related injury. The magistrate found that the claimant's job as an unskilled industrial production worker defined her universe of jobs because her previous jobs had been too remote to be significant. *Id*. The magistrate concluded that the claimant was disabled because her injury precluded her from performing any of the jobs she had done in the past for the same employer. *Id*. at 3. The WCAC affirmed, stating that the magistrate had found credible the claimant's testimony that she was "unable to perform any of the jobs she previously had with defendant." *Id*. at 5. Again, the WCAC effectively reverted to the *Haske* standard in describing the burden of proof.

On the other hand, in *Stanton v Great Lakes Employment*, 2003 Mich ACO 129, pp 2-3, the claimant's

work-related injury precluded him from being able to perform most of his previous jobs because they required him to stand all day. However, the claimant had applied for an estimated 50 jobs, some of which were the types of jobs he had performed in the past, and others were jobs that he had never performed. *Id*. at 1-2. The claimant had also contacted the previous employer from which he had earned his highest pre-injury wages but received no offer. *Id*. at 4. The WCAC determined that the claimant had satisfied the threshold level of disability on the basis of the following factors: the severity of the claimant's injury; that most of his training and qualifications required significant standing and walking; that the claimant had proved his desire to return to work by applying for an estimated 50 jobs; that the claimant had not been offered employment by his employer or another employer; that the employer had not accommodated the claimant's physical restrictions; and that no job had been made known to him for which he failed to apply. *Id*. at 3. The burden of going forward then shifted to the employer, which produced no evidence that there were actual jobs available at the maximum wage within the claimant's qualifications and training. *Id*. at 4. *Stanton*'s application of the *Sington* standard represented a much more accurate and thorough analysis than the analyses of previous cases.

In *Nowak v East Lansing*, 2005 Mich ACO 83, pp 1-2, the claimant was a patrol officer who suffered a work-related injury to her knee. The WCAC stated that the magistrate's finding that the claimant's work-related injury prevented her from working as a patrol officer did not establish a disability under *Sington*. *Id*. at 4. The claimant had continued to work full-time as the head of the parking enforcement unit for the employer and received her full salary. *Id*. at 4, 8. The WCAC

remanded to the magistrate to determine whether the claimant's new position fell within her qualifications and training, whether it constituted "a regular job for which there was a substantial job market," and whether the job paid the maximum salary. *Id*. at 8. If so, then the claimant would not be able to satisfy the definition of "disability" under *Sington*. *Id*. Again, this analysis comports with the standard set forth in *Sington*. If the employer was paying the claimant her full salary because the new job merited that salary, rather than as an accommodation for her injury, then the claimant had not suffered a loss in wage-earning capacity.

Stanton and *Nowak* represent accurate summations of what is required in the application of *Sington* to the facts of a WDCA case. A claimant must do more than demonstrate that his work-related injury prevents him from performing a previous job. *Sington*, *supra* at 161. It is insufficient to merely articulate the *Sington* standard and then overlook necessary steps in its application. Rather, MCL 418.301(4) requires that the claimant prove a limitation in "wage earning capacity in work suitable to his qualifications and training resulting from a personal injury or work related disease" to establish a prima facie case of disability. Therefore, the claimant must first prove a work-related injury. *Sington*, *supra* at 155. Second, that injury must result in a reduction of the claimant's wage-earning capacity in work suitable to his qualifications and training. *Id*. After reviewing the inconsistencies in the WCAC opinions since *Sington*, we set forth the following practical application of the *Sington* standard in this case.

First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the

time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.

Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington*, *supra* at 157. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. *Id*. at 160. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant

has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id*. at 158.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know what jobs are available within that company and has a financial incentive to rehabilitate and re-employ the claimant.

Sixth, in satisfying its burden of production, the employer has a right to discovery under the reasoning

of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853,[3] the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment. The employer may be able to demonstrate that there are actual jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.

Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence.

This precise sequence is not rigid, but rather identifies the nature of the proofs that must precede the fact-finder's decision. Should it become evident in a particular case that a different sequence is more practical, the parties may present their evidence accordingly. However, the magistrate must ensure that all steps are completed in some fashion or another, that all

[3] MCL 418.851 provides, in pertinent part, that "[t]he worker's compensation magistrate at the hearing of the claim shall make such inquiries and investigations as he or she considers necessary." MCL 418.853 allows the magistrate to "administer oaths, subpoena witness, and to examine [] parts of the books and records . . . ."

the facts necessary to the determination of the case are presented, that each side has been accorded an adequate opportunity to respond to the other's proofs, and that the statutory burden of proof is respected. After that point, the magistrate can properly determine whether the claimant has satisfied his obligations under MCL 418.301(4).

We reiterate that MCL 418.851 places the burden of proof on the claimant to demonstrate his entitlement to compensation and benefits by a preponderance of the evidence. This burden of persuasion never shifts to the employer, although the burden of production of evidence may shift between the parties as the case progresses. Because a claimant does not prove a "disability" under MCL 418.301(4) by merely demonstrating the inability to perform any previous jobs, the burden remains on the claimant to demonstrate that there are no available jobs within his qualifications and training that he can perform. Only after the claimant has first sustained this statutory burden of proof does the burden of production shift to the employer to show that there are jobs that the claimant can perform.

C. APPLICATION OF *SINGTON* STANDARD

The WCAC's determination that claimant proved a work-related injury is conclusive because there is no evidence of fraud. *Mudel*, *supra* at 701. At issue is only whether claimant sustained his burden of proving that his work-related injury effected a reduction of his maximum wage-earning capacity in work suitable to his qualifications and training. Because this is a question of law, we review this issue de novo. *DiBenedetto, supra* at 401.

We hold that claimant did not satisfy his burden of establishing a disability. Claimant's demonstration that

he could no longer perform his job because of a work-related injury was simply insufficient to establish a "disability" under MCL 418.301(4). In holding to the contrary, we believe that the Court of Appeals and the WCAC short-circuited the requirements of *Sington* and effected a reversion to *Haske*.

Under *Sington*, claimant was required to demonstrate that the injury to his cervical spine limited his maximum wage-earning capacity in work suitable to his qualifications and training. Claimant merely testified regarding his employment and educational background. Claimant presented no evidence that he had even considered the possibility that he was capable of performing any job other than driving a forklift. Likewise, the lower court, the magistrate, and the tribunal seemingly assumed that because claimant had driven a forklift for so many years, that was all he was able to do and that he had acquired no additional skills throughout his life that might translate to other positions of employment. At a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid his maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. There is no evidence in this case that claimant sought *any* post-injury employment or would have been willing to accept such employment within the limits of his qualifications, training, and restrictions.

The Court of Appeals opinion effectively relieved claimant of this burden of proof by concluding:

> [T]o the extent the WCAC addressed the issue from the standpoint of the production of evidence, and held that as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume—i.e., a listing and description of the jobs the employee held up until the time of the injury, the pay for those jobs, and a

> description of the employee's training and education—and testimony that the employee cannot perform any of the jobs within his qualifications and training paying the maximum wage, the WCAC did not err. By producing such evidence, in addition to evidence of a work-related injury causing the disability, an employee makes a prima facie case of disability—a limitation in the employee's maximum wage-earning capacity in all jobs suitable to the employee's qualifications and training. The WCAC did not err in concluding that such a showing is adequate to establish disability in the absence of evidence showing that there is in fact real work within the employee's training and experience, paying the maximum wage, that the employee is able to perform upon hiring. [*Stokes*, *supra* at 589.]

By finding that claimant had met his burden of proof under *Sington*, in the absence of evidence concerning other jobs for which he might have been qualified, the Court of Appeals suggested strongly that the burden of showing the existence of such jobs is on defendant. It is not.

In this case, claimant did not meet his burden of proving a disability under the WDCA because he only presented evidence of an inability to perform his prior job. However, even if claimant met his burden, the employer was effectively denied the opportunity to rebut claimant's proofs. The employer's pre-trial request to have claimant interviewed by the employer's vocational expert was denied. The employer renewed this request at the remand hearing, but this request was also denied. Because claimant refused to meet with the employer's vocational expert, and the magistrate was unwilling to compel an interview, the employer's vocational expert could only provide speculative testimony regarding the effect of claimant's injury on his wage-earning capacity. The employer's expert testified that, after interviewing claimant, he would have completed a transferable-skills analysis based on claimant's

profile and work restrictions. Next, the employer's expert would have contacted potential employers to determine job availability and wages for any jobs falling within claimant's qualifications, training, and restrictions. The employer requested an adjournment or continuance to allow its expert to perform this analysis, but that request was also denied.

The employer was essentially denied the opportunity to ascertain claimant's ability to perform other jobs. Not only did the magistrate's ruling deprive the employer of the ability to present evidence of actual jobs in the marketplace that claimant could have obtained, but the employer was deprived of the ability to assess whether there were any jobs available within its *own* company that claimant could perform. While the employer was in the best position to know which openings were available within its company, it was not in a position to know all the skills and training claimant had acquired throughout his life that might be compatible with one of the jobs available. The employer was entitled to discovery before the hearing to enable it to meet its burden of coming forward with evidence to rebut claimant's claim of disability.[4]

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[4] The procedures set forth in this opinion are more consistent with *Sington* than the procedures of the Court of Appeals, and *Sington* is more consistent with the statute than is *Haske*. Moreover, it must be said, although it does not influence this opinion, that the procedures set forth here will almost certainly lead to a far more efficient use of human and economic resources in Michigan than the procedures introduced by this Court in *Haske*. Injured employees who are able to continue to work will be encouraged to do so instead of having their skills wasted, workers' compensation costs will be reduced for employers, and the competitiveness of Michigan as a workplace with other states will be enhanced. Not only does the dissent misconstrue these observations by ignoring our prefatory language, *post* at 319 and n 18, but one cannot help but glean from the dissent a sense that it is somehow better that a person who, while unable to perform Job A as a result of a workplace injury, could

IV. RESPONSE TO THE DISSENT

The WDCA establishes a careful balance between the employee's interest in receiving compensation when he suffers a disability as a result of a work-related injury and the employer's interest in avoiding legally unsound workers' compensation claims. This Court's role is to avoid upsetting this balance in favor of either party and to ensure that the standards and preconditions for benefits established by the law are maintained. The dissent disregards this law and substitutes its own sense of the balance between the employer and the employee for that of the Legislature.

However, the preferences of the dissent notwithstanding, MCL 418.301(4) requires a workers' compensation claimant to demonstrate a *limitation* or *reduction* in wage-earning capacity. This provision defines a workers' compensation "disability" to mean a "limitation of an employee's wage earning capacity in work suitable to his qualifications and training resulting from a personal injury or work related disease." Thus, to be compensable, something more than an injury is required; specifically, the injury must result in a "limitation of [the] employee's wage earning capacity" in work for which that employee is suited. Instead of taking this language at face value, the dissent remains wedded to the proposition set forth in *Haske,* and rejected in *Sington,* that a claimant may demonstrate a disability merely by showing an inability to perform a *single* job within his qualifications or training. Whatever the merits of this standard, it is simply not the standard that our Legislature has adopted. In today's decision, we reiterate *Sington*'s holding and impose no

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perform Job B at an equivalent compensation should be encouraged not to do so, thereby imposing higher workers' compensation costs on his employer. To what conceivable end?

new requirements on any workers' compensation claimant. We attempt only to afford guidance in the application of *Sington* so that future claimants and employers will have the benefit of a consistent and workable standard in assessing their rights and obligations under the law.

Additionally, the employer is entitled to challenge the claimant's evidence in support of a workers' compensation claim, it is entitled to have the burden of proof in a workers' compensation claim remain with the claimant, and it is entitled to secure evidence in its own behalf. In other words, the employer is entitled to avail itself of the law.

The dissent asserts, first, that the majority has indulged in "judicial creativity" to "effectively" require that a claimant provide a transferable-skills analysis in order to evidence a disability. *Post* at 300-302. Contrary to this assertion, such an analysis does *not* constitute a requirement on the part of a claimant. While the claimant must present *some* manner of assessment of alternative employment opportunities to which his qualifications and training might, or might not, translate—precisely to demonstrate that the injury has, in fact, "limited" his wage-earning capacity—this showing need not be in any particular form. The claimant must simply demonstrate in light of his injury that there are no reasonable employment options for avoiding a diminution in wages. If there *are* such options, a claimant's wage-earning capacity has obviously not been "limited," and he is not entitled to benefits; if there are *not* such options, then the claimant's wage-earning capacity has equally obviously been limited, and he is entitled to benefits. This all makes eminent sense. There is nothing to be compensated for—at least not in terms of wage reduction—if there has been no

reduction in the claimant's ability to earn his maximum wages. Most people would not find this to be a very problematic understanding; only the dissent sees the sky falling. *Sington* requires nothing more than the kind of inquiry in which any reasonable person would engage if he became injured *outside* the workplace and could no longer perform his job. Such a person would naturally inquire, "Is there another job in which I am employable at a similar wage?" Because the dissent considers this too onerous a burden, it would simply read out of the statute any obligation of the claimant to demonstrate a *limitation* or *reduction* in his wage-earning capacity. The dissent demonstrates no alternative means by which a reduction in wage-earning capacity can be measured than by actually looking to see whether there are other jobs for which a claimant is qualified.[5]

Claimant here presented no evidence that he considered whether there were any other jobs paying appropriate wages that he could perform, and for this reason his proofs were deficient. Nonetheless, the dissent repeatedly, and confidently, asserts that claimant cannot perform any other job for which he is qualified. It is unclear how the dissent could possibly make this assertion so assuredly. Does the dissent have access to secret information denied the rest of this Court? How can the dissent be certain that claimant cannot perform any

[5] The dissent compares the general language of MCL 418.301(4) with the more specific language of MCL 418.385 to conclude that MCL 418.301(4) does not require affirmative proofs to demonstrate a limitation in wage-earning capacity. This conclusion is illogical. The Legislature used specific language in MCL 418.385 to require a claimant to submit to a medical examination. It does not follow that every other provision of the statute must use similarly specific language when more general language will suffice. In stating that the claimant must demonstrate a reduction in wage-earning capacity, MCL 418.301(4) is sufficiently clear in what it requires.

other job when *neither* party has presented evidence to this effect? While the dissent may well be proven correct in the end, there is simply no basis in the present record for making this declaration. There is no way of knowing whether claimant is entitled to benefits until the correct legal standards have been applied, and these standards cannot be applied until the claimant has introduced evidence concerning his wage-earning capacity. Only then can the magistrate render an informed determination of eligibility.

The dissent next asserts that we have indulged in "judicial creativity" to invent the requirement that the employer may be entitled to discovery in attempting to rebut an employee's claim. *Post* at 300-301. However, discovery is hardly a novel concept in workers' compensation proceedings. Rather, it may sometimes be necessary to effect the legislative intent that some, but not all, workplace injuries entitle the worker to benefits; it may sometimes be necessary to enable the magistrate to make a fully informed decision regarding whether a claimant has proven a disability; and it may sometimes be necessary to afford an employer the opportunity to present a meaningful defense.

The dissent asserts that we have "create[d] a new rule of discovery in disability hearings" in holding that the employer has a right to discovery. *Post* at 307. However, there has been discovery for both sides before the hearing on a regular basis in workers' compensation proceedings. In *O'Brien v Federal Screw Works*, 1998 Mich ACO 53, p 4, the WCAC, sitting en banc, affirmed the magistrate's order directing the defendant to allow a tour of its plant, stating:

> In examining the dissenting opinion, we cannot help noting that our colleagues would allow plaintiff to subpoena lab reports, material safety data sheets and any

> other relevant papers and documents. They would further allow depositions of defendant's representatives (not specifically provided for in the statute except in the case of medical experts). However, they would not allow the magistrate to order a physical inspection of defendant's premises, even during the trial (as they define that term), because of a lack of statutory authority.
>
> We cannot agree with this narrow interpretation. As noted, there is no explicit statutory authority which allows for the deposing of lay witnesses. Rather, the common practice of magistrates has long been to err on the side of information rather than ignorance. For this reason, accommodations are regularly made for the taking of lay testimony where necessary (even of plaintiff on occasion) despite the lack of explicit statutory authority.

It is clear that discovery is an integral part of workers' compensation proceedings that has been consistently upheld by the WCAC. See, e.g., *White v Waste Mgt*, 2004 Mich ACO 4, p 7 (holding that the employer's entitlement to a meaningful defense was hindered when the magistrate precluded its vocational expert from meeting with the claimant); *Nessel v Schenck Pegasus Corp*, 2003 Mich ACO 272, pp 7-8 (stating that, to the extent the claimant or the employer has information regarding the claimant's qualifications and training, as well as the availability of jobs, such information should be exchanged before the hearing rather than during the hearing); *Rochon v Grede Foundries, Inc*, 2000 Mich ACO 534, p 6 (upholding the magistrate's order compelling the answer of more than 200 interrogatories because "magistrates have the power to compel discovery by way of exchange of information, documents, and answers to written interrogatories").

It is clear from the requirement of MCL 418.301(4) that a claimant prove a limitation in wage-earning capacity in work suitable to his or her qualifications and training that the Legislature intended to limit the

universe of workplace injuries for which a claimant may recover compensation benefits. The only way to give meaningful effect to this intent is to ensure, where appropriate, that evidence is presented regarding the claimant's qualifications and training, what jobs the claimant is qualified and trained to perform within the maximum salary range, and the claimant's ability to perform and obtain any of those jobs. Such an analysis will sometimes require a certain amount of discovery in order for a claimant to be able to prove a disability under the statute.

The magistrate cannot make a proper determination of whether a claimant has proved a disability without becoming fully informed of all the relevant facts. The dissent asserts that our holding allowing discovery would deprive the magistrate of his discretion to allow discovery under MCL 418.851 and MCL 418.853. However, a magistrate's discretion is no more absolute than it is in any other realm of judicial decision-making. In those cases in which a magistrate's denial of discovery effectively deprives an employer of the right to present a meaningful defense, the magistrate, as a general matter, abuses his discretion.[6]

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[6] The dissent asserts that under *Boggetta*, which stated that a hearing referee has the authority to require discovery, *Boggetta*, *supra* at 603-604, the employer does not have a right to discovery. However, if a magistrate has the discretion to order discovery, and such discovery is *necessary* for the employer in a particular case to sustain its burden of production, then the magistrate does abuse his discretion in failing to order discovery and denying the employer the opportunity to present a defense. The dissent also asserts that *Boggetta* is not applicable because the statute it relied on has been modified. *Boggetta*, *supra* at 602-603, quoted with approval the WCAB opinion, which first cited Rule 7 of the workmen's compensation department's rules of practice, 1954 Mich Admin Code, R 408.7: " 'At the hearing in any case, the hearing referee may call witnesses and order the production of books, records, including hospital records, accounts and papers which he deems necessary for the purpose of making an award.' " This language reflected the authority granted under the predecessor to

The statute provides the magistrate with the authority and discretion to extract as much information from the parties as is necessary for the magistrate to make a proper determination in a case. A magistrate cannot make a proper determination without becoming fully informed of the facts regarding a claimant's limitation in wage-earning capacity in work suitable to his qualifications and training. The disposition of a case on the basis of partial information might well under some

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MCL 418.853, former MCL 413.3, which stated, in pertinent part: "The board or any member thereof shall have the power to administer oaths, subpoena witnesses and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute." The WCAB concluded that Rule 7 gave the hearing referee authority to carry out certain actions, but did not constitute an exhaustive list of what a hearing referee could do in workmen's compensation proceedings. *Boggetta*, *supra* at 602. The WCAB then cited the predecessor to MCL 418.851, former MCL 413.8, which stated that a hearing referee " 'shall make such inquiries and investigations as it (he) shall deem necessary.' " *Id*. at 603. The WCAB concluded that the hearing referee's responsibility was " 'broad enough to require the answering of interrogatories requested by one of the parties if such answers are necessary to a proper inquiry into the facts.' " *Id*. The "substantial alteration" in the statute that the dissent refers to, *post* at 311, is effectively that the language "at the hearing" was added in MCL 418.851. Applying *Boggetta*'s reasoning, this change would not alter the holding at all. These two provisions accord a magistrate the authority to require necessary discovery throughout the entire process of examining the case to render a proper decision regarding whether a claimant has proved a disability. They do not purport to constitute an exhaustive list of actions a magistrate may take. In addition, the WCAC, sitting en banc, addressed the meaning of this amendment in *O'Brien*, *supra* at 3, in which it held that the addition of this language was a result of statutory changes in 1985, in which the authority to assign cases was removed from the Bureau of Worker's Disability Compensation and vested in the newly created Board of Magistrates. The language "The worker's compensation magistrate at the hearing" was merely a replacement of the previous language, "The hearing referee assigned to any hearing." *Id*. Therefore, the phrase "at the hearing" is a qualifier for the word "magistrate" and refers to the entire proceedings before the magistrate, and does not refer to only a portion of those proceedings.

circumstances constitute an abuse of discretion, especially when, as here, the restriction on disclosure effectively relieves a claimant of the obligation to satisfy his burden of proof.

The employer has the right to present a meaningful defense. Yet, the dissent would deprive the employer of any right to discovery and, consequently, any practical way of sustaining its burden of production. How would the employer necessarily know what skills or training an employee had obtained in the course of his life that might be compatible with an employment position? How would the employer necessarily be apprised of the myriad factors that would facilitate or impede an employee's ability to secure an equivalent position in the event of an injury?

The dissent again confidently asserts that the employer here possessed sufficient information, in the form of claimant's employee file and transcripts from prior hearings, for its expert to conduct a transferable-skills analysis. How does the dissent know this? Certainly, this assertion is inconsistent with the magistrate's assessment of the testimony that defendant's vocational expert "would need to meet with plaintiff to perform a transferable job skill analysis." Moreover, as the dissenting commissioner noted, plaintiff attended college on three separate occasions *after* he began his employment with defendant, and that this training, however limited, "would be relevant in determining if he had any post injury job qualifications and training . . . ."

Even more significantly, what are the standards for the dissent's assertions? If there had been no prior proceedings, would the employer be limited to its personnel files? Must an employer maintain personnel files in specific anticipation of someday having to do a

wage-earning capacity analysis on an employee? How does an employer accurately establish wage-earning capacity without access to information from the best-informed person in the world concerning that subject: the claimant himself?

The dissent also alludes to the employer's duty under MCL 418.319(1) to provide an injured employee with vocational rehabilitation services, but immediately takes issue with the employer's right to interview the employee in this regard. Just as with the matter of discovery, it is unclear how the dissent would have the employer satisfy its obligation in this regard without affording it some means to access to necessary information. In both of these realms, the dissent prefers to deny the employer any ability to gather information necessary to defend itself.

V. CONCLUSION

We reiterate that *Sington* overruled *Haske* and, therefore, that the procedures of the workers' compensation process must reflect this change in the caselaw. The claimant bears the burden of proving a disability by a preponderance of the evidence under MCL 418.301(4), and the burden of persuasion never shifts to the employer. The claimant must show more than a mere inability to perform a previous job. Rather, to establish a disability, the claimant must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. To establish the latter element, the claimant must follow these steps:

(1) The claimant must disclose all of his qualifications and training;

(2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;

(3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and

(4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.

If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4), and the burden of producing competing evidence then shifts to the employer. The employer is entitled to discovery before the hearing to enable the employer to meet this production burden. While the precise sequence of the presentation of proofs is not rigid, all these steps must be followed.

In this case, claimant did not sustain his burden of proving a disability. The Court of Appeals erred in holding that claimant sustained his burden of proving that he was disabled from all jobs within his qualifications and training because the existence of other jobs within his qualifications and training paying the maximum wages was not apparent. The Court of Appeals also erred by holding that evidence concerning whether claimant has reasonable employment options available for avoiding a diminution in his wages in a position within his qualifications and training is not part of a claimant's proofs, and further erred by effectively shifting the burden of proof to the employer to demonstrate that there are jobs available within the claimant's qualifications and training. Finally, the Court of Appeals erred in holding that the magistrate did not abuse his discretion by denying the employer's expert the opportunity to interview claimant before the hearing.

Given the inconsistent application of the *Sington* standard in the past, we believe that it would be equitable to allow claimant the opportunity to present his proofs with the guidance provided by this opinion. Accordingly, we reverse those portions of the Court of Appeals judgment and remand this matter to the magistrate for a new hearing consistent with the procedures set forth in this opinion.

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

CAVANAGH, J. (*dissenting*). Today, the majority judicially creates new procedures, a heightened evidentiary standard, and compelled discovery for workers' compensation hearings. The majority exercises its creativity at the expense of Michigan workers, whom this opinion places at "significant risk." *Ante* at 283. Because these new provisions subvert the will of the Legislature, ignore the language of the Worker's Disability Compensation Act (WDCA), and recklessly risk the well-being of Michigan workers, I dissent.

The Legislature created a careful balance of critical interests in the WDCA. The act extinguished a worker's common-law claim for injury at work, providing an exclusive and limited remedy for such an injury. The result is lower and more predictable injury compensation costs for employers. But injured workers also benefit under the act:

> The family of the [injured worker] . . . knew privation and sorrow when injury stopped income. True, the injured workman would not get full "damages" as that term is used in the law. The amount of his recovery was carefully circumscribed. It was limited to interference with earning capacity. The workman might be so grotesquely disfigured

> as to shock even the insensitive, yet for this harm there was no compensation, unless aided by statute. . . . [T]he workman has given up his common-law action, and can no longer seek damages from a jury. However, there was a giving on both sides. In return for the workman's limited monetary recovery he got the certainty of adequate compensatory payments without recourse to litigation. [*Crilly v Ballou*, 353 Mich 303, 308-309; 91 NW2d 493 (1958).]

The people's elected representatives crafted the WDCA with precision. It states that "[p]rocess and procedure under this act shall be as summary as reasonably may be." MCL 418.853. Thus, "it is repugnant to attempt to judicially read into the act other requirements or conditions that operate to defeat or limit its aim." *Kidd v Gen Motors Corp*, 414 Mich 578, 588; 327 NW2d 265 (1982). This Court has long recognized the clear limit on judicial creativity. " 'The workmen's compensation law is a departure, by statute, from the common law, and its procedure provisions speak all intended upon the subject. *Rights, remedies, and procedure thereunder are such and such only as the statute provides*.' " *Paschke v Retool Industries*, 445 Mich 502, 511; 519 NW2d 441 (1994), quoting *Luyk v Hertel,* 242 Mich 445, 447; 219 NW 721 (1928) (emphasis in *Paschke*). Under the WDCA, a claimant who proves that he suffered a "disability" is entitled to benefits. MCL 418.301. Importantly, though the WDCA defines the term, the act does not provide any particular procedure for proving the existence of a disability. Instead, the Legislature leaves it up to the claimant regarding how to proceed in proving his case.

Today, the majority finds the act wanting. The majority reads a new requirement into the act: an injured worker must now provide the equivalent of a "transferable-skills analysis" to show a limitation of wage-earning capacity when establishing a disability

under MCL 418.301(4). This equivalent of a transferable-skills analysis is a key component of the new procedure the majority creates to prove a disability. According to the majority, a claimant must disclose his qualifications and training, present the equivalent of a transferable-skills analysis identifying the "universe of jobs" for which he might be qualified, and show that his work-related injury prevents him from performing jobs or that he is otherwise unable to obtain jobs for which he might be qualified; the employer may then rebut the claimant's proofs and, finally, the claimant "may then come forward with additional evidence to challenge the employer's evidence." *Ante* at 281-284. In addition to these novel requirements, the majority creates a new right: the employer has a right to discovery. Specifically, the employer's vocational expert "must be permitted to interview" the claimant. *Ante* at 284.

There is no support or authority in the WDCA for the new requirements, procedures, and rights the majority reads into the act. As a whole, this procedural gauntlet is inimical to the longstanding respect this Court has afforded the careful balance crafted by the people's representatives in the WDCA: "[T]he WDCA is in derogation of the common law, and its terms should be literally construed without judicial enhancement." *Paschke,* 445 Mich at 510-511. Further, the specific requirements that a claimant must provide the equivalent of a transferable-skills analysis and submit to an interview by the employer's expert are not supported by the language of the act. Accordingly, the majority invades the province of the Legislature by adopting these new requirements.

The majority effectively requires a claimant to present a transferable-skills analysis. Defendant's vocational expert in the present case described the analysis:

> . . . I would probably need to complete what is called the transferable skills analysis, where I would take the profile that was essentially presented of [plaintiff's] work history, his educational background, his restrictions as outlined by both physicians and enter all that information into the computer and essentially have that profile, all the variables of that profile bounced off of the U.S. Department of Labor's Dictionary of Occupational Titles. All of their job classifications to assess what jobs might be most appropriate falling within the restrictions and other qualifications and training as noted.

As an alternative to this complex analysis, the majority allows that the claimant may "provide some reasonable means to assess employment opportunities to which his qualifications and training might translate."[1] *Ante* at 282. But, in either case, the WDCA simply does not require this level of evidentiary proof to show a limitation in wage-earning capacity.

Comparison to the WDCA's requirement for proof of injury is instructive. MCL 418.385 requires extensive and specific proofs of injury. It states that "[a]fter the employee has given notice of injury . . . , if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or

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[1] The Code of Federal Regulations also defines "transferable skills":

> What we mean by transferable skills. We consider you to have skills that can be used in other jobs, when the skilled or semi-skilled *work activities you did in past work* can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs. [20 CFR 404.1568(d)(1) (emphasis added).]

surgeon authorized to practice medicine under the laws of this state . . . ." This demonstrates that the Legislature knows how to create a requirement of detailed proof when it wants to. The Legislature required detailed proof to show a work-related injury. It did not require the same level of evidentiary detail to show a limitation in wage-earning capacity. The "express mention in a statute of one thing implies the exclusion of other similar things." *Stowers v Wolodzko,* 386 Mich 119, 133; 191 NW2d 355 (1971); see also *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003).

The WDCA does not authorize or require a claimant to present a transferable-skills analysis or its equivalent to show disability. But the act does require *the employer* to provide a transferable-skills analysis, or its equivalent, for an employee after he has been found disabled. MCL 418.319(1) reads, in part:

> When as a result of the injury [an employee] is unable to perform work for which he or she has previous training or experience, *the employee shall be entitled to such vocational rehabilitation services, including retraining and job placement*, as may be reasonably necessary to restore him or her to useful employment. If such services are not voluntarily offered and accepted, the director on his or her own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to a bureau-approved facility for evaluation of the need for, and kind of service, treatment, or training necessary and appropriate to render the employee fit for a remunerative occupation. Upon receipt of such report, the director may order that the training, services, or treatment recommended in the report be provided *at the expense of the employer*. [Emphasis added.]

The requirements of MCL 418.319(1) sound very much like a transferable-skills analysis or its reason-

able equivalent. In fact, a transferable-skills analysis is part of the vocational rehabilitation services offered by the Workers' Compensation Agency.[2] Given that the act requires *employers* to provide and pay for a transferable-skills analysis *after* disability is established, it is simply astonishing that the majority would require the injured employee to provide and pay for this same detailed analysis, or its equivalent, in order to prove a disability.

Likewise, the act contemplates a similar analysis conducted by competent individuals trained in the field when an injured worker is also eligible for unemployment benefits. MCL 418.301 states:

> (6) A carrier shall notify the Michigan employment security commission of the name of any injured employee who is unemployed and to which the carrier is paying benefits under this act.
>
> (7) The Michigan employment security commission shall give priority *to finding employment* for those persons whose names are supplied to the commission under subsection (6). [Emphasis added.][3]

The Legislature has chosen to place the strenuous

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[2] Michigan's guidelines for vocational rehabilitation providers state: "Vocational rehabilitation is composed of numerous activities leading to the goal of returning the injured/ill individual to productive employment. Vocational rehabilitation encompasses such services as counseling, job analysis, placement, labor market surveys, *transferable skills analysis*, job seeking skills training and *vocational testing*." State of Michigan Vocational Rehabilitation Providers' Guidelines, p 1 (emphasis added), available at <http://www.michigan.gov/documents/Voc_Rehab_guidelines_153795_7.pdf> (accessed May 13, 2008).

[3] I note that the WDCA does not require an injured worker to look for work in order to prove a disability or receive compensation. MCL 421.28(1)(a), part of the Employment Security Act, demonstrates that the Legislature knows how to create such a requirement when it wishes. Such a requirement does not exist in the WDCA.

requirements of a transferable-skills analysis, or its reasonable equivalent, on the employer and the state, not on an injured worker seeking compensation.

Importantly, there is no indication that a transferable-skills analysis is a reliable indicator of a claimant's ability to find work. The Workers' Compensation Appellate Commission (WCAC), part of the Workers' Compensation Agency, an agency with specific expertise in employment matters, stated in this case that a transferable-skills analysis is speculative:

> [W]e reject the concept that the measurement of work suitable to an employee's qualifications and training includes a "transferable skills" analysis. Such an analysis suggests that work which the employee has never performed and, therefore, is totally unaware of its physical or mental requirements, can be utilized to measure disability.
>
> . . . Such proofs could go on forever if the employee has held even a few different kinds of jobs. And, no matter how exhaustive (and exhausting) the proofs, such a standard still leaves open the employer's arguments in briefing on appeal that the employee can answer only with argument and not with evidence. Both employee and employer must be excused from impossible burdens. [*Stokes v Daimler-Chrysler Corp*, 2006 Mich ACO 24, p 73.]

The majority puts an impossible burden on injured workers, in opposition to the letter and purpose of the WDCA. "[I]t is repugnant to attempt to judicially read into the act other requirements or conditions that operate to defeat or limit its aim." *Kidd,* 414 Mich at 588.

In finding that Mr. Stokes had sufficiently met the requirements of MCL 418.301(4), the Court of Appeals stated:

> The magistrate never limited the inquiry to whether plaintiff could no longer do his job. The magistrate exam-

> ined plaintiff's qualifications and training and came to the *factual* conclusion that his qualifications and training limited him to jobs driving a hi-lo and working in a warehouse, and "physically strenuous work from which he is clearly disabled." This conclusion was based on plaintiff's testimony concerning his prior jobs, his education and training, and defendant's failure to produce evidence showing that, contrary to plaintiff's proofs, there were, in fact, jobs within plaintiff's qualification or training that he could perform that would provide him with his maximum wage. This conclusion was amply supported by the record. [*Stokes v DaimlerChrysler Corp*, 272 Mich App 571, 592; 727 NW2d 637 (2006).]

I agree with the Court of Appeals that Mr. Stokes satisfied the requirements of MCL 418.301(4). The majority states that "[c]laimant merely testified regarding his employment and educational background" and that he "presented no evidence that he had even considered the possibility that he was capable of performing any job other than driving a forklift." *Ante* at 286. This is a mischaracterization of the proceedings before the magistrate. The magistrate conducted a substantial inquiry into Mr. Stokes's qualifications and training, which included his hobbies and non-work-related activities going back more than 30 years.[4] The magistrate then concluded: "In fact, I find that [Mr. Stokes's] training and qualifications limit him to physically strenuous work from which he is clearly disabled due to his significant spinal cord compression." The magistrate found, as a matter of fact, both (1) that Mr. Stokes's qualifications and training qualified him to do only physically strenuous work and (2) that his disabil-

[4] Thus, the magistrate did not confine himself to reviewing whether Mr. Stokes was disabled from a single job; rather, the magistrate extensively reviewed whether Mr. Stokes had suffered a limitation in his wage-earning capacity. See *Sington v Chrysler Corp*, 467 Mich 144, 158; 648 NW2d 624 (2002).

ity prevented him from doing physically strenuous work. There was simply no job for which Mr. Stokes was qualified that he was physically able to perform. I am mystified about what the majority finds lacking in Mr. Stokes's proofs.[5] Under these circumstances, I believe it was reasonable for the magistrate to find that Mr. Stokes had suffered a reduction in his wage-earning capacity.

The majority also creates a new rule of discovery in disability hearings. The majority states that, in order for an employer to effectively meet its burden of production, "the employer has a right to discovery"[6] under *Boggetta v Burroughs Corp*, 368 Mich 600; 118 NW2d 980 (1962). Specifically, the employer's expert "must be permitted to interview the claimant."[7] *Ante* at 283-284.

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[5] Mr. Stokes's spinal cord compression prevents him from obtaining *any* job paying the maximum wages for which he might otherwise be qualified. In light of these findings by the magistrate, any job search would obviously be an exercise in futility. As mentioned, the WDCA does not require an injured worker to look for work in order to obtain benefits. In this case, the majority requires Mr. Stokes to search for jobs that do not exist. I believe there are far more efficient uses of resources than to send claimants out on a wild goose chase for jobs that do not exist. The majority's opinion does not make "eminent sense," *ante* at 290; it is incomprehensible.

[6] There is no such right in the WDCA. The majority creates it today. There is also no constitutional right to discovery. *In re Del Rio*, 400 Mich 665, 687 n 7; 256 NW2d 727 (1977). Given that there is no statutory or constitutional right to discovery, the majority oversteps its bounds by recognizing such a right. As this Court has stated: " 'The workmen's compensation law is a departure, by statute, from the common law, and its procedure provisions speak all intended upon the subject. *Rights*, remedies, and procedure thereunder are such and such only as the statute provides.' " *Baughman v Grand Trunk W R Co*, 277 Mich 70, 72; 268 NW 815 (1936), quoting *Luyk*, 242 Mich at 447 (emphasis added).

[7] The majority states that "[b]ecause claimant refused to meet with the employer's vocational expert, and the magistrate was unwilling to compel an interview, the employer's vocational expert could only provide speculative testimony regarding the effect of claimant's injury on his wage-

This is directly contrary to the plain language and the plain purpose of the WDCA. The majority strips the magistrate of the discretion for discovery authorized by the Legislature.

The magistrate's discretion is clearly provided in the two general discovery provisions of the act. MCL 418.851 states that the "worker's compensation magistrate at the hearing of the claim shall make such inquiries and investigations *as he or she considers necessary*." (Emphasis added.) This statutory provision contemplates discovery for the purposes of, and at the discretion of, the magistrate only. Likewise, MCL 418.853 states that "the director, worker's compensation magistrates, arbitrators, and the board shall have the power to administer oaths, subpoena witnesses, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute." Again, the statute expressly grants the magistrate broad discretion regarding discovery. The majority's new discovery rule impermissibly strips discretion from the magistrate. If the Legislature had intended to limit the magistrate's discretion regarding discovery of vocational information, it would have done so. It did not.

There is one statutory exception to the magistrate's broad discretion regarding discovery. MCL 418.385 applies between parties and compels discovery. It states:

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earning capacity." *Ante* at 287. These are not the facts of this case. Defendant has identified no evidence it might have gained from interviewing Mr. Stokes that was not otherwise available. In fact, the magistrate found that defendant's own ineptitude left its expert without the necessary data. Defendant hired its vocational expert five days before the final hearing (inclusive of a weekend) and failed to provide the expert with Mr. Stokes's employee file (which was in defendant's possession) or with transcripts from prior hearings in which Mr. Stokes testified about his work and life qualifications and training. *Stokes*, 2006 Mich ACO 24 at 42-44.

> After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier. If an examination relative to the injury is made, the employee or his or her attorney shall be furnished, within 15 days of a request, a complete and correct copy of the report of every such physical examination relative to the injury performed by the physician making the examination on behalf of the employer or the carrier. The employee shall have the right to have a physician provided and paid for by himself or herself present at the examination. If he or she refuses to submit himself or herself for the examination, or in any way obstructs the same, his or her right to compensation shall be suspended and his or her compensation during the period of suspension may be forfeited. Any physician who makes or is present at any such examination may be required to testify under oath as to the results thereof. If the employee has had other physical examinations relative to the injury but not at the request of the employer or the carrier, he or she shall furnish to the employer or the carrier a complete and correct copy of the report of each such physical examination, if so requested, within 15 days of the request. If a party fails to provide a medical report regarding an examination or medical treatment, that party shall be precluded from taking the medical testimony of that physician only. The opposing party may, however, elect to take the deposition of that physician.

MCL 418.385 overrides the discretion of the magistrate and compels employees to submit to employers' discovery requests for medical information.[8] It is exten-

[8] MCL 418.222(2) also requires both the employee and the employer to disclose relevant medical records at the time of an application for a hearing or a written response. It does not apply to subsequent proceedings and further indicates the majority's error in creating discovery rules additional to those the Legislature saw fit to provide.

sive and specific. The Legislature knows how to require discovery when it wants to. It did so regarding medical information. It did not regarding a transferable-skills analysis or any other form of discovery related to a claimant's qualifications and training. "This court cannot write into the statutes provisions that the legislature has not seen fit to enact." *Passelli v Utley*, 286 Mich 638, 643; 282 NW 849 (1938).

The majority cites *Boggetta*, asserting that the case stands for the proposition that "the employer has a right to discovery" under the WDCA "if discovery is necessary for the employer to sustain its burden and present a meaningful defense."[9] *Ante* at 283-284. It does not. First, *Boggetta* was decided solely on jurisdictional grounds, so its comments on the permissible scope of discovery in workers' compensation hearings are dicta. Second, *Boggetta* did not require the magistrate to compel discovery; it merely stated that a magistrate *could* require discovery between parties at the magistrate's discretion. *Boggetta* does not create a right of discovery in any party, and it does not strip the magistrate of discretion. Finally, *Boggetta* does not apply here because the Legislature has significantly modified the statute it relied on.

The Court in *Boggetta* stated that its advisory comments were grounded "by the statute quoted in the appeal board's ruling." *Boggetta,* 368 Mich at 603-604. *Boggetta* interpreted former MCL 413.8, which stated that "the member or deputy member of the commission assigned to any hearing in accordance with the provisions of [former MCL 413.7] shall make such inquiries and investigations as it shall deem necessary." MCL

[9] I observe that if compelled discovery is necessary in this case, it is difficult to imagine the case in which it would not be.

413.8 was repealed and replaced by MCL 418.851,[10] which was subsequently amended to read that "the worker's compensation magistrate *at the hearing of the claim* shall make such inquiries and investigations as he or she considers necessary."[11] (Emphasis added.)

This is a substantial alteration of the former statute. The added language, "at the hearing," *limits* the scope of permissible discovery.[12] In fact, the amended lan-

[10] 1969 PA 317.

[11] 1994 PA 271.

[12] This is a substantial change for the matter at hand because *Boggetta* was grounded in the " 'broad general language' " of the former statute. *Boggetta*, 368 Mich at 603 (citation omitted). This "broad" language was subsequently qualified and limited by amendment. Thus, not only is the discovery rule in *Boggetta* dicta and not on point, but its statutory grounding has been substantially altered. The majority asserts that the amendment "was merely a replacement of the previous language," apparently contending that the amendment was meaningless. *Ante* at 295 n 6. For this proposition, the majority cites the WCAC en banc decision in *O'Brien v Federal Screw Works*, 1998 Mich ACO 53. But in the present case, the WCAC stated:

> [S]ince the issuance of *Boggetta*, this *dicta* [regarding discovery] has been given undue attention without recognizing that, in the passage of time, the Worker's Compensation Act has been amended since 1962 when *Boggetta* was decided. . . .
>
> It may be saying too much to assert that the amendment that was codified in what is now MCL 418.851 intended to adopt the dissenting position in *Boggetta*, but it can be stated that the amendment knocked the foundation out from under the majority opinion in *Boggetta*. For this reason, and because the language in *Bogetta* is *dicta*, we agree that any party's confidence in *Boggetta* as authority for allowing a magistrate to require a party to participate in pre-trial discovery (e.g., plant tours, interrogatories, meeting with vocational consultants) may be easily dashed. [*Stokes,* 2006 Mich ACO 24 at 47-48.]

Specifically addressing the case that the majority refers to here, the WCAC stated that "[i]n *O'Brien*, the majority suggested that the 1985 amendments . . . were written simply to alter the assignment of cases from the Director . . . to some other unstated entity." *Id.* at 53. The

guage appears to call into question even the limited advisory holding of *Boggetta*. Before the hearing is simply not "at the hearing." If it were, the added language would not have been necessary. The Legislature has subsequently modified the statute at issue in *Boggetta* to *limit* discovery. The majority's new rule broadly *expands* discovery. Indeed, it *compels* discovery between parties, which the act does not expressly allow. Further, it strips the statutorily mandated discretion of the magistrate. Under the WDCA, the propriety and form of discovery are within the magistrate's discretion.[13] What the statute gave, the majority takes away.

WCAC then observed that who assigned cases was irrelevant: "The language 'at the hearing' . . . has a very plain meaning no matter what administrative body assigns the cases for hearing." *Id.* at 54. The commission concluded: "We believe that 'the hearing' in MCL 418.851 means what it says and refers to the hearing of the claim at which time the parties present their proofs in whatever fashion is necessary and it is done on the record." *Id.* at 53. In coming to this conclusion, the WCAC observed that *O'Brien* had admitted that " 'there is no explicit statutory authority which allows for the deposing of lay witnesses.' " *Id.* at 52, quoting *O'Brien*, 1998 Mich ACO 53 at 4. The WCAC found this critical because "[w]hat is lacking in the administrative discussion of the issue of discovery is any true recognition that the authority for discovery has to be identified explicitly in the Act and that an implicit authority is not legally sufficient." *Stokes,* 2006 Mich ACO 24 at 50. See also *Baldus v Michigan*, 1997 Mich ACO 429, p 4 ("The legislature, by amending [MCL 418.851] to limit the magistrate's inquiries and investigations to those conducted at the hearing, seems to have adopted the [*Boggetta*] dissent's position.").

[13] The majority states that "[i]t is clear that discovery is an integral part of workers' compensation proceedings that has been consistently upheld by the WCAC." *Ante* at 293. This is not the issue; the issue is whether the magistrate has discretion regarding discovery (as stated in the WDCA) or is forced to require discovery in certain situations (as mandated today by the majority).

To support its decision to override the statutory discretion afforded the magistrate and to force magistrates to compel vocational interviews, the majority cites a smattering of WCAC cases. I do not find the cases compelling on this point. With one exception, the cases do not stand for

The WDCA states that the "worker's compensation magistrate at the hearing of the claim shall make such

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the proposition that the magistrate is required to compel discovery in certain situations; the cases simply affirm the magistrate's discretion to order such discovery as he deems necessary. For instance, in *Nessel v Schenck Pegasus Corp*, 2003 Mich ACO 272, p 7, the commission began with the obvious: "Certainly, the worker's compensation arena has never had full discovery as provided for in the Michigan General Court Rules." The commission went on to conclude:

> While pre-trial access to information is critical, the extent of discovery and the precise form which disclosure may take, is commended to *the broad discretion* of worker's compensation magistrates. However, it is error for a magistrate confronted with requests for information pursuant to *Sington* to categorically deny requests for information on the ground such information is not subject to pre-trial production. The need for particular information must be assessed on a *case-by-case* basis. [*Id.* at 8 (emphasis added).]

The majority disregards the broad discretion the WDCA affords the magistrate and replaces the "case-by-case" evaluation contemplated in *Nessel* with categorically compelled discovery for employers' vocational experts. *Nessel* does not support the majority's new discovery rule.

Likewise, in *Rochon v Grede Foundries, Inc*, 2000 Mich ACO 534, p 6, while the commission asserted "that magistrates have the power to compel discovery," the commission did not assert that this Court has the power, under the WDCA, to categorically compel a magistrate to require discovery in certain situations. Indeed, the commission noted the unique circumstance and specific scope of its decision: "Given the unique problems that a death case presents, the magistrate acted reasonably and within his discretion in ordering the discovery." *Id.*

Similarly, *O'Brien* did not categorically embrace vocational discovery; rather, the commission again addressed a specific circumstance, stating that *Bogetta* "stands for the proposition that limited discovery tools such as interrogatories may be utilized in cases involving unique problems, i.e., death cases." *O'Brien,* 1998 Mich ACO 53 at 3. So the cases cited by the majority stress the magistrate's discretion and address specific circumstances in which, on a case-by-case basis, discovery may be required; more importantly, they are diametrically opposed to the majority's discretion-stripping mandate.

In *White v Waste Mgt*, 2004 Mich ACO 4, the commission did require a magistrate to compel the claimant to submit to an interview by the

inquiries and investigations as he or she considers necessary." MCL 418.851. The WDCA also states that "worker's compensation magistrates . . . have the power . . . to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute."[14] MCL 418.853. The majority

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employer's vocational expert. Addressing that aberrant decision, the commission in the present case, sitting en banc, stated:

> We disagree with the majority opinion in *White* . . . .
>
> . . . Neither the Court's decision in *Sington*, nor "the reality of legal requirements and evolved complex burdens of evidentiary proofs mandated by modern case law such as found in *Sington*," have moved the Legislature to alter the authority of the magistrate. While it is accurate to state that the opinion in *Sington* changed perceptions of the Worker's Compensation Act, we must recognize that the Act, itself, did not change after *Sington* was issued. *Sington* has merely provided a party with the motivation to assert that there is dormant authority in the Act that now must be awakened. [*Stokes*, 2006 Mich ACO 24 at 51, quoting the dissent in *White*, 2004 Mich ACO 4 at 14.]

The commission then concluded:

> If the Legislature determines that it had made an unwise choice in failing to allow for discovery, it is the legislative prerogative to amend the Act and provide for it. Certainly, along the way, the Legislature could then provide some guidance as to what is a permissible and what is an impermissible use of vocational consultants. The Legislature could also determine whether *Sington* actually codified the definition of disability it intended and whether it is prudent to divert the limited dollars of employers and employees in the worker's compensation arena away from efforts to put employees back to work and in the direction of vocational consultants. [*Stokes,* 2006 Mich ACO 24 at 61.]

Because there is no statutory authority for its decision, the majority stretches for support in WCAC decisions. But such support is not consistent or substantial.

[14] This is consistent with the nature of the proceedings envisioned by the WDCA. " 'Proceedings under the workmen's compensation act are purely statutory,—administrative, not judicial,—inquisitorial, not

states that the workers' compensation magistrate must require the claimant to submit to an interview with the employer's expert. *Ante* at 284. The majority's new discovery rule is simply contrary to the language of the WDCA.

This discovery rule is a new requirement. The majority insists that its opinion creates no new requirements.[15] *Ante* at 289-290. The majority attempts to disguise the new requirement as necessary to prevent abuse of discretion. *Ante* at 294. This is disingenuous. There can be no abuse if there is no discretion, and there can be no discretion if there is no choice. Under the majority's new rule, there is no choice; the employer's expert "must be permitted to interview the claimant." *Ante* at 284. Now, every time an employer requests to have its expert interview a claimant, the magistrate must comply.

The majority assures us that its new discovery rule will apply only when "such discovery is *necessary* for the employer in a particular case . . . ." *Ante* at 294 n 6. But in this case, the defendant sought information that was completely unnecessary. To review, Mr. Stokes had worked for defendant his entire adult life; at a previous hearing, he disclosed all his out-of-work hobbies, activities, and experience (including the content of the high school classes and college courses he had attended decades earlier); it is uncontested that his severe spinal compression disables him from all physically strenuous labor. When asked what information was lacking, the

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contentious,—disposed of not by litigation and ultimate judgment, but summarily.' " *Hayward v Kalamazoo Stove Co*, 290 Mich 610, 616-617; 288 NW 483 (1939), quoting *Hebert v Ford Motor Co*, 285 Mich 607, 610; 281 NW 374 (1938).

[15] The majority opinion also claims to "afford guidance in the application of *Sington* . . . ." *Ante* at 290. If *Sington* requires rewriting the WDCA, then *Sington* should be reviewed.

defendant's expert stated that he would need Mr. Stokes's "work history, his educational background, [and] his restrictions as outlined by both physicians . . . ." All this information was in the hands of defendant well in advance of the hearing. Defendant has identified no evidence that it hoped to discover.[16] If compelled discovery is "necessary" in this case, it will be "necessary" in all cases. This Court has stated that " '[*r*]*ights, remedies, and procedure* [under the WDCA] *are such and such only as the statute provides*.' " *Paschke*, 445 Mich at 511, quoting *Luyk*, 242 Mich at 447 (emphasis in *Paschke*).

The majority asserts that discovery is not a "novel concept in workers' compensation proceedings." *Ante* at 292. I agree. The WDCA expressly gives the magistrate the power to compel testimony and the production of documents. MCL 418.853. The act authorizes the magistrate to make inquiries and investigations. MCL 418.851. Magistrate-directed discovery is not novel at workers' compensation hearings. But it is novel to endow employers with a "right to discovery" when that right is found nowhere in the statute. It is novel to require a magistrate to compel discovery in certain situations when the act gives the magistrate broad discretion in discovery: "The worker's compensation magistrate at the hearing of the claim shall make such

[16] In its attempt to characterize the magistrate's exercise of discretion in this case as abuse of that discretion, the majority states the general proposition that a "magistrate cannot make a proper determination without becoming fully informed of the facts regarding a claimant's" reduced wage-earning capacity. *Ante* at 295. I fully agree, and, when such a case is presented to this Court, I will vote accordingly. But that proposition has nothing to do with this case. The magistrate's review was extensive, and he considered all relevant facts, including employment opportunities. The majority has not identified one relevant fact or inquiry that would hint that the magistrate in this case was less than fully informed.

inquiries and investigations *as he or she considers necessary*." *Id.* (emphasis added).

The majority states that the "magistrate cannot make a proper determination of whether a claimant has proved a disability without becoming fully informed of all the relevant facts." *Ante* at 294. Again, I agree. But in this case, as noted, the magistrate conducted a thorough review of all the relevant facts.

The standards for workers' compensation hearings are found in the WDCA. Today the majority finds the language of the act wanting and creates new procedures, requirements, and rules. The majority exercises its creativity, in opposition to the purposes of the act, at the risk of injured workers. This Court has stated that "the act should be liberally construed to grant rather than to deny benefits." *Paschke,* 445 Mich at 511. Likewise, this Court has held that the careful legislative balance in the act was created "to provide financial and medical benefits to victims of work-connected injuries in an efficient, dignified and certain form." *Whetro v Awkerman*, 383 Mich 235, 242; 174 NW2d 783 (1970).

The majority confesses recognition that its requirements, especially the requirement of a transferable-skills analysis or its equivalent, place injured workers at "significant risk." *Ante* at 283. This risk is evident "because the employer always has the opportunity to rebut the claimant's proofs," and thus "the claimant would undertake *significant risk* by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant." *Ante* at 283 (emphasis added).

The requirement creates significant risk because the claimant may not understand what is required in a transferable-skills analysis. A claimant may not have

the knowledge or skills required to accurately conduct a transferable-skills analysis. Further, as the Court of Appeals observed in this case, there is a considerable risk that a transferable-skills analysis "would inaccurately depict a claimant's actual ability to obtain gainful employment and result in a virtually impossible burden of proof for the plaintiff[.]"[17] *Stokes,* 272 Mich App at 583-584. The significant risk the majority creates by requiring a transferable-skills analysis or its equivalent is inimical to certain and summary proceedings and, therefore, intolerable under the WDCA. Further, it improperly adds to the burden and expense of injured workers seeking compensation for work-related injuries.

The majority informs us that, although required to provide a detailed vocational analysis, a claimant "is not required to hire an expert . . . ." *Ante* at 282. However, as a practical matter, the claimant will face even greater risk if he does not hire an expert. The majority clearly assumes that employers will have vocational experts at workers' compensation proceedings to best support

[17] I agree with the majority that "any reasonable person" would assess her employment alternatives if she were injured outside the workplace such that she could not perform her current job. *Ante* at 291. But Mr. Stokes cannot perform any job for which he might be qualified. For Mr. Stokes, the answer to the question, "Is there another job in which I am employable at a similar wage?" is "No." Requiring him to search for work that cannot be found is unreasonable. See *ante* at 291. Further, I believe that Michigan workers wish to work for a living. I suspect few Michigan employees view an injury resulting in job loss as a welcome opportunity to become acquainted with their couches. Consequently, I do not believe that denying injured workers' claims for assistance is necessary to prevent statewide destruction. And even if I were convinced of the majority's policy assertions, I would be constrained by the language of the WDCA from denying benefits to a deserving claimant. Mr. Stokes has severe spinal compression. He is not able to perform his former job or any other paying a similar wage. The majority's decision to deny him benefits is unreasonable and unsupportable.

their positions. With the employer's expert locked and loaded, the prudent claimant will have like reinforcement. The vocational proofs required virtually ensure that claimants will need experts. Additionally, because of the uncertainty and expense imposed by this regime, it will almost certainly be more difficult for injured workers to find competent representation. This burden of uncertainty, difficulty, and expense is contrary to the "certainty of adequate compensatory payments without recourse to litigation" contemplated in the act. *Crilly*, 353 Mich at 309.

Finally, I note that the majority asserts that today's decision will enhance "the competitiveness of Michigan as a workplace with other states . . . ."[18] *Ante* at 288 n 4. But Michigan is a state, not a business. This state's first responsibility is the health and welfare of its citizens. It is for the Legislature to make policy decisions. The Legislature has crafted a careful balance of critical concerns in the WDCA.[19] This Court has stated that "[i]t is *not* this Court's role to decide whether the Legislature acted wisely or unwisely in enacting this statute. We will not substitute our own social and economic beliefs for those of the Legislature, which is elected by the people to pass laws." *McAvoy v H B Sherman Co*, 401 Mich 419, 439; 258 NW2d 414 (1977). Today, the majority takes a different view. I respectfully dissent.

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[18] I find it quite ironic that this Court's "textualists," first, have no problem adding language to the statute and, second, assert what good public policy their additions create.

[19] The majority emphasizes that fairness to employers compels its creative amendments of the WDCA. But that is precisely the point: the Legislature has carefully balanced the equities in the act. This Court should not attempt to adjust the scales that Michigan lawmakers have set.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*). I join Justice CAVANAGH's dissenting opinion, but write separately to highlight that my separate concurrence in *Sington v Chrysler Corp*, 467 Mich 144, 172; 648 NW2d 624 (2002), did not concur in, and differed from, the view of the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) that under the workers' compensation act, MCL 418.301(4), and under *Sington,* the claimant always has the burden of proof.

In this case, writing for the majority of four, Justice MARKMAN states that, under *Sington,* the claimant failed to sustain his burden of proving that his work-related injury effected a reduction of his maximum wage-earning capacity in work suitable to his qualifications and training.

I disagree with the majority of four. Rather, I agree with the Court of Appeals decision below that once a claimant has established his or her disability by a preponderance of the evidence, the burden of going forward with the evidence shifts as the parties present their proofs. Thus, the burden of proving a disability remains with the claimant, but the burden of proof shifts back and forth as each party brings forth further evidence.

Further, I concur with Justice CAVANAGH's conclusion that the majority of four reads a new requirement into the act: namely, that under the majority's view, a claimant must provide a "transferable-skills analysis" to show a limitation of wage-earning capacity as proof of a disability under MCL 418.301(4). For the reasons stated in Justice CAVANAGH's dissent, I do not think that either the statute or *Sington* can be correctly interpreted in that manner.

In re NETTLES-NICKERSON

Docket No. 133929. Argued June 11, 2008 (Calendar No. 1). Decided June 13, 2008.

The Judicial Tenure Commission (JTC) issued a formal complaint against Judge Beverley Nettles-Nickerson of the 30th Circuit Court, alleging 10 counts of misconduct, including having made false statements in obtaining her divorce, excessive absences, improper docket management, and allowing a social relationship to influence the release of a criminal defendant from probation. The Supreme Court appointed retired Circuit Judge Leopold Borrello to act as master in the matter. After a 24-day hearing, Judge Borrello found that 7 of the 10 counts alleged in the JTC complaint were established by a preponderance of the evidence. The respondent filed written objections to the master's report and a brief in support of the objections. After hearing oral argument on the respondent's objections, a majority of the JTC concluded that the respondent had committed judicial misconduct with regard to six of the counts alleged in the complaint and recommended, on the basis of the nature and pervasiveness of the misconduct, that the respondent be removed from office, conditionally suspended without pay for six years, and ordered to pay costs, fees, and expenses totaling more than $128,000.

In a memorandum opinion signed by Chief Justice TAYLOR and Justices CAVANAGH, KELLY, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The recommendations made by the Judicial Tenure Commission are adopted in part, and the respondent is removed from office, effective immediately, for having twice made false statements under oath; making and soliciting other false statements while not under oath; improperly listing cases on the no-progress docket; excessive absences, belated commencement of proceedings, untimely adjournments, and improper docket management; allowing a social relationship to influence the release of a criminal defendant from probation; and recklessly flaunting her judicial office. Costs are imposed on the respondent in the amount of $12,000.

Justice WEAVER, concurring in part and dissenting in part, agreed with the majority's decision and reasons for removing the

respondent from her position as judge, but dissented from the decision to assess against the respondent any costs of the Judicial Tenure Commission proceeding on the ground that Const 1963, art 6, § 30 does not authorize the Supreme Court to assess costs against a disciplined judge.

Philip J. Thomas for Judge Beverley Nettles-Nickerson.

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

Amici Curiae:

Daniel M. Levy for the Michigan Civil Rights Commission and the Michigan Department of Civil Rights.

Sommers Schwartz, P.C. (by *TeLisa T. Owens*), for the Wolverine Bar Association.

Law Office of Guy Sohou, PLLC (by *Guy Sohou*), for the Association of Black Judges of Michigan.

MEMORANDUM OPINION. On June 11, 2008, the Court heard oral argument from the parties concerning the Judicial Tenure Commission's findings and recommendations in this matter. The Judicial Tenure Commission's Decision and Recommendation for Order of Discipline is attached as an exhibit to this opinion.

We adopt in part the recommendations made by the Judicial Tenure Commission and order that the respondent is removed from office, effective immediately, on the basis of the following misconduct:

(1) Respondent twice made false statements under oath in connection with her divorce proceeding (Count I);

(2) Respondent made and solicited other false statements while not under oath, including the submission of fabricated evidence to the Judicial Tenure Commission (Count II);

(3) Respondent improperly listed cases on the no-progress docket (Count III);

(4) Respondent was absent excessively and engaged in belated commencement of proceedings, untimely adjournments, and improper docket management (Count IV);

(5) Respondent allowed a social relationship to influence the release of a criminal defendant from probation (Count VI); and

(6) Respondent recklessly flaunted her judicial office (Count IX).

See page 2 of the Judicial Tenure Commission's Decision and Recommendation for Order of Discipline in the attached exhibit.

The respondent is no longer a judicial officer and will not be an incumbent at the time of the 2008 30th Circuit Court election. We decline the Judicial Tenure Commission's additional recommendation to conditionally suspend the respondent.

On the basis of Counts I and II, costs are imposed on the respondent judge in the amount of $12,000. MCR 9.205(B).

This judgment is effective immediately.

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

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the majority's decision and reasons for removing respondent Judge Beverley Nettles-Nickerson from her current position as judge of the 30th Circuit Court.

I dissent from the majority's decision to assess against the respondent any costs of the Judicial Tenure Commission proceeding. As I stated previously in regard to the proposed assessment of costs against a respondent judge:

> [T]here is no constitutional authority to assess costs against a judge. Subsection 2 of Const 1963, art 6, § 30 provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge . . . ." As I stated in my concurrence in *In re Noecker,* 472 Mich 1, 18-19 (2005), "Nothing in this constitutional provision gives this Court any authority to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her." [*In re Trudel,* 477 Mich 1202, 1203 (2006) (WEAVER, J., concurring).]

Further, as I stated in a subsequent order by a majority of this Court granting a default judgment against Judge Trudel:

> While under Const 1963, art 6, § 30(2) the Supreme Court also has the authority to "make rules implementing this section [concerning the Judicial Tenure Commission]," the Supreme Court *cannot* create Judicial Tenure Commission rules that authorize the Judicial Tenure Commission to recommend to the Supreme Court something that the Supreme Court does not have constitutional authority to do. The rule-making authority available to the Supreme Court is limited to making rules "implementing this section." And, because "this section" provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge," this Court only has the authority to make rules implementing the section in connection with the *censure, suspension with or without salary, or retirement or removal of a judge*. Assessment and collection of costs is not included in this authority to discipline a judge. As the Supreme Court does not have authority to assess and collect costs granted to it by the Michigan Constitution, there is no corresponding rule-making authority to provide for the Judicial Tenure Commission to recommend to the Supreme Court the assessment and collection of costs against a respondent judge. This Court may not delegate authority that it lacks in the first place. [*In re Trudel,* 480 Mich 1213, 1214 (2007) (WEAVER, J., dissenting).]

Thus, the majority's use of its unconstitutional, law-creating court rule authorizing the assessment of costs against disciplined judges is an unrestrained interpretation of Const 1963, art 6, § 30. The majority of this Court should exercise judicial restraint in its interpretation of Const 1963, art 6, § 30 and leave it to the people of Michigan to decide, by constitutional amendment, if they want costs assessed against disciplined judges.

Additionally, given the vast power vested in the executive director and the general counsel of the Judicial Tenure Commission, and given the possibility of due process violations against a respondent judge, it is becoming apparent that the rules concerning the operation of the Judicial Tenure Commission, created by this Court pursuant to Const 1963, art 6, § 30, should be reexamined by this Court and the people.

EXHIBIT

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. BEVERLY NETTLES-NICKERSON

Judge, 30th Circuit Court
Veteran Memorial Courthouse
313 Kalamazoo St.
PO Box 40771
Lansing, MI 48901

Formal Complaint No. 81

_____/

DECISION AND RECOMMENDATION
FOR ORDER OF DISCIPLINE

At a session of the Michigan Judicial Tenure Commission held on April 24, 2008, in the City of Detroit

PRESENT:

Hon. Barry M. Grant, Chairperson
Hon. Kathleen J. McCann, Vice Chairperson
Thomas J. Ryan, Esq., Secretary
Hon. Jeanne Stempien
Hon. Michael J. Talbot
Nancy J. Diehl, Esq.
Ronald F. Rose
Hon. Nanci J. Grant
Marja M. Winters

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against Hon. Beverly Nettles-Nickerson

("Respondent"), who at all material times was a judge of the 30th Circuit Court for the County of Ingham, State of Michigan. This action is taken pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.203.

On February 12, 2008, the Commission received findings of fact and conclusions of law from the Master appointed by the Supreme Court to hear evidence in this matter. Having reviewed the transcript of the hearing, the report, the exhibits, and having considered the oral arguments of counsel, with two exceptions the Commission adopts the findings of facts set forth in the Master's report. The Commission concludes, as did the Master, that Respondent twice made false statements under oath in connection with her divorce proceeding (Count I), that Respondent made and solicited other false statements while not under oath including the submission of fabricated evidence to the Commission (Count II), that Respondent improperly listed cases on the no progress docket (Count III), that Respondent engaged in excessive absences, belated commencement of proceedings, untimely adjournments and improper docket management (Count IV), that Respondent allowed a social relationship to influence the release of a criminal defendant from probation (Count VI), and that Respondent recklessly flaunted her judicial office (Count IX).

With respect to Count X, alleging that Respondent knowingly made unfounded accusations of racism, the Commission adopts the Master's factual findings regarding the nature of the statements made by Respondent and the actions taken by Respondent, but concludes that the evidence presented does not support a determination that Respondent lacked a good faith belief in the truth of her assertions regarding race and racism.

The Commission agrees with and adopts the Master's conclusions that the Examiner failed to establish misconduct with respect to the allegations in Counts V, VII, and VIII.

Accordingly, the Commission recommends that the Supreme Court remove Respondent from the office of judge of the 30th Circuit Court and conditionally suspend her, without pay, for a period of six years commencing on January 1, 2009. Additionally, the Commission recommends that the Supreme Court order Respondent to pay costs, fees, and expenses in the amount of $128,861.26 pursuant to MCR 9.205(B) based on its finding that Respondent engaged in intentional misrepresentation and submitted fabricated evidence to the Commission.

II. Procedural Background

On May 16, 2007 the Commission filed Formal Complaint No. 81 asserting ten counts against Respondent. Count I alleged that Respondent made a fraudulent claim of residency to obtain a divorce. Count II alleged that Respondent made

false statements, solicited false statements by others, and/or fabricated evidence. Count III alleged that Respondent coerced court employees into listing cases on the no progress docket. Count IV alleged that Respondent was responsible for excessive absences, belated commencement of proceedings, untimely adjournments and improper docket management. Count V alleged that Respondent engaged in improper *ex parte* communications. Count VI alleged that Respondent allowed social or other relationships influence the release of a criminal defendant from probation. Count VII alleged that Respondent attempted to retaliate against the probation department and certain employees as a result of the incident described in Count VI. Count VIII alleged that Respondent improperly terminated her judicial assistant and covered up the reasons for the dismissal. Count IX alleged that Respondent engaged in judicial misconduct associated with a dispute between herself and the owner of a gasoline filling station. Finally, Count X alleged that Respondent made unsubstantiated claims of racism.

The Respondent filed an Answer and Affirmative Defenses on May 31, 2007. On June 6, 2007, the Supreme Court suspended Respondent with pay until further order of the Court. On June 13, 2007 the Supreme Court appointed the Honorable Leopold Borrello as Master to take proofs regarding the allegations contained in Formal Complaint No. 81. The hearing before the Master commenced on September 18, 2007, and continued over twenty-four days. On

February 12, 2008, the Master issued a thirty-five page report in which he found that seven of the ten counts alleged in the Formal Complaint (Counts I-IV, VI, IX, and X) were established by a preponderance of the evidence. The Master found no misconduct on Counts V, VII, and VIII.

On February 12, 2008, Respondent filed a motion and brief in support of a request to reopen the proofs based upon newly discovered evidence. The Examiner filed an answer and brief on February 13, 2008. On February 18, 2008, the Master signed an opinion and order denying Respondent's motion to reopen the proofs.

On February 29, 2008, Respondent filed written objections to the Master's report and a brief in support of the objections. On March 6, 2008, the Examiner filed a petition to adopt the report of the Master and to modify an evidentiary ruling made by the Master during the course of the hearing. The Commission heard oral argument on Respondent's objections on March 10, 2008.

III. Standard Of Proof

The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998). The Examiner bears the burden of proving set forth in the Complaint. MCR 9.211(A). The Commission reviews the Master's findings de novo. *In re Chrzanowski*, 465 Mich 468, 480-481; 636 NW2d 758 (2001).

Although the Commission is not required to accept to the Master's findings of fact, it may appropriately recognize and defer to the Master's superior ability to observe the witnesses' demeanor and comment on their credibility. Cf. *In re Lloyd*, 424 Mich 514, 535; 384 NW2d 9 (1986).

IV. Findings Of Fact

As noted, the Commission adopts and incorporates by reference the Master's findings of fact for Counts I through IX in their entirety, with two exceptions.

First, with respect to Count VI, we find that the note on Exhibit 9f stated "Gwen prepared discharge" and not "Gwen, prepare discharge," as the Master's report states. This change does not alter our other findings of fact or our conclusions of law as to Count VI.

Second, with respect to Count X, the Commission adopts that Master's findings of fact pertaining to Respondent's statements and actions, but we conclude that the evidence does not support a determination that Respondent lacked an honest belief that she had been treated differently, at least in some respects, based on her race. No evidence in the record supports a conclusion that Respondent was, in fact, discriminated against on the basis of her race. But the absence of such evidence does not necessarily establish that Respondent intentionally made false allegations about race and racism while knowing them to be false. Because the burden of proof lies with the Examiner, Respondent is not

obligated to establish the specific factual basis substantiating her accusations. We cannot say, based on the record before us, that Respondent necessarily lacked a basis for believing that her accusations were true. Therefore, we cannot find that Respondent *knowingly* made false accusations of race discrimination.

V. Conclusions Of Law

A. The Legal Basis for the Imposition of Discipline

With respect to Counts I-IV, VI, and IX of the Formal Complaint, the Commission adopts and incorporates the conclusions of law set forth in the Master's report. The facts asserted in the Formal Complaint and established at the public hearing in this matter show, by a preponderance of the evidence, that Respondent breached the standards of judicial conduct and is responsible for all of the following:

- Perjury contrary to MCL 750. 422 (as to Count I only);
- Misconduct in office as defined by the Michigan Constitution of 1963, as amended Article VI, § 30 and MCR 9.205 (as to Counts I, II, III, IV, VI, and IX);
- 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 (as to Counts I, II, III, IV, VI, and IX);
- 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 Michigan Code of Judicial Conduct (MCJC), Canon 1 (as to Counts I, II, III, and IV);

- Failure to bear in mind that the judicial system is for the benefit of the litigant and the public, not the judiciary, contrary to MCJC, Canon 1 (as to Counts III, and IV);
- Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Cannon 2A (as to Counts I, II, III, IV, and IX);
- Failure to respect and observe the law and so conduct herself 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 (as to Counts I, II, and III);
- Allowing family, social or other relationships to influence judicial conduct or judgment, in violation of MCJC, Canon 2C (as to Counts IV and VI);
- Using the prestige of office to advance personal business interest contrary to MCJC, Canon 2C (as to Count IX only);
- Failure to be faithful to the law and to maintain professional competence in it, contrary to MCJC, Canon 3A(1) (as to Count III only);
- Lack of personal responsibility for her own behavior and for the proper conduct in the administration of justice which she presides contrary to MCR 9.205(A) (as to Counts II, III, and IV);
- Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1) (as to Counts I, II, III, IV, VI, and IX);
- Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2) (as to Counts I, II, III, IV, VI, and IX);
- Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3) (as to Counts I, II, III, IV, VI, and IX);

- Conduct that violates the standard or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4) (as to Counts I, II, III, IV, VI, and IX); and
- Failure to cooperate with a reasonable request for assistance by the Commission, contrary to MCR 9.208(B) (as to Count II only).

B. The Master's Rulings On Evidentiary Issues

With one exception, the Commission agrees with and adopts the conclusions of law reached by the Master on all of the various evidentiary disputes raised by the parties.

The one exception is our conclusion regarding the Master's decision to strike portions of Counts IV (a portion of ¶ 41) and X (¶¶ 105-106) of the Formal Complaint based on the doctrine of laches. See Transcript, Vol. 8, pp 1361-1379. The act of striking portions of the Formal Complaint on the basis of laches is, in effect, the granting of a dispositive motion. In a judicial discipline matter, the master lacks the authority to grant dispositive motions, but instead may only make recommendations to the Commission. Therefore, the Master should not have stricken any portion of the Formal Complaint. The Examiner has indicated that he does not wish to re-open the proofs on these matters. Accordingly, we address the issue solely for purposes of clarification.

VI. Disciplinary Analysis

A. The *Brown* Factors

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999). A discussion of the relevant factors follows.

(1) *Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.*

Respondent's conduct was part of a pervasive pattern of numerous breaches of the canons and appropriate ethical conduct and included conduct violative of criminal law. Accordingly, it is much more serious than an isolated instance of misconduct. This factor weighs heavily in favor of the imposition of a more severe sanction.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

Many aspects of Respondent's misconduct involved bench activities, including the early termination of probation as a favor for a friend, coercing court employees into improperly listing cases on the No Progress docket, and making and soliciting false statements involving matters at the court. This factor weighs in favor of the imposition of a more severe sanction.

(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.***

Respondent's perjury (Count I) was prejudicial to the actual administration of justice in her divorce case because it caused the case to be brought and decided in the wrong venue. Respondent's presentation of fabricated evidence to the Commission (Count II) was prejudicial to the actual administration of justice because it brought potentially deceptive evidence before the Master and the Commission. Respondent's coercion of court employees to improperly place cases on the No Progress docket (Count III) was prejudicial to the actual administration of justice because it caused cases to be listed on the No Progress docket that should not have been listed on the No Progress docket. At least one case was dismissed when it should not have been. Respondent's allowing a social relationship to influence the release of a criminal defendant from probation (Count VI) was prejudicial to the actual administration of justice because it caused a criminal defendant to be released from probation when he otherwise would not have been so released. These acts of misconduct reflect a lack of respect for justice and the courts. Accordingly, this factor weighs heavily in favor of the imposition of a more severe sanction.

(4) ***Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.***

Respondent's actions involved misconduct that implicated the actual administration of justice and created an appearance of impropriety, as well as less specific misconduct. This factor would weigh in favor of a more severe sanction if we had not already concluded, in our analysis of factor (3), that Respondent's actions actually prejudiced the actual administration of justice. Under the circumstances of this case, this factor is duplicative.

(5) ***Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.***

Respondent's perjury, the most serious act of misconduct, was premeditated and deliberate. The evidence showed that Respondent had expressed a desire to keep her divorce out of the 30th Circuit Court. Respondent's act of perjury accomplished this goal. This factor weighs heavily in favor of the imposition of a more severe sanction.

(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.***

Respondent's act of perjury in her divorce case undermined the ability of the justice system to discover the truth of her ex-husband's residency, which if known at the time of Respondent's misrepresentations would have prompted the Kent County Circuit Court to conclude that it lacked jurisdiction over the proceeding.

See MCL 552.9. This factor weighs heavily in favor of the imposition of a more severe sanction.

> (7) ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.***

The evidence does not show that Respondent's actions caused the unequal application of justice on the basis of a class of citizenship. Accordingly, this factor, alone, does not weigh in favor of a more severe sanction.

In sum, our consideration of the totality of all seven *Brown* factors weighs heavily in support of the imposition of a more severe sanction.

B. The Basis for the Level of Discipline and Proportionality

In determining an appropriate sanction in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on comparable conduct. Based on the facts, the Commission believes that removal from office plus an additional conditional suspension of six years, without pay, is an appropriate and proportional sanction for Respondent's misconduct.

A primary function of the judiciary is to discover the truth. Perjury directly undermines this function and, as such, is an affront to the entire process.

> Our judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration

> of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.

In re Noecker, 472 Mich 1, 17; 691 NW2d 440 (2005) (Young, J., concurring) (footnotes omitted), quoting *In re Callanan*, 419 Mich 376, 386; 355 NW2d 69 (1984). Apart from the other acts of judicial misconduct, Respondent's deliberate decision to lie under oath itself renders Respondent unfit to sit as a judge.

The Supreme Court has removed judges who have lied. The Court removed Judge Andrea J. Ferrara from office in large part because she twice attempted to submit evidence to the Commission under false pretenses. *In re Ferrara*, 458 Mich 350, 365-369; 582 NW2d 817 (1998). In accepting the Commission's recommendation for removal, the Supreme Court opined that "deception of this sort is 'antithetical to the role of a judge who is sworn to uphold the law and seek the truth.'" *Ferrara, supra*, at 369, quoting *In re Collazo*, 91 NY2d 251, 255; 691 NE2d 1021, 688 NYS2d 997 (1998), quoting *Matter of Myers*, 67 NY2d 550, 554; 496 NE2d 207; 505 NYS2d 48 (1986).

Likewise, the Court removed Judge James P. Noecker because he attempted to deceive the police and the Commission in order to cover up the fact that he had been driving under the influence of alcohol. *In re Noecker, supra*.

The severity of Respondent's pattern of misconduct in this case is at least on par with the severity of the conduct ascribed to Judge Ferrara and Judge Noecker, both of whom engaged in misbehavior comparable to Respondent's misconduct. Accordingly, the Commission concludes that removal from office plus a conditional suspension without pay is an appropriate and proportional level of discipline. Respondent is unfit for judicial office.

In addition to removal from office, the Commission recommends (on the Examiner's request) that Respondent conditionally be suspended for a period of six-years, without pay. Respondent's term in office will be over at the end of 2008 and Respondent has chosen to seek re-election on the November 2008 ballot. This creates a unique set of circumstances for the Commission and the Supreme Court. If Respondent is removed from office only months before the election, and then is re-elected, the sanction of removal from office will be rendered virtually meaningless in the public's eye. Worse yet, a person not fit for judicial office will once again hold that position immediately after being terminated. Accordingly, the Commission recommends that Respondent be conditionally suspended, without pay, for an additional period of six years, commencing on January 1, 2009. This suspension would be conditional, only to become effective in the event that Petitioner is re-elected. It is clear that the Court has authority to impose such a conditional suspension in appropriate circumstances. See *In re Probert*, 411 Mich

210, 237; 308 NW2d 773 (1981); *In re Del Rio*, 400 Mich 665, 726; 256 NW2d 727 (1977).

VIII. Assessment of Costs, Fees, and Expenses

The Commission finds that Respondent engaged in deceit and intentional misrepresentation. Specifically, Respondent committed perjury and presented a fabricated piece of evidence to the Commission. Accordingly, the Commission requests that Respondent be ordered to pay the costs, fees, and expenses incurred by the Commission in prosecuting the complaint. See MCR 9.205(B). The Examiner has submitted a bill showing costs, fees, and expenses incurred by the Commission in the amount of $128,861.26. Therefore, the Commission requests an assessment of costs, fees, and expenses in the total amount of $128,861.26.

IX. Conclusion and Recommendation

The Commission concludes that Respondent committed judicial misconduct. Based on the nature and pervasiveness of the misconduct, the Commission recommends that Respondent be removed from office, that Respondent be suspended without pay, conditionally, for a period of six years commencing on January 1, 2009, and that Respondent be ordered to pay an assessment of costs, fees, and expenses in the total amount of $128,861.26.

JUDICIAL TENURE COMMISSION

HON. BARRY M. GRANT
Chairperson

THOMAS J. RYAN, ESQ.
Secretary

HON. MICHAEL J. TALBOT

NANCY J. DIEHL, ESQ.

RONALD F. ROSE

HON. NANCI J. GRANT

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. BEVERLY NETTLES-NICKERSON

Judge, 30th Circuit Court
Veteran Memorial Courthouse
313 Kalamazoo St.
PO Box 40771
Lansing, MI 48901

Formal Complaint No. 81

_____/

CONCURRING AND DISSENTING OPINION

We concur in the Commission's findings of fact and conclusions of law but dissent from the recommendation that Respondent be subject to a conditional suspension after removal from office. Removal from judicial office, is the most serious sanction that the Commission can recommend under Const 1963, art 6, § 30. Considering the Respondent's misconduct, removal from judicial office—without more—is appropriate.

When the Commission finds misconduct, its task is to make a recommendation of action to the Supreme Court that is reasonably equivalent to the action that has been taken previously in equivalent cases. MCR 9.220(B)(2). On no prior occasion has the Supreme Court imposed additional discipline over and above removal from office, including a case involving *quid pro quo* bribery.

In our view, imposing a sanction greater than the single most serious sanction available (removal) would be disproportionately severe and punitive.

The Commission must be sensitive to the constitutional rights of the voters of Ingham County. When the Commission has asked our Supreme Court to permanently enjoin a person from again serving in judicial office the Supreme Court has refused to do so, deciding instead to leave the question to the voters. The Court's decision in *In re Callahan*, 419 Mich 376, 388-389; 355 NW2d 59 (1984), is instructive:

> Because in this case we choose, by way of removal under art 6, § 30, to completely terminate all of the respondent's ties to his office, we think it would be speculative to consider at this time our authority to permanently enjoin respondent's ability to serve in an unspecified judicial office at an unspecified time. Furthermore, in view of the egregiousness of the offense of which respondent was convicted, the public attention to it, and the sanctions meted out by the sentencing judge and this Court, we are not so cynical about the electoral or appointive process that we are concerned about the respondent's re-entry upon the judicial scene.

In our view, the same considerations apply to the present case. Rather than recommending a conditional suspension in addition to removal, we would leave Respondent's fate to the voters of Ingham County. Such a recommendation would sensitive to the voters' constitutional right to franchise under Const 1963, art 2, § 1. Accordingly, we would recommend that Respondent be removed from judicial office with the imposition of costs.

HON. KATHLEEN McCANN
Vice-Chairperson

HON. JEANNE STEMPIEN

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. BEVERLY NETTLES-NICKERSON

Judge, 30th Circuit Court
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313 Kalamazoo St.
PO Box 40771
Lansing, MI 48901

Formal Complaint No. 81

_____/

CONCURRING AND DISSENTING OPINION

I concur in the Commission's findings of fact and conclusions of law as to Counts I, II, and III. I find that the Examiner failed to prove the remaining counts by a preponderance of the evidence. Based on the Commission's findings as to Counts I, II, and III, I believe that removal from judicial office, plus the imposition of costs, is appropriate discipline. I also agree with the view of the Concurring and Dissenting opinion of Judge McCann and Judge Stempien that a conditional suspension in addition to removal from office is not warranted.

Marja M. Winters

PEOPLE v SARGENT

Docket No. 133474. Argued April 9, 2008 (Calendar No. 1). Decided June 18, 2008.

An Allegan Circuit Court jury convicted Dennis M. Sargent of first-degree criminal sexual conduct and second-degree criminal sexual conduct related to his sexual abuse of a 13-year-old complainant. At the trial, the complainant's sister testified that the defendant had also sexually abused her. When sentencing the defendant, the court, Harry A. Beach, J., assessed 10 points for offense variable 9 (number of victims) of the sentencing guidelines, MCL 777.39, on the basis that there were two victims. The Court of Appeals, SAWYER, P.J., and NEFF and WHITE, JJ., affirmed the defendant's convictions and sentences in an unpublished opinion per curiam, issued January 25, 2007 (Docket No. 263392). The defendant sought leave to appeal, which the Supreme Court granted. 480 Mich 869 (2007).

In a unanimous opinion per curiam, the Supreme Court *held*:

When scoring offense variables, a trial court can consider only conduct that relates to the offense for which it is scoring the sentencing guidelines, unless otherwise stated in the statute governing the offense variable. In this case, the jury convicted the defendant only of sexually abusing the complainant. The defendant was not convicted of sexually abusing the complainant's sister. Furthermore, the defendant's sexual abuse of the complainant's sister did not arise out of the same transaction as his sexual abuse of the complainant. The trial court should thus have assessed zero points for offense variable 9, which would have reduced the recommended minimum sentence range for each of the defendant's convictions.

Reversed in part, sentences vacated, and case remanded to the trial court for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES.

When scoring offense variables under the sentencing guidelines, a trial court can consider only conduct that relates to the offense for

which it is scoring the guidelines, unless otherwise stated in the statute governing the offense variable (MCL 769.31[d]; MCL 769.34; MCL 777.1 *et seq*.).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Douglas E. Ketchum*, Assistant Prosecuting Attorney, for the people.

Law Office of John D. Roach, Jr., PLC (by *John D. Roach, Jr.*), for the defendant.

Amicus Curiae:

David G. Gorcyca, *Jeffrey R. Fink*, and *Cheri L. Bruinsma*, for the Prosecuting Attorneys Association of Michigan.

PER CURIAM. We granted leave to appeal in this case to consider whether offense variable 9 (number of victims) (OV 9) can be scored using uncharged acts that did not occur during the same criminal transaction as the sentencing offenses. Defendant was convicted of first-degree criminal sexual conduct and second-degree criminal sexual conduct as a result of his sexual abuse of the 13-year-old complainant. At defendant's trial, the complainant's older sister testified that defendant had also sexually abused her when she was 15 years old. The trial court assessed 10 points for OV 9 on the basis that there were two victims—the complainant and the complainant's sister. The Court of Appeals affirmed defendant's convictions and sentences. Unpublished opinion per curiam, issued January 25, 2007 (Docket No. 263392).

When defendant was sentenced, MCL 777.39(2)(a) stated that "each person who was placed in danger of injury or loss of life" must be counted as a victim under

OV 9.[1] Ten points are to be assessed when there were two to nine victims. MCL 777.39(1)(c). MCL 777.21 instructs us on how to score the sentencing guidelines. MCL 777.21(1)(a) instructs us to "[f]ind the offense category for *the offense* . . . [and] determine the offense variables to be scored for that offense category . . . ." (Emphasis added.) MCL 777.21(2) instructs us to "score *each offense*" if "the defendant was convicted of multiple offenses . . . ." (Emphasis added.) MCL 777.21(3), which pertains to habitual offenders, instructs us to "determine the . . . offense variable level . . . based on *the underlying offense*," and then to increase the upper limit of the recommended minimum sentence range as indicated. (Emphasis added.) This language indicates that the offense variables are generally offense specific. The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense. The primary focus of the offense variables is the nature of the offense; the characteristics of the offender are primarily considered under the prior record variables.

Further, MCL 769.31(d) provides, in part:

> "Offense characteristics" means the elements of the crime and the aggravating and mitigating factors relating to *the offense* that the legislature determines are appropriate. [Emphasis added.]

This subdivision is preceded by the language "As used in this section and section 34 of this chapter." "[T]his section," MCL 769.31, is merely a definitional section. "[S]ection 34 of this chapter," MCL 769.34, is the

[1] MCL 777.39(2)(a) has since been amended to provide: "Count each person who was placed in danger of physical injury or loss of life or property as a victim." However, this amendment has no effect on this case.

statutory provision that provides, among other things, that the trial court must sentence within the minimum sentence range calculated under the guidelines unless the trial court articulates substantial and compelling reasons that justify a departure. MCL 769.34(3)(b) is the only provision that uses the phrase "offense characteristic," and it states that

> [t]he court shall not base a departure on an *offense characteristic* or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [Emphasis added.]

The appropriate minimum sentence range is determined in part by scoring the offense variables. From this context, it seems clear that the term "offense characteristics" includes the characteristics that are taken into consideration under the offense variables. Therefore, if anything, MCL 769.31(d) suggests that, generally, only conduct "relating to the offense" may be taken into consideration when scoring the offense variables.

That the general rule is that the relevant factors are those relating to the offense being scored is further supported by the fact that the statutes for some offense variables specifically provide otherwise. For instance, MCL 777.44(2)(a) provides that when scoring OV 14 (whether the offender was a leader in a multiple-offender situation), "the entire criminal transaction should be considered . . . ." For other offense variables, the Legislature unambiguously made it known when behavior outside the offense being scored is to be taken into account. OV 12 (contemporaneous felonious acts), for example, applies to acts that occurred within 24

hours of the sentencing offense and have not resulted in separate convictions. MCL 777.42(2)(a). OV 13 (continuing pattern of criminal behavior) explicitly permits scoring for "all crimes within a 5-year period, including the sentencing offense," regardless of whether they resulted in convictions. MCL 777.43(2)(a). OV 16 (property obtained, damaged, lost, or destroyed) provides that in "multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.46(2)(a). Finally, OV 8 (asportation or captivity of victim) specifically focuses on conduct "beyond the time necessary to commit the offense." MCL 777.38(1)(a). That the Legislature has explicitly stated that conduct not related to the offense being scored can be considered when scoring some offense variables strengthens our conclusion that, unless stated otherwise, only conduct that relates to the offense being scored may be considered.

Finally, aside from having no basis in the language of the relevant statutes, the prosecutor's interpretation simply does not make sense. If, as the prosecutor contends, we are not limited to conduct relating to the sentencing offense, every single person that the defendant had ever placed in danger of injury or loss of life would properly be considered for the purposes of OV 9. Instead, when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered.[2]

[2] However, this does not mean that a defendant must commit more than one offense for there to be more than one victim. The instructions for OV 9 provide that a victim is each person who is placed in danger of injury or loss of life. MCL 777.39(2)(a). The instructions do not necessarily require that a separate criminal offense have occurred with respect

In the instant case, the jury convicted defendant only of sexually abusing the 13-year-old complainant. It did not convict him of sexually abusing the complainant's sister. Furthermore, the abuse of the complainant's sister did not arise out of the same transaction as the abuse of the complainant. For these reasons, zero points should have been assessed for OV 9. Reducing the OV 9 score from 10 to zero points reduces defendant's recommended minimum sentence range from 108-180 to 81-135 months with regard to the first-degree criminal sexual conduct conviction and from 36-71 to 29-57 months with regard to the second-degree criminal sexual conduct conviction. Therefore, we reverse in part the judgment of the Court of Appeals, vacate defendant's sentences, and remand this case to the trial court for resentencing. In all other respects, we deny leave to appeal, because we are not persuaded that we should review the remaining questions presented.

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

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to that victim. For example, in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life.

HERMAN v BERRIEN COUNTY

Docket No. 134097. Argued March 6, 2008 (Calendar No. 5). Decided June 18, 2008.

Joe Herman and others brought an action in the Berrien Circuit Court against Berrien County, challenging the ability of the county board of commissioners to locate a law enforcement training facility with outdoor shooting ranges near the plaintiffs' residences on the ground that the shooting ranges would violate various township zoning and anti-noise ordinances. The court, Paul L. Maloney, J., granted the county's summary disposition motion and denied the plaintiffs' summary disposition motion, ruling that the proposed county building and the shooting ranges were exempt under MCL 46.11 of the county commissioners act (CCA), MCL 46.1 *et seq*., from the township's ordinances. The plaintiffs appealed. In a split decision, the Court of Appeals, O'CONNELL, P.J., and MURRAY, J. (DAVIS, J., dissenting), affirmed, holding that the county was exempt from the township's regulations because the CCA grants the county the sole authority to choose the site for a county building, which includes the entire parcel involved and the uses on that parcel. 275 Mich App 382 (2007). The plaintiffs sought leave to appeal, which the Supreme Court granted. 480 Mich 961 (2007).

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

Land uses that are ancillary to a county building and not indispensable to its normal use are not covered by the grant of priority in the CCA over local regulations. Therefore, in this case, the county's outdoor shooting ranges do not have priority over the township ordinances on which the plaintiffs rely because those land uses are not indispensable to the normal use of the county building.

1. Whenever the legal question of which government entity has priority is presented, it must be resolved by thoroughly analyzing the statute that purportedly gives the entity in question priority over local regulations.

2. For purposes of determining CCA priority, a building's normal use only extends to the actual uses of that particular building, because that is the extent of the power that the CCA grants to the county.

3. A county's power under the CCA is limited to the siting of county buildings, which does not include the power to review and approve site plans or to site county activities or land uses. Therefore, a county's encroachment on a township's broad authority to enact zoning ordinances to regulate land development must be limited to that necessary to effect the purpose of those portions of the CCA that authorize a county to site and erect county buildings. Accordingly, the scope of the CCA's priority over township ordinances is limited to ancillary land uses that are indispensable to the building's normal use, as determined on a case-by-case basis.

4. The normal use of the building at issue is for conducting classroom firearms training indoors; therefore, the outdoor shooting ranges are not indispensable for the building's purposes and they do not have priority over applicable township ordinances.

Reversed and remanded to the circuit court for further proceedings.

1. COUNTIES — COUNTY COMMISSIONERS ACT — COUNTY FACILITIES — SCOPE OF POWER.

A county's power under the county commissioners act is limited to the siting of county buildings, which does not include the power to review and approve site plans or to site county activities or land uses (MCL 46.11[b], [d]).

2. COUNTIES — COUNTY FACILITIES — ZONING — TOWNSHIP ORDINANCES.

Land uses that are ancillary to a county building and not indispensable to its normal use are not covered by the grant of priority in the county commissioners act over local regulations (MCL 46.11[b], [d]).

Rhoades McKee PC (by *Gregory G. Timmer* and *Michael C. Walton*) and *Westrate & Thomas* (by *Mark A. Westrate*) for the plaintiffs.

Lewis Reed & Allen P.C. (by *Michael B. Ortega* and *Robert C. Engels*) and *R. McKinley Elliott* for the defendant.

Amicus Curiae:

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall P.C. (by *John H. Bauckham*) for the Michigan Townships Association and the Michigan Municipal League.

CAVANAGH, J. This case involves further analysis of the issue presented in *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702; 664 NW2d 193 (2003), in which we held that the county commissioners act (CCA)[1] has priority over the Township Zoning Act (TZA).[2] Today we are asked to gauge the scope of that priority, which relates to a county's power to "site" and "erect" "building(s)," by defining the CCA's term "site." In defining that term, we hold that land uses that are ancillary to the county building and not indispensable to its normal use are not covered by the CCA's grant of priority over local regulations. Therefore, in this particular case, Berrien County's outdoor shooting ranges do not have priority over the township ordinances that plaintiffs rely on because they are land uses that are not indispensable to the normal use of the county building. Accordingly, we reverse the decision of the Court of Appeals and remand this case to the circuit court for further proceedings consistent with this decision.

I. FACTS AND PROCEDURE

This case involves a piece of property that is located in Berrien County and Coloma Township. The property consists of a 14-acre parcel of land. The property is

[1] MCL 46.1 *et seq*.

[2] MCL 125.271 *et seq*. The TZA has since been replaced with the Michigan Zoning Enabling Act (MZEA) MCL 125.3101 *et seq*., but that new act expressly provides that all claims, such as the one at bar, that were pending when the Legislature replaced the TZA with the MZEA are subject to the TZA.

The shooting range facility has been the topic of a hotly contested public debate. Its supporters note that it provides an invaluable public service by simulating real-life conditions that law enforcement officers encounter in the field, preparing them to better serve the citizenry. Further, the supporters argue that indoor shooting ranges are simply inadequate to properly mimic field conditions. Opponents of the shooting ranges raised myriad concerns relating to the proximity of the ranges to other civilian land uses:

(1) Annually, 221,000 rounds will be fired.

(2) Automatic guns, semi-automatic guns, handguns, shotguns, and rifles are used. One type of gun used, the .308 caliber rifle, can fire a bullet 2.4 miles.

(3) The ranges all point outward from the property's center, toward the surrounding privately owned parcels.

(4) There are children's sports fields within one mile of the ranges.

(5) The ranges are within 2.4 miles of the Coloma schools and within one mile of over 50 homes.

(6) Seasonally, up to 200 farm workers and their children are within range of the .308 rifle, and four migrant-worker residences are within 1,500 feet.

(7) The sheriff estimates that 25 percent of the training events will be conducted after dark.

(8) Property values within one mile of the range are estimated to have declined by an aggregate of $2.5 million; real estate agents report difficulty selling homes in close proximity to the facility.

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ing to approximately 370 of the surrounding acres. This apparently violates the anti-noise ordinance, which prohibits noise levels above 65 decibels between 7:00 a.m. and 10:00 p.m. and 55 decibels at all other times.

Apparently having been persuaded by the local residents' concerns, in October 2005, the Coloma Charter Township Board voted unanimously not to support the facility. However, in November 2005, the county approved the facility, and construction on it proceeded.

Plaintiffs are a group of individuals who own property located in close proximity to the shooting ranges. In late November 2005, plaintiffs filed a declaratory judgment action that aimed to stop operation of the facility. The complaint alleged that the county's facility was prohibited by the township's zoning ordinance; and the plaintiffs' amended complaint additionally alleged that the facility violated the township's anti-noise ordinance. After various circuit court proceedings, the parties filed cross-motions for summary disposition. The trial court, relying on *Pittsfield*, *supra*, simultaneously granted the county's motion for summary disposition and denied plaintiffs' dispositive motion. Plaintiffs appealed, and the Court of Appeals affirmed in a published, split decision. *Herman v Berrien Co*, 275 Mich App 382; 739 NW2d 635 (2007). The Court of Appeals majority also relied on *Pittsfield*, holding that the county is exempt from the township's regulations because they conflict with its express legislative authorization to site county buildings, which includes the county's shooting ranges. *Id*. at 384, 388-389. We granted plaintiffs' application for leave to appeal. *Herman v Berrien Co*, 480 Mich 961 (2007).

II. STANDARD OF REVIEW

The case involves interpretation of the CCA. "Questions of statutory interpretation are questions of law, which will be reviewed de novo." *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999); see also *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

III. ANALYSIS

We are again called on to analyze a purported conflict between the powers given to intermediate government entities and the powers given to local government entities. Specifically, this case involves the relationship between a county's power, under the CCA, to site county buildings and the powers given to local governments under the TZA and the Township Ordinance Act, MCL 41.181 *et seq*.[6]

While this particular case includes novel nuances, the broad question is one that we have previously encountered. In *Dearden v Detroit*, 403 Mich 257; 269 NW2d 139 (1978), we analyzed a conflict between the Michigan Department of Corrections, in its attempts to use a building as a criminal rehabilitation center, and the city of Detroit's zoning ordinance, which precluded such land use. At that time, we acknowledged that "[n]o Michigan case has resolved, with finality, the question of whether our state or its agencies are inherently immune from local zoning ordinances." *Id*. at 262. Yet, we held that "the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances." *Id*. at 264.[7] The holding in *Dearden* continues to be the appropriate test for these particular conflict cases.

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[6] The relevant anti-noise ordinance was promulgated by Coloma Township pursuant to the Township Ordinance Act, § 1, which gives local governments the power to "adopt ordinances regulating the public health, safety, and general welfare of persons and property . . . ." MCL 41.181(1).

[7] In *Dearden*, we held that the Department of Corrections' rehabilitation house was immune from Detroit's zoning ordinance because the Legislature had evidenced its intent to that effect in MCL 791.204 by giving the Department of Corrections " '*exclusive jurisdiction* over . . . penal institutions' " and by making that act " '*repeal all acts and parts of acts inconsistent with the provisions of this act*.' " *Id*. at 265-266, quoting MCL 791.204 (emphasis in original).

In *Northville Charter Twp v Northville Pub Schools*, 469 Mich 285; 666 NW2d 213 (2003), we examined whether the authority of the state superintendent of public instruction to control site plans of schools under the Revised School Code (RSC)[8] had priority over the restrictions of a local zoning ordinance. Relying on the rule in *Dearden*, we held that the state superintendent's decision to build and operate a school was immune from the local zoning regulations because the Legislature evinced its intent to give the superintendent such priority by stating that the superintendent had " 'sole and exclusive jurisdiction over . . . site plans for those school buildings.' " *Northville*, *supra* at 290, 295, quoting MCL 380.1263(3)[9] (emphasis omitted). The opinion also pointed out that the Legislature need not use the exact phrase "sole and exclusive jurisdiction" to bestow priority; but, when that phrase is used, it signifies a grant of priority. *Id*. at 291-292. In *Northville*, we also wrestled with the scope of priority in defining the RSC's phrase "site plan." The plurality opinion held that the phrase extended the priority of the superintendent's power in locating and operating schools to "everything on the property, i.e., the entire project." *Id*. at 292.[10]

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[8] MCL 380.1 *et seq*.

[9] This subsection, in pertinent part, states:

> The superintendent of public instruction has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes and, subject to subsection (4), of site plans for those school buildings. [MCL 380.1263(3).]

[10] I concurred and wrote separately to note that the phrase "site plan" should be defined as a legal term of art that involves a broader meaning than simply " 'what goes on within the site itself,' " as the plurality phrased it. *Northville*, *supra* at 299. However, my disagreement with the

Dearden and *Northville* make it clear that whenever the legal question of priority is presented, it must be resolved by thorough analysis of the statute that purportedly gives the government entity priority over local regulations.[11] In this case, that statute that potentially gives the county priority over the township's ordinances is the CCA. Thus, following *Dearden* and *Northville*, we must analyze the CCA to discern the Legislature's intent regarding any priority that that act may give to counties.[12] The CCA states in pertinent part:

> A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:

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plurality opinion on that issue is not dispositive in the instant case because, under either definition of "site plan," priority applied to more than simply erecting a school building. Indeed, even under the plurality opinion's narrower definition, "site plan" applied to any land use on the property, which is dispositive in this case as it relates to the distinction between "site plan," as used in the RSC, and "site," as used in the CCA. See *infra*.

[11] In this context, the term "priority" is legally synonymous with the term "immunity," because if a government entity has priority over local regulations, it may also be described as being immune from local regulations. This comports with the semantics of traditional preemption analyses, which these conflict-of-laws cases involve.

[12] The Court of Appeals and both parties include *Burt Twp v Dep't of Natural Resources*, 459 Mich 659; 593 NW2d 534 (1999), in their analyses of the priority issue because that case dealt with whether a statute gave the Department of Natural Resources priority over a local zoning ordinance. However, we find *Burt* distinguishable from the instant "priority" analysis for several reasons. First, *Burt* is only helpful regarding the general precepts of the priority analysis because it was applying a different power-granting statute, and it did not expand on the general guidance *Dearden* had already given. Second, any general aid to the priority analysis that *Burt* may have given is inapplicable because, since *Burt*, *Pittsfield* has decided the instant priority question of the CCA versus local regulations. Finally, *Burt* simply did not evaluate the scope of any statutory priority, which is the pivotal issue here.

> (a) Purchase or lease for a term not to exceed 20 years, real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county.
>
> (b) Determine the site of, remove, or designate a new site for a county building. The exercise of the authority granted by this subdivision is subject to any requirement of law that the building be located at the county seat.
>
> * * *
>
> (d) Erect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them. [MCL 46.11.]

This is not the first time we have conducted a priority analysis of the CCA. Indeed, we first applied *Dearden*'s rule to the CCA in *Pittsfield*, a case in which a township wanted to stop Washtenaw County from constructing a homeless shelter because the shelter violated the township's zoning ordinance. We held that under the CCA, the county's authority to site and erect county buildings superseded the township's authority under its zoning ordinance. *Pittsfield*, *supra* at 710-712. We reasoned that if a county were required to follow local use regulations, the CCA's grant of power to site and erect county buildings would be effectively "surplusage." *Id*. at 713-714. Thus, since *Pittsfield*, it has become accepted that the CCA gives counties priority over local regulations that inhibit a county's power to site and erect county buildings under the CCA.[13]

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[13] While *Pittsfield*'s holding may have been interpreted as only applying to the CCA's priority over local zoning restrictions, today we extend that holding to include the uncontroversial notion that the CCA grants counties similar priority over any local ordinance that would apply to restrict the county's power to site and erect county buildings in the same fashion that the zoning ordinance inhibited the homeless shelter in *Pittsfield*.

In this case, we are not asked to disturb *Pittsfield*'s holding; both parties and both lower courts accept *Pittsfield* as controlling. Yet, *Pittsfield* does not answer the question presented here because that case did not examine the scope of priority that the CCA gives counties. That scope question is the pivotal issue in this case. In other words, while there is no dispute in this case regarding whether the CCA gives the county priority to site and erect county buildings, there is a dispute regarding whether that priority extends to the county's land uses—the shooting ranges—that are ancillary to its buildings. In that regard, the Court of Appeals majority correctly noted that the true issue is the definition of the CCA's term "site." Indeed, it is this definitional analysis that will answer the true question in this case: When a county erects a building pursuant to its authority under the CCA, what land uses, if any, are encompassed in the definition of "site" such that they also have priority over local regulations? Thus, as that question applies to this case, if building the outdoor shooting ranges is included in the county's power to "site" buildings, those land uses will have priority over the township's ordinance; whereas, if they are not included in the definition of "site," they will not have priority.

On that issue, the Court of Appeals stated:

> "Site" is not defined in the statute, so resorting to a dictionary is necessary to determine the ordinary meaning of the word. *Northville* [*supra at* 292]. In *Northville* . . . the Supreme Court looked to the dictionary to define "site" when determining the meaning of "site plan" under the [RSC]:
>
> "This leaves to be determined the definition of 'site plan.' The dictionary defines 'site' as 'The place where something was, is, or is to be located,' *The American Heritage Dictionary of the English Language* (1982), or

> similarly, '[T]he area or exact plot of ground on which anything is, has been, or is to be located . . . .' *Random House Webster's College Dictionary* (1997). [*Id*.]"
>
> Using these same definitions, it is clear that when designating a new "site" for county buildings, the "site" includes the entire area of ground on which the building is to be located. In other words, it is the "site" or, in real terms, the entire parcel where the buildings will be located, that is not subject to local regulation. Hence, the uses on the site of the building are not subject to the township's ordinances. *Pittsfield Twp*, *supra* at 711. [*Herman*, *supra,* 275 Mich App at 386-387.]

The Court of Appeals used this analysis to hold that the county's shooting ranges had priority over the township's ordinances. We disagree with this conclusion and therefore reverse.

Initially, we note that the definition of "site" from *Northville* is not controlling because it derives from a different priority-giving statute. *Northville* involved the RSC, while the present case involves the CCA. In comparing these two statutes, it is clear that they serve different purposes and, accordingly, bestow different powers on their respective government entities.

The RSC gives the superintendent "sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes and . . . of *site plans* for those school buildings." MCL 380.1263(3) (emphasis added). Hence, the RSC gives the superintendent unlimited authority over the entire site plan of school buildings. Also notably, the RSC defines one such building very broadly: "[a]s used in this section: 'High school building' means any structure or facility that is used for instructional purposes, that offers at least 1 of

grades 9 to 12, and that includes an athletic field or facility." MCL 380.1263(8)(a).

In contrast, the CCA gives counties the power to "[d]etermine the site of, remove, or designate a new site for a *county building*," and to "[e]rect the necessary *buildings* for jails, clerks' offices, and other *county buildings* . . . ." MCL 46.11(b) and (d) (emphasis added). Thus, a county's power under the CCA is limited to the siting of county buildings, which does not equate to the power to review and approve site plans. Further, that power is limited because it does not apply when that particular county building is required by law to "be located at the county seat." MCL 46.11(b).

In sum, the RSC gives nearly unlimited power ("sole and exclusive") regarding entire site plans of schools, whereas the CCA gives a power that is limited in certain circumstances and only applies to siting county buildings. Accordingly, the CCA's limited term "site" does not carry the same meaning as the RSC's expansive phrase "site plan." Thus, the Court of Appeals incorrectly relied on *Northville*, which dealt with the RSC, to equate "site plan" with "site" as used in the CCA.

However, simply noting that *Northville* does not adequately define "site" under the CCA does not complete our analysis. We must still give meaning to that term by adopting a test that determines whether and which land uses are encompassed in its definition. On that score, the County proffers that "site" applies to any use of land that is reasonably connected to the county building thereon. Plaintiffs do not suggest an alternative test. Instead they rely on the CCA's limited grant of authority to site buildings, which, it argues, omits the power to site ancillary land uses. Neither party is wholly correct.

In this analysis, we are mindful of *Dearden*'s overarching maxim: "legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances." *Dearden, supra* at 264. We also note that, in statutory interpretation, if the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Also, "[a]s far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory-language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (internal citations omitted). Finally, in defining particular words in statutes, we must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Id*., quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

The CCA is an unambiguous statute. In pertinent part, it gives counties the power to "[d]etermine the site of, remove, or designate a new site for a county building" and to "[e]rect the necessary buildings for jails, clerks' offices, and other county buildings . . . ." MCL 46.11(b) and (d). A plain reading of this language leads to the conclusion that the Legislature intended to give counties the power to "site" and "erect" "county buildings." Each time the CCA grants the power to site, it invariably relates that power to "buildings." Notably, the Legislature never semantically links the power to site with any nonbuilding activity or land use. In other words, the CCA does not give counties the power to site a county "activity" or county "land use"; rather, it

always relates its grant of siting power to "buildings." This leads to the conclusion that the siting power is limited to buildings.[14] This conclusion is supported by the contextually derived purpose of the CCA. The CCA was expressly promulgated "to define the powers and duties of the county boards of commissioners . . . ." Title of 1851 PA 156, as amended by 1978 PA 51. Accordingly, in § 11, the act clearly and descriptively articulates the numerous powers it gives to counties.[15] The power to site county activities or land uses is conspicuously absent from that list.[16] Also, the CCA's continued use of the term "building(s)" must have significance. That term would be rendered nugatory if the CCA's power to "site" was meant to extend to other county acts, such as siting land uses, because those other acts are never listed in the CCA. In essence, if those unlisted acts were actually included in the power to site buildings, then the CCA's express inclusion of the power to site buildings would be superfluous. This cannot be.[17] Therefore, the CCA's continued use of the

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[14] In fact, the CCA expressly includes examples that uniquely fit into the category of buildings: courthouses, jails, clerks' offices, and other county buildings.

[15] In addition to the siting power, the CCA also gives counties the power, among other things, to: "[p]urchase or lease . . . real estate," "[b]orrow or raise by tax upon the county those funds authorized by law," "[e]stablish rules consistent with the open meetings act," and "[g]rant or loan funds to a nonprofit corporation organized for the purpose of providing loans for private sector economic development initiatives." MCL 46.11 (a), (e), (p), and (r).

[16] In light of the array of disparate powers enumerated in the CCA, the Legislature surely could have, for instance, granted counties the power to site land uses, such as landfills, reservoirs, beaches, parks, or other county land uses. But it chose not to.

[17] See *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992) (when interpreting a statute, no word should be treated as surplusage or rendered nugatory if at all possible).

term "building(s)" must place significant limitations on the meaning of the act's term "site" by omitting the power to do other acts.

However, we are mindful that the power to site a building is worthless if the entity that sites the building cannot make normal use of the building. Just as *Pittsfield* recognized that the power to site a building would be "mere surplusage" if the siting entity had to comply with zoning ordinances, *Pittsfield*, *supra* at 713, we too acknowledge that the power to site a building would be meaningless if the siting entity could not conduct ancillary land uses in order to make normal use of the building. For instance, the normal use of most county buildings would require sidewalks, parking lots, and light poles. Thus, while defining the power to "site" as being limited to buildings, we simultaneously accept that some ancillary land uses must be included in the county's siting power.

Next, we must articulate a standard to test whether a particular ancillary land use is encompassed in the use of the building such that it is given priority under the CCA. To answer that question, a court must ask whether the ancillary land use is indispensable to the building's normal use. "The TZA vests townships with broad authority to enact zoning ordinances to regulate land development and to 'insure that the use of land shall be situated in appropriate locations and relationships . . . . ' " *Pittsfield*, *supra* at 707-708, quoting MCL 125.271(1). As stated, the priority given to the county in MCL 46.11(b) and (d) is significantly limited to siting a building. Because the county's authority is limited, the encroachment on a township's broad authority must be limited to that needed to effect the purpose of §§ 11(b) and (d). Thus, we hold that the scope of the CCA's priority over the TZA is limited to ancillary land uses

that are indispensable to the building's normal use. Accordingly, the ancillary land use will only have priority over local regulations if it is indispensable to the building's normal use.[18] This standard will invariably require a case-by-case analysis in future applications.

Turning to the present case, the ancillary land use in question is the outdoor shooting ranges on the county's leased property. Using the "indispensable" test, we must decide if that ancillary land use has priority over the township's zoning and anti-noise ordinances. In order to decide if this ancillary land use is indispensable to the normal use of the county's building, we must define the normal use of the county's building. The county's building is located in a complex that is called the "Berrien County Sheriff's Department Firearms Training Facility." The county's feasibility study for the facility describes the purpose of the building as being "for training and support."[19] Thus, the building's nor-

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[18] In adopting this standard, we are reminded of, and guided by, the venerable holding in *McCulloch v Maryland*, 17 US (4 Wheat) 316; 4 L Ed 579 (1819), in which the United States Supreme Court dealt with a similar issue regarding the scope of a government's power when its granting authority leaves that question unanswered. The Court stated:

> Congress is not empowered by it to make all laws, which may have relation to the powers confered on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. [*Id*. at 413.]

While the CCA does not contain the exact phrase "necessary and proper," we find the present issue strikingly similar. The CCA has given power to this state's counties, and that power must be useable, yet limited. Thus, with no statutory direction in that regard, we find the *McCulloch* Court's resolution of its similar dilemma compelling.

[19] Both parties have accepted the factual assertions of this study. In fact, the county proffered an affidavit of the chairman of the Berrien

mal use is for firearms training and support. More specifically, the building's normal use is for conducting classroom firearms training. While it may be true that this normal use works in concert with, or aids, the broader purpose of total firearms training, which includes using outdoor shooting ranges, the normal use of the building is to conduct classroom (or *indoor*) training, which is different from the outdoor firearms training that occurs in the shooting ranges. This distinction is of great import when recalling that the CCA's grant of power hinges on siting and erecting "buildings." In other words, a county may not expand a building's normal use simply because that building's use aids or complements another distinct use. For purposes of CCA priority, a building's normal use only extends to the actual uses of that particular building because, again, that is the extent of the power granted to the county by the CCA. Therefore, despite the county's use of the building to support the broad arena of firearms training, which conceivably includes the outdoor shooting ranges, the building's normal use is limited to conducting indoor "training and support." In other words, the normal use of the outdoor shooting ranges is for outdoor shooting practice and training, while the normal use of the building is for indoor classroom training and practice, despite both uses falling under the broad category of firearms training.

Accordingly, the final question is whether the outdoor shooting ranges are indispensable for the building's indoor training and support. We hold that they are not indispensable because the indoor training and sup-

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County Board of Commissioners, in which the chairman expressly adopts the study's findings. The county also presented the affidavit of a county undersheriff, who stated that "[t]he training facility building will function as a classroom. This is because virtually all firearms training begins in a classroom setting."

port can be conducted without the outdoor shooting ranges being located next to the building. Therefore, under the CCA, the shooting ranges are not given priority over the township's ordinances.

IV. CONCLUSION

The county's shooting ranges do not have priority over the township's ordinances because those local regulations do not conflict with the county's powers under the CCA; as they apply to the shooting ranges, the regulations do not stop the county from exercising its limited power to site buildings. However, the county building, its parking lot, its driveway, and its lighting poles do have priority over the local regulations because they are indispensable to the normal use of the building.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

PEOPLE v MUTTSCHELER

Docket Nos. 136101 and 136199. Decided June 18, 2008.

Theodore Muttscheler, who was incarcerated in prison at the time, pleaded guilty of attempted possession of a weapon by a prisoner after guards found a weapon in his cell. Pursuant to the plea agreement, the defendant was to receive a sentence within the applicable sentencing guidelines range. The defendant's recommended minimum sentence range under the guidelines was 5 to 17 months, but the Baraga Circuit Court, Garfield W. Hood, J., sentenced the defendant to 12 to 30 months in prison, to be served consecutively to the sentences he was already serving. The defendant moved to withdraw his plea, but the court denied the motion. The Court of Appeals, OWENS, P.J., and BANDSTRA, J. (DAVIS, J., concurring in part and dissenting in part), reversed, concluding that the defendant was entitled to an intermediate sanction as a sentence, which would have limited him to receiving at most a 12-month jail term and not a prison term. The Court remanded the case for resentencing within the guidelines recommendation, in accordance with the plea agreement, or for withdrawal of the defendant's plea if the trial court could not agree to that. Unpublished opinion per curiam, issued March 25, 2008 (Docket No. 275411). The prosecution and the defendant separately sought leave to appeal.

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal and without oral argument, *held*:

An intermediate sanction does not include a prison sentence. MCL 769.34(4)(a) requires a trial court to impose an intermediate sanction if the upper limit of the defendant's recommended minimum sentence range under the guidelines is 18 months or less, as it was in this case, unless the court articulates a substantial and compelling reason to depart upward and impose a prison sentence rather than a jail term. Because the parties agreed to a sentence within the guidelines, the trial court violated the plea agreement both by sentencing the defendant to prison and by imposing an indeterminate sentence, under which the defendant could be imprisoned longer than the 12-month maximum allowed by MCL 769.34(4)(a). The defendant did not assert his innocence;

rather, he argued on appeal that the prosecution did not fulfill its end of the bargain. Therefore, enforcement of the bargain is the proper remedy, and the Court of Appeals did not err when it held that the defendant will be allowed to withdraw his plea only if on remand the trial court cannot agree to a sentence within the guidelines.

Affirmed.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Joseph P. O'Leary*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

State Appellate Defender (by *Anne M. Yantus*) for the defendant.

MEMORANDUM OPINION. In this case, we are called on to interpret the intermediate-sanction sentencing statute, MCL 769.34(4)(a), and decide whether a defendant whose recommended minimum sentence range requires the imposition of an intermediate sanction may be sentenced to serve time in prison, rather than jail. The Court of Appeals held that, absent a departure supported by substantial and compelling reasons, a trial court may not impose an indeterminate prison sentence on a defendant for whom the sentencing guidelines require an intermediate sanction because an "intermediate sanction does not include a prison sentence." *People v Muttscheler (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 275411), p 2. In lieu of granting either the prosecution's or defendant's application for leave to appeal, we affirm that judgment.

While defendant was incarcerated in prison, guards found a crude weapon in his cell during a routine search. Defendant pleaded guilty of attempted possession of a weapon by a prisoner, in exchange for the

prosecution's dismissal of an habitual-offender notice and the imposition of a sentence within the applicable sentencing guidelines range. Under the guidelines, defendant's recommended minimum sentence range was 5 to 17 months. The trial court sentenced him to 12 to 30 months in prison, to be served consecutively to the sentences he was already serving.[1] Defendant then moved to withdraw his plea, but the trial court denied his motion. On leave granted, the Court of Appeals reversed in a split decision. The Court held that defendant was entitled to an intermediate sanction, which would at most be a *jail* term of no more than 12 months. *Id*. It remanded the case for resentencing within the guidelines, in accordance with the plea agreement. If the trial court could not agree to that, the Court held, defendant must be allowed to withdraw his plea. *Id*.

As noted, under the sentencing guidelines, defendant's recommended minimum sentence range was 5 to 17 months. MCL 769.34(4)(a) provides:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the

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[1] Because defendant was incarcerated when he committed the offense, MCL 768.7a(1) requires a consecutive sentence. Specifically, the relevant part of the statute provides:

> A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state.

> department of corrections. *An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less*. [Emphasis added.]

Furthermore, MCL 769.31(b) defines "intermediate sanction" as "probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed." The statute identifies a variety of possible intermediate sanctions, such as community service, probation, a jail sentence, a fine, house arrest, etc., but it unequivocally states that a prison sentence is not an intermediate sanction. See also *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). *Stauffer* implies that when the guidelines require an intermediate sanction, even if the *length* of the sentence does not exceed the statute's 12-month maximum, the sentence is an upward departure if the defendant is required to serve it in prison, rather than in jail. *Id*. at 636. Accordingly, the trial court cannot impose a prison sentence unless it identifies substantial and compelling reasons for the departure. *Id*.

The Court of Appeals correctly stated that the trial court erred by relying on *People v Weatherford*, 193 Mich App 115; 483 NW2d 924 (1992). *Weatherford,* predating the enactment of the legislative sentencing guidelines, was decided in the "era" of the judicial sentencing guidelines, 1983 through 1998. See *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Because the minimum sentence ranges recommended by the judicial guidelines were not the product of legislative action, sentencing courts could not be required to adhere to them. *Id.* Courts could sentence outside the guidelines simply by articulating a reason why such a sentence should be imposed. *Id.*; Michigan Sentencing Guidelines (2d ed, 1988), p 7. Thus, what the Court of Appeals determined to be a sufficient

reason for the departure in *Weatherford* is inapplicable to a sentence imposed under the legislative sentencing guidelines.

More importantly, the sentence in *Weatherford* was imposed after a jury trial. The trial court there was not bound by any plea agreement to sentence within the guidelines, as the trial court was in the present case. Because the parties here agreed to a sentence within the guidelines, the trial court violated the agreement not only by sentencing defendant to prison, but also by imposing an indeterminate sentence, under which defendant could be imprisoned for longer than the 12-month maximum allowed by the intermediate-sanction statute.

Finally, we conclude the Court of Appeals did not err when it held that defendant will be allowed to withdraw his plea only if the trial court cannot agree to a sentence within the guidelines. As the Court noted, defendant does not assert his innocence; the heart of his argument is that the prosecution did not fulfill its end of the bargain. *Muttscheler, supra* at 2.[2] Accordingly, enforcement of that bargain is the proper remedy.

Affirmed.

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

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[2] We note that this issue is simplified somewhat by the fact that defendant's new sentence must be served consecutively to the existing sentence. If the sentences could have been served concurrently, defendant might have chosen to agree to a departure in order to serve his new term in prison while he simultaneously served his existing prison term. Agreeing to such a departure from an intermediate sanction would waive an appellate challenge, unless the length of the sentence also exceeded 12 months, as it did in this case. *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005).

WALTERS v NADELL

Docket No. 131479. Decided June 25, 2008.

Robert Walters brought an action in the Jackson Circuit Court against Nathan Nadell, seeking damages related to an automobile accident. The plaintiff was unable to serve the defendant before both his original and his second summons expired because the defendant was serving in the military. The period of limitations expired while the plaintiff was attempting to perfect service of process. The plaintiff subsequently filed a second complaint against the defendant, alleging the same claims as those in his first complaint. After the defendant was served with the summons, he sought dismissal with prejudice on statute-of-limitations grounds. The plaintiff argued that the period of limitations was tolled pursuant to MCL 600.5853. The court, Charles A. Nelson, J., granted the defendant summary disposition and dismissed the plaintiff's complaint with prejudice. The plaintiff appealed, arguing for the first time that 50 USC Appendix 526(a), the tolling provision of the Servicemembers Civil Relief Act (SCRA), required reversal. The Court of Appeals, WILDER, P.J., and ZAHRA and DAVIS, JJ., affirmed, concluding that the SCRA tolling provision is discretionary and that the plaintiff had not preserved the SCRA issue for appellate review. Unpublished opinion per curiam, issued March 23, 2006 (Docket Nos. 263503 and 263504). The plaintiff sought leave to appeal.

In an opinion per curiam signed by Justices CAVANAGH, CORRIGAN, YOUNG, and MARKMAN, in lieu of granting leave and without oral argument, the Supreme Court, *held*:

The tolling provision of the Servicemembers Civil Relief Act is mandatory, but a party may waive the provision by failing to raise it in the trial court.

1. The tolling provision of the SCRA is unambiguous, unequivocal, and unlimited. While the provision, as amended in 2003, provides that a person's period of military service "may not" be included in computing a period of limitations for bringing an action, it is clear that, in the context of the statute, the phrase "may not" has the same meaning and import as the phrase "shall not" had in the predecessor statute, and the provision clearly

provides that the time a person is in military service is excluded from any period of limitations. The judgment of the Court of Appeals to the contrary must be vacated.

2. A servicemember may waive the protections of the SCRA. It would be incongruent with the purpose of the SCRA to bar a nonservicemember from waiving the incidental benefits the tolling provision provides nonservicemembers. Therefore, a plaintiff asserting a claim against a servicemember may also waive the mandatory tolling provision.

3. A litigant must preserve an issue for appellate review by raising it in the trial court. The failure to timely raise an issue generally waives review of that issue on appeal. A mandatory tolling provision may be waived by failing to raise it in the trial court. Because the plaintiff failed to raise his SCRA argument in the trial court, he waived his right to raise the provision as grounds for appellate relief. The Court of Appeals properly refused to address the merits of that argument.

Justice WEAVER concurred with the result of the majority opinion affirming the refusal of the Court of Appeals to address the plaintiff's argument concerning the tolling provision, because the plaintiff waived that argument at the trial court level.

Affirmed in part and vacated in part.

Chief Justice TAYLOR, concurring in part and dissenting in part, agreed that portions of the SCRA were intended to benefit both servicemembers and nonservicemembers and that the SCRA's tolling provision is mandatory, but disagreed that a nonservicemember can waive that provision. The SCRA contains a provision expressly addressing waiver by servicemembers, but contains no similar provision addressing waiver by nonservicemembers. Thus, the majority adds language to the statute. Moreover, while the Court does not generally review unpreserved issues, it makes an exception when review is necessary to avoid a miscarriage of justice. A miscarriage of justice would likely occur here without review. Given that the plaintiff was not even required to file a complaint as long as the defendant was in the service, Chief Justice TAYLOR considered it inconceivable that the plaintiff could lose the benefit of tolling simply by filing the complaint but being unable to timely serve the defendant. The judgment of the Court of Appeals should be reversed in part, and the case should be remanded to that Court for it to consider whether, to avoid a miscarriage of justice, it should remand the case to the trial court so that the plaintiff can develop a complete record concerning the defendant's periods of military service and other matters relevant to whether the SCRA tolled the period of limitations.

Justice KELLY, concurring in part and dissenting in part, agreed that tolling is mandatory under the SCRA, that both a servicemember and a nonservicemember can waive the SCRA's tolling provision, and that the plaintiff waived that provision by failing to raise it in the trial court. She concluded, however, that this case should be remanded to the Court of Appeals for it to determine whether a remand to the trial court is necessary in order to avoid a possible miscarriage of justice. If the defendant evaded service of process, it would be unjust to permit him to avoid liability because of the plaintiff's failure to raise the issue of tolling.

1. LIMITATION OF ACTIONS — TOLLING PROVISIONS — ARMED SERVICES — SERVICEMEMBERS CIVIL RELIEF ACT.

The tolling provision of the Servicemembers Civil Relief Act, which excludes from the computation of a period of limitations for bringing an action the time a person is in military service, is mandatory (50 USC Appendix 526[a]).

2. LIMITATION OF ACTIONS — TOLLING PROVISIONS — WAIVER — ARMED SERVICES — SERVICEMEMBERS CIVIL RELIEF ACT.

A plaintiff asserting a claim against a servicemember during the servicemember's military service may waive the tolling provision of the Servicemembers Civil Relief Act (50 USC Appendix 5026[a]).

Miller, Canfield, Paddock and Stone, P.L.C. (by *Allyn D. Kantor* and *Jaclyn Shoshana Levine*), and *Philip E. Johnson* for the plaintiff.

Moblo & Fleming, P.C. (by *Andrew D. Sugerman*), for the defendant.

PER CURIAM. The issue in this case is whether plaintiff may avail himself of the tolling provision of the Servicemembers Civil Relief Act (SCRA)[1] when he failed to raise that provision in response to a motion for summary disposition by defendant. We hold that he may not. In lieu of granting leave to appeal, MCR 7.302(G)(1), we affirm the judgment of the Court of Appeals, but for a different reason. We vacate that

[1] 50 USC Appendix 526(a).

portion of the Court of Appeals judgment holding that the SCRA tolling provision is discretionary; the tolling provision is mandatory. We hold, however, that the Court of Appeals did not err by refusing to consider the issue because the tolling provision may be waived if it is not raised in the trial court.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Robert Walters, was involved in an automobile accident with defendant, Nathan Nadell, on May 11, 2001. Plaintiff filed a complaint on February 26, 2004, that alleged that defendant was negligent.[2] Plaintiff was unable to serve defendant before his original and second summonses expired because defendant was serving in the military. The period of limitations for plaintiff's action expired while he was attempting to perfect service of process.[3]

On October 21, 2004, plaintiff filed a second, separate complaint against defendant, raising the same claims against defendant as those in the first complaint. Plaintiff was issued a summons for the second action that expired on January 20, 2005.[4] Defendant was served with the summons and complaint on December 10, 2004, at Fort Benning, Georgia. Defendant filed a

[2] As part of that action, plaintiff also filed a declaratory judgment action against the insurer of the automobile that he was operating at the time of the accident. The insurer is no longer a party to these proceedings.

[3] Pursuant to former MCL 600.5805(9), now MCL 600.5805(10), the period of limitations expired on May 12, 2004.

[4] Plaintiff also sought and obtained an amendment to the second summons he was issued in the first action. The second summons was amended to expire on January 20, 2005. Defendant was served with the amended summons, but he prevailed on a summary disposition motion, arguing that, under MCR 2.102(D), the court did not have authority to amend the second summons. Plaintiff has not appealed that decision.

motion seeking dismissal with prejudice on the ground that the period of limitations had expired before plaintiff filed his complaint for the second action. Plaintiff responded to defendant's motion, arguing that the period of limitations was tolled pursuant to MCL 600.5853. The trial court granted summary disposition in favor of defendant and entered an order dismissing plaintiff's complaint with prejudice.

Plaintiff appealed, arguing that the period of limitations was tolled under MCL 600.5853. Plaintiff also argued, for the first time, that the tolling provisions of the SCRA required reversal. The Court of Appeals affirmed the trial court, albeit on different grounds, and declined to address plaintiff's SCRA argument, holding that it was unpreserved for appellate review and that the tolling provision of the SCRA was discretionary.[5]

Plaintiff sought leave to appeal in this Court, arguing only that his claims were timely because the SCRA tolled the period of limitations.

II. STANDARD OF REVIEW

We review de novo the grant or denial of summary disposition.[6] This case requires us to interpret provisions of the SCRA. Statutory interpretation is a question of law, which we review de novo.[7] When interpreting a federal statute, " '[o]ur task is to give effect to the will of Congress . . . .' "[8] To do so, "[w]e start, of course,

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[5] *Walters v Nadell*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket Nos. 263503 and 263504), pp 6-7.

[6] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[7] *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005).

[8] *Negonsott v Samuels*, 507 US 99, 104; 113 S Ct 1119; 122 L Ed 2d 457 (1993), quoting *Griffin v Oceanic Contractors, Inc,* 458 US 564, 570; 102 S Ct 3245; 73 L Ed 2d 973 (1982).

with the statutory text," and "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."[9] "When the words of a statute are unambiguous, . . . 'judicial inquiry is complete.' "[10]

III. THE SCRA'S TOLLING PROVISION IS MANDATORY

Plaintiff argues that the Court of Appeals erred by not addressing his SCRA argument because the tolling provision of the SCRA is mandatory and cannot be waived. We first address plaintiff's contention that the tolling provision of the SCRA is mandatory.

The former Soldiers' and Sailors' Civil Relief Act of 1940 underwent significant amendment in 2003 when Congress enacted the SCRA.[11] Before the amendment, former 50 USC Appendix 525 provided in part:

> The period of military service *shall not* be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court . . . by or against any person in military service . . . . [Emphasis added.]

The substantive equivalent of this provision is now in 50 USC Appendix 526(a), which provides in relevant part:

> The period of a servicemember's military service *may not* be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court . . . by or against the servicemember . . . . [Emphasis added.]

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[9] *BP America Production Co v Burton*, 549 US 84, ___; 127 S Ct 638, 643; 166 L Ed 2d 494, 502 (2006).

[10] *Connecticut Nat'l Bank v Germain*, 503 US 249, 254; 112 S Ct 1146; 117 L Ed 2d 391 (1992), quoting *Rubin v United States,* 449 US 424, 430; 101 S Ct 698; 66 L Ed 2d 633 (1981).

[11] See PL 76-861, 54 Stat 1178, as amended by PL 108-189, 117 Stat 2835. The SCRA is codified at 50 USC Appendix 501 *et seq*.

The United States Supreme Court interpreted former 50 USC Appendix 525 of the Soldiers' and Sailors' Civil Relief Act and held that it was "unambiguous, unequivocal, and unlimited."[12] We do not believe that the 2003 amendments inserted any ambiguity into the meaning of the tolling provision, and we similarly hold that current 50 USC Appendix 526 is "unambiguous, unequivocal, and unlimited."

The Court of Appeals opined that the change from "shall not" to "may not" rendered the tolling discretionary. Although the term "shall" is clearly mandatory, and the term "may" is typically permissive, "may not," in the context of 50 USC Appendix 526(a), is not permissive. "May not," as it is used in 50 USC Appendix 526(a), has the same meaning and import as "cannot" or its predecessor, "shall not."[13] The provision clearly provides that the time that a servicemember is in military service is excluded from any period of limitations.

The Court of Appeals erred in its conclusion that the amendment rendered the tolling provision discretionary. We hold that the tolling provision, 50 USC Appendix 526(a), is mandatory. We must next consider whether the act nonetheless permits waiver of the mandatory tolling provision.

IV. A PLAINTIFF WITH CLAIMS AGAINST A SERVICEMEMBER MAY WAIVE THE SCRA'S MANDATORY TOLLING PROVISION

The SCRA makes clear that the servicemember may waive the protections of the act. 50 USC Appendix

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[12] *Conroy v Aniskoff*, 507 US 511, 514; 113 S Ct 1562; 123 L Ed 2d 229 (1993).

[13] See *Ryan v Wayne Co Bd of Canvassers*, 396 Mich 213, 216; 240 NW2d 236 (1976) ("[T]he phrase '*may* not be recounted' means *shall* not be recounted.").

517(a) provides that "[a] servicemember may waive any of the rights and protections provided by this Act."[14] 50 USC Appendix 517(b) requires written waivers for certain actions that arise from disputes involving certain legal instruments,[15] but in all other actions the rights and protections of the act may be waived by any other means.[16]

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[14] We have recognized a distinction in Michigan law between the terms "waiver" and "forfeiture." See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69-70; 642 NW2d 663 (2002). "Waiver" is an intentional and voluntary relinquishment of a known right, while "forfeiture" is "the failure to assert a right in a timely fashion." *Id.* at 69. That distinction has relevance in some contexts in which certain, usually constitutional, rights may be waived but not forfeited. See *Freytag v Internal Revenue Comm'r*, 501 US 868, 895 n 2; 111 S Ct 2631; 115 L Ed 2d 764 (1991) (Scalia, J., concurring in part) (comparing the rights to counsel and trial by jury, which cannot be forfeited by any means short of waiver, to other rights that can be forfeited). In the civil procedure context, however, the term "waiver" is typically used in the colloquial sense, encompassing inaction that would technically constitute forfeiture. For example, FR Civ P 12(h)(1) provides that "[a] party *waives* any defense listed in [FR Civ P 12(b)(2) through (5)] by" failing to raise it in a motion or responsive pleading. (Emphasis added.) This, incidentally, is consistent with our own rules of civil procedure. See, e.g., MCR 2.111(F) and 2.116(D)(1). The SCRA generally serves to suspend rights and liabilities that would be enforced through civil litigation. See 50 USC Appendix 502(2) and 512(b). Indeed, the tolling of a period of limitations, which determines when a civil action may be brought, is distinctly a matter of civil procedure. Thus, we believe that Congress used the term "waive" in the SCRA in the manner that it is commonly used in civil procedure, permitting forfeiture as well as waiver. Accordingly, we use the term "waiver" in a manner consistent with the federal statute and court rules throughout this opinion.

[15] 50 USC Appendix 517(b).

[16] 50 USC Appendix 517 provides in its entirety:

> (a) In general.—A servicemember may waive any of the rights and protections provided by this Act [50 USC Appendix 501 through 596]. Any such waiver that applies to an action listed in subsection (b) of this section is effective only if it is in writing and is executed as an instrument separate from the obligation or liability to which it applies. In the case of a waiver that permits an

Waiver under the SCRA is not limited to servicemembers. Congress set out the purpose of the SCRA in 50 USC Appendix 502:

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to

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action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.

(b) Actions requiring waivers in writing.—The requirement in subsection (a) for a written waiver applies to the following:

(1) The modification, termination, or cancellation of—

(A) a contract, lease, or bailment; or

(B) an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage.

(2) The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that—

(A) is security for any obligation; or

(B) was purchased or received under a contract, lease, or bailment.

(c) Prominent display of certain contract rights waivers.—Any waiver in writing of a right or protection provided by this Act that applies to a contract, lease, or similar legal instrument must be in at least 12 point type.

(d) Coverage of periods after orders received.—For the purposes of this section—

(1) a person to whom section 106 [50 USC Appendix 516] applies shall be considered to be a servicemember; and

(2) the period with respect to such a person specified in subsection (a) or (b), as the case may be, of section 106 shall be considered to be a period of military service.

> devote their entire energy to the defense needs of the Nation; and
>
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

Thus, in order to strengthen the national defense, Congress enacted the SCRA to temporarily free servicemembers from the burden of participating in litigation. The tolling of periods of limitations in actions against servicemembers serves to "provide for, strengthen, and expedite the national defense" by protecting "the civil rights of servicemembers during their military service." The benefits of the tolling provision to a plaintiff suing a servicemember are merely incidental to the protections that provision provides servicemembers.

Congress enacted the SCRA as a shield to protect servicemembers from having to respond to litigation while in active service, but manifestly indicated that the SCRA's protections may be waived.[17] Here, plaintiff is seeking to transform the SCRA into a sword to preserve his lawsuit without having timely invoked its provisions. It would be incongruent with the purpose of the SCRA to permit a servicemember to waive the rights and protections of the act, but bar a nonservicemember from waiving incidental benefits, and thereby provide, without exception, incidental benefits to a nonservicemember. The express purpose of the act is inconsistent with providing more protections to a nonservicemember than a servicemember. Because the purpose of the act is to protect servicemembers, we conclude that Congress did not intend to prohibit waiver by a nonservicemember. Therefore, we hold that the mandatory

[17] See 50 USC Appendix 517(a) ("A servicemember may waive any of the rights and protections provided by the Act.").

tolling provision of 50 USC Appendix 526(a) may be waived by a plaintiff asserting a claim against a servicemember during the servicemember's military service.[18]

The final question we must resolve is whether plaintiff waived the tolling of the period of limitations in this case by failing to raise the tolling provision in the trial court.

V. PLAINTIFF WAIVED THE SCRA'S MANDATORY TOLLING PROVISION

Michigan generally follows the "raise or waive" rule of appellate review.[19] Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court.[20] Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice,[21] generally a"failure to timely raise an issue waives review of that issue on appeal."[22]

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[18] In his dissent, the Chief Justice asserts that we have read a waiver provision for nonservicemembers into the SCRA. *Post* at 395. Our discussion merely establishes that Congress did not intend that the rights and protections of the SCRA would be unwaivable mandates. The Chief Justice implicitly recognizes this to be true by acknowledging that, absent a miscarriage of justice, plaintiff waived tolling pursuant to the SCRA. *Post* at 397, citing *Napier v Jacobs*, 429 Mich 222, 232-233; 414 NW2d 862 (1987). Indeed, the only distinction between the majority opinion and the dissent is that we hold that there is no miscarriage of justice in permitting plaintiff to waive a mandatory tolling provision, just as we permit waiver of a mandatory statute of limitations defense, see n 30 of this opinion and accompanying text, but the dissent would remand this case to the Court of Appeals for further consideration of that issue. *Post* at 397.

[19] See *Napier*, *supra* at 228.

[20] *Id.*; *Therrian v Gen Laboratories, Inc*, 372 Mich 487, 490; 127 NW2d 319 (1964) ("Since defendant failed to raise such issues below, they are not available to it on appeal.").

[21] *Napier*, *supra* at 233 (" '[S]uch inherent power is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a [criminal] defendant a fair trial.' "), quoting *People v Farmer*, 380 Mich 198, 208; 156 NW2d 504 (1968).

[22] *Napier*, *supra* at 227.

The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually.[23] This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful.[24] Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention.[25] Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.

Plaintiff's cause of action accrued on May 11, 2001, and plaintiff filed the instant complaint on October 21, 2004. Without tolling, the period of limitations for plaintiff's claim expired on May 12, 2004. Defendant moved to dismiss plaintiff's complaint with prejudice, arguing that plaintiff had filed his complaint after the period of limitations expired. It is undisputed that plaintiff did not raise the tolling provision of the SCRA in response to defendant's motion. Thus, under our "raise or waive" rule, it is undisputed that plaintiff waived the tolling provision.

It could be argued that the tolling provision cannot be waived because it is mandatory. However, as discussed, Congress did not intend to prohibit waiver by a

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[23] See *id.* at 228-229.

[24] *Id.* at 228.

[25] See *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891) ("Parties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases.").

nonservicemember. Moreover, our "raise or waive" rule permits waiver of otherwise mandatory statutory provisions. For example, our statute of limitations provision is mandatory, just like the tolling provision of the SCRA:

> A person *shall not* bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the period of time prescribed by this section.[26]

It has long been the rule in Michigan that a defendant may waive a statute of limitations defense by failing to raise it in the trial court.[27] Under the Michigan Court Rules, a defendant waives a statute of limitations defense by failing to raise it in his first responsive pleading.[28] The defendant may cure his failure to raise the defense in his first responsive pleading by amending the pleading,[29] but the defendant must, in any event, raise the defense in the trial court.

We hold that a tolling provision may be waived just as a statute of limitations defense may be waived. Consis-

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[26] MCL 600.5805(1) (emphasis added).

[27] See *Moden v Superintendents of the Poor of Van Buren Co*, 183 Mich 120, 125-126; 149 NW 1064 (1914); see also *Roberts, supra* at 67 (noting that "a defendant could effectively 'waive' any objections to plaintiff's fulfillment of the requirements of [MCL 600.5856(d) by] fail[ing] to invoke the pertinent statute of limitations after a plaintiff files suit . . . ."); *Lothian v Detroit*, 414 Mich 160, 167; 324 NW2d 9 (1982) ("Similarly, [a statute of limitations] defense may be waived by failure to plead it, by express agreement not to assert it, or by conduct which estops the defendant from interposing it.").

[28] MCR 2.111(F)(3)(a).

[29] Under MCR 2.118(A)(1), the defendant may amend its first responsive pleading "as a matter of course . . . within 14 days after serving the pleading if it does not require a responsive pleading." Otherwise the defendant may only amend its first responsive pleading "by leave of the court or by written consent of the adverse party." MCR 2.118(A)(2).

tent with the rule against appellate review of issues not raised in the trial court, a plaintiff may waive the tolling of the period of limitations by failing to raise it in the trial court.[30]

We are aware of decisions in other courts that reach the opposite conclusion,[31] but those decisions are not binding, and we do not find them persuasive.[32] Plaintiff failed to raise his SCRA argument in the trial court, but now seeks belatedly to use it as a sword to defeat dismissal. This would have the perverse effect of rendering the servicemember amenable to suit when the tolling provision was never invoked in the trial court. Therefore, we hold that plaintiff has waived the tolling provision of the SCRA, and the Court of Appeals did not err by not addressing the merits of plaintiff's SCRA argument.

VI. CONCLUSION

The tolling provision of the SCRA, 50 USC Appendix 526(a), is mandatory but not self-executing. A litigant pursuing a claim against a servicemember has a respon-

[30] We note that because we permit waiver of statute of limitations defenses, waiver of tolling those same periods of limitations does not present a "miscarriage of justice" that would permit appellate intervention. See *Napier*, *supra* at 233.

[31] See, e.g., *Ricard v Birch*, 529 F2d 214 (CA 4, 1975); *Kenney v Churchill Truck Lines, Inc*, 6 Ill App 3d 983; 286 NE2d 619 (1972).

[32] See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) (holding that, "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts"). In *Ricard*, *supra* at 216, the United States Court of Appeals for the Fourth Circuit held that the SCRA tolling provision could not be waived because "orderly rules of procedure do not require sacrifice of the rules of fundamental justice." The *Ricard* holding (1) is inconsistent with the principal rationale for our waiver rule, (2) suggests an exception that would consume the rule, and (3) is inconsistent with our precedent permitting waiver of a statute of limitations defense. Thus, we do not follow its holding.

sibility to bring the tolling provision to the attention of the trial court if he desires to avail himself of its benefits. Plaintiff failed to raise the tolling provision of the SCRA in the trial court; therefore he has waived his right to raise the provision as grounds for relief on appeal.

Affirmed in part and vacated in part.

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

WEAVER, J. (*concurring*). I concur in the result of the majority opinion affirming the refusal of the Court of Appeals to address plaintiff's argument concerning the tolling provision of the Servicemembers Civil Relief Act,[1] because the plaintiff waived that argument at the trial court level.

TAYLOR, C.J. (*concurring in part and dissenting in part*). At issue in this case is whether the tolling provision of the Servicemembers Civil Relief Act (SCRA), 50 USC Appendix 526(a), tolls the period of limitations for a plaintiff's cause of action when the plaintiff, a nonservicemember, failed to raise the tolling provision at the trial-court level. The Court of Appeals declined to address this issue because it determined that the issue was unpreserved and that, in any event, the tolling provision was discretionary. A majority of this Court holds that the tolling provision is mandatory, not discretionary, but affirms on the different ground that plaintiff waived the tolling provision when he failed to raise it at the trial-court level.

Although I agree with the majority that certain portions of the SCRA were intended to benefit both

[1] 50 USC Appendix 526(a).

servicemembers and nonservicemembers, and I agree that the SCRA's tolling provision is mandatory, I disagree that a nonservicemember can waive the provision. Rather than affirm the Court of Appeals on a different ground, as the majority does, I would reverse in part the judgment of the Court of Appeals and remand this case to the Court of Appeals to consider whether, to avoid a miscarriage of justice, it should remand this case to the circuit court so that plaintiff can develop a complete record concerning defendant's periods of military service and any other matters relevant to whether the SCRA tolled the period of limitations applicable to plaintiff's claim.

The purposes of the SCRA, as set forth in 50 USC Appendix 502, are:

> (1) to provide for, strengthen, and expedite the national defense through *protection extended by this Act to servicemembers* of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
>
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions *that may adversely affect the civil rights of servicemembers* during their military service. [Emphasis added.]

Despite the clear indication in 50 USC Appendix 502 that the SCRA is intended to benefit servicemembers, and its lack of reference to nonservicemembers, several courts have held that the SCRA was intended to benefit servicemembers and nonservicemembers alike.[1] And,

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[1] *Ray v Porter,* 464 F2d 452, 455 (CA 6, 1972) ("The [SCRA] was adopted by the Congress to protect the rights of individuals in the military service of the United States, and also to protect the rights of individuals having causes of actions against members of the Armed Forces of the United States."), citing, among other cases, *Stewart v Kahn,* 78 US (11 Wall) 493; 20 L Ed 176 (1871), and *Wolf v Internal Revenue Comm'r,* 264 F2d 82 (CA 3, 1959); *Ricard v Birch,* 529 F2d 214, 216 (CA

indeed, the tolling provision of 50 USC Appendix 526(a) appears to suggest that this may be the case:

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court . . . *by or against* the servicemember . . . . [Emphasis added.]

By its use of the phrase "by or against," the provision implies at least an incidental benefit of tolling to nonservicemembers. Several courts have held that this tolling provision is automatic, which means that all that must be shown in order for tolling to apply while the period of limitations is running or has expired is that one party is in the armed service.[2] In this case, the trial court was apprised at the time plaintiff sought an extension for the summons that the reason plaintiff was unable to serve defendant was because defendant was in the service. For courts that adhere to the automatic tolling, this would mean that, at that moment, the automatic tolling provision was activated. The issue here is whether Michigan adheres to the automatic-tolling doctrine.

4, 1975) ("[T]he parallel purpose of the Act [is] to protect the rights of individuals having causes of action against members of the armed forces."); *In re AH Robins Co, Inc,* 996 F2d 716, 720 (CA 4, 1993) (stating that the benefits of the tolling mechanism "inure both to military personnel and to those with rights of action against military personnel"); *Kenney v Churchill Truck Lines, Inc,* 6 Ill App 3d 983, 993; 286 NE2d 619 (1972) ("The act is not restrictive to merely the serviceman, since it addresses itself to 'any action or proceeding in any court . . . by or against any person in military service.' "); *Ludwig v Anspaugh,* 785 SW2d 269, 271 (Mo, 1990) ("[I]ts purpose is not only to protect the rights of citizens serving in the armed forces but also those of persons having causes of action against persons in military service.").

[2] *Ray, supra* at 456; *Ricard, supra* at 217; *In re AH Robins Co, Inc, supra* at 718; *Kenney, supra* at 993, quoting *Illinois Nat'l Bank of Springfield v Gwinn,* 390 Ill 345, 354; 61 NE2d 249 (1945); *Ludwig, supra* at 271.

Various courts have also held that the tolling provision is mandatory and not subject to judicial discretion.[3] Even our own court rules recognize the mandatory, automatic nature of the SCRA's tolling provision by requiring as a prerequisite for granting a default judgment that an affidavit of nonmilitary service must be filed in actions in which a defendant has failed to appear. MCR 2.603(C). Because the tolling provision is automatic, mandatory, and preclusive of state statutory periods of limitations, other courts have recognized that it can be raised for the first time on appeal, which is akin in some sense to the treatment of jurisdictional claims, although not discussed in those explicit terms.[4]

Notwithstanding the mandatory nature of 50 USC Appendix 526(a), 50 USC Appendix 517(a) expressly provides that a "servicemember may waive any of the rights and protections provided by this Act," which necessarily includes the tolling provision. There is no similar provision with respect to nonservicemembers. Although 50 USC Appendix 517, by its plain terms, applies only to servicemembers and the SCRA contains no similar waiver provision for nonservicemembers, the majority here extends the right to waive the tolling provision to nonservicemembers.

In effecting this "addition" to the statute, the majority, citing congruency, relies unconvincingly on the statutory purpose of the SCRA (which does not even mention nonservicemembers) and the tolling statute

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[3] *Ray, supra* at 455-456; *Ricard, supra* at 216; *In re AH Robins Co, Inc, supra* at 718, 720; *Kenney, supra* at 993, quoting *Illinois Nat'l Bank, supra* at 354; *Ludwig, supra* at 271. Cf. *Conroy v Aniskoff,* 507 US 511, 514-515; 113 S Ct 1562; 123 L Ed 2d 229 (1993) ("The statutory command in [former 50 USC Appendix 525] is unambiguous, unequivocal, and unlimited," and a review of other provisions in the act "supports the conclusion that Congress meant what § 525 says.").

[4] *Ricard, supra* at 216; *Kenney, supra* at 992-993.

(which itself contains no waiver provision) to conclude that a nonservicemember may waive the entitlement to tolling by failing to raise it. This addition by the majority is puzzling conceptually because this Court has strongly forbidden courts from adding language, or rights, to statutes. Moreover, the language in the statute that the majority uses as the basis for this addition neither mentions nonservicemembers in giving rights nor discusses the notion of waiver with respect to tolling. Moreover, our sense of what is congruent should not trump the Legislature's. Yet the majority reads waiver by the nonservicemember into the tolling provision.

Furthermore, to do so here is even more unsettling, given that the United States Supreme Court has instructed that the statute means what it says and that no additions are allowed. In *Conroy v Aniskoff,* 507 US 511; 113 S Ct 1562; 123 L Ed 2d 229 (1993), the Court was invited to add words or concepts to the predecessor statute. It refused to do so. In *Conroy,* the United States Supreme Court considered whether a servicemember was required to demonstrate prejudice before being entitled to tolling under former 50 USC Appendix 525. The Court first noted that the statutory command in the tolling provision "that the period of military service 'shall not be included' in the computation of 'any period now or hereafter provided by any law' "—was unambiguous, unequivocal, and unlimited. *Id.* at 514. In rejecting the respondents' argument—that the statute implicitly conditioned tolling on a showing of hardship or prejudice because other provisions of the SCRA were expressly conditioned on a showing of prejudice—the Court reasoned:

> Respondents also correctly remind us to "follow the cardinal rule that a statute is to be read as a whole, see

> *Massachusetts v. Morash,* 490 U.S. 107, 115 [109 S Ct 1668; 104 L Ed 2d 98] (1989), since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital,* 502 U.S. 215, 221 [112 S Ct 570; 116 L Ed 2d 578] (1991). But as in *King,* the context of this statute actually supports the conclusion that Congress meant what [former 50 USC Appendix 525] says. Several provisions of the statute condition the protection they offer on a showing that military service adversely affected the ability to assert or protect a legal right. To choose one of many examples, [former 50 USC Appendix 532(2)] authorizes a stay of enforcement of secured obligations unless "the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service." The comprehensive character of the entire statute indicates that Congress included a prejudice requirement whenever it considered it appropriate to do so, and that its omission of any such requirement in § 525 was deliberate. [*Conroy, supra* at 515-516.]

The United States Supreme Court's sound reasoning is no different from this Court's own standards of statutory interpretation. We assume that the Legislature intended what it plainly expressed. See *Liss v Lewiston-Richards, Inc,* 478 Mich 203, 207; 732 NW2d 514 (2007). We do not read language into an unambiguous statute. *People v McIntire,* 461 Mich 147, 153; 599 NW2d 102 (1999). And when the Legislature includes certain language in one statutory provision but not in another, we do not read the missing language into the statute under the assumption that the Legislature meant to include it; rather, we proceed under the assumption that the Legislature made a deliberate choice to not include the language. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993).

As applied here to the SCRA, then, the fact that Congress specifically provided for a waiver of SCRA provisions by a servicemember but did not likewise

provide for a waiver by a nonservicemember must be interpreted as intentional, and it is not for this Court to give to a nonservicemember the ability to waive mandatory provisions in contravention of congressional intent. Likewise, the language contained in the tolling provision, 50 USC Appendix 526(a), that arguably applies to both servicemembers and nonservicemembers is not similarly contained in the waiver provision, 50 USC Appendix 517.

Finally, although this Court generally does not review unpreserved issues, we may make an exception when review is necessary to avoid a miscarriage of justice. *Napier v Jacobs,* 429 Mich 222, 232-233; 414 NW2d 862 (1987). Given that plaintiff was *not even required to file a complaint* as long as defendant was in the service, it seems inconceivable that plaintiff could somehow lose the benefit of tolling simply by filing the complaint but being unable to timely serve defendant. Thus, it appears that a miscarriage of justice could very likely occur without review. Accordingly, I would hold that plaintiff was unable to waive the mandatory, automatic tolling provision of 50 USC Appendix 526(a), that the Court of Appeals erred in failing to consider plaintiff's argument on appeal, and that remand is necessary to address this argument.

KELLY, J. (*concurring in part and dissenting in part*). I agree with the majority that tolling is mandatory under the Servicemembers Civil Relief Act (SCRA)[1] and that the tolling provision[2] can be waived by both a servicemember and a nonservicemember. I also agree that the nonservicemember plaintiff waived the provision in this case by failing to raise it in the trial court.

[1] 50 USC Appendix 501 *et seq*.

[2] 50 USC Appendix 526(a).

However, I conclude that remanding this matter to the Court of Appeals is necessary to avoid a possible miscarriage of justice. There is some evidence that defendant was evading service of process. If so, it would be unjust to permit him to avoid liability on the basis of plaintiff's failure to raise the tolling provision in the trial court. This is a compelling circumstance that permits appellate review of the unpreserved claim that the SCRA tolled the period of limitations.[3]

This Court has the power to enter any order and grant relief as the case requires. MCR 7.316(A)(7). I would direct the Court of Appeals to determine whether, to avoid a miscarriage of justice, this case should be remanded to the Jackson Circuit Court. In that court, plaintiff could develop a complete record concerning matters relevant to whether the SCRA tolled the period of limitations applicable to plaintiff's claim against defendant Nathan Nadell. Such a record would include facts concerning defendant's periods of military service and his alleged evasion of service of process.

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[3] See *Napier v Jacobs*, 429 Mich 222, 232-233; 414 NW2d 862 (1987).

COOPER v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 132792. Argued January 8, 2008 (Calendar No. 2). Decided June 25, 2008. Amended, 482 Mich ___.

Amyruth R. and Loralee A. Cooper, by their next friend and mother, Sharon L. Strozewski, brought a common-law fraud action in the Washtenaw Circuit Court against the Auto Club Insurance Association, plaintiffs' automobile insurer, after they were injured in a vehicular accident in 1987. The action alleged that the defendant had fraudulently induced Strozewski, who had been providing in-home attendant care for her injured daughters since the accident, to accept an unreasonably low compensation rate for her services. After the court, Donald E. Shelton, J., denied each of defendant's three motions for summary disposition on the issue of liability, the parties reached an agreement regarding damages, and the trial court entered a judgment for plaintiffs in accordance with the parties' agreement, as well as an order approving a partial settlement. Defendant appealed as of right, challenging only its liability for damages incurred more than one year before plaintiffs filed their complaint under the one-year-back rule of the no-fault act, MCL 500.3145(1). The Court of Appeals, MURPHY, P.J., and METER and DAVIS, JJ., ruled that the plaintiffs' common-law fraud claim was merely a no-fault action couched in fraud terms and reversed in part and remanded for an order of partial summary disposition in the defendant's favor under the one-year-back rule. Unpublished opinion of the Court of Appeals, issued November 21, 2006 (Docket No. 261736). The plaintiffs sought leave to appeal, which the Supreme Court granted. 478 Mich 861 (2007).

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

A common-law action for fraud is not subject to the one-year-back rule because the one-year-back rule applies only to actions for recovery of personal protection insurance (PIP) benefits payable under the no-fault act for accidental bodily injury, and a fraud action is not a no-fault action but, rather, is an independent and

distinct action for recovery of damages under the common law for losses incurred as a result of an insurer's fraudulent conduct.

1. A fraud action is conceptually distinct from a no-fault action because a fraud action requires an insured to prove several elements that are different from those required in a no-fault action; a fraud action accrues at a different time than a no-fault action; and a fraud action permits an insured to recover a wide range of damages, such as attorney fees, damages for emotional distress, and exemplary damages, that are not available in a no-fault action. Unlike a no-fault claim, a fraud claim does not arise from an insurer's mere omission to perform a contractual or statutory obligation; rather, it arises from the insurer's breach of its separate and independent duty not to deceive its insureds.

2. The fact that the plaintiffs sought damages from the fraudulent conduct that were defined in terms of additional PIP benefits did not transform their fraud claim into a no-fault claim. When an insured's claim arises not out of the insurer's mere failure to pay no-fault benefits but, instead, out of the insurer's fraudulent misrepresentations, which might have ultimately led to payment of reduced no-fault benefits to the insureds, the courts are faced with a fraud claim as opposed to a no-fault claim.

3. When a plaintiff states a fraud cause of action against an insurer, a court need not consider an equitable exception to the application of the one-year-back rule because the no-fault rules simply do not apply.

4. To limit attempts to circumvent the application of the one-year-back rule, prevent wasteful or frivolous litigation, and maintain the integrity of both the no-fault law and the common-law fraud cause of action, trial courts should exercise special care in assessing these types of fraud claims.

Reversed and remanded to the circuit court for further proceedings.

Justice CAVANAGH concurred in the result only.

Justice WEAVER, joined by Justice KELLY, concurred in the result only, agreeing that the one-year-back rule applies only to actions seeking payment of no-fault personal protection insurance benefits and that a fraud action is not a no-fault action but, rather, an independent action for recovery of damages payable under the common law for losses incurred as a result of the insurer's fraudulent conduct.

FRAUD — INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — ONE-YEAR-BACK RULE.

A common-law action against an insurer for fraud is not subject to the one-year-back rule that applies to actions seeking payment of no-fault personal protection insurance benefits (MCL 500.3145[1]).

Logeman, Iafrate & Pollard, P.C. (by *Robert E. Logeman* and *James A. Iafrate*), for the plaintiffs.

Schoolmaster, Hom, Killeen, Siefer, Arene & Hoehn (by *Gregory Vantongeren*) and *Zanetti, John & Brown, P.C.* (by *R. Michael John*) (*Gross, Nemeth & Silverman, P.L.C.*, by *James G. Gross*, of counsel), for the defendant.

Amicus Curiae:

Thomas A. Biscup for the Michigan Association for Justice.

MARKMAN, J. At issue is whether plaintiffs' common-law cause of action for fraud is subject to the one-year-back rule of MCL 500.3145(1). Because the one-year-back rule only applies to actions brought under the no-fault act, and because a fraud action is not a no-fault action, i.e., an "action for recovery of personal protection insurance benefits payable under [the no-fault act] for accidental bodily injury," MCL 500.3145(1), but instead is an independent and distinct action for recovery of damages payable under the common law for losses incurred as a result of the insurer's fraudulent conduct, we hold that a common-law cause of action for fraud is not subject to the one-year-back rule. Therefore, we reverse in part the judgment of the Court of Appeals and remand the case to the Court of Appeals for it to address the remaining issues raised by the parties.

I. FACTS AND PROCEDURAL HISTORY

In January 1987, plaintiffs Amyruth and Loralee Cooper sustained severe brain injuries in an automobile accident that occurred while they were passengers in a car driven by their mother, Sharon Strozewski. From the time they were discharged from the hospital in October 1987, both sisters have required 24-hour attendant care. By the fall of 1989, Loralee did not need as much nursing care, but still needed attention beyond what a babysitter could provide. Amyruth has required continuous skilled nursing care, which has been provided through an agency paid by defendant, plaintiffs' automobile insurer.

At the time of the accident, Strozewski was working at GTE, earning approximately $50 a day. In the fall of 1989, defendant's claims representative, Jim Hankamp, suggested to Strozewski that she quit her job and stay at home to care for Loralee full-time. Defendant offered to pay Strozewski $50 a day, and she accepted by signing an agreement. In September 1991, the parties agreed to increase the payments to Strozewski to $75 a day. In October 1998, the rate was effectively increased to $6.50 an hour and, after that, it progressively increased up to $10 an hour by October 2000. According to defendant, as of December 26, 2003, defendant had paid more than $5.6 million in personal protection insurance (PIP) benefits under the no-fault act for the girls' care.

Plaintiffs filed this lawsuit in 2003, alleging that defendant had failed to pay all the PIP benefits that were due under the no-fault act because it underpaid Strozewski for the attendant care she had provided to her daughters at home over the years. Defendant filed a motion for partial summary disposition arguing, among other things, that because the amended Revised Judi-

cature Act (RJA), MCL 600.5851(1),[1] states that the minority/insanity tolling provision applies only to actions brought under this act, the saving provision does not apply to no-fault actions to toll the one-year-back rule of MCL 500.3145(1). The trial court denied the motion, and the Court of Appeals denied defendant's application for leave to file an interlocutory appeal. Unpublished order of the Court of Appeals, entered July 1, 2004 (Docket No. 254659). Two weeks later, the Court of Appeals issued its opinion in *Cameron v Auto Club Ins Ass'n*, 263 Mich App 95; 687 NW2d 354 (2004), which held that the minority/insanity provision of MCL 600.5851(1) applies only to actions filed under the RJA and, therefore, it does not toll an action brought under the no-fault act. Defendant filed an application for leave to appeal in this Court, which was denied, 471 Mich 915 (2004), as was defendant's motion for reconsideration. 471 Mich 956 (2004).

In August 2004, following the Court of Appeals decision in *Cameron*, plaintiffs amended their complaint to assert a new cause of action for fraud. Plaintiffs alleged that defendant had fraudulently induced Strozewski to accept an unreasonably low compensation rate for her in-home attendant care services. Specifically, plaintiffs alleged that defendant had committed fraud by telling Strozewski: (1) that if she did not quit her job and accept $50 a day for providing 24-hour

[1] MCL 600.5851(1) provides:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane 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. This section does not lessen the time provided for in section 5852.

attendant care for Loralee, she would be personally responsible for paying for Loralee's nursing care; (2) that she had a parental obligation to provide attendant care for her children, which reduced defendant's legal obligation to pay attendant care benefits, and that if she did not agree to take care of Loralee for $50 a day, Loralee would have to be institutionalized; (3) that the attendant-care rate was not negotiable and that a higher rate was not available even though, in reality, defendant was paying other insureds as much as $7 an hour for providing similar attendant care; (4) that she was required to sign a contract before she could recover continuing no-fault benefits; (5) that case-management expenses were paid at the same rate as attendant-care benefits; and (6) that attendant care could not be paid to family members at the market rate or agency rate, i.e., the rate normally paid by the insurance agency to other caregivers. Plaintiffs allege that, as a result of defendant's fraud, they sustained the following damages: (1) inadequate payments for attendant-care services; (2) loss of payments for case-management expenses, i.e., expenses incurred for the services rendered by a case manager; (3) loss of payments for room and board expenses; and (4) inadequate payments of no-fault benefits.

While the denial of defendant's first motion for partial summary disposition was still on appeal, defendant filed a second motion for partial summary disposition, arguing that Strozewski could not recover in-home attendant-care benefits for services rendered before the filing of the complaint. The trial court denied the motion, and defendant did not file an interlocutory appeal.

Several months later, defendant filed a third motion for partial summary disposition, arguing that, under

MCL 500.3145(1), plaintiffs could not recover benefits for any services that were rendered more than one year before the filing of the original complaint. The trial court denied the motion. Defendant filed an interlocutory application for leave to appeal, which was denied by the Court of Appeals. Unpublished order of the Court of Appeals, entered January 12, 2005 (Docket No. 259729). Defendant then filed a second application for leave to appeal in this Court, which was denied. 472 Mich 858 (2005).

After this Court denied leave to appeal, the parties stipulated the entry of a judgment that resolved their differences over the amounts of damages that plaintiffs would be able to recover over the various periods at issue. This judgment preserved defendant's right to appeal the trial court's adverse decisions with regard to issues that were raised by either party in defendant's three motions for partial summary disposition.

Defendant then filed a claim of appeal. The Court of Appeals affirmed in part, reversed in part, and remanded for entry of an order of partial summary disposition in favor of defendant. Unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 261736). The Court of Appeals held that this Court's decision in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), which affirmed the Court of Appeals decision in that case, was dispositive of defendant's claim that plaintiffs may not recover PIP benefits relating to any losses incurred more than one year before plaintiffs filed their original complaint. Moreover, it held that plaintiffs' fraud claim was subject to the one-year-back rule of MCL 500.3145(1) because the claim was nothing more than a no-fault claim couched in fraud terms. We granted plaintiffs' application for leave to appeal. 478 Mich 861 (2007).

II. STANDARD OF REVIEW

Issues of statutory interpretation and other questions of law are reviewed de novo. *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 566-567; 702 NW2d 539 (2005). The grant or denial of a motion for summary disposition is also reviewed de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005).

III. ANALYSIS

A. FRAUD ACTIONS AND ONE-YEAR-BACK RULE

The Michigan no-fault act, MCL 500.3145(1), provides, in relevant part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*. [Emphasis added.]

The one-year-back rule of this provision limits recovery of PIP benefits to those incurred within one year before the date on which the no-fault action was commenced. PIP benefits include "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

Plaintiffs argue that by alleging in their amended complaint that defendant fraudulently induced Strozewski to accept an unreasonably low compensation rate for her in-home attendant-care services, plaintiffs brought a common-law fraud claim that is distinct from a no-fault claim for benefits, and that such claim therefore is not subject to the one-year-back rule of MCL 500.3145(1). A fraud action is not subject to the one-year-back rule of MCL 500.3145(1) because the one-year-back rule applies only to actions brought under the no-fault act, and a fraud action is a distinct and independent action brought under the common law. A fraud action is not an "action for recovery of [PIP] benefits payable under [the no-fault act] for accidental bodily injury." Rather, in the context of an insurance contract, a fraud action is an action for recovery of damages payable under the common law for losses incurred as a result of the insurer's fraudulent conduct. There is a distinction between claiming that an insurer has refused to pay no-fault benefits to its insureds and claiming that the insurer has defrauded its insureds. A fraud action is conceptually distinct from a no-fault action because: (1) a fraud action requires an insured to prove several elements that are different from those required in a no-fault action; (2) a fraud action accrues at a different time than a no-fault action; and (3) a fraud action permits an insured to recover a wide range of damages that are not available in a no-fault action.

To assert a no-fault claim, an insured must demonstrate that the insured is entitled to benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" without regard to fault, and that the insurer is obligated under an insurance contract to pay those benefits, but failed to do so timely. MCL

500.3105.[2] To assert an actionable fraud claim, on the other hand, an insured must demonstrate:

> "(1) That [the insurer] made a material representation; (2) that it was false; (3) that when [the insurer] made it [the insurer] knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that [the insurer] made it with the intention that it should be acted upon by [the] plaintiff; (5) that [the] plaintiff acted in reliance upon it; and (6) that [the plaintiff] thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." [*Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).]

A fraud claim is clearly distinct from a no-fault claim. First, a fraud claim requires proof of additional ele-

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[2] MCL 500.3105 provides:

> (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.
>
> (2) Personal protection insurance benefits are due under this chapter without regard to fault.
>
> (3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury.
>
> (4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

ments, such as deceit, misrepresentation, or concealment of material facts, and the substance of such claim is the insurer's wrongful conduct. Unlike a no-fault claim, a fraud claim does not arise from an insurer's mere omission to perform a contractual or statutory obligation, such as its failure to pay all the PIP benefits to which its insureds are entitled. Rather, it arises from the insurer's breach of its separate and independent duty not to deceive the insureds, which duty is imposed by law as a function of the relationship of the parties.[3] Second, unlike an action for no-fault benefits, which arises when the insurer fails to pay benefits, an action for fraud arises when the fraud is perpetrated. *Hearn v Rickenbacker*, 428 Mich 32, 39; 400 NW2d 90 (1987). Finally, under a no-fault cause of action, the insureds can only recover no-fault benefits, whereas under a fraud cause of action, the insureds may recover damages for any loss sustained as a result of the fraudulent conduct,[4] which may include the equivalent of no-fault benefits, reasonable attorney fees, damages for emotional distress, and even exemplary damages. See *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 250-251; 531 NW2d 144 (1995); *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982); *Phinney v Perlmutter,* 222 Mich App 513, 527; 564 NW2d 532 (1997); *Clemens v Lesnek,* 200 Mich App 456, 463-464; 505 NW2d 283 (1993).

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[3] "[T]he relationship between insurers and their insureds is 'sufficient to permit fraud to be predicated upon a misrepresentation.' " *Hearn v Rickenbacker*, 428 Mich 32, 39; 400 NW2d 90 (1987), quoting *Drouillard v Metropolitan Life Ins Co*, 107 Mich App 608, 621; 310 NW2d 15 (1981).

[4] "In a fraud and misrepresentation action, the tortfeasor is liable for injuries resulting from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated." *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

Therefore, "[a]lthough mere allegations of failure to discharge obligations under [an] insurance contract would not be actionable in tort, where, as here, the breach of separate and independent duties are alleged, [the insureds] should be allowed an opportunity to prove [their] causes of action." *Hearn*, 428 Mich at 40 (citation omitted); see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603-604; 374 NW2d 905 (1985) (tort actions survive in a contractual setting as long as the tort action is based on a breach of duty that is distinct from the contract); *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 422; 295 NW2d 50 (1980) (tort actions may survive when an insurer breaches a duty that existed "independent of and apart from the contractual undertaking"). "[T]ort liability abolished by the no-fault act is only such liability as arises out of the defendant's ownership, maintenance or use of a motor vehicle, not liability which arises out of other conduct . . . ." *Citizens Ins Co of America v Tuttle*, 411 Mich 536, 542; 309 NW2d 174 (1981); see also *Shavers v Attorney General*, 402 Mich 554, 623; 267 NW2d 72 (1978) (the no-fault act only "*partially* abolish[ed] the common-law remedy in tort for persons *injured by negligent motor vehicle tortfeasors* . . . ." [emphasis added]); *Bak v Citizens Ins Co of America*, 199 Mich App 730, 737-738; 503 NW2d 94 (1993) ("The enactment of the no-fault act did not extinguish common-law doctrines predating that legislation.").

That common-law fraud claims survive even where a self-contained system, such as the no-fault system, exists is further suggested by this Court's decisions in the context of the dramshop act. The dramshop act, MCL 436.1801 *et seq.*, states that it provides "the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor." MCL 436.1801(10). In *Manuel v Weitz-*

man, 386 Mich 157, 164-165; 191 NW2d 474 (1971), overruled in part on other grounds by *Brewer v Payless Stations, Inc*, 412 Mich 673 (1982), this Court held that the dramshop act does not abrogate actions arising out of other unlawful conduct, and that tavern owners remain liable for injuries arising out of breach of other common-law duties.[5] Similarly, the no-fault act, which provides the remedy for injuries arising out of "the ownership, maintenance or use of a motor vehicle,"[6] MCL 500.3105(1), does not abrogate actions arising out of the breach of other common-law duties. Nothing in the no-fault act or other relevant law suggests that insurers are exempt from liability for breaching other common-law duties by, for example, misrepresenting material facts and deceiving their insureds. The fact that the dispute would not have arisen in the absence of the no-fault insurance contract does not mean that the action brought by the insureds is a no-fault action.

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[5] This Court stated:

> We specifically approve the following statement in [*De Villez* v *Schifano*, 23 Mich App 72, 77; 178 NW2d 147 (1970)]:
>
> "We hold that the dramshop act affords the exclusive remedy for injuries arising out of an *unlawful sale, giving away,* or furnishing of intoxicants. *King* v. *Partridge*, 9 Mich App 540, 543 (1968). However, the act does not control and it does not abrogate actions arising out of unlawful or negligent conduct of a tavern owner other than *selling, giving away,* or *furnishing of intoxicants,* provided the unlawful or negligent conduct is recognized as a lawful basis for a cause of action in the common law." [*Manuel*, 386 Mich at 164-165.]

[6] We note that the question whether the no-fault act provides the *exclusive* remedy for injuries arising out of "the ownership, maintenance or use of a motor vehicle" is not relevant here because the insureds argue that their injuries arose out of the insurer's fraudulent conduct, not out of "the ownership, maintenance or use of a motor vehicle."

Defendant argues, and the Court of Appeals appears to assert, that where the damages sought by the insureds are defined in terms of additional PIP benefits, the insureds' cause of action must necessarily be considered a "no-fault action couched in fraud terms." *Cooper v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 261736), at 2. We respectfully disagree. Although the nature of the damages sought may constitute a useful indicator of the precise nature of the claim, this factor alone cannot be viewed as dispositive.

> The fact that a lawsuit seeks to recover a loss that was covered by an insurance policy, alone, should not dictate the nature of a plaintiff's claims . . . . Although the contract of insurance may be one source of the insurer's obligation to pay the loss, the insurer may also be held liable for tortious conduct that is wholly separable from its purely contractual duties. [*Hearn*, 428 Mich at 40-41.]

Where fraudulent conduct results in the loss, or reduced payment, of PIP benefits, plaintiffs are entitled to seek damages for their entire loss, including the equivalent of the no-fault benefits. See *Phinney*, 222 Mich App at 532. It should not be seen as unusual that damages for fraud in a statutory context would be more than randomly related to lost statutory benefits. Simply because the insureds choose to measure their loss from the fraudulent conduct, in whole or in part, on the basis of lost PIP benefits does not transform their claim into a no-fault claim.

Therefore, where an insured's claim arises not out of the insurer's mere failure to pay no-fault benefits, but out of the insurer's fraudulent misrepresentations, which might have ultimately led to payment of reduced no-fault benefits to the insureds, the courts are faced with a fraud claim, as opposed to a no-fault claim.

Because fraud claims are independent of and distinct from no-fault claims, the one-year-back rule of the no-fault act simply does not apply.

Consequently, where the insureds state a fraud cause of action, this Court need not resort to its *equitable power* to prevent the one-year-back rule's application. In *Devillers*, 473 Mich at 590-591, this Court stated that, *in the context of a no-fault claim*, this Court may exercise its equitable power to avoid the application of the one-year-back rule if there are allegations of fraud, mutual mistake, or other unusual circumstances.[7] Because *Devillers* "concerns those statutory claims brought pursuant to the no-fault act," i.e., no-fault actions, *Devillers* is not pertinent in cases involving independent fraud actions. *West v Farm Bureau Gen Ins Co of Michigan (On Remand)*, 272 Mich App 58, 65; 723 NW2d 589 (2006). Thus, where the insureds state a common-law fraud claim, wholly separate from a no-fault claim, this Court need not consider an equitable exception to the application of the one-year-back rule because the no-fault rules simply do not apply.[8]

B. CAUTIONARY NOTES

While insureds are entitled to pursue common-law fraud claims against insurers and their remedies are not limited by the one-year-back rule of the no-fault act, we are not oblivious to the fact that, in the initial stages of litigation, some insureds may attempt to circumvent

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[7] In *Devillers*, however, this Court concluded that because there was "no allegation of fraud, mutual mistake, or any other 'unusual circumstance' . . . there [was] no basis to invoke the Court's equitable power." *Devillers*, 473 Mich at 591.

[8] We note that, where a case involves a no-fault claim, this Court may still exercise its equitable power if there has been a determination that genuinely "unusual circumstances" such as fraud or mutual mistake were present. *Devillers*, *supra* at 590-591.

the application of the one-year-back rule to defeat insurers' motions for summary disposition. In order to limit such practices, to prevent wasteful or frivolous litigation, and to maintain the integrity of both the no-fault law and the common-law fraud cause of action, trial courts should exercise special care in assessing these types of fraud claims, and we offer the following guidance.

Because fraud must be pleaded with particularity, MCR 2.112(B)(1), and "is not to be lightly presumed, but must be clearly proved," *Palmer v Palmer*, 194 Mich 79, 81; 160 NW 404 (1916), "by clear, satisfactory and convincing" evidence, *Youngs v Tuttle Hill Corp*, 373 Mich 145, 147; 128 NW2d 472 (1964), trial courts should ensure that these standards are clearly satisfied with regard to all of the elements of a fraud claim. As stated above, the elements of fraud in the insurance context are: (1) that the insurer made a material representation; (2) that it was false; (3) that when the statement was made, the insurer knew that it was false, or the insurer made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the insurer made the statement with the intention that it would be acted upon by the insureds; (5) that the insureds acted in reliance upon the statement; and (6) that the insureds consequently suffered injury. See *Hi-Way Motor Co*, 398 Mich at 336.

In particular, courts should carefully consider in this context whether insureds can satisfy the reliance factor. Insureds must "show that any reliance on [the insurer's] representations was reasonable." *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). Because fraud cannot be "perpetrated upon one who has full knowledge to the contrary of a representation," *Montgomery Ward & Co v Williams*, 330 Mich

275, 284; 47 NW2d 607 (1951), insureds' claims that they have reasonably relied on misrepresentations that clearly contradict the terms of their insurance policies must fail. One is presumed to have read the terms of his or her insurance policy, see *Van Buren v St Joseph Co Village Fire Ins Co*, 28 Mich 398, 408 (1874); therefore, when the insurer has made a statement that clearly conflicts with the terms of the insurance policy, an insured cannot argue that he or she reasonably relied on that statement without questioning it in light of the provisions of the policy. See also *McIntyre v Lyon,* 325 Mich 167, 174, 37 NW2d 903 (1949); *Phillips v Smeekens,* 50 Mich App 693, 697; 213 NW2d 862 (1973). In addition, insureds will ordinarily be unable to establish the reliance element with regard to misrepresentations made during the claims handling and negotiation process, because during these processes the parties are in an obvious adversarial position and generally deal with each other at arm's length. See *Mayhew v Phoenix Ins Co*, 23 Mich 105 (1871) (Where the insured has the same knowledge or means of knowledge as the insurer, the insurer cannot be regarded as occupying any fiduciary relationship that would entitle the insured to rely on the insurer's representations, and a settlement hastily made with the insurer under such circumstances will not be set aside for fraud. Insureds are bound to inform themselves of their rights before acting, and, if they fail to do so, they themselves are responsible for the loss.); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) ("There can be no fraud when a person has the means to determine that a representation is not true."). However, when the process involves information and facts that are exclusively or primarily within the insurers' "perceived 'expertise' in insurance matters, or facts obtained by the insurer[s] in the course of [their] investi-

gation, and unknown" to the insureds, the insureds can more reasonably argue that they relied on the insurers' misrepresentations. 14 Couch, Insurance, 3d, § 208:19, p 208-26; see also *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930); *French v Ryan*, 104 Mich 625, 630; 62 NW 1016 (1895); *Tabor* v *Michigan Mut Life Ins Co,* 44 Mich 324, 331; 6 NW 830 (1880).[9]

The courts should also carefully examine whether the insureds have established both that the statements are statements of past or existing fact, rather than future promises or good-faith opinions, *Hi-Way Motor Co*, 398 Mich at 337; *Danto v Charles C Robbins, Inc,* 250 Mich 419, 425; 230 NW 188 (1930); *Foreman*, 266 Mich App at 143, and that they are objectively false or misleading, *Hord v Environmental Research Institute of Michigan*, 463 Mich 399, 411; 617 NW2d 543 (2000). Further, the insureds must demonstrate that the misrepresentations were made with the intent to defraud, *Foreman*, 266 Mich App at 143, and that the insureds were injured as a consequence. *Hi-Way Motor Co*, 398 Mich at 336. The courts must distinguish between misrepresentations of fact, i.e., false statements of past or existing facts, and mere negotiation of benefits, i.e., the mutual discussion and bargaining preceding an agreement to pay PIP benefits.

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[9] In *Tabor*, the Court held that "[w]hile . . . a person cannot generally be justified in acting solely on the statement of his legal rights by an adverse agent in insurance controversies," relief is warranted if the statements are "so mixed with unconscionable conduct as to stand differently." *Id*. at 331. Not only did the insurer misrepresent the applicable law regarding forfeiture of policies and pressure the ill insured to immediately comply with the insurer's demands without allowing him to obtain independent advice, but, critically, the insurer also misrepresented facts that were within the exclusive knowledge of the insurer, such as the actions taken by the insurance commissioner and by some of the insured's neighbors, which directly affected the surrender of the insured's policy. Thus, the plaintiff could recover under her fraud claim.

Finally, as with any other action, if the courts conclude that the fraud claims were frivolous or interposed without an adequate basis or for improper purposes, appropriate sanctions should be considered. See MCR 2.114.

IV. CONCLUSION

Because under MCL 500.3145(1) the one-year-back rule applies solely to no-fault actions, and because a fraud action is not a no-fault action, but, rather, constitutes an independent and distinct action for recovery of damages under the common law for losses incurred as a result of the insurer's fraudulent conduct, we hold that a common-law action for fraud is not subject to the one-year-back rule. Therefore, we reverse in part the judgment of the Court of Appeals and remand this case to the Court of Appeals for it to address the remaining issues raised by the parties.

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

CAVANAGH, J. I concur in the result only.

WEAVER, J. (*concurring*). I concur only in the result reached by the majority opinion. Specifically, because the one-year-back rule applies only to actions brought under the no-fault act, and because a fraud action is not a no-fault action—"action for recovery of personal protection insurance benefits payable under [the no-fault act] for accidental bodily injury," MCL 500.3145(1)—but, instead, is an independent action for recovery of damages payable under the common law for losses incurred as a result of the insurer's fraudulent conduct, I agree that the common-law cause of action for fraud is not subject to the one-year-back rule.

Therefore, I concur in the majority's decision to reverse in part the judgment of the Court of Appeals and to remand this matter to the trial court for further proceedings consistent with that decision.

KELLY, J., concurred with WEAVER, J.

ALLISON v AEW CAPITAL MANAGEMENT, LLP

Docket No. 133771. Argued January 9, 2008 (Calendar No. 6). Decided June 25, 2008.

Irving Allison brought an action in the Oakland Circuit Court against his lessor, AEW Capital Management, L.L.P., after he slipped and fell on an accumulation of ice and snow in the parking lot of his apartment building. AEW moved for summary disposition, arguing that the plaintiff's common-law claims were barred by the "open and obvious" danger doctrine and that MCL 554.139(1), which imposes on a lessor the duties to keep its premises and common areas fit for their intended uses and its premises in reasonable repair, does not apply to natural accumulations of ice and snow. The court, Gene Schnelz, J., granted the motion and ordered the pleadings amended to substitute Village Green Management Company and BFMSIT, II, as the defendants. The Court of Appeals, BORRELLO, P.J., and JANSEN and COOPER, JJ., initially issued an opinion per curiam on November 28, 2006 (Docket No. 269021), affirming the grant of summary disposition, concluding that it was bound by the decision in *Teufel v Watkins*, 267 Mich App 425 (2005). The panel declared a conflict between this case and *Teufel*, but in an unpublished order entered December 21, 2006, the Court of Appeals declined to convene a special panel. The plaintiff moved for reconsideration, and in an unpublished order entered January 19, 2007, the Court of Appeals granted the motion and vacated its prior opinion. On reconsideration, the Court of Appeals reversed the trial court's grant of summary disposition, concluding that *Teufel* did not constitute binding precedent because it presented its holding regarding MCL 554.139(1) in a footnote and ignored the holding of *O'Donnell v Garasic*, 259 Mich App 569 (2003), that a lessor may not use the "open and obvious" danger doctrine to avoid liability when the lessor has duties under MCL 554.139(1). The panel held that a parking lot in an apartment complex is a common area for purposes of MCL 554.139(1)(a) and that a lessor's duty under that statute to keep common areas fit for the use that the parties to the lease intended extends to parking lots. Because one intended use of a parking lot is walking on it so that tenants can reach their cars and apartments, a parking lot covered with ice is not fit for that

purpose. 274 Mich App 663 (2007). The defendants sought leave to appeal, which the Supreme Court granted. 480 Mich 894 (2007).

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

Parking lots in leased residential properties are common areas under MCL 554.139(1)(a). The natural accumulation of snow and ice is subject to a lessor's duty under that statute to keep common areas fit for the uses intended by the parties to the lease. The natural accumulation of snow and ice is not subject to a lessor's duty under MCL 554.139(1)(b) to keep the premises in reasonable repair.

1. The protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties, and any remedy under the statute would consist exclusively of a contract remedy.

2. In the context of leased residential property, "common areas" describes those areas of the property over which the lessor retains control that two or more, or all, of the tenants share. Parking lots in leased residential property are common areas for purposes of MCL 554.139(1)(a).

3. Because a parking lot in a leased residential property is a common area, the lessor has a duty under MCL 554.139(1)(a) to keep the lot fit for the use intended by the parties. A lessor's obligation under this provision with regard to the accumulation of snow and ice is to ensure that the entrance to and exit from the lot is clear, that vehicles can access parking spaces, and that the tenants have reasonable access to their parked vehicles.

4. The one to two inches of snow on the ground in this case did not render the parking lot unfit.

5. The Legislature specifically established a duty for lessors under MCL 554.139(1)(a) with regard to the premises and all common areas, but established a duty under MCL 554.139(1)(b) only with regard to the premises. Accordingly, the duty requiring reasonable repair does not apply to common areas such as a parking lot.

Justice CORRIGAN, concurring, would hold that the statutory duty of a lessor to keep the premises and common areas fit for their intended use extends only to significant, structural defects that render a parking lot itself unfit for its intended use and not to

transitory conditions such as snow and ice accumulations, and noted that the majority's analysis of this issue was unnecessary to the disposition of the case because the accumulated precipitation at issue did not render the parking lot unfit for its intended use.

Reversed; trial court order granting summary disposition for the defendants reinstated.

Justice CAVANAGH, joined by Justice KELLY, dissenting, would hold that the plaintiff made a sufficient showing to survive summary disposition under the statutory provision that requires a landlord to ensure that the premises and common areas are fit for use by establishing that the plaintiff was unable to access his vehicle without injury; would not categorically conclude that an accumulation of one or two inches of snow or ice can never make a parking lot unfit for its intended uses; would hold that a landlord has a duty to take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to a tenant; and would not have reached several issues that were not properly before the Court.

1. LANDLORD AND TENANT — STATUTORY DUTIES — CONTRACTS — REMEDIES.

The statutory protection to tenants of residential property arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease; therefore, a breach of the statutory duty to maintain the premises would be construed as a breach of the terms of the lease between the parties , and any remedy under the statute would consist exclusively of a contract remedy (MCL 554.139[1]).

2. LANDLORD AND TENANT — COMMON AREAS — PARKING LOTS.

In the context of leased residential property, "common areas" describes those areas of the property over which the lessor retains control that two or more, or all, of the tenants share; parking lots in leased residential properties are common areas for purposes of the statute that imposes a duty on a lessor to keep the premises and all common areas fit for the uses intended by the parties to the lease (MCL 554.139[1][a]).

3. LANDLORD AND TENANT — STATUTORY DUTIES — NATURAL ACCUMULATIONS OF SNOW AND ICE.

Because a parking lot in a leased residential property is a common area, the lessor has a statutory duty to keep the lot fit for the use intended by the parties; a lessor's obligation with regard to the accumulation of snow and ice is to ensure that the entrance to and

exit from the lot is clear, that vehicles can access parking spaces, and that the tenants have reasonable access to their parked vehicles (MCL 554.139[1][a]).

4. LANDLORD AND TENANT — STATUTORY DUTIES.

The statutory duty requiring reasonable repair applies only to premises and does not apply to common areas such as a parking lot (MCL 554.139[1][b]).

Barbara H. Goldman, PLLC (by *Barbara H. Goldman*), and *Mindell, Malin & Kutinsky* (by *Brian A. Kutinsky*) for Irving Allison.

Plunkett Cooney (by *Christine D. Oldani* and *Edward M. Turfe*) for Village Green Management Company and BFMSIT, II.

Amici Curiae:

Swistak & Levine, P.C. (by *I. Matthew Miller*), for the Property Management Association of Michigan, the Detroit Metropolitan Apartment Association, the Property Management Association of West Michigan, the Property Management Association of Mid-Michigan, the Washtenaw Area Apartment Association, the Apartment Association of Michigan, the Institute of Real Estate Management Michigan Chapter 5, the Michigan Housing Council, the Property Owners Association of Kent County, and the Real Estate Investors Association of Wayne County.

Janet M. Brandon for the Michigan Association for Justice. Farmington Hills

MARKMAN, J. We granted leave to appeal to address the following questions: (1) whether parking lots in leased residential areas constitute "common areas" under MCL 554.139(1)(a); (2) whether the natural accumulation of snow and ice is subject to the lessor's duty set

forth in MCL 554.139(1)(a) to keep premises and common areas "fit for the use intended by the parties"; and (3) whether the natural accumulation of snow and ice is subject to the lessor's duty set forth in MCL 554.139(1)(b) to "keep the premises in reasonable repair." We answer the first two questions in the affirmative and the third question in the negative. Because we conclude that the duty set forth in MCL 554.139(1)(a) was not violated here because one to two inches of snow did not render the parking lot unfit for the use intended, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition in favor of defendants.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff fractured his ankle during a fall when he was walking on one to two inches of accumulated snow in the parking lot of his apartment complex. He then noticed ice on the ground where the snow had been displaced. Plaintiff filed suit against defendant AEW Capital Management, doing business as Sutton Place Apartments, alleging negligence and breach of the covenant to maintain and repair the premises, MCL 554.139(1). The trial court granted summary disposition to defendant, concluding that the danger was "open and obvious," and directed that the pleadings be amended to replace AEW with the proper defendants, Village Green Management Company and BFMSIT, II.

The Court of Appeals affirmed the trial court's ruling on the basis of *Teufel v Watkins*, 267 Mich App 425, 429 n 1; 705 NW2d 164 (2005), which held that MCL 554.139(1) does not control a lessor's duty to remove snow and ice from a parking lot. Unpublished opinion per curiam, issued November 28, 2006 (Docket No.

269021). The panel expressed its disagreement with *Teufel* and sought a conflict resolution panel. *Id*. After this request was denied, the panel granted plaintiff's motion for reconsideration and vacated its initial opinion. Unpublished order, entered January 19, 2007 (Docket No. 269021). The panel then reversed the trial court's grant of summary disposition, stating that *Teufel* did not constitute governing precedent because its holding regarding the inapplicability of MCL 554.139(1) was only presented in a footnote. *Allison v AEW Capital Mgt, LLP (On Reconsideration)*, 274 Mich App 663, 669-670; 736 NW2d 307 (2007). The panel also concluded that a parking lot constitutes a common area under MCL 554.139(1)(a), that one of a parking lot's intended uses entails persons walking on it, and that a parking lot covered with ice is not fit for that purpose. *Id*. at 670-671. Defendants filed an application for leave to appeal in this Court, and we granted leave to appeal. 480 Mich 894 (2007).

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of a summary disposition motion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Matters of statutory interpretation are also reviewed de novo. *Id*. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [and] the moving party is

entitled to judgment as a matter of law." *Id*. at 120; see also MCR 2.116(C)(10). There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

Plaintiff asserted two different causes of action in this case: (1) negligence and (2) breach of the covenants to keep the premises and common areas fit for their intended use and to keep the premises in reasonable repair, MCL 554.139(1).[1] If defendants had a duty under MCL 554.139(1)(a) or (b) to remove snow and ice from the parking lot, then plaintiff could proceed on his second claim even if plaintiff's negligence claim was barred by the "open and obvious" danger doctrine.[2] MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law. The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of

[1] The merits of plaintiff's negligence claim are not before this Court.

[2] Under common-law negligence principles, a premises owner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the premises, but not when the condition is "open and obvious." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a defendant cannot use the "open and obvious" danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises in accordance with MCL 554.139(1)(a) or (b). *Woodbury v Bruckner*, 467 Mich 922 (2002); *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003).

the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy.[3]

A. "COMMON AREAS"

MCL 554.139 provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant's wilful or irresponsible conduct or lack of conduct.

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[3] Although the nature and extent of plaintiff's remedy are not at issue in this case, we note that, typically, a plaintiff's remedy for breach of contract is limited to damages that "arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980) (citation omitted). The purpose of this remedy is to "place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996).

The dissent "would hold that a plaintiff who proves a claim under MCL 554.139(1) is entitled to full damages for the injury," citing the Second Restatement of Torts, § 357, which states that " '[a] lessor of land is subject to liability for physical harm caused to his lessee . . . if the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair . . . .' " *Post* at 448-449. This section of the Second Restatement of Torts applies to the tort of negligence. We reiterate that the merits of plaintiff's negligence claim are not before this Court. In addition, as discussed *infra*, the covenant to repair, MCL 554.139(1)(b), does not apply to common areas and would not impose a duty on the lessor to keep parking lots free from the natural accumulation of ice and snow.

The primary goal of statutory interpretation is "to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). If the language of the statute is clear, we presume that the Legislature intended the meaning expressed. *Id*. If the statute does not define a word, we may consult dictionary definitions to determine the plain and ordinary meaning of the word. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). However, legal terms of art are to be construed according to their peculiar and appropriate meaning. MCL 8.3a.

MCL 554.139 does not define the term "common areas." However, Black's Law Dictionary (6th ed), p 275, defines "common area" as: "[i]n law of landlord-tenant, the portion of demised premises used in common by tenants over which landlord retains control (*e.g.* hallways, stairs) and hence for whose condition he is liable, as contrasted with areas of which tenant has exclusive possession." This definition is in accord with the plain and ordinary meaning of the term. "Common" is defined as "belonging equally to, or shared alike by, two or more or all in question[.]" *Random House Webster's College Dictionary* (1997). Therefore, in the context of leased residential property, "common areas" describes those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants. A lessor's duties regarding these areas arise from the control the lessor retains over them. See, e.g., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988) (stating that "a landlord may be held liable for an unreasonable risk of harm caused by a dangerous condition in the areas of common use retained in his control such as lobbies, hallways, stairways, and elevators").

The issue in this case concerns whether parking lots within leased residential property constitute "common areas" within the meaning of the statute. The Court of Appeals answered in the affirmative, relying on *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), to conclude that parking lots constitute common areas. In *Benton*, *supra* at 442-443, the Court of Appeals held that sidewalks within an apartment complex constitute common areas under MCL 554.139(1)(a) because they are located within the complex, they are constructed and maintained by the lessor, and they are relied on by tenants to access their apartments and vehicles. In this case, the Court of Appeals adopted this reasoning to conclude that parking lots also constitute common areas because they are located within the complex, they are maintained by the lessor, and tenants must necessarily walk on parking lots to access their vehicles. *Allison*, *supra* at 670.

We agree that a parking lot within a leased residential property fits within the meaning of "common area" because it is accessed by two or more, or all, of the tenants and the lessor retains general control. Among other things, the lessor controls whether a parking lot is used by members of the public as well as by tenants, the circumstances under which nontenants can access the lot, the number and size of vehicles that a tenant can park in the lot, the lot's hours of operation, the means of identification of those entitled to park in the lot, and whether and how particular parking spaces will be allocated. Further, the lessor is responsible for the maintenance and security of the lot. Thus, we believe that parking lots within a leased residential property that are shared by two or more, or all, of the tenants constitute "common areas" under MCL 554.139(1)(a).

B. LESSOR'S DUTY UNDER MCL 554.139(1)(a)

Because a parking lot within a leased residential property is a common area under MCL 554.139(1)(a), the lessor effectively has a contractual duty to keep the parking lot "fit for the use intended by the parties." The next question concerns whether this covenant encompasses the duty to keep the lot free from the natural accumulation of snow and ice. The Court of Appeals held:

> The intended use of a parking lot is to park cars and other motor vehicles; however, in order to access their vehicles and apartments, tenants must also necessarily walk on the parking lot. A second intended use of a parking lot, therefore, is walking on it. A parking lot covered with ice is not fit for this purpose. [*Allison*, *supra* at 670-671.]

We agree that the intended use of a parking lot includes the parking of vehicles. A parking lot is constructed for the primary purpose of storing vehicles on the lot. "Fit" is defined as "adapted or suited; appropriate[.]" *Random House Webster's College Dictionary* (1997). Therefore, a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used.

In this case, in construing the meaning of these terms in the contract, neither of the parties has indi-

cated that the intended use of the parking lot was anything other than basic parking and reasonable access to such parking. Plaintiff's allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that plaintiff fell. Under the facts presented in this record, we believe that there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles. Accordingly, plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law.

While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes.

We recognize that tenants must walk across a parking lot in order to access their vehicles. However, plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle. The Court of Appeals erred in concluding that, under the facts presented, the parking lot in this case was unfit simply because it was covered in snow and ice.[4] *Allison*,

[4] The dissent concludes that "plaintiff has made a sufficient showing to survive summary disposition under § 139(1)(a)" on the basis that "fitness

supra at 670-671. Further, we take issue with the suggestion of the Court of Appeals that a tenant traversing a parking lot, for any reason, might be able to take advantage of the covenant for fitness for the uses intended. A tenant using a common area for a purpose other than that for which the area is intended is not protected by the covenant for fitness, but would be afforded any protections provided by the common law. The statute does not require any level of fitness beyond what is necessary to allow tenants to use the parking lot as the parties intended. In addition, should this point need clarification, a non-tenant could never recover under the covenant for fitness because a lessor has no contractual relationship with—and, therefore, no duty under the statute to—a non-tenant.[5] Plaintiff has not shown that the lot in this case was unfit for its intended use, and the Court of Appeals erred in concluding otherwise.

C. LESSOR'S DUTY UNDER MCL 554.139(1)(b)

The final question concerns whether a lessor's duty to repair under MCL 554.139(1)(b) extends to snow and ice accumulation in a parking lot. We must distinguish the term "common areas" from the term "premises" if we are to give meaning to all the words of this statute.

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for use includes safety." *Post* at 443, 444. However, the dissent's analysis focuses exclusively on premises liability law, the subject of plaintiff's first claim, which, as stated earlier, is not before this Court. Perhaps most relevantly, we do not see walking across one to two inches of snow and ice as being as harrowing an experience as the dissent asserts.

[5] The dissent disagrees, citing the Second Restatement of Torts, § 357, which states that " '[a] lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with consent of the lessee . . . .' " *Post* at 449-450. Again, the dissent's analysis would apply to premises liability law, under which a non-tenant guest would be entitled to the protections afforded a licensee under common-law principles. The dissent misapprehends what this case is about.

The lessor's duty under MCL 554.139(1)(a) applies to "the premises and all common areas," while the lessor's duty under MCL 554.139(1)(b) applies only to "the premises." We must "avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

"Premises" is defined as "a tract of land including its buildings" or "a building or part of a building together with its grounds or other appurtenances[.]" *Random House Webster's College Dictionary* (1997). Such a definition would seem to include everything within the boundaries of the apartment complex, including the common areas. However, a statute can give special meaning to a word apart from its everyday use. Under the doctrine of *noscitur a sociis*, a word is also given meaning in the context of the words around it. *Koontz*, *supra* at 318.

In this statute, the Legislature specifically set the term "common areas" apart from the term "premises" by applying the first covenant to both terms and the second covenant only to "premises." If we conclude that "premises" includes "common areas," then the phrase "and all common areas" would be entirely superfluous. The only way to give meaning to the phrase "and all common areas" in this context is to conclude that "premises" does not encompass "common areas" and that the covenant to repair under MCL 554.139(1)(b) does not apply to "common areas."[6]

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[6] Even if common areas were covered by the covenant to keep the premises in reasonable repair, this covenant would not impose a duty on the lessor to keep parking lots free from the natural accumulation of snow and ice. "Repair" as a noun is defined as "the good condition resulting from continued maintenance and repairing." *Random House Webster's College Dictionary* (1997). "Repairing" involves "restor[ing] to a good or sound condition after decay or damage; mend[ing]." *Id*.

The exclusion of common areas from the covenant to repair imposed by the statute does not necessarily mean that the lessor is free of any duty to repair common areas, because these areas must still be kept "fit for the use intended by the parties." The Legislature elected to impose two different duties on the lessor, one for "premises and all common areas" and one for only "premises," and differentiated those duties through its choice of language, one covenant requiring "fitness" and the other requiring "reasonable repair." Because both covenants imposed by the statute apply to premises, and only the covenant for fitness applies to common areas, we can reasonably infer that the Legislature intended to place a less onerous burden on the lessor with regard to common areas. Keeping common areas fit for their intended use may well require a lessor to perform maintenance and repairs to those areas, but may conceivably require repairs less extensive than those required by the second covenant. For example, if the lessor has a duty to repair a parking lot under MCL 554.139(1)(b), the lessor arguably may be required to fill a small pothole in the parking lot, even if that pothole did not affect the ability of the tenants to park in that lot. However, because the lessor does not have such a duty with regard to parking lots because they are common areas, the lessor would not necessarily be obligated to fill that pothole under the duties concerning fitness in MCL 554.139(1)(a).

In *Teufel*, *supra at* 429 n 1, the Court of Appeals held:

> Plaintiff also argues that the trial court erred when it failed to address his argument that [the lessor] had a

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Therefore, MCL 554.139(1)(b) refers to keeping the premises in a good condition as a result of restoring and mending damage to the property. There is nothing within the definition of "repair" that would include keeping a property free of snow and ice accumulation.

> statutory duty under MCL 554.139 to keep its premises and common areas in reasonable repair and fit for their intended uses, which negates the defense of open and obvious danger. Any error in the trial court's failure to address this argument is harmless. The plain meaning of "reasonable repair" as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises. Thus, a lessor's duty under MCL 554.139(1)(a) and (b) to keep its premises in reasonable repair and fit for its intended use does not extend to snow and ice removal.

This is an accurate assessment of the requirement of "reasonable repair" in MCL 554.139(1)(b). "Defect" is defined as "a fault or shortcoming; imperfection." *Random House Webster's College Dictionary* (1997). Damage to the property would constitute an imperfection in the property that would require mending. Therefore, repairing a defect equates to keeping the premises in a good condition as a result of restoring and mending damage to the property. The accumulation of snow and ice does not constitute a defect in property, and, therefore, the lessor would have no duty under MCL 554.139(1)(b) with regard to snow and ice, except to the extent that such snow and ice caused damage to the property.

This conclusion can be analogized to the government's duty to maintain highways in reasonable repair under MCL 691.1402(1), the highway exception to governmental immunity. In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000), this Court held that the "highway exception waives the absolute immunity of governmental units with regard to defective highways under their jurisdiction." To recover under MCL 691.1402(1), a plaintiff must demonstrate that a defect in the highway was the proximate cause of the plaintiff's injury. *Haliw v Sterling Hts*, 464

Mich 297, 309 n 9; 627 NW2d 581 (2001). In *Haliw*, this Court specifically excluded the accumulation of snow and ice from consideration as a defect. *Id*. More recently, in *MacLachlan v Capital Area Transportation Auth*, 474 Mich 1059 (2006), this Court held that an accumulation of snow in the roadway did not constitute a "defect in the roadway rendering it unsafe for public travel at all times."

We hold that the lessor's duty to repair under MCL 554.139(1)(b) does not apply to common areas and, therefore, does not apply to parking lots. In addition, MCL 554.139(1)(b) requires the lessor to repair defects in the premises, and the accumulation of snow and ice is not a defect. A lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice.

D. *TEUFEL* AS PRECEDENT

The Court of Appeals on reconsideration stated that the holding in *Teufel*, *supra* at 429 n 1, was legally flawed for failing to distinguish, or even mention, *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003), and for failing to conduct a separate analysis of MCL 554.139(1)(a) and (b). *Allison*, *supra* at 668-669. The Court proceeded to observe that it was not bound to follow the discussion of MCL 554.139(1)(a) and (b) in *Teufel* because, "[h]ad [the] Court in *Teufel* intended to create a rule of law regarding the availability of the open and obvious danger doctrine when a landlord has a statutory duty under MCL 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote." *Id*. at 669-670, citing *Guerra v Garratt,* 222 Mich App 285, 289-292; 564 NW2d 121 (1997).

The Court's reference to *Guerra* was misplaced. *Guerra* did not state that language set forth in a footnote does not constitute binding precedent. Rather, in *Guerra*, the Court of Appeals was attempting to interpret whether certain language in *Lemmerman v Fealk,* 449 Mich 56, 77 n 15; 534 NW2d 695 (1995), was meant to limit the retroactivity of the opinion's general holding or to create an exception to that holding. *Guerra, supra* at 291. The Court engaged in ordinary interpretative analysis, examining the circumstances and the context in order to properly give meaning to the language. The Court of Appeals concluded that, given the fact that *Lemmerman* repeatedly set forth its general holding without suggesting any exception and specifically made a statement incompatible with such an exception, this Court would have placed any such exception to the general holding, if it had been intended, in the body of the opinion. *Id*. at 291-292. Therefore, the Court of Appeals determined that the footnote pertained to the retroactivity of the holding, and did not create an exception to that holding. The statement in *Guerra* regarding the *Lemmerman* footnote was merely an analysis of the context of language within a footnote and not a holding that a discussion within a footnote cannot constitute binding precedent.

The essential question is not whether the language in *Teufel* was contained within a footnote, but whether it created a "rule of law" for the purposes of MCR 7.215(J)(1).[7] A statement that is dictum does not con-

[7] MCR 7.215 provides:

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of

stitute binding precedent under MCR 7.215(J)(1). *McNeil v Charlevoix Co*, 275 Mich App 686, 702; 741 NW2d 27 (2007). "[O]biter dictum" is defined as "1. an incidental remark or opinion. 2. a judicial opinion in a matter related but not essential to a case." *Random House Webster's College Dictionary* (1997).

In *Teufel*, the plaintiff slipped and fell on ice in the parking lot of his apartment complex. *Teufel, supra* at 426. The Court of Appeals held that the trial court properly granted summary disposition to the defendant apartment complex on the basis of the "open and obvious" danger doctrine. *Id*. at 428-429. The language in the *Teufel* footnote was not dictum; rather, the footnote addressed an alternative argument raised by the plaintiff regarding the applicability of MCL 554.139 and was, therefore, necessary to the disposition of the case. Thus, the language in the footnote constituted a rule of law, and the Court of Appeals was obligated to follow this rule under MCR 7.215(J)(1).

The Court of Appeals' concern that *Teufel* itself did not follow the precedent of *O'Donnell* was without merit. In *O'Donnell*, *supra* at 581, the Court of Appeals held that a defendant cannot use the "open and obvious" danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises in accordance with MCL 554.139(1)(a) and (b). However, the *Teufel* footnote held that MCL 554.139(1)(a) and (b) do not apply to snow and ice removal. Therefore, the "open and obvious" danger doctrine could avoid the defendants' liability in *Teufel*, and there was no need to refer to, nor was there any inconsistency with, *O'Donnell*.

Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

Language set forth in a footnote can constitute binding precedent if the language creates a "rule of law" and is not merely dictum. *Teufel*, *supra* at 429 n 1, created a rule of law that the Court of Appeals was bound to follow. MCR 7.215(J)(1). However, to the extent that *Teufel* held that a lessor's duty to maintain premises and common areas "fit for the use intended" under MCL 554.139(1)(a) can *never* include snow and ice removal, we overrule *Teufel*. There are conceivable circumstances in which a lessor may have a duty to remove snow and ice under MCL 554.139(1)(a), such as when the accumulation is so substantial that tenants cannot park or access their vehicles in a parking lot. As we have already observed, such circumstances were not present in this case. The Court of Appeals erred in reversing the trial court's order granting summary disposition in favor of defendants under the "open and obvious" danger doctrine.

IV. CONCLUSION

We hold that: (1) parking lots in leased residential areas constitute "common areas" under MCL 554.139(1)(a); (2) the natural accumulation of snow and ice is subject to the lessor's duty established in MCL 554.139(1)(a), but that plaintiff has not shown the duty was violated here because the parking lot was apparently "fit for the use intended by the parties"; and (3) the natural accumulation of snow and ice is not subject to the lessor's duty established in MCL 554.139(1)(b). Moreover, we believe that the Court of Appeals acted contrary to MCR 7.215(J)(1) in failing to follow the precedent set forth in *Teufel* and erred in holding that language contained in a footnote cannot be binding precedent. However, we overrule *Teufel* to the extent that it is inconsistent with our holding in this case.

Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting summary disposition in favor of defendants.

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

CORRIGAN, J. (*concurring*). I concur in the result and virtually all of the reasoning of the majority opinion. In particular, I agree that (1) sidewalks and parking lots in leased residential areas are "common areas" under MCL 554.139(1)(a); (2) the natural accumulation of ice and snow is not subject to the lessor's duty under MCL 554.139(1)(b) to "keep the premises in reasonable repair"; and (3) the Court of Appeals erred in concluding that language in the footnote in *Teufel v Watkins*, 267 Mich App 425, 429 n 1; 705 NW2d 164 (2005), could not constitute binding precedent.

My sole area of disagreement with the majority concerns its analysis of whether a lessor's duty to keep the premises and common areas "fit for the use intended by the parties," MCL 554.139(1)(a), obligates the lessor to remove natural accumulations of snow and ice. The majority correctly observes that the parking lot here was "fit for the use intended by the parties" where only one to two inches of snow had accumulated. Yet the majority goes on to state that in "more exigent circumstances" a natural accumulation of snow or ice could trigger the statutory duty. Not only is this conclusion unnecessary to the disposition of this case, but I believe it is founded on an erroneous analysis.

MCL 554.139(1) provides in part:

> In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

The majority resorts to a lay dictionary to define "fit" as " 'adapted or suited; appropriate[.]' " *Ante* at 429, quoting *Random House Webster's College Dictionary* (1997). The majority then concludes that in some unspecified "exigent circumstances," *ante* at 430, a natural accumulation of ice or snow could render the parking lot unfit for its intended use.

The majority's analysis hinges on its implicit view that the duty to keep the parking lot *itself* fit extends to *transient* conditions such as natural accumulations of snow or ice. This assumption overlooks a fair reading of the statutory text limiting the duty of fitness to the *physical structure* of the premises and common areas.[1] My analysis of the statutory covenant and its legal background suggests that it is limited to structural defects.

While a court may use a lay dictionary to define common words or phrases that lack a unique legal meaning, MCL 8.3a; *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007), I would not assume that the terms used in MCL 554.139 lack an acquired legal meaning. Indeed, it appears that the statute codifies the implied warranty of habitability, and that this warranty does not protect against transient conditions such as ice or snow.

The duties set forth in MCL 554.139 are directed at ensuring that the premises are habitable. The statute

[1] Notably, we have interpreted the highway exception to the governmental tort liability act, MCL 691.1402, in precisely this manner. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000); *Haliw v Sterling Hts*, 464 Mich 297; 627 NW2d 581 (2001) (holding that a natural accumulation of ice on a sidewalk did not implicate the highway exception because the plaintiff's injury was not caused by a defect in the sidewalk itself).

was enacted " 'to establish as a matter of law the landlord's promissory duty *to make the premises fit for habitation* at the time of taking possession and throughout the term of period of tenancy.' " *Rome v Walker*, 38 Mich App 458, 462 n 3; 196 NW2d 850 (1972), quoting Schier, *Draftsman: Formulation of Policy*, 2 Prospectus, A Journal of Law Reform 227, 233 (1968) (emphasis added).

"At common law, a landlord generally had no duty to provide a habitable rental property." 49 Am Jur 2d, Landlord and Tenant, § 447, p 455. See also *Fisher v Thirkell*, 21 Mich 1, 6-7 (1870). That traditional rule was abrogated as a majority of jurisdictions adopted, either by common law or by express statutory provision, an implied warranty of habitability. 49 Am Jur 2d, Landlord and Tenant, § 447, p 455.[2]

"An implied warranty of habitability requires that a dwelling be *fit for its intended use; that is, it should be habitable and fit for living*." 52 CJS, Landlord & Tenant, § 687, p 607 (emphasis added). The warranty is breached where a "defect" exists that is "of a nature and kind which will prevent the use of the dwelling *for its intended purpose to provide premises fit for habitation by its dwellers*." 49 Am Jur 2d, Landlord and Tenant, § 450, p 459 (emphasis added). This implied warranty extends to common areas. See *id*., § 447, p 455. A reasonable inference arises from the language of MCL 554.139(1)(a) ("fit for the use intended by the parties") that it codifies the implied warranty of habitability.[3]

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[2] The recognition of this warranty arose in light of "the realities of the modern urban landlord-tenant relationship." 52 CJS, Landlord & Tenant, § 687, p 606.

[3] See also *Browder, The taming of a duty — the tort liability of landlords*, 81 Mich L R 99, 112 n 55 (1982) (listing MCL 554.139 as an

The warranty of habitability extends only to "significant, structural defects" that "render the premises uninhabitable in the eyes of a reasonable person." 52 CJS, Landlord & Tenant, § 687, p 607. The natural accumulation of ice or snow is *not* such a defect. *Id*. at 607 n 12; *McAllister v Boston Housing Auth*, 429 Mass 300, 306; 708 NE2d 95 (1999). The warranty extends only to "significant defects in the property itself." *McAllister*, *supra* at 305.[4]

Therefore, in light of the legal background of the implied warranty of habitability and the codification of that warranty in MCL 554.139, I question the majority's conclusion that the statutory duty applies to transitory conditions such as snow and ice accumulations. I would hold that the duty extends only to significant, structural defects that render the parking lot itself unfit for its intended use.

In any event, the majority's analysis of this issue is unnecessary to the disposition of this case. As the majority correctly concludes, the one to two inches of accumulated precipitation in this case did not render

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example of legislation that "has consisted of the enactment or amendment of landlord and tenant codes and laws, almost all of which have created a new duty in landlords *similar in scope to the implied warranty of habitability* declared by some courts") (emphasis added).

[4] In *Gossman v Lambrecht*, 54 Mich App 641, 645-646; 221 NW2d 424 (1974), our Court of Appeals recognized that "Michigan, although not explicitly, has followed the Massachusetts rule. Under that view a landlord, absent a contract, has no duty to his tenant to remove from common passageways any natural accumulation of snow and ice." The panel noted that "[a]dherents of the Massachusetts rule believe it better suited to northern climates where slippery conditions from ice and snow are natural, frequent and without fault of the landowner, unless he increases the hazard." *Id*. at 646. Although MCL 554.139 was not at issue in that case, the *Gossman* panel held that a section of the Housing Law, MCL 125.474, providing for the cleanliness of dwellings, required no more of a landowner than is required by the common law regarding the removal of snow and ice. *Id*. at 649.

the parking lot unfit for its intended use. We thus need not speculate regarding whether a greater accumulation would, in some unspecified "exigent circumstances," trigger the statutory duty.

For these reasons, I cannot join the majority's analysis in full. In all other respects, I concur in the reasoning and conclusions set forth in the majority opinion.

CAVANAGH, J. (*dissenting*). I agree with the majority's conclusions under MCL 554.139(1)(a) that a parking lot is a common area, the intended use of a parking lot includes walking to and from parked vehicles, accumulations of ice and snow may be subject to a landlord's duties under § 139(1)(a), and the "open and obvious danger" doctrine is inapplicable to the duty created by the statute.[1] However, I disagree with the majority's application of § 139(1)(a) in this case. While I tend to agree with the majority that one or two inches of snow would rarely make a parking lot unfit for its intended use under § 139(1)(a), I cannot categorically conclude that an accumulation of one or two inches of snow or ice can never make a parking lot unfit. Specifically, I cannot conclude that the parking lot in this case was fit for its use on the facts presented. Thus, I respectfully dissent.

I believe that plaintiff has made a sufficient showing to survive summary disposition under § 139(1)(a). Section 139(1) provides that, in every lease or license of residential premises, a landlord has a duty to ensure that premises and common areas are fit for use, to keep the premises in reasonable repair, and to comply with health and safety laws. Review of a claim under § 139(1) requires a determination of where the claimed injury took place. If the injury occurred in a common area,

[1] I also agree that placement in a footnote does not, of itself, affect the language's precedential significance.

§ 139(1)(a) requires review of the parties' intended use for the common area and the area's fitness for that use.

In this case, plaintiff was defendant's tenant and suffered injury in defendant's apartment complex parking lot. The parking lot was a common area. Its intended use included parking vehicles, which includes walking to and from the vehicle. Plaintiff was walking to his vehicle when he slipped and fell; therefore, he was using the parking lot as the parties intended when he was injured.[2] So the next question is whether the parking lot was fit for its intended use when plaintiff fell.

The concept of fitness for use includes safety. The Second Restatement of Torts states:

> [A]n invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. [2 Restatement Torts, 2d, § 343, comment *b*, p 216.]

Specifically in landlord and tenant law, this Court has stated that "a landlord may be held liable for an unreasonable risk of harm caused by a dangerous condition in the areas of common use retained in his control . . . ." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). The *Williams* Court reasoned:

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[2] The majority states that "[a] tenant using a common area for a purpose other than that for which the area is intended is not protected by the covenant for fitness . . . ." *Ante* at 431. I disagree. The statute does not require that the injury occur while the common area is being used as intended. It requires the common area to be fit for the use intended. Thus, if the area is unfit for its intended use, an injured plaintiff may seek recovery for damages regardless of the use that plaintiff was making of the area when the injury occurred.

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide *a place of safety*." [*Id.* (emphasis added).]

So § 139(1)(a), requiring fitness, imposes a duty on the landlord to ensure that common areas are safe for their intended use. Whether a common area is sufficiently safe to be fit for its intended purpose depends on the condition of the area in question.[3]

There appears to be some confusion about the condition of defendant's parking lot at the time of plaintiff's injury. The Court of Appeals described the condition as "[a] parking lot covered with ice,"[4] while the majority describes the condition as a lot with "one to two inches of accumulated snow . . . . " *Ante* at 423. A two-inch sheet of ice ordinarily presents a very different degree of danger from that ordinarily presented by two inches of snow. Typically, the danger associated with snow becomes greater as the snow becomes deeper. But ice may be dangerous at almost any thickness.

Plaintiff testified that when he left his apartment for work on the morning of March 13, 2003, the entire area

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[3] The trial court did not inquire into the condition of the common area because it applied improper legal standards. The trial court believed that MCL 554.139(1) did not apply to this case and the open and obvious danger doctrine did apply. Thus, the trial court only needed to know two facts: that plaintiff fell on ice or snow and the ice or snow was open and obvious. Plaintiff attempted to present more facts regarding the condition of the common area at the hearing on defendant's motion for summary disposition, but the trial court rebuffed the effort. Inquiry into the condition of the common area was irrelevant to the legal standards applied by the trial court.

[4] *Allison v AEW Capital Mgt, LLP (On Reconsideration)*, 274 Mich App 663, 671; 736 NW2d 307 (2007).

was covered with "maybe an inch or two" of snow that had accumulated overnight. He stepped down the two stairs of his porch, walked down the sidewalk to the parking lot, and then began walking across the parking lot toward his car. After walking about 20 feet across the parking lot toward his car, plaintiff slipped and fell. In deposition testimony, plaintiff described how he fell: "I just take the step and then my foot falls or slips out from under me, and then I fell and then I—that's basically it. My foot slipped. It was the ice that I slipped on." When asked how he knew that he slipped on "ice versus snow," plaintiff stated: "Well, because the way my foot slipped. It slipped and my leg just went from under me and then when I fell, I saw where my foot slipped, I saw ice." So, according to the only evidence available to this Court, plaintiff slipped on ice in defendant's parking lot. I believe that a parking lot covered with ice is not fit for its intended use because it is not safe for walking.

The majority states that "[m]ere inconvenience" does not make a common area unfit for its intended use. *Ante* at 430. But the ice-covered surface of defendant's parking lot presented a much greater danger to plaintiff than mere inconvenience. Plaintiff's fall on ice in defendant's parking lot caused severe injury. Plaintiff's fractured ankle required extensive surgery. Plaintiff was not able to return to work for three months following surgery. In deposition testimony two years after the injury, plaintiff stated, "I always have pain and restrictions . . . I have pain in my ankle every day." Further, plaintiff is subject to ankle "re-sprains" three or four times a week. I would not call the condition plaintiff faced a mere inconvenience. And I would not call a common area that presented such a danger fit for its intended use.

The majority states that the parking lot was fit for its intended use because "tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles." *Ante* at 430. I am unaware of any evidence to support this conclusion. The only fact established on this point is that plaintiff was not able to access his vehicle without injury. The majority concludes that the parking lot was fit for its intended use when plaintiff fell because "plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle." *Ante* at 430. But, as mentioned, access to vehicles must be safe in order to be fit. Plaintiff could access his vehicle only by risking serious injury.

A landlord's duty to provide safe common areas does not preclude a tenant's duty to take steps within his control to keep himself safe. The trial court intimated as much when it opined on the proper method of walking on ice: "I suggest that—I call it the Michigan shuffle, but you don't necessarily walk; you do the skating." Contrary to the apparent perception of the trial court, plaintiff testified in deposition that he took every reasonable precaution: he was wearing boots specifically made for walking on snow, he watched where he was going, and he proceeded with great care when crossing the parking lot. Despite his best efforts to attend to his safety by means within his control, he was injured. At this pretrial stage, I believe that plaintiff has raised a genuine issue of fact concerning whether the parking lot was unfit. Thus, summary disposition is inappropriate.

If a plaintiff is able to show that a common area is not fit for its intended use, the reasonableness of the landlord's actions to remedy the unfit condition should also be assessed. "[A] contract to keep the premises in

safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need of repairs. In any case his obligation is only one of reasonable care." 2 Restatement Torts, 2d, § 357, comment *d*, pp 242-243. In this case, if the parking lot is found unfit, there is a valid question whether defendant exercised reasonable care to remedy the unfit condition. I would remand the case to the trial court for further inquiry into these matters under the proper legal standards.

I would also state a clearer standard for a landlord's liability regarding ice and snow than the majority provides to guide courts facing similar claims in the future. Because fitness for use requires a landlord to take measures to provide safe common areas, and because a landlord's duty requires exercise of reasonable care, I would apply the standard of *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975): the duty owed by a landlord to a tenant regarding ice and snow requires that "reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the [tenant]." This standard arose in tort law, but it applies to fitness for use as well. It is faithful to the statute and readily applicable for courts in the future.

I generally agree with the majority's analysis (if not its application) of § 139(1)(a), but I believe the majority has unnecessarily reached several issues. These matters are not necessary to the majority's disposition of the case; thus, they are dicta. Nonetheless, I disagree with several of these extraneous conclusions. First, because the majority holds that defendant is entitled to summary disposition, there is no need to determine plaintiff's potential remedy. However, I would hold that a

plaintiff who proves a claim under MCL 554.139(1) is entitled to full damages for the injury. The Second Restatement of Torts, § 357, states:

> A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract. [*Id.* at 241.]

The comments to that section state that "the duty arises out of the existence of the contract to repair." *Id.*, comment *d*, p 242. The comments further state that "[t]he lessor's duty under the rule stated in this Section is not merely contractual, although it is founded upon a contract. It is a tort duty." *Id.*, § 357, comment *c*, p 242. There is no reason this liability should not apply under MCL 554.139(1). Indeed, it should apply because the statute's very purpose is to provide safety in areas outside the tenant's control. *Williams*, *supra* at 499 ("duty to protect is imposed upon the person in control because he is best able to provide a place of safety").

Also, because this case involves a tenant only, there is no reason to address a landlord's liability to nontenants under § 139(1). However, I believe the majority incorrectly asserts that a nontenant could never recover under the covenant for fitness because a lessor has no contractual relationship with a nontenant. The Second Restatement of Torts, § 357, states that "[a] lessor of land is subject to liability for physical harm caused to

his lessee and *others upon the land with consent of the lessee* . . . ." *Id.* at 241 (emphasis added). Additionally, I believe the intended use of a parking lot in an apartment complex will generally include, at minimum, parking (and walking) for a tenant's guests. An apartment is a tenant's home. It is likely that both parties to an apartment lease intend the parking lot to be used by guests as well as tenants.

Finally, I believe that MCL 554.139(1)(b) may apply to common areas. Section 139(1)(b) contains two independent covenants. The first is "[t]o keep the premises in reasonable repair during the term of the lease." The second is "to comply with the applicable health and safety laws of the state and of the local government." The second is independent of the first and is not confined to the "premises." Therefore, a landlord may be liable for an injury sustained in a common area due to a condition that does not comply with health and safety laws. I would direct the trial court to examine whether plaintiff has a claim under the second covenant of § 139(1)(b).

The trial court in this case found that § 139(1) did not apply and the open and obvious danger doctrine did apply. The majority determines that § 139(1) applies and the open and obvious danger doctrine does not. I agree with that determination, but I would affirm the result of the Court of Appeals and remand this case to the trial court for further proceedings under the proper legal standards.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE v BLACKSTON

Docket No. 134473. Argued March 4, 2008. Decided June 25, 2008.

Junior F. Blackston was twice convicted by a jury in the Van Buren Circuit Court of first-degree murder in the 1988 killing of Charles Miller. At the first trial, Charles Lamp and Guy Simpson testified that they and the defendant took Miller to a field near the defendant's home, where the defendant shot Miller and cut off his ear to prove to a local drug dealer, Benny Williams, that Miller had been killed. In exchange for this testimony, Lamp was allowed to plead guilty of manslaughter and Simpson was granted immunity from prosecution. The mother of the defendant's child, Darlene (Rhodes) Zantello, testified that on the night Miller was killed she had overheard the defendant and Simpson talking about blood, blowing off someone's head, a pre-dug hole or grave, and an ear being cut off. Miller's girlfriend and her sister also testified that the defendant had admitted his involvement in Miller's murder and apologized to them. The defendant testified that on the night in question he had stayed home with his child while Zantello, who was pregnant, went to the hospital. The defendant's three sisters confirmed this alibi, but Lamp and Simpson testified that the defendant brought the child along and left her sleeping in the back seat of the car while he murdered Miller. After the jury convicted the defendant, the court, William C. Buhl, J., granted the defendant's motion for a new trial on the ground that the jury had been improperly told about a codefendant's plea agreement. Before the second trial, both Simpson and Zantello submitted statements recanting their former testimony. When Simpson refused to testify at the second trial and Zantello claimed to be unable to remember anything in connection with her testimony or her recanting of it, the court admitted their testimony from the first trial under MRE 804(b)(1), the hearsay exception for former testimony of unavailable witnesses. The court denied defense counsel's motion to admit the witnesses' recanting statements, explaining that they were inadmissible under MRE 613 because the inconsistent statements in the affidavits were not asserted before the former testimony. After the second jury returned a guilty verdict, the defendant moved for another new trial on the ground that the recanting

statements should have been admitted under MRE 806, which permits impeachment of hearsay declarants. The court denied the motion, explaining that while the statements were admissible under MRE 806, it would have excluded them under MRE 403 because their undue prejudice outweighed their probative value in light of the fact that they were highly suspect and contained unfairly prejudicial allegations that could not be challenged on cross-examination. The Court of Appeals, WHITE, P.J., and MARKEY and OWENS, JJ., reversed, holding that the statements should have been admitted under MRE 806 and that any prejudice could have been remedied by redacting the statements and instructing the jury to consider them only for their impeachment value. The Court concluded that this error required reversal because, more likely than not, it had been outcome determinative. Unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099). The Supreme Court vacated the Court of Appeals decision and remanded for that court to reevaluate the harmless-error issue by considering the volume of untainted evidence in support of the jury verdict and to consider whether any error that occurred was harmless beyond a reasonable doubt. 474 Mich 915 (2005). On remand, the Court of Appeals again concluded that the statements should have been admitted and, therefore, that the trial court abused its discretion when it denied the defendant's motion for a new trial. Unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 245099). The prosecution applied for leave to appeal to the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 480 Mich 929 (2007).

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

The defendant is not entitled to a new trial because the trial court acted within its discretion when it excluded the witnesses' recantations and denied the defendant's motion for a new trial. Any error that may have occurred was harmless.

1. Evidence impeaching hearsay declarants that meets the criteria of MRE 806 is not automatically admissible. Rather, trial courts have the discretion to exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, the trial court did not abuse its discretion in excluding the evidence on the ground of unfair prejudice. Although the statements could have been redacted to exclude their inadmissible contents, the remaining information would have been cumulative when used for impeachment purposes.

2. It is unnecessary to decide whether the defendant's claim of error was preserved or whether it is constitutional in nature, because any error was harmless under each of the possibly applicable standards. Had the recanting statements been admitted, they could have been used only for the purpose of impeaching the credibility of Simpson and Zantello and, at the most, would have caused the jury to discredit their testimony inculpating the defendant. The defendant would have been left to rely on his primary alibi defense, which depended solely on the highly suspect testimony of his three sisters and of Williams, who admitted that he had been a large-scale cocaine dealer at the time but denied commissioning Miller's murder. The jury would have been left with the untainted testimony of Miller's girlfriend and her sister, who both stated that the defendant had confessed to them and apologized for his involvement in Miller's murder. In light of the volume of untainted evidence against the defendant, any error did not affect the outcome of the case.

Reversed and remanded to the Court of Appeals for further proceedings.

Justice MARKMAN, joined by Justices CAVANAGH and KELLY, dissenting, would affirm the Court of Appeals, stating that the trial court abused its discretion in excluding the recanting statements because, far from being marginally probative, they would have impeached two critical prosecutorial witnesses. This error was not harmless, regardless of which test applied, because the evidence against defendant was by no means overwhelming, the exclusion of the recanting statements of the prosecutor's two critical witnesses may very well have been outcome determinative, and the error may have resulted in the conviction of an actually innocent defendant. The exclusion of the statements seriously affected the fairness, integrity, and public reputation of the proceeding because, by restricting the jury's access to all the available evidence, it presented the jury with a highly distorted view of the evidence against the defendant and, thus, deprived him of a fair trial.

EVIDENCE — HEARSAY — IMPEACHMENT — UNFAIR PREJUDICE.

Evidence impeaching a hearsay declarant is not automatically admissible under MRE 806; rather, trial courts have the discretion to exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice. (MRE 806; MRE 403).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Juris Kaps*, Prosecuting Attorney, and *Eric Restuccia*, Assistant Attorney General, for the people.

Patrick K. Ehlmann for the defendant.

CORRIGAN, J. At issue in this case is whether defendant is entitled to a new trial on the basis of his argument that two unavailable witnesses' written recantations were improperly excluded from defendant's second trial. A transcript of the witnesses' testimony from the first trial was admitted as evidence at the second trial and defendant sought to admit the recanting statements for purposes of impeachment. The Van Buren Circuit Court denied defendant's motion to introduce the statements. The court also denied defendant's motion for a new trial, in which defendant argued that the statements were improperly excluded. The Court of Appeals reversed and ordered a new trial. We conclude that defendant is not entitled to a new trial because the trial court acted within its discretion when it excluded the recantations and denied defendant's motion for a new trial. Further, any error that may have occurred was harmless. Accordingly, we reverse the Court of Appeals judgment and remand to that court for consideration of any remaining issues advanced by defendant in his claim of appeal.

FACTS AND PROCEEDINGS IN THE CIRCUIT COURT

In 2001 and 2002, juries twice convicted defendant, Junior Fred Blackston, for the first-degree murder of Charles Miller.[1] In 1988, Miller was executed and buried in a field near defendant's home in Allegan County. Miller's disappearance remained unsolved until codefendant Charles Lamp ultimately led the police to Miller's body in 2000. At defendant's first trial, code-

[1] Because the trial court acknowledged that it had incorrectly informed the first jury about the nature of a codefendant's plea agreement, it granted defendant's first motion for a new trial.

fendants Lamp and Guy Simpson testified against him. The prosecutor permitted Lamp to plead guilty of manslaughter, while Simpson received complete immunity for his testimony. Both codefendants testified that defendant, Lamp, and Simpson took Miller to the field where defendant shot Miller and cut off his ear to show it to a local drug dealer, Benny Williams, as proof that Miller was dead. Lamp testified that he helped defendant plan and execute the murder after defendant learned that Miller planned to rob Williams.

Defendant testified at the first trial but not at the second. Defendant agrees that the victim was at defendant's house on the night he was murdered. Through alibi witnesses, defendant asserted that he did not leave the house with Miller, Lamp, and Simpson. The defense contended that defendant remained home with his 1½-year-old daughter. The child's mother—defendant's girlfriend at the time, Darlene (Rhodes) Zantello—was pregnant. All parties agreed that she left her 1½-year-old daughter with defendant when Zantello went to the hospital that night because she was experiencing pain. Lamp and Simpson testified that defendant brought his daughter along and left her sleeping in the back seat of the car during the crime.

Zantello testified at the first trial that, when she returned home from the hospital that night, defendant was not present but returned later with Simpson. Zantello overheard Simpson say "that was like a movie with all that blood." She also recalled hearing the men mention an ear being cut off, a pre-dug hole or grave, and that defendant "almost blew his whole head off."

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and Mock's sister, Roxann (Krause) Barr, also testified that, in 1990, defendant had admitted his involvement in the murder to them. They said

that defendant cried, confessed his participation, and stated that he felt badly about their acts. The police confirmed that shortly after defendant confessed Mock and Barr reported defendant's confession to them.

Defendant's three sisters each confirmed his alibi. Each sister attested that she had visited defendant's house—and had found him home with his daughter—on the night of September 12, 1988, when Miller disappeared. Defendant also produced Williams, who claimed to have known nothing about Miller's death. The investigators acknowledged that they had been unable to link Williams to Miller's murder.

The second jury trial took place in 2002. In the interim, both Simpson and Zantello proffered written statements[2] recanting their former testimony. Simpson claimed that only he and Lamp participated in the murder and that he had implicated defendant for personal advantage under pressure from the prosecutor. Zantello claimed that an abusive boyfriend had pressured her; he sought to gain favor with the prosecutor in a separate case against him. In her recanting statement, she denied having overheard Simpson and defendant talking about the murder and claimed that defendant was home when she returned from the hospital.

Neither Simpson nor Zantello testified at the retrial. Simpson refused to testify. Zantello stated that she could not remember the night of the crime, her previous statements to the police, her previous testimony, or the contents of her recanting affidavit, which she had completed only three months earlier. The trial court declared both witnesses unavailable. It admitted their testimony from the first trial under MRE 804(b)(1),

[2] Zantello submitted a sworn and notarized statement. Simpson signed his statement, which included his assertion that the allegations therein were true, but his statement was not sworn and notarized.

which establishes a hearsay exception for former testimony of an unavailable witness. Without citing any authority, defense counsel moved to admit the written recantations to impeach the unavailable witnesses. The court ruled the recantations inadmissible under MRE 613, which addresses prior statements of present witnesses, because the inconsistent statements in the recantations were not asserted *before* the former testimony. The court also ruled that Simpson and Zantello were attempting to manipulate the trial process by conveniently becoming unavailable to testify. Further, it ruled that because the recanting statements could not be cross-examined the prosecutor would be prejudiced by their contradictory claims regarding defendant's innocence.

Defendant was convicted again of first-degree murder and again moved for a new trial. For the first time, he argued that the recanting statements should have been admitted under MRE 806, which permits impeachment of hearsay declarants.[3] The court agreed that the statements *could have been* admitted under MRE 806, but opined that it would have excluded them under MRE 403—because their undue prejudice outweighed their probative value—even if defendant had raised his

[3] MRE 806 states:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant *may* be attacked, and if attacked *may* be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [Emphasis added.]

argument under MRE 806 at trial. The court opined that the statements were highly suspect. Not only did they contain collateral and damaging allegations that could not be challenged on cross-examination, but the witnesses had conveniently rendered themselves unavailable to testify just seven and three months, respectively, after they completed their recantations. Therefore, defendant's new argument for admission under MRE 806 did not justify a new trial.

APPEAL

Defendant appealed and the Court of Appeals reversed and remanded for a new trial, concluding that the statements should have been admitted under MRE 806. The Court held that any prejudice could have been remedied by redacting portions of the statements and instructing the jury to consider them only for their impeachment value.[4] Applying the harmless error standard of review for nonconstitutional error, it concluded that the error required reversal because, more likely than not, it had been outcome determinative.[5]

This Court vacated the Court of Appeals opinion and remanded for that court to "fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial." We also directed the Court of Appeals to consider whether the error, if any, was harmless beyond a reasonable doubt.[6]

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[4] *People v Blackston,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099) (*Blackston I*), pp 5-8, vacated 474 Mich 915 (2005).

[5] *Id.* at 9.

[6] *People v Blackston,* 474 Mich 915 (2005).

On remand, the Court of Appeals repeated its conclusion that the statements should have been admitted and, therefore, that the trial court abused its discretion when it denied defendant's new trial motion. The Court of Appeals also concluded that the error was not harmless beyond a reasonable doubt and again ordered a new trial.[7] The prosecution applied for leave to appeal to this Court and we ordered oral argument to consider whether to grant leave or take other action.[8] We now reverse.

STANDARD OF REVIEW

The correct standard of appellate review of defendant's claimed evidentiary error has generated considerable debate in this case. The prosecution originally conceded that any error was preserved constitutional error—because it implicated defendant's confrontation rights—and therefore subject to review for whether it was harmless beyond a reasonable doubt.[9] But the Court of Appeals found it unnecessary to decide whether the error was constitutional in nature. It held that reversal was required even under the less stringent standard for nonconstitutional error, concluding that it was more probable than not that the error was outcome determinative.[10] Our order of remand presumed that the standard governing preserved constitutional error applied.[11] The prosecution now argues that any eviden-

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[7] *People v Blackston (On Remand),* unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 245099) (*Blackston II*).

[8] 480 Mich 929 (2007).

[9] *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999); *Blackston I, supra* at 9 n 3.

[10] *Carines, supra* at 774; *Blackston I, supra* at 9 n 3 and accompanying text.

[11] 474 Mich 915 (2005).

tiary error is subject to plain error review because defendant did not sufficiently preserve the claim of error at trial.[12] Because we conclude that the error, if any, was harmless under any of these standards, and because the Court of Appeals did not explicitly analyze which standard of review was appropriate, we find it unnecessary to resolve this question.

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.[13] A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes.[14]

ANALYSIS

First, we conclude that the trial court acted within its discretion in denying defendant's motion for a new trial. At trial, defendant moved that he be "allowed somehow" to introduce the unavailable witnesses' statements as impeachment evidence.[15] At the new-trial hearing, he argued that MRE 806 required admission of the statements. The trial court concluded that evidence impeaching hearsay declarants that qualifies for admission under MRE 806 is not *automatically* admissible.

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[12] Under the plain error standard, defendant would be obliged to show that (1) an error occurred, (2) the error was plain or obvious, and (3) the error affected the outcome of the trial. *Carines, supra* at 763. Reversal is then warranted only if defendant is actually innocent of the crime or if the error " 'seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings . . . .' " *Id.,* quoting *United States v Olano,* 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508. (1993) (internal citation omitted; brackets in original).

[13] *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003).

[14] *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

[15] The dissent asserts, and the prosecution appears to assume, that defendant moved for admission under MRE 613. *Post* at 479 n 5, 493. The trial transcript reveals to the contrary that defendant did not cite any court rules. In the face of his failure to cite any authority, the trial court itself cited MRE 613 among its reasons for denying defendant's motion.

Rather, other jurisdictions have held with regard to the rule's counterparts, FRE 806 and similar state provisions, that such evidence is still subject to the balancing test under MRE 403 or its equivalent. The trial court's conclusion is supported by the plain language of MRE 806, which provides that the credibility of the declarant "*may* be attacked, and if attacked *may* be supported . . . ." (Emphasis added.) There is nothing in the rule of evidence that *requires* admission of an inconsistent statement, and MRE 806 provides no greater leeway regarding admissibility of a statement for impeachment purposes than is granted to litigants offering impeachment evidence in general.[16] This Court expressly permits employing a balancing analysis under MRE 403 when considering the admissibility of other forms of impeachment evidence. See *People v Brownridge,* 459 Mich 456, 461; 591 NW2d 26 (1999). Thus, it is within the trial court's discretion to exclude the evidence "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." MRE 403.[17]

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[16] We fail to see the relevance of the dissent's suggestion that "[i]t is undisputed that if Simpson and Zantello had testified against defendant at his second trial, the statements at issue here would have been admissible as prior inconsistent statements." *Post* at 482. We cannot know what testimony Simpson and Zantello would have given if they had testified at the second trial. It is pure speculation to assume that the content of their testimony would have justified admission of their recantations. Further, we have no reason to assume that their recantations' admissibility under these hypothetical circumstances would be "undisputed." To the contrary, the extent of their admissibility would be debatable and even the admissible portions would be carefully considered under MRE 403.

[17] See, e.g., *Vaughn v Willis,* 853 F2d 1372, 1379 (CA 7, 1988); *Arizona v Huerstel,* 206 Ariz 93, 104; 75 P3d 698 (Ariz, 2003); cf. *United States v Grant,* 256 F3d 1146, 1155 (CA 11, 2001) (requiring admission of evidence under FRE 806 but leaving open whether FRE 403 may sometimes bar evidence otherwise admissible under FRE 806).

"Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony" by the trial judge. *People v VanderVliet,* 444 Mich 52, 81; 508 NW2d 114 (1993). Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. *People v Oliphant,* 399 Mich 472, 490; 250 NW2d 443 (1976). Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence. *People v Mills,* 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). As we have previously noted, a party may strike " 'as hard as he can above, but not below, the belt.' " *People v Vasher,* 449 Mich 494, 501; 537 NW2d 168 (1995), quoting McCormick, Evidence (2d ed), § 185, p 439.

In this case, the court ruled that the recantations would have qualified for admission under MRE 806, but concluded that their prejudicial nature outweighed their probative value under MRE 403. The court reasoned that their probative value was limited because both Zantello and Simpson had been effectively impeached during cross-examination at the first trial. Zantello's testimony at the first trial revealed that she had initially told the police that defendant was home on the night of the murder and only later asserted his absence. Further, Simpson had regularly changed his story; his statements varied regarding defendant's involvement in the crime.

The court also concluded that the recantations were highly prejudicial; Zantello and Simpson did not merely recant their former accusations, but provided lengthy explanations for why they had lied. Simpson's statement in particular amounted to an epistle advocating defendant's acquittal. The court opined that Simpson's statement likely would not have been admissible even if he had testified. At a minimum, Simpson would have been vigorously cross-examined regarding the statement had he testified. Yet, because he rendered himself unavailable at the second trial, he foreclosed the possibility of cross-examination regarding his wide-ranging assertions.[18]

We conclude that the court's decision was principled and supported by Michigan law. The trial court reasonably excluded the statements because they were highly unfairly prejudicial. Most significantly, to the extent that the statements' irrelevant or unfairly prejudicial content could have been redacted as suggested by the Court of Appeals, their remaining contents would have been largely cumulative.

Simpson's recantation, which is unsworn,[19] is an eight-page missive, more than half of which is devoted to recounting hearsay statements purportedly made by

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[18] The court also opined that Simpson had consistently attempted to manipulate the trial process by recanting but then engineering his own absence. Simpson recanted only after receiving the benefit of immunity from prosecution and then would not cooperate with the judge at the retrial lest he lose that immunity. Before the retrial, Simpson wrote to the judge that he would refuse to testify. He ultimately appeared before the court, but the court declared him unavailable after he refused to take the stand.

[19] Indeed, as the dissent notes, *post* at 475 n 1, Simpson confirmed that he accused defendant of the murder each time Simpson testified under oath; he accused defendant under oath in response to an investigative subpoena as well as at the first trial. Simpson asserted that defendant was not present at the murder only in unsworn, out-of-court statements.

various attorneys associated with the case. For example, Simpson asserts that the prosecutor regularly advised Simpson that he "does not believe in 'God,' " and that defendant's own attorney encouraged Simpson to testify against defendant because Simpson would be "crazy" not to accept the prosecutor's offer of immunity. The general tenor of the recantation is that the prosecutor essentially admitted to Simpson that he intended to convict defendant without regard to whether defendant was innocent. Simpson claims that the prosecutor forced Simpson to commit perjury at the first trial in order to achieve his goal. These unsworn statements would inject the specter of prosecutorial corruption into the trial in a manner that the prosecutor could not directly challenge given that Simpson refused to take the stand; the allegations injected issues into the trial that went far beyond Simpson's credibility. Therefore, their potential for misleading or confusing the jury—and, thus, their potential for unfair prejudice—was great.

With respect to Zantello's recanting statement, she claims to have previously perjured herself as a result of cajoling statements by a former boyfriend, who never testified and was never cross-examined about his involvement. Although Zantello testified briefly at the second trial, she was unable to answer the prosecutor's questions because she did not "recall what [she] said" and did not want to "incriminate [her]self because of [her] former testimony" inculpating defendant. Both witnesses were thus unwilling or unable to testify regarding the contents of the statements that they signed just seven and three months, respectively, before the retrial.

For these reasons, the trial court reasonably concluded that the statements' potential for prejudice was

great. They largely contained unduly prejudicial hearsay and accusations regarding collateral issues with the potential to mislead the jury. As the Court of Appeals correctly observed, the statements could have been redacted to the extent that their contents were inadmissible or unduly prejudicial. But the remaining information was still properly excluded because it was largely cumulative when used for its only admissible purpose: impeachment.[20] Because Simpson and Zantello were impeached with information substantially similar to the information contained in the statements, we cannot agree with the dissent that exclusion of the statements "resulted in the jury being painted a false picture." *Post* at 488.

Specifically, Simpson's statement admits that he made inconsistent statements to police beginning in 1989 "when doing so served [his] best interest[s]. (ie: getting-deals [sic] on other non-related offenses)." He states that he lied at the first trial to avoid perjury charges and gain immunity from prosecution. He also reiterates that Lamp had threatened to kill him or his family if he implicated Lamp. He proceeds to give an account of events on the night of the murder in which he asserts that Lamp, not defendant, killed Miller. Simpson's cross-examination during the first trial, which was read at the second trial, had similarly revealed that Simpson told varying stories over the years regarding who was responsible for the murder in order to gain personal advantage. His testimony also revealed that he had been threatened by Lamp. Simpson also explicitly acknowledged during the first trial that, if he did not accuse defendant of the murder at

[20] Significantly, as will be discussed further *infra,* the central error of the Court of Appeals' analysis is that it considers the statements' contents for their truth, rather than merely for impeachment purposes.

trial as he agreed to do in exchange for full immunity, Simpson would face various charges, including perjury. The second jury was fully informed of Simpson's immunity deal.

Zantello's statement similarly repeats assertions that she made at the first trial and that were read into the record at the second trial. At the first trial and in her recanting statement, Zantello confirmed that she originally told the police that she knew nothing about the murder and did not overhear defendant and Simpson talk about any murder. Indeed, as with Simpson, the primary permissible use of Zantello's recantation would have been to show the jury that she had reverted to a previous version of her story, not that she was claiming defendant's innocence for the first time. Accordingly, it is significant that defense counsel succeeded in confronting Zantello with the fact that she had recanted by explicitly asking her at the second trial whether she remembered making a statement that defendant "was home when [she] got home and that [she] had lied under oath originally because [she] had been threatened." She simply answered: "No, I do not."

Under these circumstances, the admissible portions of both statements were largely cumulative to the remaining evidence relevant to Simpson's and Zantello's credibility, which was presented at both trials and, with regard to Zantello, which was expanded on during her live testimony at the second trial. Therefore, the trial judge—who had become familiar with the witnesses over the course of two trials—did not abuse his discretion when he denied defendant's motion for a new trial on the basis of defendant's argument that admission was required under MRE 806. At a minimum, the trial court was called upon to make a close, discretionary decision regarding whether the danger of undue

prejudice that the statements presented outweighed their probative nature. Moreover, the court was required to consider defendant's claim for admission on the basis of an argument that defendant did not advance until after trial and, therefore, which the court was unable to evaluate contemporaneously at the time of the objection. Indeed, at trial, defendant not only failed to cite a single court rule, but he moved to admit each statement in its entirety; he did not argue for admission under MRE 806 of redacted versions of the statements to avoid unfair prejudice to the prosecution. Under these circumstances, we disagree with the dissent's contention that exclusion of the statements amounted to error, let alone *plain* error. "[T]he trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *People v Sabin (After Remand),* 463 Mich 43, 67; 614 NW2d 888 (2000). Here, where the court was faced with the witnesses' unfairly prejudicial and largely cumulative inconsistent statements, we cannot say that the court's decision lay outside the range of principled outcomes.

Further, the trial court's discretionary decision in this case differs from that of the trial court in *United States v Grant,* 256 F3d 1146, 1155 (CA 11, 2001), on which the dissent relies. In *Grant,* a co-conspirator never testified because he had been deported before the trial took place. *Id.* at 1153. The co-conspirator's previous, arguably inculpatory statements were read into the record; the statements circumstantially linked the defendant to the conspiracy but did not directly name him as a conspirator. *Id.* at 1152-1153. At trial, defense counsel properly moved under FRE 806 for admission of exculpatory statements the co-conspirator made after he had been deported, in which he affirmatively claimed

that the defendant was uninvolved. *Id.* at 1153.[21] The trial court denied the motion, ruling that the exculpatory statements were not actually inconsistent with the co-conspirator's earlier, circumstantially inculpatory statements. *Id.* The Eleventh Circuit Court of Appeals reversed, concluding that the trial court's view of inconsistency was too narrow and that the exculpatory statements would have significant probative value with regard to the credibility of the purportedly inculpatory statements. *Id.* at 1153-1155.

The circumstances of *Grant* differ from those of the case before us in crucial respects. First, the exculpatory statements in *Grant* were significantly more probative because they appear to have been the co-conspirator's *only* exculpatory statements. For this reason, in contrast to the instant case, they were not cumulative. Second, although the prosecutor in *Grant* observed on appeal that the exculpatory statements were unreliable because they were made only after the co-conspirator was deported, the trial court in *Grant* did not find that the co-conspirator explicitly attempted to manipulate the trial process by injecting collateral issues into the trial or gained an advantage by changing his story. Rather, as noted earlier, the court concluded that the statements did not directly contradict each other. In sum, without regard to whether we agree with the *Grant* court's holding, we conclude that *Grant* is distinguishable.[22]

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[21] Thus, in contrast to the case before us, defense counsel contemporaneously argued for admission under FRE 806 *at trial*. Yet the prosecutor did not argue that admission created undue prejudice until the issue was reviewed on appeal. *Id.* at 1155.

[22] We agree with the dissent that the facts of *Vaughn v Willis,* 853 F2d 1372, 1379 (CA 7, 1988), are not perfectly comparable to those of the instant case. Here, the facts fall on a spectrum somewhere between those of *Grant* and those of *Vaughn*. But the mere fact that the unique

Most significantly, even if the trial court in this case erred, any error was harmless under each of the potentially applicable standards of review. The harmless error analysis employed by the Court of Appeals was clearly erroneous for several reasons. On remand, when considering the effect of any error on the remaining evidence presented at trial, the Court reasoned:

> Lamp's testimony would be subject to the utmost scrutiny, given his undisputed involvement in the murder, his plea agreement, and defendant's theory, supported by many of the impeaching statements that were not admitted, that Lamp had done the shooting himself. Further, much of the interlocking testimony concerned the allegation that defendant killed Miller and cut off his ear at the direction of drug dealer Benny Williams. However, police testified that they had no evidence connecting Williams to the murder, Williams testified that he did not know Miller and had not received one of his ears, and police also testified that there was no physical evidence indicating that Miller's ear had been cut off. Regarding Mock and her sister, there was testimony that they and defendant were always drinking when they were together. Further Mock, her sister, and Z[a]ntello, who was supposedly present during some of the discussions, gave differing accounts of what defendant said. Lastly, we conclude that the evidence overwhelmingly supported that defendant knew something about the murder, but his role, and the extent of his knowledge and participation or assistance, largely depended on Simpson's testimony.[23]

First and foremost, the court erred as a matter of law by considering the recanting statements for improper purposes. It erroneously concluded that defendant's theory that Lamp committed the shooting without defendant's aid would have been supported "by many of the im-

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circumstances of this case and those of *Vaughn* are different in no way requires the conclusion that the trial court abused its discretion here.

[23] *Blackston II, supra* at 9.

peaching statements that were not admitted, that Lamp had done the shooting himself." To the contrary, had the statements been admitted, they could not have been directly considered as evidence in favor of the defense theory. They could have been used *only* for the purpose of impeaching the credibility of Simpson and Zantello.[24] MRE 806. Thus, *at the very most*, the statements would have caused the jury to discredit entirely Simpson's and Zantello's testimony inculpating defendant. The remaining untainted evidence—in the form of testimony from Lamp, Mock and Barr—alone established beyond a reasonable doubt that defendant was at least an accomplice to first-degree, premeditated murder.

The Court of Appeals mischaracterizes the untainted evidence by essentially dismissing the very significant testimony of Mock and Barr. The sisters both described a specific night and location at Lion's Park where defendant tearfully apologized and admitted to them that he had participated in Miller's murder.[25] Mock recalled that defendant specifically told her that defendant pulled the trigger and cut off Miller's ear. Barr recalled defendant saying that defendant was present at the murder but thought that he said Lamp had pulled the trigger. Barr also testified that, around the time of the murder, she had been at someone's house and "they were saying that Charles' ear was in the freezer." Most significantly, Mock attested that, in April 1990, in light of defendant's confessions, Mock convinced him that he should speak with the police. Defendant initially agreed

[24] The dissent similarly errs when it asserts that the content of the recantations would have supported defendant's claim of innocence instead of being used only to undermine the credibility of Zantello and Simpson. See, e.g., *post* at 491.

[25] Defendant confessed twice: once at Lion's Park, to Mock and Barr, and on a separate occasion to Mock and Zantello at Zantello's house after defendant had moved out of the house.

to do so the next day. Mock called the police and told them about defendant's admissions but, by the time the police contacted defendant, he refused to provide them any details. Michigan State Police Detective Sergeant Dana Averill confirmed that Mock contacted the police and that Mock, Barr, and Zantello gave statements regarding defendant's admissions.[26] Overall the substantially consistent testimony of Mock and Barr, which was confirmed in part by Averill's testimony, provided strong evidence against defendant. Significantly, their testimony also directly corroborated Lamp's testimony and added to his credibility. The Court of Appeals clearly erred when it simply discounted their testimony because they were "always drinking when they were together" and "gave differing accounts of what defendant said."[27]

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[26] Averill also spoke to defendant at that time and testified that defendant never specifically denied his involvement but was uncooperative and said something like, "When the time comes, the truth will come out and I'll tell you when I'm ready."

[27] The dissent also discredits the testimony of Mock and Barr. But, contrary to the dissent's implications, their testimony was consistent with regard to defendant's critical admissions that he was present during and directly involved in the murder. For example, Barr *did* come to believe that defendant cut off Miller's ear; she simply could not remember whether defendant or someone else had first told her this. She admitted that she remembered only "pieces" of defendant's confession to her and Mock because she had been drinking at the time. The dissent also emphasizes that Mock was a suspect during the investigation of Miller's death. *Post* at 490. But there is no reason to conclude that the jury would have entirely discredited Mock's testimony for this reason. As Mock explained during her testimony, Mock had been a suspect but she had not been singled out by the police; rather, she explained that "[e]verybody was" a suspect at the time. Overall, the dissent focuses on minor discrepancies among the details of Mock's and Barr's testimony. But such discrepancies are unsurprising when the testimony occurred a decade after the relevant events and conversations took place. The jury had reason to credit their testimony precisely because of the substantial similarity of their memories of the relevant events despite this significant lapse in time.

Finally, because Zantello's and Simpson's recantations could not have been introduced for their truth, defendant still would have been left to rely on the defense theories that he presented at trial to cast doubt on the consistent testimony from Lamp, Mock, and Barr. His primary alibi defense depended solely on the testimony of his three sisters, which was suspect because of their obvious bias in favor of their brother. Defendant also relied, as does the dissent, on Williams's unsurprising testimony that, although Williams was a "fairly large-scale cocaine dealer" at the time of Miller's murder, he did not commission the murder. A police officer also attested that the police were unable to link Williams to the crime. But, significantly, even the defense conceded in closing argument that Miller planned to steal from Williams; the defense simply argued that Lamp, "having heard Mr. Miller . . . was going to steal from Benny Williams, fearing that he, Mr. Lamp, was next, he decided that Miller had to die first." Regarding the lack of physical evidence establishing that Miller's ear had been cut off, all parties agreed that Miller's remains were skeletal and that most of the soft tissue had decayed. Contrary to the implications of defendant and the dissent, no testimony or physical evidence affirmatively suggests that Miller's ear was *not* severed. The defense also attempted to divert the jury from Lamp's description of the crime by presenting several experts who opined that Miller may have been killed by blunt force, rather than by a bullet. Yet Lamp himself testified that Lamp had access to guns and therefore encouraged defendant to shoot Miller instead of beating him to death, that Lamp provided the gun defendant used to kill Miller, and that Lamp sold the gun after the crime. Therefore, the defense theory that Miller was beaten, rather than shot, did little to inculpate Lamp and exculpate defendant.

In sum, the volume of untainted evidence against defendant was significant. The facts do not cast reasonable doubt on the prosecutor's theory of the case. In particular, nothing in the record suggested that Mock and Barr had any motive to falsely implicate defendant. They came forward early in the investigation, and the details and timing of their testimony were directly confirmed by the police. Although Zantello's and Simpson's original inculpatory testimony certainly would strengthen the prosecution's case, their testimony was not critical for the prosecution because defendant's culpability was clearly established by the other witnesses. Moreover, because the jury had already heard the evidence impeaching Simpson and Zantello that was offered at the first trial, and had obviously chosen to disregard it, the likelihood that the jury would have been convinced by cumulative impeachment evidence was slight in light of the fact that Simpson's and Zantello's inculpatory testimony so clearly coincided with the untainted evidence. In light of the volume of untainted evidence against defendant, any error did not affect the outcome of the case.

CONCLUSION

We hold that the trial court did not abuse its discretion when it denied defendant's motion for a new trial on the basis of defendant's argument that MRE 806 required admission of Simpson's and Zantello's highly prejudicial and cumulative recantations. Further, any error would also have been harmless under any of the potentially applicable standards of review. The Court of Appeals erred as a matter of law by considering the recantations for the truth of the matters asserted, instead of as impeachment of the recanting witnesses' testimony, and improperly dismissed the testimony of two key prosecution witnesses. For these reasons, we

reverse the judgment of the Court of Appeals and remand the case to that court for consideration of defendant's remaining issues on appeal.

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

MARKMAN, J. (*dissenting*). Following a jury trial, defendant was convicted of first-degree murder. However, the trial court granted defendant's motion for a new trial because the jury was misinformed regarding the extent of the immunity granted to a witness in exchange for that witness's testimony against defendant. After the first trial, but before the second trial, two witnesses, in signed written statements, recanted the testimony that they had provided in the first trial against defendant. Although the trial court admitted these witnesses' testimony from the first trial, the trial court excluded their recanting statements. Following a second jury trial, defendant was again convicted of first-degree murder. The Court of Appeals reversed and remanded for a new trial, concluding that the trial court had abused its discretion in excluding the recanting statements and that the error was not harmless. The majority here today reverses the Court of Appeals, concluding that the trial court did not abuse its discretion in excluding the statements and that any error was harmless. Because I agree with the Court of Appeals that the trial court abused its discretion in excluding the statements and that this error was not harmless, I dissent.

I. FACTS AND PROCEDURAL HISTORY

In 2001, following a jury trial, defendant was convicted of first-degree murder for the shooting death of Charles Miller in 1988. During this first trial, Guy Simpson, an alleged accomplice who was given full

immunity in exchange for his testimony against defendant, testified that defendant, Charles Lamp, and he were present when Miller was shot, but that defendant was the one who actually shot Miller.[1] He also testified that defendant cut off Miller's ear and that defendant had told him that he needed to show Miller's ear to Benny Williams, a local drug dealer. Simpson admitted that he had, in the past, told several different versions of the events, including one in which only he and Lamp, and not defendant, were involved in Miller's death. However, a police officer testified that Simpson's version of the events had always been the same—defendant was the shooter—on the occasions that he had interviewed Simpson. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he endangered Lamp's plea agreement in any way. Finally, Simpson testified that defendant had an affair with Lamp's wife.

Lamp, who testified pursuant to a plea agreement under which he pleaded guilty of manslaughter and received a 10- to 15-year sentence, also testified that defendant shot Miller while Lamp and Simpson were present, and that defendant cut off Miller's ear. Lamp further testified that defendant killed Miller for Williams. He admitted that he had once threatened to kill Simpson if Simpson talked to the police. Lamp eventually took the police to the location where Miller's remains were found.

[1] Before Simpson testified, Simpson stated that his previous statement under oath against defendant, pursuant to an investigative subpoena, was not truthful, and that he now wanted to testify truthfully, but he was concerned that if he did so he could be charged with perjury. When the court instructed him that he, indeed, could be charged with perjury if he testified differently from his previous statement, Simpson stated, "[S]o, it'll put a hindrance on my testimony today." Neither the jury at the first trial nor the jury at the second trial was privy to this conversation.

Darlene Zantello, defendant's girlfriend at the time of the murder but no longer so at the time of the trial, testified that when she arrived home on the night of the murder, nobody was there; defendant and Simpson arrived later, and she heard them talking about blowing someone's head off and cutting someone's ear off. She also testified that about a year or two later, while they were all drinking, she heard defendant say to Rebecca Mock, Miller's girlfriend at the time of his death, that he was sorry that "they did what they did," although he did not say that he was the one who did it. On cross-examination, Zantello denied that she had initially told the police that defendant was at home when she arrived there and that defendant was not involved in Miller's death.

Rebecca Mock and her sister, Roxann Barr, testified that one night when they were all drinking, defendant admitted being present when Miller was killed. However, Mock and Barr offered differing accounts of what exactly defendant said, including whether he stated that he killed Miller.[2]

Three of defendant's sisters supported his alibi defense. They all testified that he was at home on the night that Miller was killed. According to Lamp and

[2] Mock testified that defendant said that he was the shooter, but Barr testified that defendant did not admit to being the shooter. In addition, Mock testified that defendant said that he cut off Miller's ear, but Barr testified that she did not think that defendant said anything about cutting off Miller's ear. Both Mock and Barr admitted that Mock had been a suspect in Miller's murder.

In addition, Lamp testified that when he arrived at defendant's house, Simpson was already there and Miller arrived later. However, Simpson testified that when he arrived at defendant's house, Miller was there, and Lamp arrived later. Meanwhile, Mock testified that defendant and Lamp came to her house to pick Miller up, but that Miller was not ready then, so he went to defendant's house later. Finally, Zantello testified that Simpson was at defendant's house before Miller.

Simpson, defendant killed Miller for Williams, but Williams testified that he did not know Miller or anything about Miller's death, and there is no evidence linking Williams to Miller. In fact, a police officer testified that the police had concluded that Williams was not involved in the murder. Finally, contrary to the testimony of Simpson and Lamp, the police testified that there was no physical evidence indicating that Miller's ear had been cut off.

After the first trial, the trial court granted defendant's motion for a new trial because the jury had been misinformed regarding the extent of the immunity that was granted to Simpson in exchange for his testimony against defendant. After the first trial, but before the second trial, Simpson and Zantello provided signed and written statements recanting the testimony that they had presented against defendant at his first trial.

Simpson's signed and written statement explained that Lamp was the one who shot Miller, and that defendant was not even present when Lamp did so. Simpson stated that defendant was at home when he left with Miller and Lamp, and that defendant was still at home when Lamp dropped him off at defendant's house later that evening after Lamp shot Miller in front of Simpson. As far as he knew, defendant was at home that entire evening. Simpson further stated that the prosecutor threatened to charge him with obstruction of justice if he did not testify against defendant, but promised him "full immunity" if he testified against defendant, even though Simpson asserted that he told the prosecutor that defendant was innocent. He also explained that all his statements to the police implicating defendant were given while he was incarcerated for unrelated crimes and were given to benefit himself while he was facing criminal charges. Finally, he ex-

plained that he was not making these statements because of his friendship with defendant, as he had not seen defendant in over 11 years.

Similarly, Zantello explained in a signed written and notarized affidavit that the first statement that she gave to the police was the truth; that is, defendant was at home when she arrived home that evening and she did not know anything about Miller's murder. She explained that about 10 months after the murder, she was arrested for disorderly conduct and was instructed to implicate defendant in Miller's murder. She further explained that her boyfriend at the time of defendant's first trial, Robert Lowder, was released from jail even though he had two felony charges pending against him. Lowder told her that if she testified against defendant, he would not go to prison for his felony charges. The prosecutor in charge of Lowder's case was also the prosecutor in charge of defendant's case, and she was afraid of Lowder. The two felony charges pending against Lowder were for beating her. Finally, she admitted that she never overheard any conversations about Miller's murder, and that defendant had always told her that he was not involved in Miller's murder.[3]

At defendant's second trial, the court ruled that Simpson and Zantello were unavailable on the basis of their unwillingness to testify and alleged memory problems.[4] Although the trial court admitted these wit-

[3] Defendant argues that it is unlikely that Zantello is lying to help him, given that she sent a letter to defendant the day after she testified against him at his first trial stating that she hated him and hoped that he would die in prison, and she signed the affidavit recanting her testimony against defendant after this.

[4] Simpson said that he would testify after he was allowed to shower because apparently he had been in the "hole" the night before and had not been allowed to shower. The trial court deemed this to be a refusal to testify. Simpson did not testify even though his counsel warned him on the

nesses' testimony from the first trial as prior testimony of unavailable witnesses under MRE 804(b)(1), it excluded their subsequent recanting statements. In 2002, following a second jury trial, defendant was again convicted of first-degree murder.

The trial court denied defendant's motion for a new trial, holding that although the witnesses' recanting statements were admissible under MRE 806, they were properly excluded under MRE 403.[5] The Court of Appeals subsequently reversed and remanded for a new trial. *People v Blackston,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099). In response to the prosecutor's application for leave to appeal, this Court vacated the Court of Appeals judgment and remanded to the Court of Appeals "for reconsideration of the issue whether the trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt." 474 Mich 915 (2005). This Court further stated, "The court

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record that there was a "strong possibility" that he would be charged with perjury if he did not testify and that he was "risking his immunity that was granted to him." Zantello took the stand and stated that she could not recall any of the events because of her long-term drinking problem. One of the issues that defendant raised on appeal was whether the trial court erred in considering Simpson and Zantello unavailable. Given its holding on the present issue, the Court of Appeals did not address this issue.

[5] During defendant's second trial, defense counsel objected to the exclusion of the recanting statements on the basis of MRE 613 (prior inconsistent statements), but not on the basis of MRE 806 (attacking credibility of declarant). However, defendant raised the MRE 806 argument in his motion for a new trial. Although the majority claims that defendant did not even rely on MRE 613 at trial, *ante* at 460 n 15, the prosecutor has repeatedly conceded to the contrary. See Plaintiff-Appellant's Application For Leave, pp 4, 15, and Plaintiff-Appellant's Supplemental Brief, p 2. Further, what remains most significant in this regard is that defendant attempted to introduce the recanting statements and the trial court excluded them, and, as discussed later, this constituted a plain error that justifies a new trial.

should fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial." *Id.*

On remand, the Court of Appeals held that the error was not harmless beyond a reasonable doubt, and, thus, again reversed and remanded for a new trial. *People v Blackston (On Remand),* unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 245099). In response to the prosecutor's second application for leave to appeal, we ordered and heard oral argument on whether to grant the application or take other peremptory action. 480 Mich 929 (2007). The majority now reverses the Court of Appeals.

II. STANDARD OF REVIEW

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). A trial court's decision to deny a motion for a new trial is likewise reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). The court abuses its discretion when it chooses an outcome falling outside the principled range of outcomes. *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

I agree with the majority that it is unnecessary to determine whether the error here was preserved, constitutional error or unpreserved, non-constitutional error. However, unlike the majority, I reach this conclusion because I believe that even assuming that the error was unpreserved, non-constitutional error, and thus that the most difficult standard for defendant to satisfy is applicable, the error here was not harmless and defendant is entitled to a new trial. As will be discussed

more thoroughly in part III(B), assuming that the error is unpreserved, non-constitutional error, defendant must satisfy the plain-error standard of review, which requires him to establish (1) that there was error, (2) that the error was plain, (3) that the error affected the outcome of the lower court proceeding, and (4) that the error resulted in the conviction of an actually innocent defendant or that the error " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" . . . . ' " *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999) (citation omitted). In my judgment, he has clearly satisfied even this standard.

III. ANALYSIS

A. EXCLUSION OF EVIDENCE

As discussed earlier, although the trial court admitted Simpson's and Zantello's testimony from the first trial, it excluded their subsequent recantations. I agree with the Court of Appeals that the trial court abused its discretion when it excluded this evidence. MRE 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, *the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness*. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [Emphasis added.]

MRE 806 specifically states that when hearsay statements are admitted, the credibility of the declarant may be attacked by any evidence that would have been admissible if the declarant had testified. It is undisputed that if Simpson and Zantello had testified against defendant at his second trial, the statements at issue here would have been admissible as prior inconsistent statements.[6]

At the motion for a new trial, the trial court agreed that the recanting statements were admissible under MRE 806, but concluded that the statements were "more prejudicial [than] probative," and, thus, were properly excluded under MRE 403. 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.

"Evidence is not inadmissible simply because it is prejudicial. Clearly, in every case, each party attempts to introduce evidence that causes prejudice to the other party." *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). " ' "Relevant evidence is inherently

[6] MRE 806 states that a defendant may introduce evidence that attacks the credibility of declarants if this evidence would have been "admissible for those purposes if declarant had testified as a witness." That is, if the recanting statements would have been admissible to attack the credibility of the declarant if the declarant had testified according to the hearsay statement, they are admissible to attack the credibility of the declarant when only the hearsay statement is admitted. Contrary to the majority's view, *ante* at 461 n 16, MRE 806 requires us to assume that the declarant's testimony would have been consistent with the hearsay statement. Moreover, again contrary to the majority's view, *ante* at 461 n 16, I believe it is "undisputed" that the recanting statements here would have been admissible had declarants testified at trial, particularly given that the prosecutor has not argued otherwise even though this is one of the requirements of MRE 806.

prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403 . . . .' " *Id.* (citations omitted). "In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). MRE 403 " ' "is not designed to permit the court to 'even out' the weight of the evidence . . . or to make a contest where there is little or none." ' " *Waknin*, 467 Mich at 334 (citations omitted). Instead, the rule only prohibits evidence that is unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Given that the excluded evidence at issue here would have impeached two critical prosecutorial witnesses, this evidence cannot possibly be considered "marginally probative evidence," and, thus, cannot possibly be considered "unfairly prejudicial." Therefore, the trial court's holding to the contrary "fall[s] outside th[e] principled range of outcomes," *Babcock,* 469 Mich at 269, and thus constitutes an abuse of discretion.

Where a Michigan rule of evidence is modeled after its federal counterpart, it is appropriate to look to federal precedent for guidance, *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996), although the latter is never dispositive. Both MRE 806 and MRE 403 are identical to their federal counterparts. In *United States v Grant*, 256 F3d 1146 (CA 11, 2001), a co-conspirator, Deosie Wilson, made statements during the conspiracy to an undercover police officer that impli-

cated the defendant. Subsequently, Wilson signed an affidavit stating that the defendant was not involved in the crimes. The trial court admitted Wilson's statements to the undercover police officer, but excluded Wilson's subsequent affidavit. *Id.* at 1152-1153. The Eleventh Circuit Court of Appeals reversed, concluding that the affidavit was admissible under FRE 806 and could not be excluded under FRE 403. That court explained:

> Rule 403 is an "extraordinary remedy," whose "major function . . . is limited to excluding matter[s] of scant or cumulative probative force, dragged in by the heels for the sake of [their] prejudicial effect." The Rule carries a "strong presumption in favor of admissibility." Wilson's inculpatory co-conspirator statements were important pieces of evidence in the government's case. The impeaching statements in the affidavit would serve to cast doubt on Wilson's credibility and would have significant probative value for that purpose. Whatever prejudice to the government that might occur from admitting the affidavit statements could not substantially outweigh their probative value, anymore than it could if those affidavit statements had been admitted for impeachment following live testimony of Wilson to the same effect as his co-conspirator statements. [*Id.* at 1155 (citations omitted).]

In *Vaughn v Willis*, 853 F2d 1372 (CA 7, 1988), plaintiff Terry Vaughn, an inmate, testified that defendant Henry Willis, a guard, helped several inmates rape Vaughn. Alvin Abrams, another inmate, testified during a deposition that he saw Willis help the inmates rape Vaughn. Before the trial in this civil action, Abrams wrote a letter to Willis's attorney stating that he would not testify at the trial and that he had made some mistakes during his deposition. Subsequently, Abrams was allowed to correct the mistakes made in his deposition, which simply pertained to the sequence in which the assailants entered Vaughn's cell, and again swore to

the truthfulness of the deposition testimony. However, at trial, Abrams refused to testify, stating, in the absence of the jury, that he would not testify because he feared for his life, as well as the lives of his family. *Id.* at 1377-1378. The trial court admitted Abrams's deposition testimony, but excluded Abrams's letter to Willis's attorney on the basis that "the possibility of prejudice far outweighed any probative value the letter might have." *Id.* at 1379.

The Seventh Circuit Court of Appeals affirmed the trial court's decision to exclude the letter for several reasons. First, the letter's probative value was minimal because it was "very ambiguous." *Id.* at 1379. Second, the letter had the potential of confusing the jury because it referred to mistakes that the witness had made in his prior testimony, but those mistakes pertained only to irrelevant details and had subsequently been corrected. *Id.* at 1380. The court's third reason for affirming the trial court's decision to exclude the letter was that the witness did not want this letter disclosed because he "fear[ed] for his safety and that of his family." *Id*.

In the instant case, the trial court held that *Vaughn* is "more akin to our case in the sense that, although it wasn't prior trial testimony, it was prior testimony given in a deposition where there was a full right to cross examine, and the subsequent statement was a letter." I respectfully disagree. Both *Grant* and the instant case involve a statement by a witness/accomplice followed by a recanting statement by that same witness/accomplice. *Vaughn*, on the other hand, involved a statement by an eyewitness, not an alleged accomplice, followed by a letter refusing to testify, not a recanting statement. Unlike the statements in *Grant* and in the present case, the letter in

Vaughn did not assert that the witness's earlier statement was untrue. The probative value of the letter in *Vaughn* does not even remotely compare to the probative value of the subsequent recanting statements in *Grant* and in the present case because in the latter cases, the witnesses expressly stated that their previous statements were untrue. Furthermore, unlike the letter in *Vaughn,* the recanting statements at issue in *Grant* and in the instant case were not at all ambiguous. To the contrary, they very clearly stated that the previous statements were untrue. In addition, unlike *Vaughn,* neither *Grant* nor the instant case involves a witness who wants his subsequent statement excluded because he fears for either his own or his family's safety.

Grant and the instant case are similar in another respect. In *Grant*, the prosecutor argued that the subsequent statement should be excluded because it would provide a "complete defense" and because it was "particularly unreliable." *Grant,* 256 F3d at 1155. Similarly, in the instant case, the trial court excluded the subsequent statements because they were an "advocacy for acquittal" and because the witnesses' "manipulative nature" made him "skeptical." However, the court in *Grant* rejected these arguments, stating:

> The evidence of the affidavit statements could do no more than impeach and could not provide "a complete defense" if the government requested the limiting instruction to which it would have been entitled. See *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L. Ed.2d 727 (2000) ("A jury is presumed to follow its instructions.").
>
> The government's second fallback argument is that Wilson's affidavit statements were properly excluded from evidence because they were particularly unreliable . . . . The government maintains that because the statements in

> the affidavit were so unreliable, admitting them would not have affected the outcome of the trial—sort of a harmless error argument.
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> The government's argument on this point is more than a little inconsistent with its Rule 403 argument that the affidavit statements were terribly prejudicial to its case. Putting that inconsistency aside, however, Rule 806 made the statements admissible for impeachment purposes, and the point of admitting inconsistent statements to impeach is not to show that they are true, but to aid the jury in deciding whether the witness is credible; the usual argument of the party doing the impeaching is that the inconsistent statements show the witness is too unreliable to be believed on important matters. See *United States v. Graham*, 858 F.2d 986, 990 n. 5 (5th Cir.1988) ("[T]he hallmark of an inconsistent statement offered to impeach a witness's testimony is that the statement is not hearsay within the meaning of the term, i.e., it is not offered for the truth of the matter asserted, see Fed.R.Evid. 801(c); rather, it is offered only to establish that the witness has said both 'x' and 'not x' and is therefore unreliable."). Given all the circumstances of this case, that strategy might well have worked to undermine the probative effect of Wilson's co-conspirator statements to such an extent that the verdict on the conspiracy charge would have been different. For that reason, we reverse Grant's conviction on that charge. [*Id*. at 1155-1156.][7]

These same arguments should likewise be rejected in this case. The subsequent statements here are not admissible to prove that defendant was not the shooter. Instead, they are admissible to show that two of the prosecutor's witnesses are not credible. As the Court of Appeals explained:

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[7] Although the majority concedes that *Vaughn* is distinguishable from the instant case, it argues that *Grant* is also distinguishable from the instant case. *Ante* at 467-468. While *Grant* and the instant case are not identical, for the reasons discussed earlier, I believe that *Grant* is sufficiently similar to be of considerable guidance.

> [T]he statements were not offered to prove the truth of what was in them, but to attack the witnesses' credibility. As in *Grant*, the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility is always a question for the jury, and the court erred in concluding that it would have been proper to insulate the jury from the witnesses' contradictory statements. [*Blackston (On Remand)*, *supra* at 7-8.]

The probative value of the recanting statements was not substantially outweighed by the danger of unfair prejudice under MRE 403. The probative value of these statements is evinced by the fact that there is a specific rule of evidence, MRE 806, that provides that this very kind of evidence, i.e., evidence attacking the credibility of a declarant when that declarant's hearsay statement is being used against the defendant, is admissible. The probative value of these recanting statements was especially significant, given that the prior testimony of these two witnesses was obviously extremely damaging. The only "unfair prejudice" at issue in this case was caused by the trial court's exclusion of the recanting statements, because it resulted in the jury being painted a false picture. If the recanting statements had been placed before the jury, the prosecutor would, of course, have been free to argue to the jury that the recanting witnesses had manufactured their testimony. However, the jurors were told instead that one witness previously testified that defendant was the shooter and the other one testified that she overheard defendant and a co-defendant talking about blowing somebody's head off *without* being informed that the first witness subsequently stated that defendant was not even present when the victim was killed and that the second witness subsequently stated that she never heard de-

fendant talking about the murder. This was critical evidence of which the jury, in fairness, should not have been deprived. For these reasons, I agree with the Court of Appeals that the trial court abused its discretion in excluding the recanting statements.[8]

B. HARMLESSNESS OF ERROR

I also agree with the Court of Appeals that the error was not harmless. Simpson testified that defendant was the shooter. However, Simpson testified against defendant in exchange for full immunity; before testifying at the first trial, he indicated that he wanted to testify truthfully but was concerned that he would be charged with perjury if his testimony conflicted with his previous statement; Simpson has told several different versions of the events; in his very first statement to the police, Simpson said that Lamp was the shooter and that defendant was not even there, which is consistent with his most recent statement; Simpson testified that defendant cut off Miller's ear, but the police testified that there was no physical evidence indicating that Miller's ear had been cut off; Simpson testified that defendant killed Miller for Williams, but Williams testified that he did not even know Miller and the police indicated that there was no evidence that Williams was in any way involved with Miller's death; and Lamp threat-

[8] The majority argues that the recanting statements included irrelevant and unfairly prejudicial content; however, as the majority concedes, any such material could have been redacted. *Ante* at 463, 465. The key assertions made in the recanting statements were that these witnesses' prior testimony against defendant was untruthful; these assertions were clearly not irrelevant or unfairly prejudicial and thus should not have been excluded from the jury. In addition, for the reasons discussed in part III (B), I disagree with the majority that the recanting statements were merely cumulative. *Ante* at 463, 465-466, 473.

ened to kill Simpson if he said anything to the police to endanger his plea agreement, a threat on which Simpson believed Lamp would follow through.

Lamp also testified that defendant shot Miller. However, Lamp also testified against defendant in exchange for a plea agreement; Lamp testified that defendant cut off Miller's ear, but the police testified that there was no physical evidence indicating that Miller's ear had been cut off; Lamp testified that defendant killed Miller for Williams, but Williams testified that he did not even know Miller, and the police indicated that there was no evidence that Williams was in any way involved in Miller's death; Lamp threatened to kill Simpson if he said anything to the police to endanger his plea agreement; defendant had an affair with Lamp's wife; and, finally, Simpson has stated that Lamp shot Miller.

Zantello testified that defendant was not at home when she arrived at home and that she overheard defendant and Simpson talking about blowing off somebody's head. However, in her very first statement to the police she said that defendant was home when she arrived there and that defendant was not involved in Miller's murder, which is consistent with her most recent statement; and she testified that she overheard defendant and Simpson talking about cutting off somebody's ear, but the police testified that there was no physical evidence indicating that Miller's ear had been cut off.

Mock testified that defendant told her that he shot Miller. However, Mock was a suspect in Miller's murder; Barr, who witnessed the same conversation, testified that defendant did not say that he was the shooter[9] and that they were all drunk when this confession allegedly

[9] The majority claims that there were only "minor discrepancies" between Mock's and Barr's testimony. *Ante* at 471 n 27. Given that Mock

occurred; and, finally, Mock testified that defendant said that he cut off Miller's ear, but Barr testified that she did not think that defendant said anything about cutting Miller's ear off, and the police testified that there was no physical evidence indicating that Miller's ear had been cut off.

There are also inconsistencies between the testimonies of Lamp, Simpson, Mock, and Zantello regarding who showed up when at defendant's house on the night that Miller was murdered. See note 2, *supra*. Finally, three of defendant's sisters testified that defendant was home the night that Miller was killed.

The evidence against defendant, in other words, was anything but overwhelming. All the prosecutor's witnesses had compelling motives to lie. Simpson, Lamp, and Mock were all suspects. Zantello was defendant's ex-girlfriend and, according to Zantello, her then-current boyfriend, who beat her, forced her to testify against defendant because the prosecutor—the same prosecutor prosecuting defendant's case—allegedly promised the boyfriend no prison time if she did so. Under these circumstances, excluding Simpson's and Zantello's written statements that indicated that defendant was innocent was not harmless error. These statements could very well have caused the jury to have reasonable doubt about defendant's guilt.

The prosecutor argues that the recanting statements are cumulative because the jury already heard evidence that Simpson and Zantello had made prior inconsistent statements. However, Zantello's earlier inconsistent statement made to the police just after the incident and while she was still living with defendant did not under-

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testified that defendant said that he was the one who killed Miller and Barr testified that defendant did not say he was the one who killed Miller, I disagree.

mine her first trial testimony to the extent that her later written statement would have. As the Court of Appeals explained:

> The jury heard evidence that Zantello's first statements to police were that defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not. [*Blackston (On Remand), supra* at 8.]

In addition,

> [r]egarding Simpson, although he was impeached with having given prior inconsistent versions of what happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had Simpson's inconsistent written statement . . . been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. [*Id*.]

Because the evidence against defendant is by no means overwhelming, and because the excluded evi-

dence was significantly probative, I agree with the Court of Appeals that the error here was not harmless.

Even assuming that the issue was not properly preserved because, although defendant objected to the exclusion of the evidence on the basis of MRE 613, he did not object on the basis of MRE 806, MRE 103(d) provides that unpreserved "plain errors affecting substantial rights" can be raised for the first time on appeal.[10] As discussed in part II, in order for a defendant to obtain relief for an unpreserved error, the defendant

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[10] The prosecutor arguably should be precluded from asserting that the issue is unpreserved given that, in his brief to the Court of Appeals, he conceded that defendant "had brought a motion for a new trial on this basis expressly under MRE 806, and thereby, preserved the issue for appeal" and stated that as "a preserved claim of constitutional error, this Court must determine whether the people have established beyond a reasonable doubt that any error was harmless." Moreover, the error was arguably properly preserved under MRE 103, which provides:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
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> * * *
>
> (d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

must establish (1) that there was an error, (2) that the error was plain, (3) the error affected the outcome of the lower court proceedings, and (4) the error resulted in the conviction of an actually innocent defendant or that it " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" . . . . ' " *Carines*, 460 Mich at 763 (citation omitted). Because Simpson's and Zantello's recanting statements are clearly admissible under MRE 806, and should not have been excluded under MRE 403, there was error, and the error was plain. Because the evidence against defendant was by no means overwhelming, the exclusion of the recanting statements of the prosecutor's two critical witnesses may very well have been outcome determinative, and the error may have resulted in the conviction of a defendant who was actually innocent.

Alternatively, the error certainly and seriously affected the fairness, integrity, and public reputation of the judicial proceeding. The jury was affirmatively apprised that two witnesses previously testified against the defendant (one testified that he saw defendant

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Given that the trial court excluded evidence, all that was required to preserve the issue under MRE 103(a)(2) was to make "the substance of the evidence . . . known to the court . . . ." Nobody disputes the fact that "the substance of the evidence was made known to the court." Further, the error arguably denied defendant his right to confront witnesses against him, and thus was arguably of constitutional dimension.

If the error was constitutional, preserved error, the prosecutor would be required to prove that the error was harmless beyond a reasonable doubt. *People v Anderson,* 446 Mich 392, 406; 521 NW2d 538 (1994). If the error was non-constitutional, preserved error, defendant would be required to prove that it was more probable than not that the error was outcome determinative. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). As discussed in part II, it is unnecessary to determine whether the error was constitutional or non-constitutional, or preserved or unpreserved, because even assuming that it was unpreserved, non-constitutional error, defendant is entitled to relief.

shoot Miller and the other testified that she heard defendant talking about shooting Miller), but it was never told that these witnesses subsequently signed written statements indicating that defendant was actually innocent. By restricting the jury's access to *all* of the available evidence, the trial court presented the jury with a highly distorted view of the state of the evidence against defendant and thereby deprived the defendant, and the community, of a fair trial. Therefore, even assuming that the issue is unpreserved, there was plain error requiring reversal.

IV. CONCLUSION

The trial court abused its discretion in allowing the jury to hear the hearsay testimony of two critical witnesses, while excluding their recanting statements, and in denying defendant's motion for a new trial. Therefore, I would affirm the judgment of the Court of Appeals that reversed the trial court and remanded this case for a new trial.

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

MICHIGAN ASSOCIATION OF HOME BUILDERS
v DEPARTMENT OF LABOR & ECONOMIC GROWTH DIRECTOR

Docket No. 135023. Decided June 25, 2008.

The Michigan Association of Home Builders brought an action for declaratory and injunctive relief in the Ingham Circuit Court against the director of the Department of Labor and Economic Growth and the department, challenging the defendants' authority to revise a set of administrative rules. The court, Joyce Draganchuk, J., allowed the Michigan Community Action Agency Association, the Michigan Environmental Council, and the Midwest Energy Efficiency Alliance to intervene as defendants. During discovery, the plaintiff developed various analyses and studies concerning the rules, which the plaintiff intended to offer at trial through the testimony of numerous witnesses. The defendants moved in limine to preclude the testimony on the ground that it would be irrelevant because the witnesses' analyses, studies, and testimony had not been presented for the defendants' consideration during the rulemaking process. The defendants also requested the court to limit its review to whether, on the existing administrative record, the rules were valid. The court denied the defendants' motion and request and stated that it would review de novo all the proposed evidence. The Court of Appeals, TALBOT, P.J., and CAVANAGH and METER, JJ., reversed in part, holding that judicial review of an administrative rule is limited to the administrative record, but also stating that the trial court could remand the matter to the department for additional investigation or explanation. 276 Mich App 467 (2007). The plaintiff applied for leave to appeal.

In a memorandum opinion signed by Chief Justice TAYLOR and Justices CAVANAGH, KELLY, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Judicial review of an administrative rule is limited to the administrative record, and the administrative record may not be expanded by a remand to the administrative agency. Under the Administrative Procedures Act, MCL 24.201 *et. seq*., the review of an administrative rule involves a non-contested case. While that act specifically provides for expansion of the record in

a contested case by way of a remand to the agency, there is no similar provision for non-contested cases.

Affirmed in part and vacated in part.

Justice WEAVER would grant leave to appeal.

ADMINISTRATIVE LAW — JUDICIAL REVIEW — RULEMAKING — EXPANSION OF ADMINISTRATIVE RECORD.

Judicial review of an administrative rule is limited to the administrative record, and the administrative record may not be expanded by a remand to the administrative agency (MCL 24.201 *et seq*.).

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland*, *David E. Pierson*, and *Jared A. Roberts*), for the Michigan Association of Home Builders.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Susan Przekop-Shaw* and *Richard P. Gartner*, Assistant Attorneys General, for the director of the Department of Labor and Economic Growth and the department.

Clark Hill PLC (by *Don L. Keskey*) and *Brickfield, Burchette, Ritts and Stone, PC* (by *Christopher G. Mackaronis*), for the Michigan Community Action Agency Association, the Michigan Environmental Council, and the Midwest Energy Efficiency Alliance.

Amici Curiae:

Warner Norcross & Judd LLP (by *John J. Bursch* and *William C. Fulkerson*) for the Michigan Manufacturers Association.

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) and *Dykema Gosset PLLC* (by *Lori McAllister*) for the Insurance Institute of Michigan and the Michigan Insurance Coalition.

MEMORANDUM OPINION. At issue here is whether judicial review of an administrative determination in a

non-contested case is limited to the administrative record and whether the administrative record may be expanded by a remand to the administrative agency for additional fact-finding. The Court of Appeals held that judicial review of an administrative rule is limited to the administrative record, but stated that the trial court could "remand the matter to the department for additional investigation or explanation." *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Director*, 276 Mich App 467, 479; 741 NW2d 531 (2007). In lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals in part, vacate it in part, and hold 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.

Administrative determinations are governed by the Administrative Procedures Act (APA), MCL 24.201 *et seq*. An administrative determination is categorized as either a contested or a non-contested case. "Contested case" is defined as "a proceeding, including ratemaking, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). A non-contested case would therefore encompass administrative determinations that do not fall within the definition of a contested case. This case concerns the review of an administrative rule. "A determination, decision, or order in a contested case" is specifically exempted from the definition of "rule," MCL 24.207(f), and, therefore, the review of an administrative rule is categorized as involving a non-contested case.

MCL 24.241(1) provides, in pertinent part: "[B]efore the adoption of a rule, an agency, or the office of regulatory reform, shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments."[1] MCL 24.264 allows a plaintiff to challenge the validity of a rule in an action for a declaratory judgment. There is no provision in the statute regarding whether the trial court can expand the record for purposes of review at the trial court level or by remanding the matter to the agency.

For contested cases, the APA sets forth an entire chapter dedicated to the procedures for agency hearings, including the taking of witnesses' testimony. See MCL 24.271 through 24.287. The public hearings specified in MCL 24.241(1), which are held before the adoption of a rule, are "not subject to the provisions governing a contested case." MCL 24.241(4). Once a plaintiff exhausts the administrative remedies in a contested case, the plaintiff is entitled to direct judicial review. MCL 24.301. MCL 24.305 specifically provides for the expansion of the record in a contested case by way of a remand to the agency:

> If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file

[1] Executive Order No. 2005-1 abolished the Office of Regulatory Reform and transferred its powers, duties, and responsibilities to the State Office of Administrative Hearings and Rules. The order is codified at MCL 445.2021.

> with the court the additional evidence and any new findings, decision or order, which shall become part of the record.

There is no similar provision for non-contested cases. The more formal procedures called for in contested cases are simply not part of the rulemaking process or the process of judicial review of non-contested cases.

Other states have held that judicial review of non-contested cases is limited to the administrative record if there is no express provision of law that allows expansion of the record. For example, in Mississippi, "[a]ppellate review of an agency decision is limited to the record and the agency's findings." *Boyles v Mississippi State Oil & Gas Bd*, 794 So 2d 149, 153 (Miss, 2001). The Minnesota Court of Appeals stated: "The scope of review in a pre-enforcement challenge to a rule is more restrictive than review of an agency's decision in a contested enforcement proceeding. The court's review is limited to the record during rulemaking." *City of Morton v Minnesota Pollution Control Agency*, 437 NW2d 741, 745-746 (Minn App, 1989) (citation omitted). In Illinois, courts review an agency's promulgation of rules and regulations "on the basis of the rulemaking record . . . ." *Union Oil Co of California v Illinois Pollution Control Bd*, 43 Ill App 3d 927, 930; 357 NE2d 715 (1976). But see *Furlong Cos, Inc v Kansas City*, 189 SW3d 157, 165 (Mo, 2006) (ruling that the evidentiary record may be developed before the trial court in a non-contested case on the basis of a state statute that expressly provides that judicial review in non-contested cases is not limited to the administrative record).

The APA expressly provides for expansion of the record in contested cases. MCL 24.305. The 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*.[2] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). 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.[3]

We affirm the portion of the Court of Appeals judgment determining that judicial review is limited to the administrative record, vacate the portion of its judgment stating that the trial court can "remand the matter to the department for additional investigation or explanation," and vacate the portion of its judgment stating that *Westervelt v Natural Resources Comm*, 402 Mich 412; 263 NW2d 564 (1978), is not binding.

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[2] "[T]he expression of one thing is the exclusion of another." Black's Law Dictionary (6th ed).

[3] In making its determination that judicial review is limited to the administrative record, the Court of Appeals concluded that *Westervelt v Natural Resources Comm*, 402 Mich 412; 263 NW2d 564 (1978), constituted a nonbinding, plurality opinion. In *Westervelt*, we considered (1) whether the Legislature unconstitutionally delegated certain legislative powers and (2) whether an administrative agency exceeded the scope of its authority in promulgating administrative rules. The parties stipulated that only legal issues were contested, so the trial court's review would be limited to specified evidence in the administrative record. *Id*. at 450-451 (opinion by WILLIAMS, J.). When the trial court failed to consider this evidence, we remanded the case for further factual findings and held that such findings should be entered into the record. *Id*. at 452-453. Three justices signed the lead opinion, and three justices signed a concurring opinion that disagreed only with the lead opinion's analysis of the delegation-of-powers issue. *Id*. at 454, 459 (opinion by RYAN, J.). Therefore, the opinion is binding regarding the second issue, and the Court of Appeals erred in holding otherwise. *Westervelt* did not hold that the trial court may consider evidence that was not considered by the administrative agency because the evidence to be considered by the trial court was, in fact, part of the administrative record.

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

WEAVER, J. I would grant leave to appeal in this case.

SIDUN v WAYNE COUNTY TREASURER

Docket No. 131905. Argued March 5, 2008 (Calendar No. 1). Decided July 2, 2008.

Stella Sidun brought an action for monetary damages in the Ingham Circuit Court against the Wayne County Treasurer after the county foreclosed, for delinquent property taxes, on a rental property the plaintiff had jointly owned with her now-deceased mother. The defendant sent notice of the foreclosure proceedings to the home where the plaintiff's mother used to live, published a notice in a local newspaper, and posted notice of the proceedings at the property itself, but did not send notice to the plaintiff at the address corresponding to her name on the deed. The court, William E. Collette, J., granted summary disposition in the defendant's favor, ruling that the defendant gave the plaintiff sufficient notice under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., and the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17. In a split decision, the Court of Appeals, BANDSTRA, P.J., and FITZGERALD, J. (WHITE, J., dissenting), affirmed. Unpublished opinion per curiam of the Court of Appeals, issued January 19, 2006 (Docket No. 264581). The plaintiff sought leave to appeal, and the Supreme Court vacated the judgment of the Court of Appeals and remanded for reconsideration in light of *Jones v Flowers*, 547 US 220 (2006). 475 Mich 882 (2006). On remand, the same Court of Appeals panel affirmed in an identically split decision, ruling that *Jones* did not compel a different conclusion. Unpublished opinion per curiam of the Court of Appeals, issued August 15, 2006 (Docket No. 264581). The plaintiff sought leave to appeal, which the Supreme Court granted. 480 Mich 864 (2007).

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

The measures that the defendant took to inform the plaintiff of the foreclosure proceedings were constitutionally deficient under *Jones*. The defendant's decision to send notice by certified mail to only one of the two addresses on the deed, and not to send notice to the second address when the initial delivery attempt failed, was unreasonable in light of the information the defendant had regarding the property owners, particularly the fact that the recorded

deed in the defendant's possession denotes two property holders with different last names and two separate addresses.

1. A fundamental requirement of due process in a proceeding to take property from its owner is the provision of notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Interested parties are not entitled to actual notice, but they are entitled to have the government employ those means to apprise them that one who wished to actually inform them might reasonably adopt. A notification method may be reasonable and constitutional if employing the method is reasonably certain to inform those affected or if the method is not substantially less likely to provide notice than other customary alternative methods.

2. When a government learns that its attempt to provide notice to a property owner of an impending tax sale has failed, the government must take reasonable steps to provide notice to the property owner if it is practicable to do so and take into account unique information it has about the property owner, although it need not search for the owner's new address in the telephone book or in other governmental records.

3. The provisions of the GPTA that limit the plaintiff's remedy to money damages and strip the circuit court of jurisdiction to set aside the foreclosure were held unconstitutional after the plaintiff filed her claim and are therefore unenforceable.

Reversed and remanded to the circuit court for further proceedings.

CONSTITUTIONAL LAW — DUE PROCESS — TAX FORECLOSURE — NOTICE.

When a governmental entity learns that its initial attempt to provide notice to a property owner of an impending tax sale has failed, it must take reasonable additional steps to provide notice to the property owner, taking into account unique information it has about the property owner and employing those means of notice that one who wished to actually inform the property owner might reasonably adopt (US Const, Ams V, XIV; Const 1963, art 1, § 17).

John T. Hermann and *Public Citizen Litigation Group* (by *Deepak Gupta* and *Michael Kirkpatrick*) for the plaintiff.

Plunkett Cooney (by *Mary Massaron Ross*), *Edward M. Thomas*, Corporation Counsel, and *Jacob S. Ghannam* for the defendant.

Amicus Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Kevin T. Smith*, Assistant Attorney General, for the Department of Treasury.

CAVANAGH, J. We granted leave to appeal in this case to determine whether defendant Wayne County Treasurer's efforts to provide notice of foreclosure proceedings to plaintiff Stella Sidun satisfied due process in light of *Jones v Flowers*, 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006). Because the county treasurer failed to employ reasonable follow-up methods to notify plaintiff of the proceedings involving her property, we hold that plaintiff's due-process rights were violated. The Court of Appeals erred by concluding that the county treasurer's efforts met the requirements described by *Jones*. Therefore, we reverse the judgment of the Court of Appeals and remand to the circuit court for further proceedings.

I. STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff's mother, Helen Krist, owned a two-family dwelling at 2691 Commor Street in Hamtramck for several decades. In 1979, Krist executed a quitclaim deed conveying the Hamtramck property to herself and plaintiff as joint tenants. The deed stated that "HELEN KRIST . . . the address of which is 3233 Stolzenfeld-Warren, MI 48091" quitclaims the property "to HELEN KRIST and STELLA SIDUN, as joint tenants with right of survivorship and not as tenants in common, whose street number and postoffice address is 3233 Stolzenfeld-Warren, MI 48091 and 2681 Dorchester-

Birmingham, MI 48008 . . . .” The deed was properly recorded with the Wayne County Register of Deeds.

Krist used the Hamtramck residence as rental property, taking primary responsibility for maintaining the property and collecting rent from its tenants. Plaintiff assisted Krist by driving her to the property to collect the rent and writing receipts. The utility bills for the property were sent to Krist's residence in Warren, and plaintiff assisted Krist in paying them as well. Krist developed Alzheimer's disease in the late 1990s. In 1998, Krist moved from her Warren residence to live with plaintiff and her husband in their Birmingham residence. Plaintiff's husband arranged to have the utility bills from the Hamtramck property sent to the Birmingham address. However, the Hamtramck city assessor and the county treasurer were not informed of Krist's new address. The Warren house was sold several months after Krist moved to Birmingham.

Wayne County tax bills are mailed to the address of the taxpayer, as recorded by the local assessor. During the tax years of 1999 to 2003, the county treasurer mailed all tax bills for the Hamtramck property to Krist at the Warren residence, which was consistent with the Hamtramck city assessor's records from that period. Plaintiff was not mentioned in the city assessor's records. Krist and plaintiff failed to pay the county property taxes on the Hamtramck property for the tax years 2000 and 2001, resulting in a tax delinquency of $2,066.45.

In accordance with the General Property Tax Act (GPTA), MCL 211.1 *et seq*., the county treasurer sent two notices of tax delinquency by first-class mail, address correction requested, to Krist at the Warren

address. Notice of tax delinquency was also sent by certified mail, return receipt requested, to Krist at the Warren address; it was returned as undeliverable. After the property was forfeited to the county treasurer, a petition for foreclosure was filed on June 14, 2002. The county treasurer took several additional steps required by MCL 211.78i as part of the foreclosure proceedings. On the basis of the information located on the property's deed, the county treasurer sent notice of the show-cause and foreclosure hearings by certified mail addressed to both Krist and plaintiff at the Warren address on December 18, 2002. The letter was returned as undeliverable. A representative of the county treasurer visited the property and posted notice of the foreclosure petition on the property, as the representative was unable to personally meet with the occupant. The county treasurer also published notification three times in the public-notice section of the *Michigan Citizen*, a community newspaper. However, notice was never sent to plaintiff's Birmingham residence, which was on the recorded deed.

Krist died on January 1, 2003. A show-cause hearing regarding why the property should not be foreclosed was held on January 14, 2003. The foreclosure hearing was held on February 26, 2003. On March 10, 2003, a judgment of foreclosure was entered against the property and absolute title vested in the county treasurer. The county treasurer sold the property at auction for $52,000 to the owner of Krist's former Warren residence. At the time of the purchase, the property had an appraised value of $85,000. Plaintiff and her husband learned of the sale from a tenant of the property, who contacted them after the new owner attempted to collect rent.

Plaintiff filed suit, alleging that she had been wrongfully deprived of her property without proper notice in violation of the GPTA and the Due Process Clause of

the Michigan Constitution. The trial court denied plaintiff's motion for summary disposition and granted summary disposition for the county treasurer, ruling that the attempts to notify plaintiff satisfied due process and the requirements of the GPTA. Plaintiff appealed in the Court of Appeals, which, in a split decision, affirmed the trial court's order.[1] Plaintiff appealed in this Court; we vacated the judgment of the Court of Appeals and remanded for reconsideration in light of *Jones*. 475 Mich 882 (2006). On remand, the Court of Appeals, again in a split decision, reached the same result, holding that *Jones* did not compel a different conclusion because the county treasurer's efforts to provide notice were sufficient to satisfy due process, particularly in light of the county's follow-up measure of posting notice on the property.[2] This Court granted plaintiff's application for leave to appeal. 480 Mich 864 (2007).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). This Court also reviews constitutional issues de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

III. CONSTITUTIONAL NOTICE REQUIREMENTS

The Due Process Clause of the Michigan Constitution states: "No person shall be . . . deprived of life, liberty or property, without due process of law." Const

[1] *Sidun v Wayne Co Treasurer*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2006 (Docket No. 264581).

[2] *Sidun v Wayne Co Treasurer* (*On Remand*), unpublished opinion per curiam of the Court of Appeals, issued August 15, 2006 (Docket No. 264581).

1963, art 1, § 17. The corresponding provision of the United States Constitution is applicable to Michigan through the Fourteenth Amendment, and provides in part, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." US Const, Am V. It is undisputed that plaintiff holds a property interest in the subject property; accordingly, she has a constitutional right to due process of law before the government takes title to the property.

Proceedings that seek to take property from its owner must comport with due process.[3] A fundamental requirement of due process in such proceedings is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). Interested parties are "entitled to have the [government] employ such means 'as one desirous of actually informing [them] might reasonably adopt' to notify [them] of the pendency of the proceedings." *Dow v Michigan,* 396 Mich 192; 240 NW2d 450 (1976), quoting *Mullane, supra* at 315. That is, the means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice. *Mullane, supra* at 315. However, "[d]ue process does not require that a property owner receive actual notice before the government may take his property." *Jones*, *supra* at 226. In this case, the county treasurer at-

[3] "The state has no proper interest in taking a person's property for nonpayment of taxes without proper notice and opportunity for a hearing at which the person can contest the state's right to foreclose and cure any default determined." *Dow, supra* at 210 (applying *Mullane v Central Hanover Bank & Trust Co,* 339 US 306; 70 S Ct 652; 94 L Ed 865 [1950]).

tempted to notify plaintiff of the foreclosure proceedings, but actual notice was not achieved. Thus, the issue is whether the methods employed by the county treasurer were sufficient to satisfy due-process requirements.[4]

A notification method may be reasonable and constitutional if employing the method is "reasonably certain to inform those affected," or, when circumstances do not reasonably permit such notice, if the method employed is not substantially less likely to provide notice than other customary alternative methods. *Mullane*, *supra* at 315. Notably, *Mullane* recognized that the reasonableness of a particular method could vary, depending on what information the government had. That case concerned a New York law that merely required notice by publication to inform beneficiaries of a common trust fund that the fund was subject to judicial settlement. *Id*. at 309-310. The Court held that while notice by publication was constitutionally sufficient with regard to beneficiaries whose interests or addresses were unknown, notice by publication was insufficient for beneficiaries whose names and ad-

[4] While plaintiff also alleged violations of the GPTA, we will not review the disposition of these claims. As a practical matter, any remedies available to plaintiff are contingent on her constitutional claim since MCL 211.78(2) states in relevant part, "The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated." See also MCL 211.78i(10), which states, "The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States."

dresses were known by the government. "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id*. at 318. Notice by publication was inadequate in the case of known beneficiaries "because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id*. at 319.

Moreover, even if a statutory scheme is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless "required the government to consider unique information about an intended recipient . . . ." *Jones*, *supra* at 230. The Court has explained that the " 'notice required will vary with [the] circumstances and conditions.' " *Id*. at 227 (citation omitted). The government's knowledge that its attempt at notice has failed is a " 'circumstance and condition' that varies the 'notice required.' " *Id*. (citations omitted). In such a case, the adequacy of the government's efforts will be evaluated in light of the actions it takes after it learns that its attempt at notice has failed. The Court explained, "[W]hen mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id*. at 225. "What steps are reasonable in response to new information depends upon what the new information reveals." *Id*. at 234. For example, when certified mail is returned as "unclaimed," it means either that the addressee still lives at that address but was not home when the mail was delivered and did not retrieve it, or that the addressee no longer resides at that address. *Id*. Under those circumstances, a reasonable follow-up measure aimed

at the first possibility would be to resend the notice by regular mail. *Id*. Reasonable follow-up measures directed at the possibility that the addressee had moved would be to post notice on the front door or to send notice addressed to "occupant." *Id*. at 235. Although the government must take reasonable additional steps to notify the owner, it is not required to go so far as to "search[] for [an owner's] new address in the . . . phonebook and other government records such as income tax rolls." *Id*. at 235-236. Ultimately, the Court did not prescribe the form of service that should be adopted in any given case, but simply observed that for purposes of its holding—which found the state's follow-up actions insufficient—it sufficed that additional reasonable steps were available for the state to employ before taking the property. *Id*. at 238.

IV. THE INITIAL ATTEMPT AT PROVIDING NOTICE

Applying the principles established by *Mullane* and *Jones* to this case, we conclude that the measures taken by the county treasurer to inform plaintiff of the foreclosure proceedings were constitutionally deficient. When there are multiple owners of a piece of property, due process entitles each owner to notice of foreclosure proceedings. See *Mennonite Bd of Missions v Adams*, 462 US 791, 799; 103 S Ct 2706; 77 L Ed 2d 180 (1983). The notice provisions of the GPTA seek to fulfill this obligation. After the foreclosing governmental unit has determined the owners of a property interest in the subject property, it must send notice by certified mail to those owners at "the address reasonably calculated to apprise those owners" of the foreclosure proceedings.

MCL 211.78i(2).[5] Pursuant to this provision, the county treasurer sent certified mail, addressed to both Krist and plaintiff, to the Warren residence. At the time the letter was sent, sending mail to Krist at the Warren address was a method reasonably calculated to notify her of the proceedings because that address was on file with the Hamtramck city assessor. Moreover, the deed confirmed that Krist lived at the Warren residence. However, using the same Warren address to contact both property owners was not reasonable in light of the information known by the county treasurer.

To identify all interest-holders in the property under MCL 211.78i(1), the county treasurer was required to consult the deed to the property.[6] And, in fact, the county treasurer did consult the deed and discover plaintiff's property interest. But it was unreasonable for the county treasurer to assume that both property holders resided at the Warren address when the deed denotes two property holders with different last names and references two separate addresses. Further, the

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[5] MCL 211.78i(2) provides in relevant part:

> [T]he foreclosing governmental unit or its authorized representative shall determine the address reasonably calculated to apprise those owners of a property interest of the show cause hearing under section 78j and the foreclosure hearing under section 78k and shall send notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k to those owners, and to a person entitled to notice of the return of delinquent taxes under section 78a(4), by certified mail, return receipt requested, not less than 30 days before the show cause hearing.

[6] MCL 211.78i(1) states in part: "The foreclosing governmental unit shall initiate a search of records identified in subsection (6) to identify the owners of a property interest in the property who are entitled to notice under this section of the show cause hearing under section 78j and the foreclosure hearing under section 78k." The first type of records specified in subsection 6 are land title records in the office of the county register of deeds. MCL 211.78i(6)(a).

initial reference linking Krist to the Warren residence supports the inference that the Birmingham address belongs to plaintiff, the other owner. The beginning of the deed states, "HELEN KRIST, formerly HELEN CHWALEBA, survivor of herself and ANDREW CHWALEBA, her former husband, . . . the address of which is 3233 Stolzenfeld-Warren, MI 48091 Quit Claims to HELEN KRIST AND STELLA SIDUN" the subject property. Immediately following this reference, the deed repeats the Warren address and mentions the Birmingham address for the first time; it lists Krist's name first and plaintiff's name second and then provides Krist's address first and plaintiff's address second. Although the deed does not specifically state, "the following is Sidun's address," a reasonable person would be able to infer that the *second address* is plaintiff's address given that plaintiff's name is the *second name* listed immediately above the addresses. Accordingly, the deed did not support the county treasurer's interpretation that both Krist and plaintiff resided at the single address, because that would leave the Birmingham address unexplained. The county treasurer also knew that Krist *alone* was listed as the taxpayer for the property at the Warren address. In light of all the information, a reasonable person would deduce that Krist was connected to the Warren address, while plaintiff was connected to the Birmingham address. Accordingly, a person who actually wished to notify both property owners would have sent a letter to the Birmingham address, rather than operating as if it were never mentioned in the deed.

If the government provides notice by mail, due process requires it to be mailed to an "address reasonably calculated to reach the person entitled to notice." *Dow, supra* at 211. The address "reasonably calculated to

reach [plaintiff]," a person who was entitled to notice, was her home address that was listed on the recorded deed in defendant's possession. Because defendant had plaintiff's address at hand but failed to mail notice to her at that address, defendant failed to accord plaintiff minimal due process.

Our holding does not categorically require foreclosing entities to search for and send notice to additional addresses whenever multiple owners are entitled to notice of foreclosure. And neither due process nor the GPTA generally requires a foreclosing entity to send notice to all addresses that the entity has, or could have, discovered. The guiding principle remains that notice must be "reasonably calculated" to apprise interested parties of the action and to provide them an opportunity to be heard. *Mullane, supra* at 314; *Dow, supra* at 211. Under different circumstances, sending notice to multiple owners at one address may well satisfy this standard. But here, the deed in the treasurer's possession listed two owners and two addresses, and, in light of the deed's wording, sending notice to both owners at the first address only was constitutionally insufficient.

V. THE FOLLOW-UP NOTIFICATION MEASURES

The follow-up measures taken by the county treasurer were insufficient to rectify the failed attempt to notify plaintiff. When the county treasurer learned that the certified mail sent to the Warren address had been returned, it was alerted that Krist, plaintiff, or both either did not live there or had not been home at the time. As additional steps, the county treasurer posted notice on the Hamtramck property and published notice. These both may be reasonable follow-up measures, as *Jones* recognized. However, *Jones* also indicated that what constitutes a reasonable follow-up measure depends on the

circumstances, including what information the government had both before and after its failed attempt.

In this case, the county treasurer knew that there were two owners and two addresses listed on the deed, but it only sent notice to one address. When that notice failed with respect to *both* owners, a reasonable additional step would have been to attempt sending notice to the other address in the deed, whether addressed to Krist, plaintiff, or both. A person who actually desired to inform a real-property owner of an impending tax sale of a house she owns would not fail to send notice to the second of two addresses on the recorded deed that such person had in his possession, especially when the notice sent to the other address came back unclaimed. The reasonable alternative measure of sending notice to the Birmingham address was obviously available to the county treasurer, as *Jones* requires, since the county treasurer had already consulted the deed to identify plaintiff as a property owner.

This step is far from asking the government to conduct a search for a new address in a phone book or income-tax rolls. See *Jones, supra* at 235-236. The burden on the government would have been slight; defendant would not have had to search for plaintiff's address because it was in the recorded deed that the county treasurer had already consulted, and it only involved exploring one alternative address. Thus, while the county treasurer should have sent notice to the Birmingham address when it first attempted to contact both property owners, it particularly should have done so when it learned that its initial methods of providing notice had failed. The address "reasonably calculated to reach [plaintiff]," *Dow, supra* at 211, a person who was entitled to notice, was her home address that was listed on the recorded deed in defendant's possession. Simi-

larly, " 'one desirous of actually' . . . notify[ing] [plaintiff] of the pendency of the proceedings," *Dow, supra* at 211, quoting *Mullane, supra* at 315, would certainly have mailed notice to plaintiff's home address that was listed on the recorded deed in defendant's possession, particularly when the notice mailed to the other address listed on the deed was returned unclaimed. "This is especially true when, as here, the subject matter of the [notice] concerns such an important and irreversible prospect as the loss of a house." *Jones, supra* at 230.

It is worth noting that the government's constitutional obligation to provide notice is not excused by an owner's failure to keep his or her address updated in governmental records. A party's ability to take steps to safeguard its own interests does not relieve the government of its constitutional obligation. *Id*. at 232. Similarly, "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property." *Id*. On the contrary, "an interested party's 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.' " *Id*. at 232-233, quoting *Mennonite Bd, supra* at 800. Thus, while plaintiff should have been more diligent regarding the tax liability on her property, the government may not take that property without providing due process of law.

VI. CONCLUSION

Given that plaintiff's due-process rights were violated, the circuit court erred in denying her motion for

summary disposition and granting summary disposition for the county treasurer. Further, at the time plaintiff filed her claim, she sought only money damages, not to set aside the judgment of foreclosure. Indeed, the GPTA specifically precludes claims seeking to modify judgments of foreclosure and limits causes of action arising under the act to claims for money damages.[7] However, while plaintiff's appeal was pending, we decided *In re Petition by Wayne Co Treasurer*, 478 Mich 1; 732 NW2d 458 (2007), in which we held unconstitutional the provisions of the GPTA that vest absolute title in the foreclosing governmental unit without allowing the circuit court to modify judgments of foreclosure if an owner has been deprived of due process. *Id*. at 10-11. Plaintiff is such an owner; thus, the provisions of the GPTA that limit her remedy to money damages and strip the circuit court of jurisdiction to set aside the foreclosure are unenforceable against her. We reverse the Court of Appeals judgment and remand the case to the circuit court for further proceedings consistent with this opinion.

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

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[7] MCL 211.78*l*(1) provides:

> If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

SMITH v KHOURI

Docket No. 132823. Argued December 4, 2007 (Calendar No. 4). Decided July 2, 2008.

Kevin Smith brought a dental-malpractice action in the Oakland Circuit Court against Louie Khouri, Louis Khouri, D.D.S., P.C., and Advanced Dental Care Clinic, L.L.C. Case evaluation resulted in an evaluation for the plaintiff, who accepted the award while the defendants rejected it. The jury returned a verdict in the plaintiff's favor, and the plaintiff moved for case-evaluation sanctions under MCR 2.403(O), including attorney fees. The court, Mark A. Goldsmith, J., applied some of the factors set forth in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573 (1982), and concluded that the hourly rate sought for the plaintiff's lead attorney was reasonable and, without making any findings regarding the other three attorneys who worked on the plaintiff's case, awarded as sanctions the entire amount of attorney fees that the plaintiff requested. The defendants appealed, and the Court of Appeals, WHITBECK, C.J., and SAWYER and JANSEN, JJ., affirmed in an unpublished opinion per curiam, issued November 16, 2006 (Docket No. 262139). The defendants sought leave to appeal, which the Supreme Court granted, limited to the issue of the case-evaluation sanctions. 479 Mich 852 (2007).

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

The proper method of determining reasonable attorney fees is to begin with a determination of the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence, and multiply that amount by the reasonable number of hours expended in the case. The court may then consider making adjustments up or down in light of the other factors listed in *Wood* and in Rule 1.5(a) of the Michigan Rules of Professional Conduct. The court should briefly indicate its view of each of the factors to aid appellate review.

1. The starting point for calculating a reasonable attorney fee is to determine the fee customarily charged in the locality for similar legal services, as set forth in MRPC 1.5(a)(3), then multiply

that amount by the reasonable number of hours expended. The burden is on the fee applicant to produce satisfactory evidence, in addition to the attorney's own affidavits, that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. This burden can be met by means of testimony or empirical data found in surveys and other reliable reports; anecdotal statements will not suffice. The court must then determine the reasonable number of hours expended by each attorney on the basis of detailed billing records submitted by the fee applicant, who bears the burden to support the number of hours claimed. If there is a factual dispute regarding the reasonableness of the hours billed or the hourly rate, the party opposing the fee request is entitled to an evidentiary hearing.

2. On remand, the trial court should use the fee customarily charged in the locality for similar legal services as a starting point, rather than the rate charged by the top trial attorneys in the county. The trial court erred in relying on the lead attorney's previous awards without considering whether those fees were justified by the particular circumstances of those cases, such as the complexity and the skill required. The trial court must also perform a separate analysis with regard to each of the other three attorneys in question that considers their hourly rates, the number of hours reasonably expended, and whether it was reasonable for two attorneys to bill for the same day of trial.

Lower court judgments vacated and case remanded to trial court for reconsideration.

Chief Justice TAYLOR, joined by Justice YOUNG, would hold that the factor that considers the amount in question and the results achieved is not a relevant consideration in determining a reasonable attorney fee for case-evaluation sanctions. The purpose of MCR 2.403(O) is to encourage serious consideration of case-evaluation awards and penalize a party that should have accepted the case evaluation, and it would be inconsistent with this purpose to reduce the accepting party's reasonable attorney fees for services necessitated by the rejection on the basis of the amount in question or the results achieved. Doing so could present a situation in which the accepting party could properly evaluated the case value, yet was forced to incur additional fees, potentially in excess of the case's value. Reducing the accepting party's reasonable attorney fees necessitated by the rejection because they exceed or are disproportionate to the value the accepting party correctly assessed simply encourages the inefficiency the rule seeks to combat. Likewise, the factor that considers whether the fee is fixed

or contingent is not relevant in determining a reasonable attorney fee for case-evaluation sanctions because it is unrelated to the legal services necessitated by the rejection of a case evaluation.

Justice CORRIGAN, joined by Justice MARKMAN, would hold that there is no principled basis for excluding the factors that consider the results obtained and whether the fee is fixed or contingent when determining a reasonable attorney fee in the context of case-evaluation sanctions. Consideration of whether a fee is fixed or contingent may be helpful in determining a reasonable attorney fee award for case-evaluation sanctions because the percentage involved expresses an attorney's expectations of the case and the risks involved, and considering the results obtained is reasonable, prudent, and consistent with federal precedent.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, agreed with the majority that the trial court's attorney-fee awards regarding the plaintiff's three supporting attorneys were insufficiently supported, but would affirm the trial court's determination regarding the lead attorney's fee because it was properly guided by the factors set forth in *Wood*, a method of calculating reasonable attorney fees under MCR 2.403(O) that is not broken and will not be improved by the majority's adoption of a method that is neither more consistent nor more easily reviewable.

Robert Gittleman Law Firm, PLC (by *Robert Gittleman*), for the plaintiff.

Van Belkum & Felty, P.C. (by *Gary N. Felty, Jr.*), for the defendants.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Ann M. Sherman*, Assistant Attorney General, for the Attorney General.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Eric J. Pelton* and *Noel D. Massie*), for the State Bar of Michigan.

Vandeveer Garzia (by *Thomas Peters*) and *Wascha, Waun & Parillo, P.C.* (by *Thomas W. Waun*), for the Negligence Section of the State Bar of Michigan.

Robert M. Raitt for the Michigan Association for Justice.

TAYLOR, C.J. In this case, we review a trial court's award of "reasonable" attorney fees as part of case-evaluation sanctions under MCR 2.403(O) calculated under some of the factors we listed in *Wood v Detroit Automobile Inter-Ins Exch,* 413 Mich 573; 321 NW2d 653 (1982), and Rule 1.5(a) of the Michigan Rules of Professional Conduct. We take this opportunity to clarify that the trial court should begin the process of calculating a reasonable attorney fee by determining factor 3 under MRPC 1.5(a), i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number should be multiplied by the reasonable number of hours expended. This will lead to a more objective analysis. After this, the court may consider making adjustments up or down in light of the other factors listed in *Wood* and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors.

Given that the trial court made its decision without first determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, we vacate the lower court judgments regarding the case-evaluation sanctions and remand the case to the trial court to revisit the issue in light of the opinion we adopt today.

I. STATEMENT OF PROCEEDINGS

Plaintiff sued defendants in 2003 for dental malpractice in the Oakland Circuit Court. The case went to case evaluation and was evaluated at $50,000. Plaintiff accepted the award, but defendants rejected it. After a

2 1/2-day trial, the jury returned a verdict in favor of plaintiff. The verdict, reduced to present value,[1] was $46,631.18.

After defendants' motion for judgment notwithstanding the verdict or for a new trial was denied, plaintiff filed a motion in January 2005 seeking case-evaluation sanctions under MCR 2.403. Plaintiff sought $68,706.50 in attorney fees for time spent by four lawyers at the firm that represented him. In particular, plaintiff sought $450 an hour for the 102 hours[2] lead trial attorney Robert Gittleman claimed, $450 an hour for 6 hours claimed by another partner, $275 an hour for 59 hours attributable to one associate, and $275 an hour for 14 hours claimed by another associate. Plaintiff's motion was supported by several items, including Mr. Gittleman's curriculum vitae showing his extensive experience in trying dental malpractice cases. Plaintiff's motion also attached copies of three circuit court judgments awarding Mr. Gittleman attorney fees: a 1985 case awarding $200 an hour, a 1998 case awarding $300 an hour, and a 2004 case awarding $400 an hour. Plaintiff also represented that the other partner had been practicing law for 35 years and had tried numerous cases that resulted in favorable verdicts. The motion also indicated that the associates had both tried personal injury cases to conclusion and that $275 an hour was the going rate for their work and research, which were necessitated by the evaluation rejection.

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[1] All but $300 of the verdict consisted of future noneconomic damages, which were set at $2,800 a year for the remaining 36 years of plaintiff's life expectancy. Pursuant to MCL 600.6306, those future noneconomic damages were reduced to their present value.

[2] Plaintiff stipulated a reduction of seven hours from the time Mr. Gittleman claimed after defendants objected to the claim.

Defendants presented numerous objections, arguing that the requested attorney fees would be highly unreasonable if they were awarded and specifically challenged the rate of $450 an hour and the fact that the fees sought exceeded the judgment. They contrasted the requested $450 an hour rate and the relatively small verdict with those in a recent Court of Appeals case, *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002), in which a plaintiff's attorney had sought $350 an hour but had only been awarded $150 an hour in case-evaluation sanctions in a personal injury case where the verdict had been $900,000. An objection was also made that some of the billings were duplicative, in that it was unnecessary for two lawyers to jointly try the same relatively simple two-day case.[3] Defense counsel indicated that his challenge was not so much to the hours claimed (other than the duplication claim), but to the rates sought. However, he did not seek an evidentiary hearing. Instead, he agreed to have the court decide the motion on the basis of what had been submitted.

The trial court indicated its belief that $450 an hour was a reasonable rate for Mr. Gittleman. The court took judicial notice of the fact that senior trial practitioners in Oakland County bill rates of about $450 an hour. The judge indicated that he had reviewed the billings and that he did not believe there was any duplication. The court said that Mr. Gittleman was a recognized practitioner in the area of dental malpractice and that he had a superlative standing in that area, having tried numerous cases. The court, however, did not make any findings relevant to the other partner or the associates. The

[3] For example, Mr. Gittleman charged eight hours for a full day of trial on December 17, 2004, and one of the associates also charged eight hours for that same day. Further, Mr. Gittleman billed five hours for the third day of trial while an associate charged eight hours for the same day.

court concluded by stating that the entire amount claimed was reasonable and signed an order granting attorney fees of $65,556 (the claimed amount of $68,706.50 minus the stipulation to drop seven hours attributable to Mr. Gittleman).[4]

Defendants appealed in the Court of Appeals, arguing that the hourly rates were unreasonable, and attaching an article from the November 2003 issue of the Michigan Bar Journal[5] showing that the median billing rate for equity partners in Michigan was $200 an hour and $150 an hour for associates.

The panel affirmed in an unpublished opinion.[6] It rejected defendants' claim that the amount of the attorney-fee award was excessive because it was based on unreasonable hourly rates. The Court of Appeals agreed with the trial court that $450 an hour was a reasonable rate for Mr. Gittleman. The panel conceded that the data submitted by defendants showed lower rates, but concluded that the data did not reflect the range of hourly rates charged by attorneys who specialize in complex litigation such as dental malpractice. It acknowledged that the trial court had not made any findings regarding the other three attorneys. Nevertheless, the panel found sufficient the trial court's overall statements regarding the complexity of dental malpractice cases as well as the skill, time, and cost expended to obtain the favorable verdict. Finally, the Court of Appeals refused to follow *Zdrojewski* because there was evidence that courts of this state had consistently

[4] Plaintiff was awarded $23,623.99 in costs.

[5] Stiffman, *A snapshot of the economic status of attorneys in Michigan*, 82 Mich B J 20 (November 2003).

[6] *Smith v Khouri*, unpublished opinion per curiam, issued November 16, 2006 (Docket No. 262139).

awarded attorney fees for Mr. Gittleman's services at hourly rates higher than the $150 an hour approved in *Zdrojewski*.

Defendants appealed in this Court, and we granted leave to appeal, limited to the case-evaluation-sanction issue, asking the parties to address several issues relating to the *Wood* factors, and also invited briefs from several amici curiae.[7]

II. STANDARD OF REVIEW

A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. *Casco Twp v Secretary of State,* 472 Mich 566, 571; 701 NW2d 102 (2005); *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006). We review for an abuse of discretion a trial court's award of attorney fees and costs. *Wood,* 413 Mich at 588. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. LEGAL BACKGROUND

A. PURPOSE OF THE RULE

The general "American rule" is that "attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998); *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). Consistently with the American rule, this Court has specifically authorized

[7] 479 Mich 852 (2007).

case-evaluation sanctions through court rule, allowing the awarding of reasonable attorney fees to promote early settlements.[8] The examination of those rules and the extent to which fees can be awarded is at issue in this case.

MCR 2.403 is the Michigan court rule regarding case evaluation. The rule holds that if both parties accept a case evaluation, the action is considered settled and judgment will be entered in accordance with the evaluation.[9] However, if one party accepts the award and one rejects it, as happened here, and the case proceeds to a verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is, after several adjustments, more than 10 percent more favorable to the rejecting party than the case evaluation.[10] Actual costs are defined in MCR 2.403(O)(6) as those costs taxable in any civil action and "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation."

The purpose of this fee-shifting provision is to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it

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[8] In 2000, the name of the process described in MCR 2.403 was changed from "mediation" to "case evaluation." The term "mediation" now applies to the process described in MCR 2.411.

[9] MCR 2.403(M)(1).

[10] MCR 2.403(O)(3) provides that a verdict must be adjusted by adding to it assessable costs and interest and that, after this adjustment, the verdict is considered more favorable to a defendant "if it is more than 10 percent below the evaluation . . . ." As we explained in *Haliw*, 471 Mich at 711, actual costs do not include attorney fees incurred when responding to appeals. Moreover, as explained in *Rafferty v Markovitz*, 461 Mich 265, 273 n 6; 602 NW2d 367 (1999), attorney fees are not allowed under the court rule if they have already been recovered pursuant to a statute. As we held in *Rafferty,* double recovery of attorney fees under two different authorities is not appropriate, even if the authorities advance different purposes.

develops, "should" have accepted but did not. This encouragement of settlements is traditional in our jurisprudence, as it deters protracted litigation with all its costs and also shifts the financial burden of trial onto the party who imprudently rejected the case evaluation. *Rohl v Leone,* 258 Mich App 72, 75; 669 NW2d 579 (2003); *Bennett v Weitz*, 220 Mich App 295, 301; 559 NW2d 354 (1996). This rule, however, is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls.[11] Rather, it only permits an award of a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged[12] or the highest rate the attorney might otherwise command. As *Coulter v Tennessee*, 805 F2d 146, 148 (CA 6, 1986), explains, reasonable fees "are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region."

B. PLAINTIFF WAS ENTITLED TO CASE-EVALUATION SANCTIONS

Defendants here have correctly conceded that case-evaluation sanctions were applicable because, even ignoring the costs and interest of $23,623.99 that are to be added to the verdict, the verdict as reduced to its present value of $46,631.18 was not more than 10 percent less than the $50,000 case-evaluation amount.

C. DETERMINING A REASONABLE ATTORNEY FEE

As all agree, the burden of proving the reasonableness of the requested fees rests with the party request-

[11] See *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 478 US 546, 565; 106 S Ct 3088; 92 L Ed 2d 439 (1986) ("[T]hese [attorney-fee shifting] statutes were not designed as a form of economic relief to improve the financial lot of attorneys . . . .").

[12] "Reasonable fees are not equivalent to actual fees charged." *Zdrojewski,* 254 Mich App at 72.

ing them. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983).[13] In Michigan, the trial courts have been required to consider the totality of special circumstances applicable to the case at hand. *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 297; 463 NW2d 261 (1990); *Hartman v Associated Truck Lines*, 178 Mich App 426, 431; 444 NW2d 159 (1989). *Wood* listed the following six factors to be considered in determining a reasonable attorney fee:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood*, 413 Mich at 588 (citation omitted)].[14]

The trial courts have also relied on the eight factors listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct, see, e.g., *Dep't of Transportation v Randolph*, 461 Mich 757; 610 NW2d 893 (2000), and *In re Condemnation of Private Prop for Hwy Purposes (Dep't of Transportation v D & T Constr Co)*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995), which overlap the *Wood* factors and include:

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[13] Accord *Hensley v Eckerhart*, 461 US 424, 433; 103 S Ct 1933; 76 L Ed 2d 40 (1983) (stating that the party seeking the fee award bears the burden of proving the reasonableness of the hours worked and the hourly rates claimed); *Blum v Stenson*, 465 US 886, 896 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

[14] These factors were traceable to *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). *Crawley* relied in part on then-applicable Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics.

We also stated in *Wood* that a trial court is not limited to those factors in making its determination and that the trial court need not detail its findings on each specific factor considered. *Wood,* 413 Mich at 588. We clarify today that in order to aid appellate review, the court should briefly address on the record its view of each of the factors.

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent. [MRPC 1.5(a).]

In determining "the fee customarily charged in the locality for similar legal services," the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan. See, e.g., *Zdrojewski*, 254 Mich App at 73; *Temple v Kelel Distributing Co Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990). The above factors have not been exclusive, and the trial courts could consider any additional relevant factors. *Wood,* 413 Mich at 588.

IV. ANALYSIS

We conclude that our current multifactor approach needs some fine-tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or

other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.[15]

The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." *Eddleman v Switchcraft, Inc*, 965 F2d 422, 424 (CA 7, 1992) (citation and quotation omitted). We emphasize that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v Stenson*, 465 US 886; 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984). The fees customarily charged in the locality for similar legal services can be established by testimony or

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[15] *Wood*, 413 Mich at 588, held that trial courts were "not limited to [the six listed] factors in making [their] determination[s]." To the extent a trial court considers any factor not enumerated in *Wood* or MRPC 1.5(a), the court should expressly indicate this and justify the relevance and use of the new factor.

empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan.[16] By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area.

In considering the time and labor involved (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney.[17] The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence.

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[16] See n 5, *supra*. The trial court did not have this report. It was first submitted to the Court of Appeals.

[17] *Norman v Housing Auth of Montgomery*, 836 F2d 1292, 1301 (CA 11, 1988), quoting *Hensley*, 461 US at 434 (in determining hours reasonably expended, the Court should exclude "excessive, redundant or otherwise unnecessary" hours regardless of the attorneys' skill, reputation or experience).

Multiplying the reasonable hourly rate by the reasonable hours billed will produce a baseline figure. After these two calculations, the court should consider the other factors and determine whether they support an increase or decrease in the base number.

Having clarified how a trial court should go forward in calculating a reasonable attorney fee, we find it appropriate to vacate the award and remand this case to the trial court for reconsideration under this opinion. We offer the following observations in order to provide guidance to the trial court.

In making its ruling, the trial court indicated it was taking judicial notice of the fact that top trial attorneys in Oakland County charge $450 an hour or more.[18] While we do not doubt that some trial attorneys have such rates, the fee customarily charged in the locality for similar legal services, which likely is different, should be the measure. That is, reasonable fees are different from the fees paid to the top lawyers by the most well-to-do clients. *Coulter, supra.* The trial court also erred in relying on previous awards Mr. Gittleman obtained without considering whether those fees might have been justified by the particular circumstances of the earlier cases, such as the complexity and the skill required. Moreover, the trial court erred when it conclusorily stated that Mr. Gittleman had tried the case in a "professional manner," without further explanation, because this is something all attorneys should be expected to do.

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[18] We note that the hourly rate charged by top trial attorneys in Oakland County was not a proper fact for judicial notice. A judicially noticed fact must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b).

As previously noted, the trial court only made findings regarding Mr. Gittleman. On remand, the court should be careful to perform a separate analysis with reference to the other three attorneys, considering both the hourly rates and the number of hours reasonably expended, and should consider whether it was reasonable for plaintiff's firm to have two lawyers "on the clock" during the trial.

We reiterate that the goal of awarding attorney fees under MCR 2.403 is to reimburse a prevailing party for its "reasonable" attorney fee; it is not intended to "replicate exactly the fee an attorney could earn through a private fee arrangement with his client."[19] We also caution the courts to avoid duplicative consideration of the factors mentioned above.[20]

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[19] *Delaware Valley,* 478 US at 565; see also *Cleary v Turning Point,* 203 Mich App 208, 212; 512 NW2d 9 (1993).

[20] Factor 3 under *Wood,* 413 Mich at 588, and factor 4 under MRPC 1.5(a), is "the amount in question and the results achieved." Although this factor may be relevant in other situations, we conclude that it is not a relevant consideration in determining a reasonable attorney fee for case-evaluation sanctions. As stated, the purpose of MCR 2.403(O) is to encourage serious consideration of case-evaluation awards and penalize a party that "should have" accepted the case's evaluation. The rejecting party that does not achieve a more favorable result must pay reasonable attorney fees "for services necessitated by the rejection . . . ." MCR 2.403(O)(6). It would be inconsistent with MCR 2.403(O) to reduce the accepting party's reasonable attorney fees "for services necessitated by the rejection" on the basis of the amount in question or the results achieved. If we were to do so, the accepting party could have properly evaluated the case's value, yet be forced to incur additional fees, potentially in excess of the case's value. Reducing the accepting party's reasonable attorney fees necessitated by the rejection because they exceed or are disproportionate to the value the accepting party correctly assessed undermines the rule. MCR 2.403(O) penalizes the rejecting party who incorrectly valued the case, not the accepting party who correctly assessed the case's value at a much earlier and more efficient time. Reducing the accepting party's reasonable attorney fees on the basis of proportionality simply encourages the inefficiency the rule seeks to combat.

V. RESPONSE TO THE DISSENT

The dissent's primary complaint seems to be that a "reasonable fee" for an exceptional lawyer cannot be determined by using the fee charged by the average attorney. But *Wood* factor 1 mentions the professional standing and experience of the attorney, *Wood* factor 2 mentions the skill involved, and MRPC 1.5(a)(7) speaks of "the experience, reputation, and ability of the lawyer." These factors allow an upward adjustment for the truly exceptional lawyer.

The dissent criticizes our use of the market rate for attorney services to determine a reasonable rate, stating that "the market rate for an individual attorney's work is not some figure that can be plucked from a reference manual or interpolated from a statistical graph." *Post* at 551. To an extent, we agree; see note 18 of this opinion, explaining that the fee charged by top trial lawyers in Oakland County is not a proper fact for judicial notice. This is not an exact science; if it were, no factors or analysis would be required. We merely aim to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes. To that end, we are persuaded by the guidance offered by the United States Supreme Court in *Blum*, and we note that the dissent offers no similar, countervailing guidance.

Although factor 8 under MRPC 1.5(a), "whether the fee is fixed or contingent," may be relevant in other situations, we conclude that it is not relevant in determining a reasonable attorney fee for case-evaluation sanctions. Again, sanctions under MCR 2.403 are to reimburse a party for reasonable legal fees for services necessitated by the rejection of the case evaluation. Whether the attorney-fee agreement is fixed or contingent is unrelated to the legal services necessitated by the rejection of a case evaluation.

The dissent agrees with the Supreme Court's assessment in *Blum* that the market rate, although not always easily discerned, is a "valid inquiry." *Post* at 552. Nevertheless, it rejects the principled mechanism the *Blum* Court chose to best conduct the "valid inquiry" into the market rate. *Post* at 552. We, however, accept the *Blum* Court's resolution, placing the burden on the fee applicant "to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, *supra* at 895 n 11. The dissent concedes that "assessing that rate should include comparisons with rates for similar services," *post* at 552, but offers no rubric to guide Michigan courts in doing so. Unlike the dissent, we choose to provide the guidance that has been, and the dissent would allow to remain, sorely lacking for the many Michigan courts that are asked to impose "reasonable attorney fees" under our fee-shifting rules and statutes.

The dissent also faults us for using the fee customarily charged in the locality for similar legal services as a starting point. See *post* at 546. We see no fault in providing an objective baseline, i.e., a starting point, to aid trial and appellate courts alike in assessing a "reasonable fee." Whimsy is a double-edged sword. If a trial court awarded a highly experienced and skilled attorney, such as Mr. Gittleman, a "reasonable attorney fee" at a rate of $100 an hour—a rate well below the $150 an hour median rate for associate attorneys in Michigan[21]—we would have the same concerns with the absence of an objective framework to assess such a judgment. An objective starting point, at a minimum, provides a more concrete basis for setting and reviewing

[21] See Stiffman, *supra*.

a reasonable attorney fee. Again, we reject the dissent's argument to leave Michigan courts without guidance.

The dissent asserts that our decision is somehow inconsistent with *Randolph,* in which we rejected the federal lodestar method for calculating the reasonableness of an attorney fee under our condemnation statute. In *Randolph,* we specifically noted that MCL 213.66(3) requires consideration of whether actual fees are reasonable, and that this is different from fee-shifting statutes that simply authorize the trial court to award "reasonable attorney fees" without regard to the fees actually charged. *Randolph*, 461 Mich at 765-766. Contrary to the dissent's assertion, our opinion today does not contradict, undermine, or overrule *Randolph*.

VI. CONCLUSION

In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors.

The judgments of the Court of Appeals and the trial court regarding the attorney-fee issue are vacated, and the case is remanded to the trial court for reconsideration in light of this opinion.

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

CORRIGAN, J. I concur with the reasoning and result of the lead opinion, with one exception. I disagree with the conclusion that two factors should be eliminated from consideration when determining a reasonable attorney fee for case evaluation sanctions; namely, the "results obtained" and whether the fee is fixed or contingent. See *ante* at 534 n 20. Both *Wood v Detroit Automobile Inter-Ins Exch,* 413 Mich 573; 321 NW2d 653 (1982), and MRPC 1.5(a) specifically list these two factors as considerations when assessing reasonable attorney fees without limitation. No principled basis exists for excluding these factors from consideration in the case evaluation context, nor is there any textual support for such exclusion in either *Wood* or MRPC 1.5(a). Therefore, both factors should be considered, along with all the other factors listed in *Wood* and the MRPC, when assessing reasonable attorney fees for case evaluation sanctions. *Consideration* of these factors does not, however, affect the trial court's ultimate authority to determine which factors, if any, justify an adjustment to the base calculation of reasonable attorney fees obtained by multiplying the reasonable hourly rate by the reasonable number of hours expended.

Wood lists the factors a court should consider when awarding reasonable attorney fees:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.[1]

Similarly, MRPC 1.5(a) lists the factors to be considered in determining the reasonableness of an attorney fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

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[1] *Wood*, *supra* at 588 (citation and quotation omitted).

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.[2]

The lead opinion correctly concludes that trial courts should consider each of these factors when determining whether to adjust the base reasonable attorney fee calculation. Nevertheless, it then contradictorily concludes that when awarding reasonable attorney fees for case evaluation sanctions under MCR 2.403(O), a court is barred from considering factor #3 in *Wood* (#4 in the MRPC), concerning the "results obtained," and factor #8 in the MRPC, "whether the fee is fixed or contingent." MCR 2.403(O)(6)(b) requires that a trial court award "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." The plain language of the rule merely requires that the court award a "reasonable attorney fee"; it does not suggest that "reasonable attorney fee" means something different for case evaluation sanctions than for any other situation. Therefore, no justification exists for the lead opinion's attempt to deviate from the reasonable attorney fee calculation when case evalua-

[2] MRPC 1.5(a).

tion sanctions are involved. This carve-out exception appears to arise from its assessment of what is fair rather than from the plain language of the court rule.

Contrary to the assertion in the lead opinion, consideration of whether a fee is fixed or contingent may be helpful in determining a reasonable attorney fee award for case evaluation sanctions. If a court establishes that an attorney was working under a contingency fee agreement, knowledge of the percentage of the fee may prove to be a useful tool. Contingency fee percentages express an attorney's expectations of the case and the risks involved. While the actual percentage of a contingency fee need not be used in determining a reasonable fee award, this potentially useful information certainly should not be eliminated outright from consideration as a factor in a reasonableness analysis.

Likewise, the results obtained can also be a relevant consideration when determining reasonable attorney fees in a case evaluation situation. Although case authority specifically addressing the "results obtained" factor primarily involves situations where an adverse party is ordered to pay the other party's attorney fees outside the case evaluation context, in "reasonable attorney fee" cases, courts consistently acknowledge the relevance of the results obtained.[3] The majority provides no authority for its conclusion that the results obtained should be excluded from consideration when calculating reasonable attorney fees for case evaluation sanctions.

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[3] See, e.g., *City of Riverside v Rivera,* 477 US 561, 574; 106 S Ct 2686; 91 L Ed 2d 466 (1986); *Hensley v Eckerhart,* 461 US 424, 433; 103 S Ct 1933; 76 L Ed 2d 40 (1983); *Farrar v Hobby*, 506 US 103, 115; 113 S Ct 566; 121 L Ed 2d 494 (1992); *Davis v Southeastern Pennsylvania Transportation Auth,* 924 F2d 51 (CA 3, 1991); *Kreimes v Dep't of Treasury*, 764 F2d 1186 (CA 6, 1985).

Within the milieu of fee shifting authority, apart from the limited category of case evaluation sanctions, civil rights cases most frequently articulate how a court should evaluate the reasonableness of an attorney fee award. In these cases, the prevailing party is entitled to collect fees from the adverse party. *City of Riverside v Rivera,* 477 US 561, 574; 106 S Ct 2686; 91 L Ed 2d 466 (1986), states in a plurality opinion that the results obtained is "one of [the] many factors that a court should consider in calculating an award of attorney's fees." In another civil rights case, *Hensley v Eckerhart,* 461 US 424, 440; 103 S Ct 1933; 76 L Ed 2d 40 (1983), the United States Supreme Court calls the "results obtained" factor "crucial" in the analysis of reasonable attorney fees. *Hensley* further specifies that its decision applies in cases not involving civil rights. *Id.* at 433 n 7.

The Court of Appeals also has expressed concern about the proportionality of the attorney fees awarded to damages awards. See *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 32; 335 NW2d 710 (1983); *Burke v Angies, Inc*, 143 Mich App 683, 692-693; 373 NW2d 187 (1985). In *Petterman*, the Court of Appeals noted that the $9,304 attorney fee that was charged for a claim evaluated at $12,500 raised serious questions regarding the reasonableness of the attorney fee award. In *Burke*, the Court of Appeals again considered this aspect, but held that the $17,750 attorney fee was not excessive in light of the $175,000 damages award, i.e., approximately 10 percent of the amount of the damages award, and did not rise to the level of *Petterman*, where the attorney fees were 75 percent of the amount of the damages award.

The lead opinion seems to argue that case evaluation sanctions are singularly distinguishable from all other

fee shifting cases. I disagree. An award for attorney fees in a case evaluation sanction context is not so unlike an award for attorney fees in a civil rights case as to render the consideration of the proportionality "crucial" in one context and not a factor at all in the other. Both types of cases involve fee shifting. The majority describes the purpose of case evaluation sanctions as punishment of the party who did not accept the case evaluation and encouragement of parties to take the process seriously.[4] But any situation where one party is ordered to pay the other's attorney fees is inherently punitive. Civil rights cases allow the prevailing party to collect from the "losing" party, at least in part, to punish the losing party for necessitating the suit in the first place and to discourage both civil rights infringements and frivolous suits and defenses. Case evaluation situations are not so different from other attorney fee shifting cases to eliminate a factor from consideration that has otherwise consistently been included in the analysis.

I do not contend that fee awards must always be proportional to the results obtained. I simply suggest that *considering* the results obtained, while not requiring a proportionality rule, is reasonable and prudent. Moreover, it is consistent with federal precedent, including that which the majority cites.[5]

The lead opinion suggests that when a party rejects a case evaluation that it "should" have accepted, the adverse party necessitated the accumulation of additional fees, perhaps fees above and beyond the true value of a case. Therefore, the lead opinion asserts that the rejecting party should be responsible for fees even if

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[4] See *ante* at 527-528.

[5] See, e.g., *Riverside*, *supra*; *Hensley*, *supra*; *Davis, supra* (considering results obtained as a factor but rejecting per se proportionality rule); and *Kreimes, supra* (holding that proportionality should not be the sole deciding factor).

they are, as in this case, completely disproportionate to the damages award. It is true that some cases will involve parties who correctly valued their claims, accepted case evaluation, and were then forced to incur more fees than they could expect to receive in damages because the other party rejected the case evaluation. It is also conceivable, however, that some attorneys will, after accepting a case evaluation that the other side has rejected, proceed in a way that escalates the fees beyond any damages that could reasonably be expected in the case. To avoid such potential abuse, a trial court must consider whether fees may be disproportionate to a damages award as a part of the overall analysis.

I see no principled reason for altering the factors that should be considered when assessing reasonable attorney fees for case evaluation sanctions. Therefore, I respectfully disagree with the lead opinion. Both the "results obtained" and "whether a fee is fixed or contingent" are appropriate factors to consider in assessing the reasonableness of attorney fee awards as case evaluation sanctions, along with all the other factors listed in *Wood* and the MRPC.

MARKMAN, J., concurred with CORRIGAN, J.

CAVANAGH, J. (*dissenting*). Today the majority says much, but changes little, in its attempt at "fine-tuning," *ante* at 530, our longstanding method for assessing reasonable attorney fees under MCR 2.403(O), which has remained unchanged since this Court unanimously adopted it 25 years ago in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982).[1] In fact, despite the majority's attempt to aid appellate

[1] The *Wood* test for a reasonable attorney fee includes the following factors:

review and increase the consistency of reasonable attorney-fee awards, its new variation of the *Wood*-factors method changes little because, in the end, it still leaves the trial court with broad discretion in awarding reasonable attorney fees under the rule. Accordingly, I would not tinker with the *Wood* factors simply because in this case a contingency-fee attorney was awarded an hourly-rate fee that some on this Court would not have accepted had they been the trial judge. The *Wood*-factors method is not broken; therefore, I respectfully dissent from the majority's attempt to fix it.

In applying the *Wood* factors to this case, I would affirm the trial court's determination regarding the reasonable attorney fee for plaintiff's lead attorney, Mr. Gittleman, because that ruling was not an abuse of discretion, as it was guided by several of the *Wood* factors.[2] Further, the trial court's reasoning was supported by the information presented to the trial court, which included Mr. Gittleman's curriculum vitae, previous decisions supporting similar fee awards for his

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(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood*, *supra* at 588.]

[2] The trial court stated:

> There's no question Mr. Gittleman's a recognized practitioner in the area of dental malpractice and has superlative standing in that area, has tried numerous cases. His skill, time and labor involved here was evidence [sic] from the professional way in which this case was tried. The amount in question, the results achieved . . . that was significant. The case was of difficulty because of the complexity of the issues involved. . . . There were significant expense [sic] incurred based on my review of the billings and taking all of those factors into account, I think that the 450 dollars rate is reasonable.

services, and plaintiff's billing records. Also, defendant was offered an opportunity to contest these assertions at a hearing, but he expressly waived the opportunity. Thus, I do not agree with the majority's assertion that the attorney-fee award regarding Mr. Gittleman's services requires further analysis.

However, I do agree with the majority that the trial court did not conduct sufficient analysis to support its award of attorney fees regarding plaintiff's second-, third-, and fourth-chair attorneys. Thus, regarding those awards, I would remand to the trial court for further analysis under our longstanding precedent in *Wood*.

Turning to the majority's new fine-tuned method, this new method begins by determining the fee customarily charged in the locality for similar legal services. The majority limits what may be used to establish the customary fee to "testimony or empirical data found in surveys and other reliable reports," but "the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality." *Ante* at 531-532. The majority also requires the claimant to provide more than his attorney's own affidavit as proof of the attorney's hourly fee.[3] Then, as an example of a reliable report, the majority accepts the snapshot of the economic status of attorneys in Michigan (Snapshot) that was published in the November 2003 issue of the Michigan Bar Journal. In essence, the

[3] The lead opinion states: "We emphasize that 'the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.' " *Ante* at 531. The majority does not explain why a sworn affidavit by an officer of the court and member of the bar is not sufficient proof of the facts attested to within it, especially when those assertions are not countered by competing evidence.

majority directs lower courts to use this report to start their analyses by finding the hourly rate for the average attorney in the applicable field and locality.[4] Next, the majority requires this average fee to be multiplied by the reasonable number of hours expended in the case to give a baseline fee amount. Then, the majority allows trial courts to adjust the fee award upward or downward by applying "the remaining *Wood*/MRPC factors." *Ante* at 531.[5] Finally, the trial court must "briefly discuss its view of the remaining factors" in order to aid appellate review. *Ante* at 531.[6]

I see several problems with this new method that make its results no more consistent and reviewable than the *Wood*-factors method that it aims to fine-tune. First, I am not convinced that the *starting point* for this issue should be the customary fee in the locality, multiplied by the hours expended on the case. While that figure is undoubtedly a valid factor in the reasonable-attorney-fee analysis, I disagree with the majority's

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[4] Indeed, the Snapshot expressly "concerns . . . the 'average' attorney . . . with respect to . . . hourly billing rates . . . ." See p 5 of the complete survey report, located at <http://www.michbar.org/pmrc/articles/0000133.pdf> (accessed June 9, 2008).

[5] Under the lead opinion, it is unclear which "remaining factors" are usable in this adjustment calculation. Recall that under *Wood*, any of the enumerated factors were usable, as well as any other relevant factors. *Wood, supra* at 588. Also, MRPC 1.5(a), which the lead opinion expressly incorporates, enumerates several factors that are distinct from the *Wood* factors. Thus, it is unclear whether the "remaining factors" usable for this adjustment are those from *Wood*, MPRC 1.5(a), any other relevant factor, or all of the above. If the majority aims to make appellate review of these questions more clear, this aspect of its new method is unsuccessful.

[6] It is illogical that a trial court would be required to articulate its analysis of the remaining factors that it found to be inapposite. I would not require the trial court to state that it found a particular factor inapplicable, when simply not discussing that factor would suffice to convey that point.

attempt to give that one factor inordinate emphasis by making it the baseline amount from which all adjustments must be made. I note that this starting point method is very similar to the federal lodestar method, which begins its analysis by taking the reasonable hourly fee and multiplying it by the hours expended. In *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 478 US 546, 564; 106 S Ct 3088; 92 L Ed 2d 439 (1986), the United States Supreme Court adopted the lodestar method and stated that the "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." But my inclination against such a starting-point method, or lodestar method, is neither novel nor contrary to the views of all members of this very Court. Indeed, just eight years ago every justice in today's majority joined the opinion per curiam in *Dep't of Transportation v Randolph*, 461 Mich 757, 766 n 11; 610 NW2d 893 (2000), in which we unequivocally stated that we "reject the . . . argument that the 'lodestar' method is the 'preferred' way of determining the reasonableness of requested attorney fees." Thus, by fine-tuning the *Wood*-factors method, the majority has effectively adopted some version of the lodestar method and overruled *Randolph* in part.[7]

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[7] The majority attempts to distinguish *Randolph* so that it may implement its new average-fee method (which is a modified version of the federal lodestar method that *Randolph* rejected) and claim that *Randolph* is not affected by today's decision. While I agree that *Randolph* dealt with a different fee-shifting statute than the case-evaluation court rule at issue here, I note that the differences are irrelevant—at least with respect to the question of reasonableness.

Indeed, the statute in *Randolph*, MCL 213.66(3), mandates that the fee question hinge on the reasonableness of plaintiff's actual attorney

To be clear, I am not opposed to giving the average fee equal weight in this multifactor reasonable-fee analysis; but I am opposed to it playing a paramount role by being the starting point because the average fee does not represent the reality that a reasonable attorney fee under MCR 2.403(O) is not preliminarily derived from an average attorney fee charged in a locality.[8] This is evidenced in several respects.

First, the reasonable attorney fee awarded under MCR 2.403(O) is retrospective in its analysis, whereas the average rate charged in a locality is prospective in its focus. In other words, attorney fees awarded under MCR 2.403(O) depend heavily on, among other things, what work was required because of the other party's rejection of the case-evaluation award, the outcome of

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fees, whereas the case-evaluation court rule only allows a reasonable attorney fee for the services the aggrieved party was forced to procure as a result of the other party's rejection of the case evaluation. In other words, this difference is only significant in the context that the fee analysis occurs: in MCL 213.66(3), the reasonableness of the fee actually charged is evaluated, and under the case-evaluation court rule, the reasonableness of the services necessitated is evaluated. However, that difference does not change the main issue, which is reasonableness. Indeed, the opinion per curiam in *Randolph* stated that "[i]nitially, the court must determine whether the 'owner's' attorney fees are 'reasonable.' " *Randolph*, *supra* at 765. Further, in this reasonableness analysis, the *Randolph* Court went on to include the factors in MRPC 1.5(a), *id*. at 766, which are the very factors that the majority now adds to the case-evaluation fee analysis. Accordingly, despite the majority's attempt to say otherwise, the reasonableness analysis from *Randolph* is not so unlike that in today's case. Additionally, *Randolph* expressly rejected any average-fee starting point. Thus, the majority cannot have it both ways. Either the reasonableness analysis under either fee-shifting provision includes an average-fee starting point and *Randolph* is partially overruled, or *Randolph*'s holding precludes the majority's new fine-tuned average-fee starting point because it expressly rejected such a method.

[8] While it is true that MCR 2.403(O)(6)(b) relies on the reasonable hourly rate, it nowhere mandates, or even references, a starting point that hinges on the average hourly rate.

the case, and the skill that the outcome required—all of which depend on the trial's outcome. This stems from the text of the court rule, which expressly limits its award to "the opposing party's *actual* costs . . . ," MCR 2.403(O)(1) (emphasis added), which are defined as "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for *services necessitated* by the rejection of the case evaluation," MCR 2.403(O)(6)(b) (emphasis added). Accordingly, the reasonable attorney fee is what the trial court recognizes, after completion of the trial, as the reasonable value of that particular attorney's service in that particular trial. This award is not necessarily what the client and his attorney agreed to as the fee, but it could be as high as the agreed-to amount.[9]

In contrast, the average rate charged in a locality, which the majority's rule initially relies on, involves a prospective focus because it uses the fees on which parties and their lawyers have agreed before the pending litigation. Thus, while this average rate is a relevant factor in the reasonable-fee analysis, it should not be the starting point any more than any other relevant factor should be, because it does not share the retrospective focus that MCR 2.430(O) expressly requires.

Also, the majority's average-rate method wrongly assumes that the average rate exists for any given legal service performed. While an average rate may exist for some repetitive or general legal services, it does not exist for the work conducted in prosecuting a claim through formal litigation, as is required in every case involving case-evaluation sanctions. In other words,

[9] The majority accepts as much in stating that the rule "only permits an award of a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the actual fee charged . . . ." *Ante* at 528 (citations omitted).

every time a party imprudently rejects a case-evaluation award, the opposing party is forced to subject its claim to the slower, more expensive rigors of trial.[10] And it is undisputed that no two trials are the same; thus, no two reasonable trial fees are the same. In essence, the majority rule asks us to accept the illogical premise that legal services provided at trial are like manufactured products that the consumer can take off a store's shelf, each identical product being equally valuable. But, even within the very same attorney's cases, the average billing rate does not necessarily equate to the reasonable value of the attorney's performance at a given trial.[11]

As noted earlier, this reality is exactly what the multifactor *Wood* method recognizes and the retrospective language of MCR 2.403(O) requires. The majority's starting-point rule does not recognize this and makes the illogical assumption that the average rate charged by similarly skilled advocates is presumptively reasonable, and only then adjustable for individual circumstances. I would not start the analysis with the average attorney fee because that construct is not in accord with the language of the court rule or its purpose.[12]

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[10] The majority acknowledges these purposes of MCR 2.403(O). *Ante* at 527-528.

[11] It is true that in the "real world" one must assume that the value of the attorney's trial advocacy is the same from one trial to the next because attorneys do not set their fees after trial by adjusting them for the results delivered. But MCR 2.403(O) is not constrained to the pretrial analysis like the average fee is; the rule depends on the reasonable fee for the services that were *necessitated* by a party's rejection of a case-evaluation award.

[12] I am also not persuaded by the majority's unsupported intimations that the *Wood* factors have been applied inconsistently and that they need a fine-tuned starting point. Nor do I accept the majority's new requirement that trial courts discuss each and every factor in order to make appellate review possible. I note that the majority sees these very

Also, I question the majority's assertion that the average attorney fee for a particular attorney's services is easily ascertainable. In conclusory fashion, the majority states that "[t]he reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work." *Ante* at 531. But, contrary to the majority's assertion, the market rate for an individual attorney's work is not some figure that can be plucked from a reference manual or interpolated from a statistical graph. The fallacy of such a proposition has been noted by the United States Supreme Court when, in a similar context, it stated:

> [D]etermining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely. The fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer's customary rate. . . . Nevertheless, . . . the critical inquiry in determining reasonableness is now generally

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problems as inconsequential in other contexts. For instance, in *Kreiner v Fischer*, 471 Mich 109, 133-134; 683 NW2d 611 (2004), the majority accepted a similarly subjective list of court-made, nonexclusive factors as giving acceptable guidance to a similar fact-intensive analysis. I dissented in *Kreiner*, but the majority in that case adopted a list of factors that, like the *Wood* factors, give no starting point, have led to seemingly disparate results, and have confounded appellate courts, as evidenced in this Court's several peremptory reversals of the genuine attempts by the Court of Appeals to apply *Kreiner*'s amorphous factors. For the most recent examples of this reality, see *Jones v Olson*, 480 Mich 1169 (2008), and *Minter v Grand Rapids*, 480 Mich 1181 (2008). It is not clear why the *Kreiner*-factors method is not flawed for the same reasons that the *Wood* method is held to be today.

> recognized as the appropriate hourly rate. And the rates charged in private representations may afford relevant comparisons. [*Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984).]

I agree with the Court in *Blum*; the appropriate hourly rate is a valid inquiry, and assessing that rate should include comparisons with rates for similar services. And, like the Court in *Blum*, I recognize that the market rate for any given attorney is simply not an easily grasped number; thus, I disagree with the majority's attempt to initially set the appropriate hourly rate at the average rate for attorneys in a particular locality.

Nonetheless, assuming that such an average rate, or market rate, for a given attorney is easily ascertainable, the majority gives little guidance regarding how its new rule adds to what trial courts have already been using in evaluating reasonable attorney fees. The majority states that the average rate, or market rate, can be established by "testimony or empirical data found in surveys and other reliable reports." *Ante* at 531-532. First, I note that, if the majority insists on finding the market rate, one of the best indicators of the market rate for a service is what a consumer agreed to pay for it, i.e., the hourly rate on which this particular attorney and his client agreed. I would not require an attorney and his client to give testimony to prove they agreed to a certain hourly fee when the court can deduce as much by simply looking at the billing documents, as the trial court did in this case.[13]

Second, regarding empirical data and reliable reports, it is unclear what standard of admittance courts

[13] Moreover, this testimonial requirement has no effect on this case because defendant expressly waived an evidentiary hearing on the fee issue when the trial court offered him one.

are to apply to such sources. Apparently by way of example, the majority points to the survey described in the Snapshot conducted by the state bar.[14] While the state bar's surveys are very useful in giving a broad picture of the financial status of the practice of law in Michigan, I would not cede our courts' discretion in assessing reasonable attorney fees to surveys that derive their conclusions from voluntary submissions. In fact, the survey was sent to only 25 percent of the members of the Michigan bar. What is more, only 20 percent of those surveys were returned. Thus, this "reliable" source is based on the responses of only 5 percent of the legal practitioners in this state. This is a stunningly low sample from which to assess the "fee customarily charged in the locality for similar legal services . . . ." *Ante* at 531. Also, the survey's ability to give average hourly fees in a particular locality is limited because in many of its localities it received only a small number of responses. For instance, in Muskegon County the hourly fee is based on a paltry four responses, which supposedly gives the average of all types of practices in that locality. In fact, in 12 of the 30 localities sampled, the survey reports less than 10 responses.[15]

The majority also does not describe how the survey is to be used to determine the customary fee for similar legal services. This lack of direction creates a problem in this case because the survey does not include a category for dental malpractice; in fact, it does not even

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[14] While the majority allows for reference to empirical data found in surveys and other reliable reports, it only directly endorses one such report. It is unclear if there are other such acceptable reports, and what standard any other reports must meet to be admissible. Not knowing the answers to those questions, I limit my analysis to the single source that the majority endorses as acceptable.

[15] I also note that this 2003 survey puts the hourly rate for the 95th percentile in the highest paying locality in Michigan at $440.

include the broader category of medical malpractice. Accordingly, I question this survey's ability to give any guidance beyond that already available to the trial court, especially regarding this case's unique practitioner.[16] In this regard, the majority concedes that its lone example of a reliable report is of small utility: "[T]he benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area." *Ante* at 532. Nevertheless, the majority gives the lower courts no direction on how to use this survey while they wait for more specific surveys.

I am also troubled by the ramifications of the majority's rule because any practitioner who reads this opinion now realizes that his voluntary submissions to surveys are powerful enough to affect the future results of attorney-fee awards. In other words, the majority unwittingly invites inflated survey submissions. Further, I do not understand why the majority chooses a survey that was conducted more than four years ago. Noting that the trial in this case occurred in December 2004, it is not clear why the 2003 version of this survey is preferable to a later version.

Thus, while I have no qualms with trial courts using these types of surveys for broad guidance on this multifactor analysis, I would not elevate this survey as the lone representative of reliable reports that courts should use in beginning their reasonable fee analysis.

The majority also does not define the scope of its new rule. The majority has articulated a new rule for attorney-fee awards under MCR 2.403; yet that new test's application to other attorney-fee contexts is left

[16] It is undisputed that the plaintiff's lead attorney is a specialist in the field of dental malpractice. He has extensive experience in this state and around the country in this field.

for its readers to ponder. Indeed, the majority's new test specifically incorporates the third factor under MRPC 1.5(a).[17] Does this now mean that the third factor of MRPC 1.5(a) is the starting point for all proceedings under that provision of our ethical code? Further, does this new rule apply to other fee-shifting provisions? For example, does the majority's test apply to the fee-shifting provisions of the Uniform Condemnation Procedures Act, MCL 213.66, and the Michigan Civil Rights Act, MCL 37.2802, each of which involves reasonable attorney fees? And if today's rule only applies to MCR 2.403, what is the basis for such a limited application of the new rule? I would not forge ahead in the name of consistency and ease of appellate review while concomitantly creating these uncertainties in the wake.

I also note that the majority mandates that the trial court decide whether it was reasonable for plaintiff to have two attorneys representing him at trial. I am aware of no authority that casts doubt upon the reasonableness of a party's decision to retain the services of multiple attorneys at trial. In addition, if this multiple-attorney analysis is a new court-made factor in every reasonable-fee analysis, the majority should state as much. See note 5, *supra*. It should also note if this element, like all earlier elements, must also always be discussed by the trial court. See note 6, *supra*.

In the end, I can empathize with the majority in its desire to bring consistency to attorney-fee awards under MCR 2.403. But that desire is inconsistent with the rule's inherently subjective analysis, and, with that in mind, the majority has gone to great lengths while

[17] The third factor of the reasonableness analysis of MRPC 1.5(a) evaluates "the fee customarily charged in the locality for similar legal services."

changing little.[18] The instant case is a perfect example of this. It is probable that when this case returns to the trial court, under the majority's new test, that court will use the Snapshot, find an average rate for the locality, and then adjust that rate to comport with its original award. What is more, the trial court can support a reiteration of the fee award by simply restating its original rationale for its first award. Thus, I would not expend such effort and make these changes to our current method because they add little to the analysis while propagating the numerous questions I have noted. Instead, I would do as courts have been doing for the 25 years since *Wood*: simply evaluate the several factors that guide a court in assessing "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b).[19]

Simply put, this analysis cannot be molded into the mathematical precision that the majority seeks because, in the end, under either the *Wood* method or the

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[18] If the majority is earnest in its proclamation that it can implement its new version of the lodestar method without affecting *Randolph*, which expressly rejected such a method, it should pay heed to *Randolph*'s words regarding the consistency of attorney fee awards:

> [C]ourts can and will reach different decisions concerning reimbursement of attorney fees. However, that is the nature of discretionary decisions. The key in each case is that the trial court provide a reasoned basis for its decision. [*Randolph*, *supra* at 767-768.]

[19] The majority misunderstands me when it claims that my protestations are based on the proposition that "a 'reasonable fee' for an exceptional lawyer cannot be determined by using the fee charged by the average attorney." *Ante* at 535. This is not true. Again, my main contention is that the majority's average-fee starting point gives inordinate weight to that factor, when the rule does not mandate such a starting point. I find that the *Wood*-factors method provides sufficient guidance. Stated as simply as possible, my position is this: *Wood* is good.

majority's fine-tuned method, a trial court still exercises its discretion in assessing the reasonable value of the services that a particular advocate delivered in a particular trial. Not all attorneys are created equal, and the reasonable attorney-fee awarded under MCR 2.403(O) should recognize as much. Because the new method adopted by the majority does not reflect this as well as the *Wood*-factors method does, I respectfully dissent.

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

BOODT v BORGESS MEDICAL CENTER

Docket No. 132688. Decided July 2, 2008.

Melissa Boodt, as personal representative of the estate of David Waltz, deceased, brought a medical-malpractice, wrongful-death action in the Kalamazoo Circuit Court against Borgess Medical Center, Michael A. Lauer, M.D., and Heart Center for Excellence, P.C. The defendants moved to dismiss on the ground that Boodt's notice of intent failed to comply with the requirements of MCL 600.2912b. The court, Philip D. Schaefer, J., agreed that the notice of intent was insufficient under the statute and, because the limitations period had expired, granted the defendants summary disposition. The Court of Appeals, DAVIS, J. (WHITE, P.J., concurring and WHITBECK, C.J., concurring in part and dissenting in part), affirmed in part, but reversed with respect to the grant of summary disposition to Lauer. The Court of Appeals concluded that the notice, read as a whole, adequately notified Lauer of the factual basis of the claim against him. 272 Mich App 621 (2006). Lauer and Heart Center sought leave to appeal, and Boodt sought leave to cross-appeal. The Supreme Court ordered and heard oral argument on whether to grant the applications or take other peremptory action. 480 Mich 908 (2007).

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

Boodt's notice of intent did not satisfy the requirements of MCL 600.2912b(4)(e) with respect to Lauer. The statement concerning causation did not describe the manner in which Boodt alleged that Lauer's breach of the standard of practice or care was the proximate cause of the injury she claimed, as required by the statute. Even when read in its entirety, the notice did not describe the manner in which the breach was the proximate cause, but merely indicated that Lauer had caused a perforation of an artery and then failed to do several things that he presumably should have done. The notice did not describe the manner in which Lauer's actions or lack of actions caused Waltz's death. Given that Boodt's notice of intent did not contain all the information required by the statute, she was not authorized, under MCL 600.2912b(1) and (4), to file a complaint and affidavit of merit in

this case, and thus the complaint and affidavit she did file could not have tolled the period of limitations under MCL 600.5856(a).

Reversed in part; trial court order granting summary disposition reinstated with respect to Lauer.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, concluded that the plaintiff's notice of intent stated the manner in which the perforation was the proximate cause of Waltz's death and that her notice thus met the requirements of MCL 600.2912b. MCL 600.2301 should control when a notice of intent is deficient. Thus, even if the plaintiff's notice were deficient, the deficiency should be disregarded if it does not affect Lauer's substantial rights. Justice CAVANAGH would remand the case to the trial court for consideration under MCL 600.2301.

NEGLIGENCE — MEDICAL MALPRACTICE — LIMITATION OF ACTIONS — NOTICES OF INTENT.

A plaintiff cannot commence a medical-malpractice action before he or she files a notice of intent that contains all the information required by MCL 600.2912b(4), and a complaint and affidavit of merit filed after a notice of intent that does not contain all the information required cannot toll the period of limitations for a medical-malpractice action (MCL 600.2912b[1], [4]; MCL 600.2912d[1]; MCL 600.5856[a]).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Turner & Turner, P.C.* (by *Matthew L. Turner*), for Melissa Boodt.

Smith Haughey Rice & Roegge (by *William L. Henn* and *Carol D. Carlson*) for Borgess Medical Center.

Willingham & Coté, P.C. (by *James L. Dalton*, *Matthew K. Payok*, and *Curtis R. Hadley*), for Michael A. Lauer, M.D., and Heart Center for Excellence, P.C.

Amici Curiae:

Charfoos & Christensen PC (by *David R. Parker*) for the Michigan Association for Justice.

Olsman Mueller, P.C. (by *Jules B. Olsman* and *Donna M. MacKenzie*), for Citizens for Better Care.

PER CURIAM. At issue in this wrongful-death, medical-malpractice action is whether plaintiff's notice of intent was sufficient with respect to the defendant physician, Michael A. Lauer, M.D. The trial court granted defendants' motion for summary disposition, holding that plaintiff's notice of intent was not sufficient, and the Court of Appeals reversed with respect to the grant of summary disposition to Lauer. 272 Mich App 621; 728 NW2d 471 (2006).

Regarding causation, the notice of intent states: "If the standard of care had been followed, [David] Waltz would not have died on October 11, 2001." This statement does not describe the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice," as required by MCL 600.2912b(4)(e). Even when the notice is read in its entirety, it does not describe the manner in which the breach was the proximate cause of the injury. When so read, the notice merely indicates that Lauer caused a perforation and that he then failed to do several things that he presumably should have done, such as perform a pericardiocentesis in a timely manner. However, the notice does not describe the manner in which these actions or the lack thereof caused Waltz's death. As this Court explained in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004) (*Roberts II*), "it is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." (Emphasis in original.)

Although the instant notice of intent may conceivably have apprised Lauer of the nature and gravamen of

plaintiff's allegations, this is not the statutory standard; § 2912b(4)(e) requires something more. In particular, it requires a "statement" describing the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(e). The notice at issue here does not contain such a statement.[1]

On the other hand, as we also explained in *Roberts II,* 470 Mich at 694, § 2912b(4) does not require a plaintiff to provide statements in the notice that "ultimately [must] be proven, after discovery and trial, to be correct and accurate in every respect." We recognize that a "notice of intent is provided at the earliest stage of a medical malpractice proceeding," *id.* at 691, and, thus, a plaintiff need only "specify what it is that she is *claiming* under each of the enumerated categories in § 2912b(4)," *id.* at 701 (emphasis in original). As long as these claims are made in good faith, the notice is not rendered insufficient simply because it is later discovered that the claims are imperfect or inaccurate in some respect. *Id.* at 692 n 7.

This Court has already held that a defective notice of intent does not toll the period of limitations. *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 64; 642 NW2d 663 (2002) (*Roberts I*).[2] Plaintiff now argues that even if the

[1] The dissent contends that the notice does contain such a statement because, according to the dissent, it states that "Lauer negligently caused Waltz's death by the continued administration of an anticoagulant after internal bleeding was detected." *Post* at 567. However, contrary to the dissent's contention, this statement cannot be found anywhere in the notice of intent. Instead, the notice only states that defendants "[f]ailed to timely recognize the perforation and stop the anticoagulation and order an echocardiogram[.]" Nowhere in the notice does plaintiff state the "manner in which [this failure] was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(e).

[2] The dissent complains that defendant waited until it was "too late to correct an alleged deficiency" to raise it. *Post* at 565. However, as we

notice here did not toll the period of limitations, under MCL 600.5856(a) and MCL 600.2912d(1),[3] the filing of the complaint and the affidavit of merit *did* toll the period. See *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007) (holding that the filing of the complaint and affidavit of merit tolls the period of limitations, at least until the sufficiency of the affidavit is successfully challenged). We respectfully disagree.

MCL 600.2912b(1) states that "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." MCL 600.2912b(4) states that the "notice given to a health professional or health facility under this section shall contain a statement of at least all of the following . . . ." Therefore, a plaintiff cannot commence an action before

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explained in *Roberts I,* 466 Mich at 59, "MCL 600.2912b places the burden of complying with the notice of intent requirements on the plaintiff and does not implicate a reciprocal duty on the part of the defendant to challenge any deficiencies in the notice before the complaint is filed." Further, the case the dissent relies on for its position that "dismissal on the basis of a deficient notice of intent [is] inappropriate when there was no prejudice to the recipient," *post* at 570, citing *Lisee v Secretary of State,* 388 Mich 32; 199 NW2d 188 (1972), did not involve the notice of intent specifically required by § 2912b. Further, in *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 213; 731 NW2d 41 (2007), this Court, in contrast to the holding in *Lisee*, 388 Mich at 45, made clear that a prejudice requirement cannot be read into a statutory notice provision that does not itself contain such a requirement. The *Rowland* Court's approach is most consistent with our goal to uphold the Legislature's intent by honoring the Legislature's choice of language. Our adherence to *Rowland* explains why we treat the statutory language at issue here differently from how *Lisee* treated the statutory language at issue in that case.

[3] MCL 600.5856(a) states that the filing of a complaint tolls the period of limitations. MCL 600.2912d(1) requires a medical-malpractice plaintiff to file an affidavit of merit with the complaint.

he or she files a notice of intent that contains all the information required under § 2912b(4). See *Roberts I,* 466 Mich at 64 (holding that the period of limitations is not tolled unless notice is given in compliance with all the provisions of § 2912b[4]). Because plaintiff's notice of intent here did not contain all the information required under § 2912b(4), she could not have commenced an action.[4] Therefore, her complaint and affidavit of merit could not have tolled the period of limitations.

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[4] The dissent argues that, pursuant to MCL 600.2301, we should remand this case to the trial court to allow plaintiff to amend her notice of intent. 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.

As discussed above, because the notice of intent was deficient, no action is pending, and § 2301 only applies to pending actions. In addition, § 2301 only applies to a "process, pleading, or proceeding." Although the dissent acknowledges that a notice of intent is not a pleading, it argues that a notice of intent is a "proceeding." *Post* at 568 and n 6. However, contrary to the dissent's contention, our decision in *Fildew v Stockard,* 256 Mich 494; 239 NW 868 (1932), did not even discuss the meaning of the term "proceeding." Moreover, any discussion in *Fildew* regarding whether the statute permitted amendment was dictum in light of the fact that the Court first concluded that the defendants had waived any objection to the plaintiff's misdescription in the summons and the affidavits for writs of garnishment of the state in which the defendant company was incorporated. *Id.* at 496. Likewise, our decision in *Tudryck v Mutch,* 320 Mich 99, 107; 30 NW2d 518 (1948), did not discuss the meaning of the term "proceeding." Nor did we apply the predecessor of § 2301 to amend the settlement agreement in *Tudryck*, as demonstrated by the fact that we found it "unnecessary to [even] determine [whether] the settlement agreement was defective . . . ." *Id.* Neither of these cases stands in any way for the proposition that a notice of intent constitutes a "proceeding."

This case is distinguishable from *Kirkaldy*, because there the plaintiff presumably filed a notice of intent that satisfied § 2912b(4)(e). We concluded that the plaintiff's subsequent filing of a complaint and an affidavit of merit, which was later determined to be defective, tolled the period of limitations until the affidavit's sufficiency was successfully challenged. In this case, however, plaintiff failed to file a notice of intent that satisfied the requirements of § 2912b(4)(e), and, thus, plaintiff was not yet authorized to file a complaint and an affidavit of merit. Therefore, the filing of the complaint and the affidavit of merit that plaintiff was not yet authorized to file could not possibly have tolled the period of limitations.

Because we conclude that plaintiff's notice of intent with regard to Lauer did not satisfy the requirements of § 2912b(4)(e), we reverse in part the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition to Lauer. Finally, we deny plaintiff's application for leave to appeal as a cross-appellant because we are not persuaded that we should review the question presented.

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

CAVANAGH, J. (*dissenting*). I believe that plaintiff has stated the manner in which the perforation of decedent's artery was the proximate cause of his death and, thus, that her notice of intent meets the requirements of MCL 600.2912b. I also believe that when a notice of intent required by MCL 600.2912b is deficient, MCL 600.2301 should control and the deficiency should be disregarded if there is no effect on the substantial rights of a party. Most importantly, I believe that the Legislature did not intend a statute mandating notice to one

party to be used by that party to defeat another party's claim after it is too late to correct an alleged deficiency. Therefore, I respectfully dissent.

On October 5, 2001, David Waltz was admitted to Borgess Medical Center for chest pains. The next day, Dr. Michael Lauer performed an angioplasty on Waltz. During the procedure, Lauer perforated Waltz's coronary artery. Waltz experienced severe hypotension and hypoxia. Dr. Alponse DeLucia, III, a cardiothoracic surgeon, performed emergency coronary-bypass surgery, but, by this time, Waltz had suffered an anoxic brain injury. He died six days later, on October 11, 2001. According to Lauer's own testimony, the perforation was the cause of Waltz's death.

Plaintiff is the personal representative of Waltz's estate. Following the requirements of MCL 600.2912b(1) and (2), plaintiff mailed a notice of intent (NOI) to three defendants on January 13, 2003.[1] After waiting 182 days, as required by MCL 600.2912b(1), plaintiff commenced this action by filing a complaint naming the three defendants and an affidavit of merit on June 19, 2003. Plaintiff filed the complaint and affidavit four months before the expiration of the applicable period of limitations. MCL 600.5805(5), now MCL 600.5805(6). In February 2005, 20 months after plaintiff filed suit and more than two years after receiving plaintiff's NOI, defendants filed a motion for summary disposition, claiming that a defect in plaintiff's NOI entitled them to dismissal.

The majority concludes that plaintiff did not meet the requirements of MCL 600.2912b(4)(e), which requires a statement of the "manner in which it is alleged

[1] The three named defendants are Lauer, Borgess Medical Center, and Heart Center for Excellence, P.C.

the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." I disagree.

Plaintiff's NOI states that "Mr. Waltz presented to defendants for an elective [percutaneous transluminal coronary angioplasty]. During the procedure, the defendant caused a perforation which led to Mr. Waltz' death." Plaintiff's NOI further alleges that Waltz might have survived but for negligence in responding to the perforation. The NOI alleges actions that defendants should have taken but did not. It states that defendants did not (1) recognize the perforation in a timely manner, (2) stop the administration of an anticoagulant, (3) order an echocardiogram, (4) insert a balloon pump, (5) timely perform a pericardiocentesis,[2] (6) attempt another pericardiocentesis after the initial attempt proved unsuccessful, and (7) keep the LAD[3] wire in place to maintain access to the blood vessel.

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[2] According to MedlinePlus, Medical Encyclopedia, a service of the National Institutes of Health and the United States National Library of Medicine:

> Pericardiocentesis involves the use of a needle to withdraw fluid from the pericardial sac (membrane that surrounds the heart).
>
> * * *
>
> This test may be performed to remove fluid that is compressing the heart for examination. It is usually done to evaluate the cause of a chronic or recurrent pericardial effusion (fluid in the pericardial sac). It may also be done as a treatment measure to relieve cardiac tamponade (compression of the heart from an accumulation of fluid within the pericardial sac). [<http://www.nlm.nih.gov/medlineplus/ency/article/003872.htm#Definition> (visited June 2, 2008).]

[3] "LAD" refers to the left anterior descending coronary artery, in which the guide wire was placed for Waltz's angioplasty.

I believe that this is a statement of the manner in which Lauer's breach was the proximate cause of Waltz's death. Plaintiff's NOI alleges that Lauer's breach caused a perforation of Waltz's artery and deprived Waltz of the enumerated means that would have helped him survive the emergency.

This Court has stated that, given the presuit timing of the notice and lack of information available, "the claimant is not required to craft her notice with omniscience"; thus, it is not fatal that the allegations in the NOI are inaccurate. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004). Plaintiff alleges, for example, that Lauer negligently caused Waltz's death by the continued administration of an anticoagulant after internal bleeding was detected.[4] This may or may not be accurate, but it is an allegation of the manner in which Lauer's negligence was the proximate cause of the injury in this case.

I am uncertain what the majority finds lacking here, and the majority does not specify it. In fact, the majority appears to say that plaintiff did not state the manner of causation because she did not state the manner of causation. I would find plaintiff's statement sufficient under MCL 600.2912b(4)(e).

Additionally, if plaintiff's NOI were deficient, I would allow her to amend it or direct the trial court to disregard the deficiency in this case. The most obvious, direct, and irrefutable legislative intent of this statute is notice. Indeed, the statute mandates that a potential medical-malpractice defendant receive notice of impending litigation. There is no indication of an intent for the NOI to be used as a trap for the unwary, ambushing a plaintiff who is without notice of the

[4] This allegation is readily ascertainable in plaintiff's NOI.

technical defect in her NOI.[5] The majority's decision annihilates notice for a plaintiff with the slightest deficiency under MCL.600.2912b. What is worse, a plaintiff may receive this terminal blow, not only without notice of the NOI's deficiency, but after any opportunity to correct the defect is past.

I believe that MCL 600.2301 should apply when an NOI is deficient. That statute 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.

While MCR 2.118 controls the amendment of pleadings, an NOI is not a pleading, and its amendment is controlled by MCL 600.2301, which applies to any process or proceeding before a court.[6]

The statute allows amendment "at any time" before judgment is rendered. At the time defendants asserted that plaintiff's NOI was defective, judgment had not

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[5] In *South Norfolk v Dail*, 187 Va 495, 503; 47 SE2d 405 (1948), the court aptly referred to dismissal of a claim on the basis of a defective notice as "a trap for the unwary."

[6] In my view, service of an NOI is part and parcel of medical-malpractice "proceedings" in Michigan; service of an NOI is encompassed by MCL 600.2301. See *Fildew v Stockard,* 256 Mich 494; 239 NW 868 (1932) (applying 1929 CL 14144, a predecessor of MCL 600.2301, to an affidavit for a writ of garnishment that was required to be filed before commencement of the action), and *Tudryck v Mutch*, 320 Mich 99, 106-107; 30 NW2d 518 (1948) (applying 1929 CL 14144 to a settlement agreement and stating that "[t]o argue at this late date that the Tudrycks did not authorize the settlement or that their attorney exceeded his authority is, to say the least, not appealing to the conscience of the Court").

been entered (in fact, the trial had not even begun yet). Therefore, allowing amendment is proper. The amendment may be "either in form or substance." So amending the substance of the NOI to more clearly state, for example, the manner in which the breach caused the injury is proper.

The statute operates "for the furtherance of justice." Justice is furthered by applying MCL 600.2301 in a case in which a statute mandating notice to one party operates as a terminal trap without notice to the party required to give notice. In this case, Lauer has not asserted that plaintiff's claim lacks merit, that he was not negligent, or that plaintiff's notice failed to put him on notice of plaintiff's claim. Lauer merely alleges that plaintiff's NOI was technically insufficient under MCL 600.2912b. The aim 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.' " *Gratiot Lumber & Coal Co v Lubinski*, 309 Mich 662, 668-669; 16 NW2d 112 (1944) (citation omitted). If plaintiff's NOI were deficient, MCL 600.2301 should apply to allow amendment.

The second sentence of MCL 600.2301 requires a court to "disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." I do not believe that Lauer's substantial rights would be affected by disregarding a defect in plaintiff's NOI in this case. The only possible effect on Lauer is lack of notice. But lack of notice is not evident here because he had actual notice.[7] Indeed, in deposition

[7] Additionally, the specific notice requirements of MCL 600.2912b(4) are precisely duplicated in the complaint and affidavit of merit once litigation is commenced. See MCL 600.2912d(1), listing the required content of an affidavit of merit; MCR 2.111(B), listing the required

testimony taken on October 24, 2003, Lauer stated that he knew what the case was about. In his answer to plaintiff's interrogatories, submitted on December 3, 2003, Lauer admitted that he caused the perforation of Waltz's artery and that the perforation caused Waltz's death. When asked in those interrogatories whether he admitted negligence, Lauer responded, "Perforation is a rare, but accepted, complication of [percutaneous coronary intervention, i.e., angioplasty], even when everything is done properly." Lauer knew what plaintiff's claim was about. He now challenges that claim only to invalidate it after plaintiff can no longer fix the alleged error.[8]

In similar circumstances, this Court held that dismissal on the basis of a deficient notice of intent was inappropriate when there was no prejudice to the recipient. In *Lisee v Secretary of State*, 388 Mich 32; 199 NW2d 188 (1972), the plaintiff gave the Secretary of State notice of a potential claim, as required by MCL 257.1118, which stated:[9]

> In all actions in which recovery is to be sought against the [motor vehicle accident claims] fund, said action must be commenced within 3 years from the time the cause of action accrues. Provided that *recovery from the fund shall not be allowed in any event unless notice of intent* to claim against the fund is served upon the secretary, on a form prescribed by him, within 1 year of the date that the cause of action shall accrue. [Emphasis added.]

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content of a complaint; and *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994), stating the requirements for a claim asserting medical malpractice.

[8] Because I believe that plaintiff's notice of intent was sufficient, or that any insufficiency should be disregarded under MCL 600.2301, I do not reach the issue whether plaintiff's complaint and affidavit of merit tolled the period of limitations.

[9] After the claim accrued in *Lisee*, the statute was amended to make the notice period six months, among other changes. 1968 PA 223.

The Secretary of State refused to pay the plaintiff's claim and defended on the grounds that the plaintiff had failed to file a notice of intent within the statutory period. *Lisee*, *supra* at 37. This Court held that the deficient notice of intent did not bar recovery because there was no prejudice to the Secretary of State. *Id.* at 45. We reasoned as follows:

> The purpose of the notice provision of [MCL 257.1118] is met in this case. The Secretary of State did receive actual notice of the accident through the notice of intent to claim filed by the estate of Ella Burgy . . . . Hence, the Secretary of State *was not prejudiced in any way*. Because of the remedial nature of this Act and because of the lack of prejudice to the defendant, we hold that plaintiffs' *failure to file notice* within the time required under [MCL 257.1118] *is not a bar to recovery* under the circumstances of this case. [*Id.* at 44-45 (emphasis added).]

There is no reason to treat MCL 600.2912b differently from MCL 257.1118 when the critical language is nearly identical.

The majority states that MCL 600.2912b places no duty on a defendant to challenge deficiencies in a plaintiff's NOI before the plaintiff's case is filed. The question here is not one of a defendant's duty; rather, the question is one of legislative intent. The clear intent of MCL 600.2912b is to require pretrial notice to potential medical-malpractice defendants. I find no indication in the statute that it was intended to trap unwary plaintiffs and defeat otherwise meritorious claims months or years after an action is commenced.

I believe that plaintiff's NOI contains a statement of the manner in which Lauer's breach caused the injury at issue. If plaintiff's NOI were deficient, I would remand this case to the trial court for consideration

under MCL 600.2301. On remand, Lauer would be free to argue that his substantial rights have been affected.

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

ESTES v TITUS

Docket No. 133098. Argued November 6, 2007 (Calendar No. 4). Decided July 2, 2008.

Jan K. Estes, as personal representative of the estate of her deceased husband, Douglas D. Estes, brought a wrongful-death action in the Kalamazoo Circuit Court against Jeff E. Titus, who had been convicted of first-degree murder for the death. After Estes filed this action, Titus's wife, now known as Julie Swabash, filed for divorce. The divorce judgment awarded Swabash substantially all the marital assets. Estes sought to intervene in the divorce action to argue that the property settlement constituted a fraud upon Titus's creditors, such as herself, but the family division of the circuit court, Patricia N. Conlon, J., denied her motion, concluding that the property settlement was equitable in light of Titus's incarceration for life without parole. Estes did not appeal that denial. After the court in this action, J. Richardson Johnson, J., awarded Estes a judgment against Titus, however, she requested that the court subpoena Swabash to appear for discovery regarding the marital assets and to show cause why she should not be made a party to this case. Estes also requested that the court enjoin Swabash from transferring the property, arguing that Titus's transfer of marital property to Swabash was fraudulent under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*. Judge Johnson ultimately denied the request to add Swabash as a party defendant, concluding that he had no authority to amend a divorce judgment entered by another judge. Estes appealed by leave granted. The Court of Appeals, WHITE and MARKEY, JJ. (O'CONNELL, P.J., concurring in part and dissenting in part), reversed and remanded the case to the trial court so that Swabash could be added as a party defendant in supplemental proceedings in the wrongful-death case. 273 Mich App 356 (2006). The Supreme Court granted Swabash leave to appeal. 478 Mich 864 (2007).

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

The UFTA applies to a transfer of property in a divorce action that incorporates the parties' property-settlement agreement.

Property that is owned as tenants by the entirety is not subject to process by a creditor holding a claim against only one spouse. Such property is not an asset under the UFTA, and the distribution of that property in a divorce judgment is not a transfer for purposes of the UFTA.

1. The UFTA does not exempt from its scope property transferred pursuant to a divorce judgment, but property transferred pursuant to a divorce judgment is subject to a UFTA action only if it meets the act's definition of an asset. A property-settlement agreement incorporated in a divorce judgment disposes of the parties' interests in the marital property. If a property-settlement agreement is incorporated in a divorce judgment, the judgment effectuates a transfer of the property for purposes of the UFTA when the judgment enters.

2. Property that is held as tenants by the entirety and exempt from the claims of the creditors of only one spouse is not an asset as defined in MCL 566.31(b)(*iii*). Unless both spouses are debtors on the claim that is the subject of a UFTA action, a distribution of property held as tenants by the entirety in a divorce judgment is not a transfer for purposes of the UFTA, and the property cannot be the subject of a UFTA claim.

3. A third party can be joined in a divorce action when fraud is alleged only if the third party had conspired with one spouse to defraud the other of a property interest. That did not occur in this case. Judge Conlon's determination was of the equities between the spouses. She did not consider whether the transfer of assets envisioned in the property-settlement agreement constituted a fraudulent transfer with respect to creditors. Thus, Judge Conlon properly denied Estes's motion to intervene in the divorce proceedings, and an appeal of that denial would have been futile.

4. The doctrines of res judicata and collateral estoppel do not apply with regard to Estes's failure to appeal the denial of her motion to intervene in the divorce proceedings.

5. MCR 2.613(B) precluded Judge Johnson from setting aside or voiding the divorce judgment. That court rule, however, does not prevent a court from granting relief under the UFTA in a separate proceeding, such as this wrongful-death action. Relief under the UFTA determines only the creditor's right to fraudulently transferred property. The relief Estes sought in her wrongful-death action could not vacate the divorce judgment. Relief under the UFTA could only affect Estes's right to property fraudulently transferred to Swabash pursuant to the judgment, allowing avoidance of the fraudulent transfer or attachment of a fraudulently transferred asset.

6. A creditor's request for relief under the UFTA is not an impermissible collateral attack on a divorce judgment.

7. Judge Johnson should have granted Estes's motion to join Swabash in the supplemental proceedings in the wrongful-death action. Swabash was a person claiming adversely to the judgment debtor, Titus, under MCL 600.6128(2) and, under MCR 2.205(A), a necessary party to Estes's UFTA claim.

8. Whether Estes raised issues of fact concerning Titus's actual intent to defraud her was not properly before the Court of Appeals, and the portion of the Court's judgment discussing the validity of Estes's claim and the various badges of fraud listed in MCL 566.34(2) must be vacated.

Justice KELLY also concurred separately to address the concern raised on appeal that the decision in this case will leave divorce judgments subject to attack by creditors, thus robbing the judgments of finality. Justice KELLY noted that the great majority of divorce judgments will not be subject to UFTA actions. A creditor will encounter difficulty in a UFTA action against a newly divorced individual because much of the marital estate would have been held as tenants by the entirety and will not be an asset subject to a UFTA action unless the creditor's judgment covers both parties to the divorce. Also, because the transfer of property interests in a divorce judgment and the dissolution of the marriage occur simultaneously when the judgment is entered, the parties to a divorce cannot still be married when the transfer occurs and thus cannot be automatic insiders under MCL 566.34(2)(a), one of the badges of fraud used in determining whether an actual intent to defraud existed. If automatic insider status is the creditor's only basis for alleging fraud, the action will not survive a summary disposition motion.

Affirmed in part, vacated in part, and remanded for further proceedings.

1. FRAUDULENT CONVEYANCES — UNIFORM FRAUDULENT TRANSFER ACT — DIVORCE — PROPERTY SETTLEMENTS.

The Uniform Fraudulent Transfer Act applies to a transfer of property pursuant to a property-settlement agreement incorporated in a divorce judgment, and the transfer of property occurs, for purposes of that act, when the court enters the divorce judgment (MCL 566.31 *et seq*.).

2. FRAUDULENT CONVEYANCES — UNIFORM FRAUDULENT TRANSFER ACT — DIVORCE — TENANTS BY THE ENTIRETY.

Property that is held as tenants by the entirety is not subject to process by a creditor holding a claim against only one spouse; such

property is not an asset as defined in the Uniform Fraudulent Transfer Act (MCL 566.31 *et seq*.).

Butler, Durham & Toweson–PLLC (by *H. van den Berg Hatch*) for Jan K. Estes.

Kreis, Enderle, Callander & Hudgins, P.C. (by *Russell A. Kreis*, *James D. Lance*, and *Michael J. Toth*), for Julie L. Swabash.

Amici Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jodi M. Latuszek*), for the Family Law Section of the State Bar of Michigan.

Howard & Howard Attorneys, P.C. (by *Lisa S. Gretchko*), and *Michael W. Bartnik* for the Business Law Section of the State Bar of Michigan.

KELLY, J. In this case of first impression, we are asked whether the Uniform Fraudulent Transfer Act (UFTA)[1] applies to a transfer of property made pursuant to a property settlement agreement incorporated in a divorce judgment. We hold that it does apply and that a UFTA claim is not an impermissible collateral attack on a divorce judgment. However, property owned as tenants by the entirety is not subject to process by a creditor holding a claim against only one spouse. Such property is not an "asset" under the UFTA. Therefore, its distribution in a divorce judgment does not constitute a "transfer" for purposes of that act.

Because the trial court refused to apply the UFTA in this case, it never addressed whether plaintiff stated a valid cause of action against Julie Swabash under the act. Thus, the question whether plaintiff raised issues

[1] MCL 566.31 *et seq*.

of material fact concerning Jeff Titus's actual intent to defraud her was not properly before the Court of Appeals. Hence, we vacate the portion of the Court of Appeals judgment that discusses the factual sufficiency of plaintiff's claim of a transfer made with an actual intent to defraud. We affirm in part and vacate in part the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

The relevant facts of this case are as follows. On September 23, 2002, plaintiff Jan Estes filed a wrongful death action against defendant Jeff Titus, the incarcerated murderer of plaintiff's husband.[2] Not long after, Titus's wife, now known as Julie Swabash, filed for divorce. A divorce judgment entered on March 23, 2003, providing Swabash with nearly all the marital assets pursuant to the parties' property settlement agreement.[3] The judgment explained that the property distribution was unequal because Titus was serving a life sentence in prison and was relieved of any child support obligation for the couple's 17-year-old daughter.

On March 24, 2003, plaintiff sought to intervene in the divorce action. She challenged the distribution of assets to which Titus was entitled, in anticipation of obtaining a recovery from him in her wrongful death action. The divorce court denied the motion, and plaintiff did not appeal the denial. Instead, on January 20, 2005, after obtaining a wrongful death award, she

[2] Titus shot plaintiff's husband and another hunter during deer hunting season in 1990. The case was not solved until a decade later, and Titus was convicted of premeditated murder and sentenced to a nonparolable term of life in prison in 2002.

[3] The terms of the parties' property settlement agreement were included in the divorce judgment, but the agreement explicitly was not merged in the judgment.

moved under MCL 600.6128 to join Swabash in the wrongful death action in an effort to collect the judgment.

Plaintiff contended that the Tituses' property settlement had been a fraudulent transfer within the meaning of the UFTA. The trial court held that it lacked the authority to amend the judgment entered by the divorce court. It declined to add Swabash as a party, dissolved the restraining order, and quashed the discovery subpoena it had issued earlier. Plaintiff appealed.

Judge MARKEY, writing for the majority in the Court of Appeals, joined by Judge WHITE, held that the UFTA applied to property transfers in divorce cases. The Court of Appeals majority went further, holding that plaintiff had sufficiently established a claim under the UFTA by demonstrating an actual intent to defraud.[4] The Court remanded the matter to the trial court so that Swabash could be added as a party defendant to the supplemental proceedings in the wrongful death case.[5] Judge O'CONNELL dissented in part in the belief that the Court of Appeals majority was allowing a collateral attack on the divorce judgment. We granted leave to appeal.[6]

II. STANDARD OF REVIEW

This appeal presents jurisdictional issues, which we review de novo.[7] The interpretation of statutes and court rules is also a question of law subject to de novo

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[4] See MCL 566.34(2).

[5] *Estes v Titus*, 273 Mich App 356; 731 NW2d 119 (2006).

[6] *Estes v Titus*, 478 Mich 864 (2007).

[7] *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002).

review,[8] as is the application of legal doctrines, such as res judicata and collateral estoppel.[9]

III. THE UFTA'S APPLICATION TO PROPERTY SETTLEMENTS IN DIVORCE CASES

In her appeal, Swabash argues that the Legislature did not intend to include property distributions in divorce cases within the purview of the UFTA. We note initially that the language of the act does not exempt from its reach property transferred pursuant to divorce judgments. However, the definition of "asset" in the UFTA does exempt some property held as tenants by the entirety.[10] Hence, in a UFTA action, marital property held by the entirety is exempt from the creditor of only one spouse when the property is transferred pursuant to a divorce judgment. But property transferred pursuant to a property settlement agreement incorporated in a divorce judgment is subject to a UFTA action if it meets the definition of an asset.

A. TRANSFER

We reject Swabash's claim that the UFTA can never reach the transfer of property in divorce actions. The UFTA defines "transfer" at MCL 556.31(*l*) as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, and creation of a lien or other encumbrance."

A court may provide for the distribution of property in a divorce judgment, and, when it enters, the judg-

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[8] *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

[9] *Ghaffari v Turner Constr Co*, 473 Mich 16, 19; 699 NW2d 687 (2005).

[10] MCL 566.31(b)(*iii*).

ment has the same effect as a deed or a bill of sale.[11] A property settlement agreement incorporated in a divorce judgment disposes of the parties' interests in the marital property. As part of the judgment, it effectuates a transfer for purposes of the UFTA when the divorce judgment enters.

We conclude that plaintiff may challenge the Tituses' property settlement agreement incorporated in the divorce judgment as a transfer within the purview of the UFTA.

B. PROPERTY HELD AS TENANTS BY THE ENTIRETY

Swabash's argument that the Legislature did not intend that the UFTA reach property transferred in a divorce action pursuant to a property settlement agreement is correct only with respect to some property held as tenants by the entirety. Only spouses can hold property in that fashion.[12]

A UFTA action will not reach such property unless both spouses are debtors on the claim that is the subject of the action. This is because a "transfer" under the

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[11] MCL 552.401 provides:

> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

[12] "Husband and wife are the only persons who can be tenants by the entireties." *Field v Steiner*, 250 Mich 469, 477; 231 NW 109 (1930).

UFTA includes "disposing of or parting with an asset or an interest in an asset."[13] "Asset" is defined in the act as including the "property of the debtor."[14] One important exception is "[a]n interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant."[15] Property held as tenants by the entirety is exempt from the claims of the creditors of only one spouse and is not an asset. Hence, a distribution of such property in a divorce judgment is not a transfer for purposes of the UFTA.

"A judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife."[16] The Legislature extended that same protection to "[a]ll bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness" held by a husband and wife.[17] Thus, "[p]roperty described in section 1 of 1927 PA 212, MCL 557.151, or real property, held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse."[18]

Therefore, real estate and the financial instruments described in MCL 557.151 held as tenants by the entirety cannot be the subject matter of a UFTA claim if only one spouse is the debtor. This conclusion fits into the larger statutory purpose of avoiding fraudulent

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[13] MCL 566.31(*l*).

[14] MCL 566.31(b).

[15] MCL 566.31(b)(*iii*).

[16] MCL 600.2807(1).

[17] MCL 557.151.

[18] MCL 600.6023a.

transfers because it is difficult to comprehend how disposing of property that a creditor cannot reach could "defraud" that creditor.

This rule applies when property held as tenants by the entirety is disposed of in a divorce judgment, despite the fact that the divorce ends the tenancy by the entirety.[19] This is because the spouses hold the property as tenants by the entirety until the marriage is dissolved. Under the UFTA, such property is not an asset, and its distribution pursuant to the divorce judgment is not a transfer.

IV. UFTA RELIEF AND COLLATERAL ATTACKS ON DIVORCE JUDGMENTS

The dissenting judge in the Court of Appeals opined that plaintiff was precluded from using this case to collaterally attack the Tituses' divorce judgment. According to the dissent, plaintiff's proper remedy was to appeal the divorce court's denial of her motion to intervene in the divorce proceedings.[20] The dissent's position is faulty because it presumes that the divorce court had the authority to determine a creditor's property rights within a divorce proceeding. If that had been the case, plaintiff would have been required to appeal the divorce court's denial of her motion to intervene.

A. THE EFFECT OF PLAINTIFF'S FAILURE TO APPEAL THE ORDER DENYING HER MOTION TO INTERVENE

This Court has long recognized that the jurisdiction of a divorce court is strictly statutory and limited to

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[19] MCL 552.102 provides: "Every husband and wife owning real estate as joint tenants or as tenants by entireties shall, upon being divorced, become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce."

[20] *Estes,* 273 Mich App at 386-387 (O'CONNELL, P.J., dissenting).

determining "the rights and obligations between the husband and wife, to the exclusion of third parties . . . ."[21] When fraud is alleged, third parties can be joined in the divorce action only if they have conspired with one spouse to defraud the other spouse of a property interest.[22]

In this case, plaintiff does not allege that one of the Tituses defrauded the other. She alleges instead that the property distribution was fraudulent only with respect to her, a third party to the divorce.

Plaintiff's motion to intervene was based on MCR 2.209(A)(3), which allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties.[23] The court rule would otherwise have applied in the divorce because neither of the Tituses adequately represented plaintiff's interest as a potential creditor. However, the rule did not apply because the creditor sought to intervene in a divorce action in which the court did not have statutory jurisdiction to decide the intervenor's rights. Court

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[21] *Yedinak v Yedinak*, 383 Mich 409, 413; 175 NW2d 706 (1970). In *Yedinak*, the divorce court allowed the defendant husband's brothers to be joined as parties in the divorce. It placed an equitable lien on the property to secure the payment of money the husband was alleged to have orally promised to his brothers. A majority of this Court reversed, reasoning that the creditor brothers had an adequate remedy at law to secure a judgment against their debtor brother. *Id*. at 414-415. The divorce court could not exercise its equitable powers in contravention of its limited statutory authority. *Id*. at 415.

[22] *Berg v Berg*, 336 Mich 284, 288; 57 NW2d 889 (1953).

[23] MCR 2.209(A)(3) states that a person has the right to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

rules cannot establish, abrogate, or modify the substantive law.[24]

In *Yedinak v Yedinak*, we addressed this same issue in the context of the court rules of permissive and necessary joinder. The majority in *Yedinak* found that nothing in these rules gave the divorce courts "power to disregard statutory provisions pertaining to divorce and to litigate the rights of others than the husband and wife."[25] The same reasoning applies here. The divorce court properly denied plaintiff's motion to intervene in the divorce proceedings, and plaintiff correctly concluded that an appeal from the denial order would have been futile.

When it denied plaintiff's motion to intervene, the divorce court opined that the Tituses' property settlement was not fraudulent because it achieved an equitable division between the spouses. The judge opined:

> The problem with the Intervenor/Petitioner's position is that it presumes fraud due to what may appear to be an uneven or inequitable distribution of marital assets to the Divorce/Plaintiff. If the husband were not incarcerated, and/or not incarcerated for a significant period of time, then the argument of fraud may have more weight. However, in the present case, it is very likely that had the divorce case gone to trial, that this Court would have granted most of the property to Ms. Titus simply based on the fact that her husband will be incarcerated for a significant period of time.

Swabash argues that plaintiff's failure to appeal the denial of plaintiff's motion caused the divorce court's decision that no fraud existed to have the preclusive

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[24] *Shannon v Ottawa Circuit Judge,* 245 Mich 220, 222-223; 222 NW 168 (1928).

[25] *Yedinak*, 383 Mich at 414.

effect of either res judicata or collateral estoppel. But these doctrines are inapplicable here. The creditor's right to relief under the UFTA was not raised in plaintiff's motion to intervene in the divorce proceeding, nor could it have been granted if raised.

The doctrine of res judicata bars a subsequent action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies."[26] The doctrine bars all matters that with due diligence should have been raised in the earlier action.[27] Plaintiff did not raise her claim for UFTA relief in her motion to intervene, nor was she required to do so, given that the divorce court lacked the authority to consider it.

Collateral estoppel is also inapplicable. That doctrine requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.[28] The essential issue in the motion to intervene was whether a third party could be allowed to claim that fraud was perpetrated against her in the divorce proceeding.

Once the divorce court decided that it had no jurisdiction to grant the motion to intervene, it could not reach the merits of plaintiff's claim. Thus, plaintiff had no opportunity to litigate the issue of fraud. Because no hearing was held on this issue, it cannot be said that the issue was fully and fairly litigated. Moreover, the issue whether relief under the UFTA was available, the only

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[26] *Dart v Dart,* 460 Mich 573, 586; 597 NW2d 82 (1999).

[27] *Id*.

[28] *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).

issue relevant to this appeal, was not even raised in the motion to intervene. Consequently, the divorce court did not resolve the issue whether the Tituses' property distribution was inequitable with respect to plaintiff under the UFTA.

In summary, we hold that plaintiff's failure to appeal the order denying her motion to intervene in the Tituses' divorce had no preclusive effect on her claim for relief under the UFTA.

B. THE LIMITED NATURE OF UFTA RELIEF

The Court of Appeals correctly concluded that MCR 2.613(B) prevented the trial court in the wrongful death case from setting aside or voiding the divorce judgment entered by the family division of the circuit court.[29] It accurately noted, as well, that MCR 2.613(B) does not prevent a court such as the court in the wrongful death case from granting relief under the UFTA.[30] The dissenting judge concluded that the Court of Appeals in effect allowed plaintiff to "recover any 'marital assets' by way of a collateral attack on a valid divorce judgment."[31]

The UFTA specifically provides for avoiding a fraudulent transfer or attaching a particular fraudu-

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[29] MCR 2.613(B) states:

> A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

[30] *Estes*, 273 Mich App at 367-369.

[31] *Id.* at 386 (O'CONNELL, P.J., dissenting).

lently transferred asset.[32] Relief under the UFTA determines only the creditor's right to fraudulently transferred property.[33] The court in a UFTA action would transfer directly to the creditor any property interest that would have been awarded to the debtor in the divorce action but for the parties' fraud. Hence, the relief granted would not affect the validity of the divorce judgment or provisions of the judgment such as child custody.

C. UFTA RELIEF DISTINGUISHED FROM A COLLATERAL ATTACK ON THE VALIDITY OF THE DIVORCE JUDGMENT

Relief under the UFTA should be distinguished from

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[32] MCL 566.37 provides:

> (1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in [MCL 566.38], may obtain 1 or more of the following:
>
> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
>
> (b) An attachment against the asset transferred or other property of the transferee to the extent authorized under section 4001 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4001, and applicable court rules.
>
> (c) Subject to applicable principles of equity and in accordance with applicable court rules and statutes, 1 or more of the following:
>
> (*i*) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property.
>
> (*ii*) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee.
>
> (*iii*) Any other relief the court determines appropriate.
>
> (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

[33] See *Ocwen Fed Bank, FSB v Int'l Christian Music Ministry*, 472 Mich 923 (2005).

a collateral attack on the validity of the divorce judgment itself. Challenges to the validity of a divorce typically are premised on alleged violations of the various statutory requirements for divorce, such as the residency requirement and the waiting period.[34] These are jurisdictional requirements.[35] Judgments may be attacked both directly and collaterally for lack of jurisdiction. However, this Court has been loath to invalidate divorce judgments on the urgings of third parties when neither spouse challenged the validity of the divorce in a direct appeal.[36] Furthermore, the Court has refused to invalidate divorces on the basis of third-party allegations of nonjurisdictional irregularities in the divorce proceedings.[37]

This line of cases is distinguishable from the instant case because relief under the UFTA does not invalidate the divorce judgment itself. Furthermore, an independent action for relief under the UFTA is not premised on any irregularity in the divorce proceedings. It is premised on the divorce court's lack of statutory au-

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[34] In *Couyoumjian v Anspach*, 360 Mich 371, 374-375, 386; 103 NW2d 587 (1960), the plaintiffs alleged that the defendant attorney had misrepresented his client's residence in a divorce proceeding. In that proceeding, the court awarded the client property that the client's husband had earlier conveyed to plaintiffs. In *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935), the estate of the defendant's second husband attempted to set aside real property conveyances by the second husband to the defendant and himself as tenants by the entirety. The plaintiff claimed that the defendant's divorce from her first husband was invalid because the court entered the divorce judgment before the applicable waiting period had expired.

[35] *Stamadianos v Stamadianos*, 425 Mich 1, 6-7; 385 NW2d 604 (1986).

[36] *Jackson City Bank*, 271 Mich at 544, 548.

[37] In *Pettiford v Zoellner*, 45 Mich 358, 361; 8 NW 57 (1881), the decedent's child by a prior marriage sought to eject the decedent's widow from the couple's residence. The Court refused to invalidate the couple's divorces from their former spouses on the basis of allegations of irregularities in the affidavits supporting service by publication.

thority to conduct a UFTA analysis within the divorce proceeding.

D. UFTA RELIEF DISTINGUISHED FROM A COLLATERAL ATTACK ON A LIFE INSURANCE PROVISION IN THE DIVORCE JUDGMENT

The decision on which the Court of Appeals dissent relied when stating that divorce judgments are not generally subject to third-party collateral attacks[38] derived from a different line of cases. Those cases dealt specifically with life insurance provisions in divorce judgments.

Prominent among them is *Kasper v Metro Life Ins Co*.[39] *Kasper* involved a dispute over life insurance proceeds between the decedent's father and the decedent's ex-wife as guardian of the couple's son. The ex-wife contended that, under the divorce judgment, the couple's son was to be the designated beneficiary of the decedent's life insurance policy. After the divorce judgment was entered, the decedent had named the decedent's father as the policy's beneficiary. The father argued that the divorce court had no jurisdiction to adjudicate the rights of the couple's son, a third party, within the divorce proceeding. We held that, although the divorce court could not make a third party the beneficiary of a life insurance policy, it could ratify the parties' agreement to that effect.[40] Thus, it was not the divorce court but the parties to the divorce who decided their son's right to receive life insurance proceeds under the policy.

In denying the right of the decedent's father to claim the proceeds as a later-designated beneficiary in

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[38] *White v Michigan Life Ins Co*, 43 Mich App 653; 204 NW2d 772 (1972).

[39] *Kasper v Metro Life Ins Co,* 412 Mich 232; 313 NW2d 904 (1981).

[40] *Id*. at 254-255.

Kasper, we noted that the court's authority to enforce the spouses' agreement was "predicated upon our settled rule that one who has partaken of the fruits of a divorce decree cannot be heard to question the jurisdiction of the court which rendered it."[41] We also quoted the following passage from the Court of Appeals decision in *Krueger v Krueger*, which dealt with the life insurance provision in a divorce judgment:

> It is also important to note that the person challenging the divorce judgment and the underlying agreement was not a party to it. Under the circumstances it would be improper to allow this divorce settlement to be collaterally attacked after the husband has accepted all the benefits which he could obtain under it, but relieving him of his obligation.[42]

The proposition that a third party cannot collaterally attack a divorce judgment also occurred in earlier Court of Appeals cases dealing with life insurance provisions in divorce judgments. One of these, *White v Michigan Life Ins Co,* is the case cited in the Court of Appeals dissent.[43] Viewed in context, the prohibition against

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[41] *Id*. at 255.

[42] *Krueger v Krueger*, 88 Mich App 722, 725-726; 278 NW2d 514 (1979).

[43] *White* was decided under an earlier version of MCL 552.101, which at the time provided that an insurance policy was payable to the decedent's estate "unless otherwise ordered" in the divorce judgment. The Court of Appeals interpreted this provision as giving authority to the divorce court to order the husband to name the couple's children as the principal beneficiaries of his insurance policy. The husband did not do so. At his death, his second wife was the sole beneficiary of his life insurance policies. The Court of Appeals stated the general proposition that a "divorce judgment may not be collaterally attacked." *White*, 43 Mich App at 657. It then interpreted the divorce judgment to conclude that the second wife was entitled to insurance proceeds only to the extent that the decedent had purchased additional insurance after the divorce. *Id*. at 658.

An earlier case decided under the same version of the statute also relied on the proposition that "the validity of an unappealed decree of

third-party attacks on life insurance provisions in divorce judgments is based on the premise that they are an improper means of challenging the provisions' validity. The spouse who was ordered, or who promised, to designate a certain beneficiary was a party to the divorce proceedings. That spouse could have challenged the validity of the judgment's life insurance provision on direct appeal. A third-party collateral attack on the provision would be inappropriate for that reason.

This line of cases should be distinguished from cases involving a creditor's right to relief under the UFTA. A creditor is not a party to a divorce proceeding and cannot directly appeal a divorce judgment. A creditor's right to relief under the UFTA is not affected by the fact that the debtor can appeal the property distribution in the divorce judgment. If a debtor agrees to a transfer of substantially all the marital assets in order to defraud a creditor, he or she cannot be expected to appeal that transfer. Neither can a creditor appeal in such a case. Given that a creditor is precluded from intervening in a divorce proceeding, the only way in which the creditor can raise a UFTA claim is in a separate action.[44] A

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divorce may not be attacked by third parties except for lack of jurisdiction." *Binben v Continental Cas Co*, 9 Mich App 97, 100-101; 155 NW2d 883 (1967). The Court concluded that the decedent's second wife was not entitled to life insurance proceeds under the clear language of the divorce judgment. The judgment had ordered the decedent to name his minor children as his beneficiaries.

[44] We note that courts in other states have allowed UFTA relief under a fraud exception to the prohibition against collateral attacks on judgments. In *Greeninger v Cromwell*, 140 Or App 241, 246; 915 P2d 479 (1996), the court reasoned that a fraudulent transfer under the UFTA constitutes extrinsic fraud because it is collateral to the merits of the case. The court held that an attack on such a transfer fell under the extrinsic fraud exception to collateral attacks on judgments. In *Dowell v Dennis*, 998 P2d 206, 212 (Okla Civ App, 1999), the court relied on select sections of Corpus Juris Secundum to hold that a third party whose

creditor's request for relief under the UFTA in a separate proceeding is not an impermissible collateral attack on the divorce judgment.

The Court of Appeals correctly concluded that Swabash should be joined in the wrongful death action. She is both a "person claiming adversely to the judgment debtor" in that action under MCL 600.6128(2) and a necessary party to plaintiff's claim for UFTA relief under MCR 2.205(A).[45]

V. CONCLUSION

We hold that the UFTA applies to the transfer of property in a divorce judgment that incorporates a property settlement agreement. Property that is held as tenants by the entirety is not subject to process by a creditor holding a claim against only one spouse. Such property is not an "asset" under the UFTA. Therefore, the distribution of such property in a divorce judgment is not a "transfer" for purposes of the UFTA.

Because the validity of the UFTA claim in this case was not properly before the Court of Appeals, we vacate that portion of the Court's judgment discussing the badges of fraud listed in MCL 566.34(2).

The trial court should have granted plaintiff's motion to join Swabash in the supplemental proceedings to the wrongful death action. Swabash is a person claiming adversely to the judgment debtor, Titus, under MCL

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interests have accrued beforehand may attack a divorce judgment on the ground of fraud "regardless of whether such attack is labeled 'collateral' or 'direct.' " We take no position on the validity of this alternative approach. Rather, we conclude that a creditor's claim under the UFTA is not an impermissible collateral attack on a divorce judgment because (1) the divorce court has no jurisdiction to determine the rights of a creditor and (2) a creditor cannot appeal a divorce judgment.

[45] *Estes,* 273 Mich App at 383-386.

600.6128(2) and a necessary party to plaintiff's claim for UFTA relief under MCR 2.205(A).

Plaintiff's claim for relief under the UFTA brought in the wrongful death action does not constitute a collateral attack on the divorce judgment. The relief plaintiff sought in the wrongful death action could not vacate the divorce judgment. It could only affect plaintiff's right to property fraudulently transferred to Swabash pursuant to the judgment. It could allow avoidance of a fraudulent transfer or attachment of a fraudulently transferred asset.

We also hold that the divorce court properly denied plaintiff's motion to intervene in the Tituses' divorce action. An appeal of that denial would have been futile. Plaintiff was a third party to the action. A third party can be joined in a divorce action when fraud is alleged only if he or she has conspired with one spouse to defraud the other of a property interest. That did not occur here. The divorce court's determination was of the equities between the spouses. The court did not consider whether the transfer of assets envisioned in the property settlement agreement constituted a fraudulent transfer with respect to creditors.

We affirm the judgment of the Court of Appeals in part, vacate it in part, and remand the case to the trial court for further proceedings in conformity with this opinion.

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

KELLY, J. (*concurring*). I write separately to address the concern expressed during this appeal that our decision will leave a great many divorce judgments subject to attack by creditors, thus robbing them of

finality. I believe the concern is unfounded. As I will explain, relatively few creditors will be incentivized to bring actions under the Uniform Fraudulent Transfer Act (UFTA) against newly divorced individuals as a result of the Court's opinion in this case. This is because of the difficulty creditors will encounter in surviving a motion for summary disposition.

Difficulties for creditors will exist on several fronts. First, to maintain a UFTA action, creditors must identify one or more property interests that qualify as "assets" under the act. As the unanimous opinion describes, property held as tenants by the entirety when the judgment is entered is not an asset under the UFTA unless the creditor's judgment covers both divorced individuals. Normally that property will include real estate, stocks, bonds, and promissory notes, among others. Hence, much of the marital estate will not be subject to a UFTA action.

A second difficulty creditors will encounter is stating a prima facie case alleging a transfer made with an actual intent to defraud. To state such a case, creditors must allege at least one badge of fraud under MCL 556.34(2). In the instant case, the creditor alleged several, including (1) that before the transfer was made, the debtor had been threatened with suit, (2) that the transfer the debtor made was of substantially all his assets, and (3) that the debtor become insolvent after the transfer.

By contrast, regarding most divorce cases, the only badge of actual fraud that might plausibly be alleged is that the transfer took place while the parties were "insiders" under the act.[1] In my opinion, this allegation

[1] Creditors might also seek to avoid the dismissal of their UFTA actions by alleging only that the property distribution under a divorce judgment was not for a reasonably equivalent value. This refers to factor h under

will not survive a motion for summary disposition. For the UFTA to apply, the transferee must be an insider when the transfer occurs. Although a husband and wife are insiders while married, they normally cease to have that status when the divorce judgment is entered. And it is only when the judgment is entered that the transfer of property takes place, assuming, of course, that the individuals do not exchange the property beforehand.

A more thorough analysis follows.

AUTOMATIC INSIDER STATUS UNDER THE MICHIGAN UFTA

The UFTA's definition of "insider" includes a relative of the debtor.[2] The definition of "relative," in turn, includes a spouse.[3] Consequently, spouses are automatic insiders under the UFTA.

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the act, MCL 566.34(2)(h). The lack of a reasonably equivalent value may be indicative of both actual and constructive fraud. MCL 566.34(1)(a) and (2), MCL 566.34(1)(b), and MCL 566.35(1). But I do not believe that UFTA actions will succeed in altering many property distributions on the basis of this factor alone. The courts have not developed standards for determining what constitutes a reasonably equivalent value in divorce cases. Clearly, many intangible or indirect benefits are involved in the property distributions in these cases. It is usually very difficult to show that the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred. Until standards are developed, creditors will be hard-pressed to demonstrate actual fraud using this factor by itself. Moreover, most property settlements are unlike the one in this case, in which the debtor agreed that Julie Swabash should have virtually all the marital property.

[2] MCL 566.31(g) states in relevant part:

> "Insider" includes all of the following:
>
> (*i*) If the debtor is an individual, all of the following:
>
> (A) A relative of the debtor or of a general partner of the debtor.

[3] MCL 566.31(k) states: " 'Relative' means an individual related by consanguinity within the third degree as determined by the common law,

A transfer to an insider is one of the relevant factors for determining whether the transfer was made with an actual intent to defraud a creditor.[4] MCL 566.34(2), which supplies a list of such factors, states that any one may be considered to establish the intent to defraud.[5]

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a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree."

[4] MCL 566.34(1) states in relevant part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . :
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

The term "insider" also appears in MCL 566.35(2), the UFTA provision that deals with preferential transfers:

> A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

In the instant case, plaintiff did not argue that this provision applies to a transfer of property in a divorce. The division of property in a divorce in Michigan is based on "equitable factors." *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992), citing *Johnson v Johnson*, 346 Mich 418, 431; 78 NW2d 216 (1956). Thus, it is doubtful that the preferential-transfer provision of the UFTA, based as it is on a creditor-debtor model, can be applied to the typical distribution of property in divorce.

[5] MCL 566.34(2) provides:

> In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
>
> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.

Because insider status alone can automatically establish fraudulent intent, if all newly divorced spouses were automatic insiders under the UFTA, creditors could jeopardize the finality of many divorce judgments. I agree with the argument of the Family Law Section of the State Bar of Michigan in its brief amicus curiae that this could not have been the Legislature's intent.

It is interesting to note that the application of the badges of fraud listed in the Michigan UFTA differs from that allowed in other states' versions of the UFTA. For example, the UFTA as adopted in New Jersey, Oregon, and Illinois does not expressly allow the use of only one factor to establish the intent to defraud.[6] Not

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(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[6] See NJ Stat Ann 25:2-26; Or Rev Stat 95.230(2); 740 Ill Comp Stat 160/5(b). The language these statutes share in common states: "In determining actual intent . . . , consideration may be given, among other factors to whether [various factors are present]." In contrast, MCL

surprisingly, in these states, courts require a "confluence" of factors indicating an actual intent to defraud.[7]

As a practical matter, a creditor will normally allege multiple badges of fraud to establish an actual intent to defraud under the Michigan version of the UFTA as well. Multiple factors were present in *Szkrybalo v Szkrybalo*, in which the Court of Appeals originally rejected the creditor's claim on the ground that it was based solely on insider status.[8] We remanded the case to the Court of Appeals to review several other badges of fraud alleged under MCL 566.34(2), specifically under subdivisions c, d, h, g, and j.[9] On remand, the Court of Appeals ruled for the plaintiff. The plaintiff raised a genuine issue of material fact regarding whether the debtor-husband had made a transfer to his wife during the marriage with an actual intent to defraud his creditors.[10]

In this case, plaintiff did not base her cause of action solely on the allegation that Jeff Titus made fraudulent transfers to an insider. On remand, the trial court can consider the other badges she alleged, those in subdivisions d, e, and f, in determining whether any transfer was made with an actual intent to defraud plaintiff.

566.34(2) provides: "In determining actual intent . . . , consideration may be given, among other factors, to whether 1 or more of the following occurred . . . ."

[7] See *In re Hill*, 342 BR 183, 199 (Bankr D NJ, 2006); see also *In re Knippen*, 355 BR 710, 732-733 (Bankr ND Ill, 2006) (citing cases for the proposition that in sufficient number, e.g., seven, the factors give rise to a presumption of fraud); *Morris v Nance*, 132 Or App 216, 223; 888 P2d 571 (1994) (reasoning that some factors can be used to infer fraudulent intent, while others can be used to infer the lack of such intent).

[8] *Szkrybalo v Szkrybalo*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 269125).

[9] *Szkrybalo v Szkrybalo,* 477 Mich 1086 (2007).

[10] *Szkrybalo v Szkrybalo* (*On Remand*), unpublished opinion per curiam of the Court of Appeals, issued May 31, 2007 (Docket No. 269125).

Thus, in this case, whether a transfer was made to an insider is not dispositive. However, because our UFTA allows a creditor to allege a single factor, it is important to know whether a divorce judgment may be attacked solely on the ground that spouses are automatic insiders.

NEWLY DIVORCED INDIVIDUALS ARE NOT AUTOMATIC INSIDERS UNDER THE UFTA

In determining whether a transfer under the UFTA was to an automatic insider, it is necessary to consider the parties' status at the time of the transfer. Under MCL 552.401, the transfer of property interests in a divorce judgment occurs when the judgment is entered.[11] It is also at that time that the marriage is dissolved. The simultaneity of the two events makes it impossible for the parties to be still married at the time the transfer occurs. Because the spousal relationship evaporates at the same moment that the transfer occurs, the parties to the divorce are not automatic insiders under the UFTA.

A question arises about what importance to accord to the parties' status during the negotiation of the property settlement agreement incorporated into the divorce judgment. Virtually every property settlement agreement is negotiated while the parties are still married. However, the UFTA is concerned with the transferee's status at the time of transfer, not while the terms of the transfer are being negotiated.[12] The settlement agreement in itself is not a transfer. It is a

[11] MCL 552.401 provides in relevant part: "The [divorce] decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party."

[12] MCL 566.34(2)(a).

conditional promise to transfer that has no effect until the divorce judgment is entered.

CONCLUSION

I believe that the great majority of divorce judgments will not be subjected to a UFTA action. A creditor will encounter difficulty sustaining a UFTA action against a newly divorced individual (1) if the property that the creditor seeks was held as tenants by the entirety at the time of divorce or (2) if automatic insider status is the creditor's only available basis for alleging fraud.

MILLER v ALLSTATE INSURANCE COMPANY

Docket Nos. 134393 and 134406. Argued April 10, 2008 (Calendar No. 2). Decided July 2, 2008.

William Miller brought an action in the Wayne Circuit Court seeking benefits from Allstate Insurance Company for physical-therapy services he received from PT Works, Inc., after being injured in an automobile accident. Allstate had refused to pay PT Works for these services, alleging that because PT Works was incorporated under the Business Corporation Act (BCA), MCL 450.1101 *et seq*., rather than the Professional Service Corporation Act (PSCA), MCL 450.221 *et seq*., Miller's treatment was not lawfully rendered as required by the no-fault act, MCL 500.3101 *et seq*. PT Works intervened and filed a claim against both Miller and Allstate for payment of Miller's physical-therapy bills, and PT Works' claim against Miller was dismissed after he assigned to PT Works his rights to insurance benefits from Allstate. The court, David F. Breck, J., denied Allstate's motion for summary disposition and granted summary disposition to PT Works, reasoning that physical-therapy practices were not required to be incorporated under the PSCA. The Court of Appeals, JANSEN, P.J., and MURPHY and FORT HOOD, JJ., affirmed, holding that, regardless of whether PT Works was properly incorporated under the BCA, the treatment rendered to Miller was lawful, and therefore reimbursable under the no-fault act, because it was performed by properly licensed physical therapists. 272 Mich App 284 (2006). The Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals to determine whether PT Works could properly be incorporated solely under the BCA, and not under the PSCA, and, if PT Works was improperly incorporated under the BCA, to reconsider whether the physical therapy provided by PT Works was lawfully rendered under MCL 500.3157 of the no-fault act. 477 Mich 1062 (2007). On remand, the same Court of Appeals panel again affirmed, holding that although PT works was improperly incorporated under the BCA, the physical-therapy services it provided to Miller were lawfully rendered under MCL 500.3157 of the no-fault act. 275 Mich App 649 (2007). PT Works and Allstate filed applications for leave to appeal in the Supreme Court, both of which the Supreme Court granted. 480 Mich 938 (2007).

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

Allstate lacks statutory standing to challenge PT Works' corporate status because the BCA grants the power to challenge corporate status solely to the Attorney General.

1. Although the Legislature cannot expand beyond constitutional limits the class of people who have standing, it may limit the class of people who may challenge a statutory violation.

2. The BCA indicates that once articles of incorporation have been filed, such filing constitutes conclusive evidence that all the requirements for complying with the BCA have been fulfilled and that the corporation has actually been formed in compliance with the BCA, thereby creating an irrebuttable presumption of proper incorporation. The BCA creates a single exception to this presumption by granting the Attorney General the sole authority to challenge whether a corporation has been properly incorporated under the BCA. Thus, this Court can only consider whether a corporation has been properly incorporated under the BCA in a suit brought by the Attorney General.

3. The provision of the BCA that grants the Attorney General the sole authority to challenge whether a corporation was properly incorporated presents a jurisdictional bar to Allstate's affirmative defense that PT Works was improperly incorporated. Accordingly, the lower courts should not have considered the merits of Allstate's claim.

Affirmed, but rationale vacated; case remanded to the circuit court for further proceedings.

Justice CAVANAGH concurred in the result only.

Justice WEAVER, joined by Justice KELLY, concurred in the result only, because the defendant lacked standing to challenge the corporate status of PT Works, but wrote separately to disagree with the majority's discussion of and test for standing.

1. STATUTES — BUSINESS CORPORATION ACT — STANDING.

An individual plaintiff lacks statutory standing to challenge whether a corporation was properly incorporated under the Business Corporation Act because that act grants standing with respect to that issue solely to the Attorney General (MCL 450.1221).

2. STATUTES — BUSINESS CORPORATION ACT — AFFIRMATIVE DEFENSES — JURISDICTION.

Courts do not have jurisdiction to consider improper incorporation under the Business Corporation Act as an affirmative defense of a party who is not the Attorney General (MCL 450.1221).

Nemier, Tolari, Landry, Mazzeo & Johnson, P.C. (by *David B. Landry* and *Michelle E. Mathieu*), for Allstate Insurance Company.

Thav, Gross, Steinway & Bennett, P.C. (by *Barry A. Steinway*), for PT Works, Inc.

Amici Curiae:

Allan Falk, P.C. (by *Allan Falk*), for Preferred Medicine, Inc., Joanna Rohl, and Fatmeh Chehab.

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C. (by *Karen W. Magdich*), for the International Association of Special Investigation Units, the Michigan Chapter of the International Association of Special Investigation Units, and the Property Casualty Insurers Association of America.

Hall, Render, Killian, Heath & Lyman, PLLC (by *Margaret Marchak*, *Michael J. Philbrick*, and *Leah Voigt Romano*), for the Health Care Law Sectiom of the State Bar of Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David W. Silver* and *Amy L. Rosenberg*, Assistant Attorneys General, for the Attorney General.

James L. Carey, *Justin G. Klimko*, and *Cyril Moscow* for the Business Law Section of the State Bar of Michigan.

Foster, Swift, Collins & Smith, P.C. (by *Richard C. Kraus* and *Alan T. Rogalski*), for the Michigan Physical Therapy Association.

Keranen & Associates, P.C. (by *Gary D. Quesada*), for the American Institute of Architects Michigan, the

American Council of Engineering Companies of Michigan, and the Michigan Society of Professional Engineers.

Gross & Nemeth, P.L.C. (by *Mary T. Nemeth*), for the Insurance Institute of Michigan.

MARKMAN, J. We granted leave to appeal to consider (1) whether plaintiff corporation was improperly incorporated under the Business Corporations Act (BCA), MCL 450.1101 *et seq*., and, if so, (2) whether an improperly incorporated entity rendering physical therapy treatment has "lawfully" rendered such treatment under MCL 500.3157. However, because defendant insurance company lacks statutory standing to challenge plaintiff's corporate status under MCL 450.1221, which grants the power to challenge corporate status solely to the Attorney General, the above questions are not properly before us. Accordingly, we affirm the judgment of the Court of Appeals in plaintiff's favor, albeit on alternative grounds, and we remand to the trial court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

William Miller was injured in separate car accidents on February 27, 2002, and September 13, 2002.[1] Miller was diagnosed with whiplash; his doctor prescribed physical therapy and referred Miller to plaintiff PT Works, Inc. Miller was treated by PT Works from April 2, 2003, through August 28, 2003, incurring a bill for $29,150.

[1] Although William Miller is the named plaintiff in this case, he is no longer involved in the litigation; hence, all references to "plaintiff" are to cross-plaintiff PT Works, Inc., and all references to "defendant" are to cross-defendant Allstate Insurance Company.

Miller was insured with defendant Allstate Insurance Company (Allstate). PT Works billed Allstate for $29,150, but Allstate refused to pay. Miller then filed this lawsuit against Allstate for no-fault benefits, and subsequently assigned his claim to PT Works, who then filed a claim against Allstate as cross-plaintiff.

Allstate moved for summary disposition, arguing that PT Works was unlawfully incorporated under the BCA, because PT Works was required to incorporate under the Professional Services Corporations Act (PSCA), MCL 450.221 *et seq*. Allstate argued that, because it was obligated to pay no-fault benefits only for treatment "lawfully" rendered, MCL 500.3157, PT Works could not recover no-fault benefits if it was unlawfully incorporated. The trial court denied Allstate's motion, concluding that physical therapy did not constitute "professional services" under the PSCA, and hence PT Works could incorporate under the BCA.

Allstate appealed, and the Court of Appeals affirmed. *Miller v Allstate Ins Co*, 272 Mich App 284; 726 NW2d 54 (2006). The Court of Appeals held that, regardless of whether PT Works was lawfully incorporated under the BCA, the treatment rendered to Miller was "lawful" under MCL 500.3157 because it was rendered by properly licensed physical therapists. *Id*. at 286-287.

Allstate then filed an application for leave to appeal with this Court, and, in lieu of granting leave, we vacated the initial Court of Appeals judgment and remanded to the Court of Appeals to consider whether PT Works was lawfully incorporated and, if PT Works was unlawfully incorporated, to reconsider whether treatment was lawfully rendered. 477 Mich 1062 (2007).

On remand, the Court of Appeals again affirmed the trial court's denial of summary disposition. *Miller v Allstate Ins Co* (*On Remand*), 275 Mich App 649; 739

NW2d 675 (2007). The Court of Appeals held that PT Works could have incorporated under the PSCA, and thus was unlawfully incorporated under the BCA, citing MCL 450.1251(1).[2] *Id*. at 654. In particular, the Court of Appeals noted that physical therapy constituted a personal service to the public, and required a license under Michigan law. *Id*. However, the Court of Appeals adopted its prior analysis and concluded that the improper incorporation under the BCA did not render the treatment "unlawful" under MCL 500.3157. *Id*. at 655-658.

PT Works appealed the decision of the Court of Appeals that it was unlawfully incorporated. In a separate application, Allstate appealed the decision of the Court of Appeals that, despite the unlawful incorporation, the treatment was "lawfully rendered." This Court granted both applications for leave to appeal. 480 Mich 938 (2007).

II. STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *Lash v Traverse City*, 479 Mich 180, 186; 735 NW2d 628 (2007).

III. ANALYSIS

Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim. *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 346; 737 NW2d 158 (2007). This

[2] MCL 450.1251(1) of the BCA states:

> A corporation may be formed under this act for any lawful purpose, except to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act.

constitutional standing doctrine is longstanding and stems from the separation of powers in our constitution. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). Because the constitution limits the judiciary to the exercise of "judicial power," Const 1963, art 6, § 1, the Legislature encroaches on the separation of powers when it attempts to grant standing to litigants who do not meet constitutional standing requirements.[3] *Rohde*, *supra* at 350.

Although the Legislature cannot *expand* beyond constitutional limits the class of persons who possess standing, the Legislature may permissibly *limit* the class of persons who may challenge a statutory violation. That is, a party that has constitutional standing may be precluded from enforcing a statutory provision, if the Legislature so provides. This doctrine has been referred to as a requirement that a party possess "statutory standing." See, e.g., *Graden v Conexant Sys, Inc*, 496 F3d 291, 294 (CA 3, 2007). Statutory standing "simply [entails] statutory interpretation: the question it asks is whether [the Legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury." *Id*. at 295 (emphasis in original).

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[3] To establish constitutional standing, a plaintiff must satisfy three elements:

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " [*Nat'l Wildlife Federation*, *supra* at 628-629 (citations omitted).]

In this case, plaintiff asks this Court to conclude that, under the express terms of the BCA, defendant may not bring any challenge against plaintiff's corporate status. That is, defendant's lack of statutory standing would act as a jurisdictional bar to defendant's affirmative defense that plaintiff was unlawfully incorporated. If the BCA categorically bars defendant's claim, then the lower courts should not have considered the substance of defendant's claim, as they each did in different ways; rather, they should have simply determined that defendant may not raise the affirmative defense that plaintiff was unlawfully incorporated. Accordingly, before considering whether an entity is lawfully incorporated under the BCA, a court must consider whether the party challenging corporate status has statutory standing to raise that claim.

Statutory standing, which necessitates an inquiry into whether a statute authorizes a plaintiff to sue at all, must be distinguished from whether a statute permits an individual claim for a particular type of relief. See *Steel Co v Citizens for a Better Environment*, 523 US 83, 92; 118 S Ct 1003; 140 L Ed 2d 210 (1998) (distinguishing between "whether [a statute] authorizes this plaintiff to sue" and "whether the scope of the [statutory] right of action includes past violations" and stating that the latter "goes to the merits and not to statutory standing"). The statutory-standing inquiry is generally jurisdictional; the claim-for-relief inquiry is non-jurisdictional. *Lerner v Fleet Bank, NA*, 318 F3d 113, 127 (CA 2, 2003); see also *Steel Co*, *supra* at 92 (stating that the claim for relief inquiry is non-jurisdictional and contrasting that inquiry with the statutory-standing inquiry); *Northwest Airlines, Inc v Kent Co*, 510 US 355, 365; 114 S Ct 855; 127 L Ed 2d 183 (1994) ("The question whether a . . . statute creates a claim for relief is not jurisdictional."). But see *Canyon*

Co v Syngenta Seeds, Inc, 519 F3d 969, 975 n 7 (CA 9, 2008) (rejecting the proposition that statutory standing is jurisdictional). We acknowledge that the line dividing these inquiries is not always susceptible to easy demarcation; as *Steel Co* points out, "the merits inquiry and the statutory standing inquiry often 'overlap.' " *Steel Co*, *supra* at 97 n 2, quoting *Nat'l R Passenger Corp v Nat'l Ass'n of R Passengers*, 414 US 453, 456; 94 S Ct 690; 38 L Ed 2d 646 (1974).

An example illustrates the distinction. This Court considered during its last term whether an individual plaintiff "may maintain a private cause of action for money damages against" a public employer for a violation of MCL 15.602.[4] *Lash*, *supra* at 191. We held that, based on the text of the statute, "the Legislature did not intend to create a private cause of action for violation of this particular provision." *Id*. at 196. We further noted that the plaintiff could seek enforcement of the statute through a claim for injunctive relief or a declaratory judgment. *Id*. at 196-197. Thus, an individual plaintiff could bring *some* cause of action to enforce MCL 15.602, thereby indicating that an individual plaintiff has statutory standing. However, an individual plaintiff could not bring every *particular* type of action, namely in that case an action for money damages. This latter question goes to the scope of the cause of action.

Two conclusions should be drawn from this. First, a determination that a plaintiff lacks statutory standing to assert a cause of action is essentially the equivalent of concluding that a plaintiff cannot bring *any* action in reaction to an alleged legal violation. Second, an inquiry regarding statutory standing and an inquiry regarding the merits of a particular claim for relief both follow the

[4] This statute restricts a public employer's ability to impose residency restrictions on employees.

same method: both analyze the statutory language to determine legislative intent. However, the two inquiries ask different questions: the former asks whether any plaintiff may ever assert a violation of the statute, whereas the latter asks whether the plaintiff may assert a particular cause of action for the violation.

Here, the initial question is whether defendant Allstate may challenge the incorporation of PT Works under the BCA.[5] Because the relevant question is whether the BCA authorizes defendant to make such a challenge, the issue presented is properly characterized as one of statutory standing.

MCL 450.1221 of the BCA states:

> The corporate existence shall begin on the effective date of the articles of incorporation as provided in [MCL 450.1131].[6] Filing is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, except in an action or special proceeding by the attorney general.

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[5] Ordinarily, statutory standing questions involve a challenge to a *plaintiff's* standing. Here, however, plaintiff challenges defendant's ability to assert plaintiff's allegedly unlawful incorporation under the BCA as an affirmative defense. If the BCA prevents defendant from bringing an original action against plaintiff based on unlawful incorporation, then it would be illogical to permit defendant to assert the same grounds as an affirmative defense. See, e.g., *Cinema North Corp v Plaza At Latham Assoc*, 867 F2d 135, 139 (CA 2, 1989) (stating that ordinarily a guarantor who has been sued does not possess standing to assert, as an affirmative defense, a claim that inheres in a principal); *United States v Dunifer*, 997 F Supp 1235, 1239 (ND Cal, 1998) ("Where the defendant asserts an affirmative defense requiring the litigation of issues not encompassed in the plaintiff's case-in-chief, the defendant is in a similar situation on those issues to a plaintiff who is invoking the jurisdiction of the court."). Accordingly, we must inquire into whether defendant has statutory standing to assert this particular affirmative defense.

[6] MCL 450.1131 establishes general procedures for filing articles of incorporation.

This statute indicates that once articles of incorporation under the BCA have been filed, such filing constitutes "conclusive evidence" that (1) all the requirements for complying with the BCA have been fulfilled and (2) the corporation has actually been formed in compliance with the BCA. Thus, the statute generally creates an irrebuttable presumption of proper incorporation once the articles of incorporation have been filed.[7] The statute then creates a single exception to this general rule by granting the Attorney General the sole authority to challenge whether a corporation has been properly incorporated under the BCA. That is, only the Attorney General is not affected by the irrebuttable presumption in favor of legality. By naming only the Attorney General in this respect, the Legislature has indicated that the Attorney General alone has the authority to challenge corporate status, under the principle *expressio unius est exclusio alterius*, that is, "the expression of one thing is the exclusion of another." *Miller v Chapman Contracting*, 477 Mich 102, 108 n 1; 730 NW2d 462 (2007). Thus, the filing of the articles of incorporation serves as "conclusive evidence" that PT Works has been properly formed, and this Court cannot, under the terms of MCL 450.1221, conclude otherwise, except as a consequence of a suit brought by the Attorney General.

In essence, MCL 450.1221 prevents any person—other than the Attorney General—from bringing any challenge to corporate status under the BCA: every such challenge would be doomed to failure, because the mere filing of articles of incorporation constitutes "*con-*

[7] In contrast with the irrebuttable presumption established in MCL 450.1221, the Legislature has on other occasions created rebuttable presumptions. See, e.g., MCL 333.17031(3) (filing a written statement regarding educational history creates a "rebuttable presumption" that statement was filed "in good faith").

clusive evidence" of the corporation's legality. Because the Legislature has expressly forbidden Allstate from raising the affirmative defense asserted in this litigation, Allstate lacks statutory standing to challenge the corporate status of PT Works.[8]

Moreover, MCL 450.1221 presents a jurisdictional bar to defendant's affirmative defense. Because MCL 450.1221 indicates that only the Attorney General may pursue a claim that a corporation such as plaintiff is improperly incorporated under the BCA, the lower courts should not have considered the merits of Allstate's claim.

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[8] This conclusion is bolstered by other provisions of the BCA that limit the authority of certain individuals to challenge improper incorporation. The BCA, MCL 450.1821, states:

> (1) The attorney general may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located for dissolution of a corporation upon the ground that the corporation has committed any of the following acts:
>
> (a) Procured its organization through fraud.
>
> (b) Repeatedly and willfully exceeded the authority conferred upon it by law.
>
> (c) Repeatedly and willfully conducted its business in an unlawful manner.
>
> (2) The enumeration in this section of grounds for dissolution does not exclude any other statutory or common law action by the attorney general for dissolution of a corporation or revocation or forfeiture of its corporate franchises.

Thus, MCL 450.1821 vests authority in the Attorney General to pursue dissolution of a corporation. Similarly, MCL 450.1823 permits the shareholders and directors of a corporation to pursue dissolution under certain circumstances. See also MCL 450.1488(1)(g) (allowing shareholders to dissolve a corporation by agreement). Because the expression of one thing is the exclusion of another, *Chapman Contracting*, *supra* at 108 n 1, these statutes indicate that an outside party may not pursue dissolution, and thus reflect a general legislative intent to prevent outside parties from challenging an entity's corporate status under the BCA.

Allstate argues that MCL 450.1221 sets forth a general rule that only the Attorney General may challenge corporate status under the BCA, but that the no-fault act, MCL 500.3157, provides a specific exception to that general rule. MCL 500.3157 states in part:

> A physician, hospital, clinic or other person or institution *lawfully* rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. [Emphasis added.]

"[S]pecific provisions . . . prevail over any arguable inconsistency with the more general rule . . . ." *Jones v Enertel, Inc*, 467 Mich 266, 271; 650 NW2d 334 (2002). The question raised by Allstate is how to ascertain which provision is more specific and which is more general. As with any question of statutory interpretation, we examine the language of the statutes to discern the Legislature's intent. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). In order to determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm. MCL 500.3157 grants a right to insurers to refuse payment for treatment that is unlawfully rendered. This right encompasses all forms of unlawfulness, and hence would seem to apply to the challenge made here. However, MCL 450.1221 applies to one specific form of unlawfulness—improper corporate formation. Because MCL 450.1221 applies to one form of unlawfulness, and MCL 500.3157 applies to all forms, MCL 450.1221 is the more specific provision and, therefore, prevails over MCL 500.3157.

Contrary to Allstate's argument, MCL 500.3157 does not specifically grant an insurer the right to challenge *all* forms of unlawfulness, regardless of other statutes that impose limitations or exceptions upon such an ability. Rather, MCL 500.3157 sets up a general ability to challenge lawfulness, but neither states nor implies that a right has been established that trumps any other statutory limitation on an insurer's ability to contest the lawfulness of treatment. Hence, Allstate's argument fails, and we conclude that MCL 450.1221 prevents an insurer from challenging the corporate status of a corporation formed under the BCA.[9]

Although our analysis rests solely on our interpretation of the relevant statutes, we note that MCL 450.1221 encapsulates at least 100 years of common-law practice in Michigan. In *Int'l Harvester Co of America v Eaton Circuit Judge*, 163 Mich 55; 127 NW 695 (1910), this Court stated:

> This brings us to the doctrine, founded in public policy and convenience and supported by an almost unanimous consensus of judicial opinion, which is that rightfulness of the existence of a body claiming to act, and in fact acting in the face of the State, as a corporation, cannot be litigated in actions between private individuals, or between private individuals and the assumed corporation, but that the rightfulness of the existence of the corporation can be questioned only by the State; in other words, that the question of the rightful existence of the corporation cannot be raised in a collateral proceeding. [*Id*. at 67 (quotations and citation omitted).]

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[9] We emphasize that in no way are we passing judgment on the lawfulness of plaintiff's incorporation. Because a court cannot entertain an individual's challenge to corporate status under MCL 450.1221, plaintiff must be presumed to be lawfully formed until its incorporation has been successfully challenged by the Attorney General.

Indeed, Michigan courts have long held that the state possesses the sole authority to question whether a corporation has been properly incorporated under the relevant law. See, e.g., *Flueling v Goeringer*, 240 Mich 372, 375; 215 NW 294 (1927) (stating that a particular taxicab company "is a corporation, and its right to be such under the provisions of the act authorizing corporations . . . , if questioned, must be at the instance of proper State authority"); *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 317; 206 NW2d 490 (1973) ("Only the state may challenge the validity of an incorporation."); see also OAG, 1981-1982, No 5893, pp 167-168 (May 8, 1981) ("The validity of an incorporation can be questioned only by the state in a proper proceeding and cannot be questioned collaterally."), citing *Besson v Crapo Toll Rd*, 150 Mich 655; 114 NW 924 (1908). Moreover, a party cannot raise an argument challenging a corporation's corporate status in a collateral proceeding; rather, such an argument may only be brought in a direct proceeding to challenge such status. *Attorney General v Lapeer Farmers Mut Fire Ins Ass'n*, 297 Mich 174, 184; 297 NW 232 (1941); *Cahill v Kalamazoo Mut Ins Co*, 2 Doug 124, 141 (Mich 1845). Thus, in historical context, MCL 450.1221 codifies Michigan's longstanding common-law practice of only permitting the state to challenge corporate status, and to do so only in a direct proceeding on that issue.

One need not look far to ascertain the merits of this limitation. As one treatise states:

> It would produce endless confusion and hardship, and probably destroy the corporation, if the legality of its existence could be drawn in question in every suit to which it was a party . . . . [18A Am Jur 2d, Corporations, § 208, p 88.]

Indeed, if the legality of every Michigan corporation were subject to continual assault by any person, it would be difficult to see how a stable economic climate could ever exist. Relevant to this case, no insured person could obtain medical treatment without undertaking a laborious inquiry into whether the entity providing treatment has complied with every applicable corporate statute and regulation. Whether an insured person could obtain benefits would largely depend on the ingenuity of lawyers in ferreting out aspects of corporate non-compliance with applicable statutes. However, the Legislature has deemed it fit that residents of Michigan may depend on the corporate status of any corporation formed under the BCA and approved by the state, and we do nothing more here than enforce that policy decision—a decision rooted in relevant statutes and in longstanding judicial practice.

IV. CONCLUSION

Because Allstate lacks statutory standing to assert that PT Works was improperly incorporated, the Court of Appeals correctly held that summary disposition should be granted to PT Works, albeit on alternative grounds. Accordingly, we affirm the conclusion of the Court of Appeals, but vacate its rationale, and we remand to the trial court for further proceedings consistent with this opinion.

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

CAVANAGH, J. I concur in the result only.

WEAVER, J. (*concurring in the result only*). I concur in the result of the majority opinion because defendant

Allstate Insurance Company lacks the authority to challenge the corporate status of cross-plaintiff PT Works, Inc. Under MCL 450.1221, only the Attorney General is authorized to challenge an entity's corporate status.

I write separately because I disagree with the opinion's strained discussion of the standing test erroneously created by the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) in *Lee v Macomb Co Bd of Comm'rs*,[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[2] *Rohde v Ann Arbor Pub Schools*,[3] and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*.[4] In those cases, the majority of four systematically dismantled Michigan's law on standing and replaced years of precedent with its own test that denies Michigan citizens access to the courts.[5]

KELLY, J., concurred with WEAVER, J.

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[1] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001).

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004).

[3] *Rohde v Ann Arbor Pub Schools*, 479 Mich 336; 737 NW2d 158 (2007).

[4] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007).

[5] See my opinions chronicling the majority of four's assault on standing in *Lee*, 464 Mich at 742; *Nat'l Wildlife*, 471 Mich at 651; *Rohde*, 479 Mich at 366; and *Michigan Citizens*, 479 Mich at 310.

DIMMITT & OWENS FINANCIAL, INC
v DELOITTE & TOUCHE (ISC), LLC

Docket No. 134087. Decided July 9, 2008.

Dimmitt & Owens Financial, Inc., and JMM Noteholder Representative, L.L.C., brought an accounting-malpractice action in the Wayne Circuit Court against Deloitte & Touche (ISC), L.L.C., and others. The defendants had an office in Wayne County. They brought a motion to change venue to Oakland County, where Dimmitt had its corporate headquarters, on the ground that the defendants had performed the accounting work there. The court, Daphne Means Curtis, J., denied the motion. The defendants applied for leave to appeal. The Court of Appeals, WILDER, P.J., and KELLY and BORRELLO, JJ., reversed, holding that, under MCL 600.1629(1), the original injury in this case occurred in Oakland County, at Dimmitt's place of business, when the plaintiffs first relied on the negligently provided information to make investment decisions and that venue was proper in that county. 274 Mich App 470 (2007). The plaintiffs applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 480 Mich 899 (2007).

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

The location of the original injury for purposes of determining venue under MCL 600.1629(1)(a) or (b) is where the first actual injury occurred that resulted from an act or omission of another.

1. A claim for negligence requires an actual injury. Because MCL 600.1629(1)(a) and (b) refer to the county where the original injury occurred, a court must examine the first injury resulting from an act or omission by a defendant to determine where venue is proper. The place of original injury, not the original breach of the standard of care, establishes venue.

2. Plaintiffs did not suffer their original injury when the defendants allegedly negligently conducted audits and prepared reports or when plaintiffs relied on the defendants' reports. Plaintiffs suffered only a potential injury—that their investment

decisions might turn out to be poor ones—when they relied on the reports. Plaintiffs allegedly suffered their first actual injury only when Dimmitt was unable to comply with its financial obligations and was forced to liquidate its assets. Because plaintiffs' principal places of business are in Oakland County, they suffered their original injury there, and venue is proper in that county.

3. The Court of Appeals erred by focusing on where plaintiffs relied on the information, but that Court reached the right result in this case with respect to the proper venue.

4. *Bass v Combs*, 238 Mich App 16 (1999), is overruled to the extent that it held that venue was proper in the county where the negligent omissions of a defendant occurred rather than the county in which the original injury to the plaintiff occurred.

Court of Appeals result affirmed and case remanded for entry of an order changing venue.

Justice KELLY, concurring in part and dissenting in part, agreed that the phrase "original injury" as used in the tort venue statute is not synonymous with breach of a duty, that venue is proper in Oakland County, and that the Court of Appeals decision should be affirmed. She would hold that the original injury to Dimmitt occurred when it made business decisions in reliance on the allegedly negligent audit because when and where damages manifest themselves is not important for venue purposes.

Justice CAVANAGH would deny leave to appeal.

VENUE — TORT ACTIONS.

The location of the original injury for purposes of determining the venue for a tort action is where the first actual injury occurred that resulted from an act or omission of another (MCL 600.1629[1][a], [b]).

Stark Reagan, P.C. (by *Peter L. Arvant* and *Gregory S. Pierce*), for Dimmitt & Owens Financial, Inc.

Beals Hubbard, P.L.C. (by *John A. Hubbard* and *Eric A. Parzianello*), for JMM Noteholder Representative, L.L.C.

John P. Jacobs, P.C. (by John P. Jacobs), and *Sidley Austin LLP* (by *Jeffrey C. Sharer* and *Kristin R. Seeger*) for Deloitte & Touche (ISC), LLP, and Philip Jennings.

Amicus Curiae:

Plunkett Cooney (by *Ernest R. Bazzana*) for the Michigan Association of Certified Public Accountants.

CORRIGAN, J. In this accounting malpractice action, we consider where an "original injury" occurs for purposes of determining venue under MCL 600.1629(1)(a) and (b). We conclude that the location of the original injury is where the first *actual* injury occurs that results from an act or omission of another, not where a plaintiff contends that it first relied on the act or omission that caused the injury. Reliance creates only a *potential* injury, which is insufficient to state a negligence cause of action and, consequently, cannot constitute the original injury necessary to establish venue. Accordingly, we affirm the result the Court of Appeals reached, but reject its reasoning.

Plaintiffs Dimmitt & Owens Financial, Inc., and JMM Noteholder Representative, L.L.C., sued defendants Deloitte & Touche (ISC), L.L.C., Deloitte Services Limited Partnership, also known as Deloitte & Touche, L.L.P., and Philip Jennings (collectively, defendants) in the Wayne Circuit Court, alleging that defendants had committed malpractice when providing auditing services to Dimmitt. Defendants moved for a change of venue, contending that they had performed their auditing services at Dimmitt's offices in Oakland County. They contended that Oakland County was the "county in which the original injury occurred." MCL 600.1629(1)(a). Plaintiffs responded by arguing that defendants had generated the reports on which plaintiffs relied in defendants' Wayne County office. The trial court denied defendants' motion.

The Court of Appeals reversed, holding that the original injury occurred when plaintiffs first relied on

defendants' allegedly faulty audit reports to make investment decisions at Dimmitt's place of business in Oakland County.[1] The Court of Appeals concluded that venue was proper in Oakland County.[2] The Court of Appeals erred as a matter of law by focusing on where plaintiffs relied on defendants' work product because this reliance only created a potential injury. We hold that, for purposes of determining where venue is properly laid, the location of the original injury is where the first actual injury occurred that resulted from an act or omission of the accountant defendants. Here, the first injury plaintiffs allegedly suffered occurred when Dimmitt could not satisfy its financial obligations and was forced to liquidate its assets. Because both plaintiffs' principal places of business are in Oakland County, venue is proper in Oakland County. Therefore, although the reasoning of the Court of Appeals was erroneous, we affirm the result on other grounds.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs alleged that Dimmitt is a "traditional factor" that purchases accounts receivable at a discount from its customers. Factoring is a financial transaction that occurs when a business is owed money by a debtor. This business sells one or more of its invoices at a discount to a third party, the factor, to obtain cash. The debtor then directly pays the factor the full value of the invoice. The factor, however, bears the risk that the debtor will not pay the invoice.[3]

Dimmitt received financial backing for its factoring business through unsecured promissory notes from

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[1] *Dimmitt & Owens Financial, Inc, v Deloitte & Touche (ISC), LLC*, 274 Mich App 470, 480; 735 NW2d 288 (2007).

[2] *Id*.

[3] See Black's Law Dictionary (7th ed).

numerous investors.[4] By late 2002, it held approximately $16 million in debt on these promissory notes. These unsecured promissory notes were subordinate in interest to Dimmitt's obligation to Standard Federal Bank, which had provided Dimmitt with a line of credit to fund its factoring operations. Because the bank required Dimmitt to provide interim review and year-end financial statements, Dimmitt retained defendants to conduct financial audits and generate reports. Dimmitt would then distribute copies of the interim review and year-end financial statements to the bank and Dimmitt's investors.

Plaintiffs alleged that by 2003 Dimmitt was in default on its repayment obligation to the bank and could not meet its financial obligations to its investors. Dimmitt notified the bank of its impending default and presented a proposal for reorganization to its investors, which both the bank and the investors accepted. Dimmitt also entered into a forbearance agreement with the bank. Shortly thereafter, Dimmitt determined that it lacked the financial capacity to comply with either the forbearance agreement or the reorganization plan, and it elected to liquidate its assets.

Plaintiffs alleged that the development of Dimmitt's proposal for reorganization and its negotiations with the bank were premised on the true value of Dimmitt's assets, as set forth in the financial statements audited by defendants. Subsequently, however, Dimmitt discovered that a significant portion of its assets had been vastly overstated in the financial statements audited and reviewed by defendants. Moreover, Dimmitt discovered accounting errors and omissions. In particular, the statements included accounts receivable that had been

[4] Plaintiff JMM Noteholder Representative, LLC, is composed of and represents the interests of these investors.

converted to "purchase discounts" that should have been considered debts rather than assets. Defendants had also failed to accurately assess which of Dimmitt's accounts receivable were actually collectible. Defendants had designated some accounts as assets that were actually uncollectible.

Plaintiffs filed a complaint in the Wayne Circuit Court, alleging accounting malpractice. They also alleged negligence, fraud/intentional misrepresentation, constructive fraud, breach of contract, and breach of fiduciary duty and sought a declaratory judgment. In lieu of answering plaintiffs' complaint, defendants sought a change of venue. Defendants contended that they had performed the accounting work relevant to plaintiffs' complaint at Dimmitt's offices in Oakland County. Defendants argued that MCL 600.1629(1)(a) required a transfer of venue from Wayne County to Oakland County because Oakland County was "the county in which the original injury occurred." Plaintiffs responded by asserting that the annual engagement letters, meetings and audit staffing decisions, letters seeking documents and spreadsheets in preparation for conducting an audit, document review and analysis, compilation of a draft report, and issuance of the final financial statements had all originated from or occurred at defendants' headquarters in Wayne County. The trial court denied defendants' motion to change venue.

On defendants' application for leave to appeal, the Court of Appeals reversed, holding that the original injury occurred when plaintiffs first relied on the information that defendants had negligently provided.[5] It held that "defendants' alleged negligence in collecting and analyzing data and information presented only the potential for future injury, but plaintiffs suffered the

[5] *Dimmitt*, 274 Mich App at 480.

original injury when they relied on defendants' allegedly faulty information in making investment decisions."[6] Those decisions occurred at Dimmitt's place of business. The Court thus held that venue was proper in Oakland County.[7]

Plaintiffs sought leave to appeal in this Court. We ordered oral argument on whether to grant plaintiffs' application or take other peremptory action.[8]

II. STANDARD OF REVIEW

Venue is controlled by statute in Michigan.[9] The Legislature is properly imbued with the power to establish the venue for causes of action.[10] This Court reviews de novo questions of statutory interpretation.[11] In doing so, our primary obligation is to discern legislative intent as reflected in the plain language of the statute.[12] When the language of a statute is unambiguous, the Legislature's intent is clear, and judicial construction is neither necessary nor permitted.[13]

We review a trial court's ruling in response to a motion to change venue under the "clearly erroneous" standard.[14] Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made.[15]

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[6] *Id*.

[7] *Id*.

[8] *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 480 Mich 899 (2007).

[9] *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 309; 596 NW2d 591 (1999) (opinion by KELLY, J.); MCL 600.1629(1).

[10] *Coleman v Gurwin*, 443 Mich 59, 62; 503 NW2d 435 (1993).

[11] *Lash v Traverse City*, 479 Mich 180, 186; 735 NW2d 628 (2007).

[12] *Id*. at 187.

[13] *Id*.

[14] *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

[15] *Id*.

III. LEGAL ANALYSIS

MCL 600.1629(1) provides, in relevant part:

> Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The defendant resides, has a place of business, or conducts business in that county.
>
> (*ii*) The corporate registered office of a defendant is located in that county.
>
> (b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The plaintiff resides, has a place of business, or conducts business in that county.
>
> (*ii*) The corporate registered office of a plaintiff is located in that county.

Before the statute was amended by 1995 PA 161 and 1995 PA 249, effective March 28, 1996, subsections 1(a) and (b) referred to a "county in which all or a part of the cause of action arose," rather than "the county in which the original injury occurred."

In *Lorencz v Ford Motor Co,* 439 Mich 370, 377; 483 NW2d 844 (1992), this Court interpreted the preamendment language to mean that "venue is proper where part or all of the cause of action arose, not merely at the situs of the injury." We explained:

> It is clear that a breach of duty can occur in a different venue than the injury in a tort case. For example, in a products liability action, the product can be designed in one

> county, manufactured in another, and the injury may occur in yet a third. A plaintiff, alleging proper facts, can file suit in any one of these places because all or a part of the cause of action arose in any one of them. Under the plain language of MCL 600.1629(1)(a); MSA 27A.1629(1)(a), venue would be properly laid in any one of them.[16]

This Court refined *Lorencz* in *Gross v Gen Motors Corp*, 448 Mich 147; 528 NW2d 707 (1995). In that case, the plaintiff argued that because damages are an element of a tort action, they establish a place or places where a tort action arises. We stated:

> Under MCL 600.1629; MSA 27A.1629, venue in a tort action is proper only at the situs of an injury, or in the place or places where the breach of a legal duty occurs that subsequently causes a person to suffer damages. Tangential damages that occur other than at such places are irrelevant to venue determination.[17]

In *Coleman v Gurwin,* 443 Mich 59; 503 NW2d 435 (1993), this Court analyzed the preamendment version of the statute in the context of a legal malpractice action. In that case, the defendant lawyer had allegedly given erroneous advice regarding a potential wrongful discharge claim and the applicable statute of limitations. This information induced the plaintiff to forgo filing suit until after the expiration of the period of limitations. Because the underlying suit arose in Wayne County and the defendant conducted business there, the trial court held that venue was properly laid in Wayne County. The Court of Appeals agreed. We reversed, stating:

> Although evidence of an underlying suit may be necessary to prove proximate cause and damages, because legal

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[16] *Lorencz*, 439 Mich at 375.

[17] *Gross*, 448 Mich at 165.

> malpractice is a separate cause of action, venue is determined by the location of the primary suit, i.e., where the alleged legal negligence occurred. The venue of a "suit within a suit" is not a part of the legal malpractice cause of action, therefore, it may not direct the venue of the legal malpractice action. A legal malpractice action arises solely in the county where the allegedly negligent legal representation occurred. The Court of Appeals, therefore, erred by holding that the venue of the "suit within a suit" controls the venue of a legal malpractice claim.[18]

We continued:

> Not one of the parts of the cause of action for legal malpractice occurred in Wayne County; the plaintiff retained the attorney in Oakland County, the advice was given in Oakland County and received in Washtenaw County, and the statute of limitations ran while the plaintiff lived in Washtenaw County. Plaintiff's action did not arise in whole or in part in Wayne County because defendant's alleged malpractice occurred outside of the county. Although the underlying litigation would have occurred in Wayne County, the actual suit at issue—the legal malpractice between plaintiff and defendant—is premised solely on allegedly negligent advice given on soil beyond the boundaries of Wayne County.[19]

In *Bass v Combs,* 238 Mich App 16; 604 NW2d 727 (1999), the Court of Appeals analyzed the proper venue for a legal malpractice action under the current, amended version of the statute. In that case, the plaintiff filed a legal malpractice claim against the defendants when her underlying wrongful discharge case was dismissed with prejudice because the defendants had failed to respond to discovery requests and had failed to instruct the plaintiff to appear at a deposition. The plaintiff filed her legal malpractice

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[18] *Coleman*, 443 Mich at 66.

[19] *Id.* at 66-67.

claim in Wayne County, but the trial court transferred the case to Oakland County because the parties had initiated their attorney-client relationship in Oakland County.

The plaintiff appealed the transfer of venue of her legal malpractice claim.[20] The Court of Appeals relied on the reasoning of *Coleman*, although *Coleman* had interpreted the preamendment version of the statute.[21] The Court of Appeals held that Wayne County was the proper venue for the malpractice action because the plaintiff had set forth several instances of "legal negligence" that occurred in Wayne County, namely, the defendants' failures to comply with court orders and otherwise properly handle the plaintiff's wrongful discharge case.[22]

We overrule *Bass* to the extent that it held that venue was proper in the county where the negligent omissions of the defendant occurred rather than the county in which the original injury suffered by the plaintiff occurred.[23] The amendment of MCL 600.1629(1)(a) and (b) changed the law of venue in tort cases and considerably limited the county in which a cause of action can be brought. The Legislature chose in the amended statute to adopt language that clearly and unambiguously limits venue to the situs of the original injury when either the defendant or the plaintiff resides, does business, or has a corporate office there.

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[20] The Court of Appeals consolidated that appeal with her appeal of the trial court's dismissal of her underlying claim.

[21] *Bass*, 238 Mich App at 20-21.

[22] *Id*. at 21-22.

[23] Although the Court of Appeals improperly applied the reasoning of *Coleman* to the decision in *Bass*, it did reach the right result. The original injury in *Bass* was the dismissal of the underlying suit that occurred in Wayne County. Therefore, venue was properly laid in Wayne County.

The phrase "original injury" is not defined by statute, and this Court has not addressed it previously. The Court of Appeals analyzed what constitutes an original injury in *Taha v Basha Diagnostics, PC*, 275 Mich App 76, 78; 737 NW2d 844 (2007), holding that "to determine venue in tort actions, it is necessary to identify the actual place of occurrence of the damage or injury that gives rise to the plaintiff's cause of action."

While *Taha* involved a medical malpractice claim, its reasoning applies equally to the present case. In *Taha*, the plaintiff alleged that he fell and injured his wrist. A doctor treated the plaintiff for his wrist injury in Wayne County. An x-ray of the plaintiff's wrist was taken in Wayne County, but it was sent to the defendants in Oakland County to be read. The defendants allegedly misread the x-ray and communicated their findings to the doctor, who began treating the plaintiff in Wayne County based on the defendants' allegedly negligent reading of the x-ray. The Court of Appeals explained that "[i]n the medical-malpractice context, it is clear that the plaintiff's injury is not merely the defendant's alleged failure to meet the recognized standard of care. Instead, the plaintiff's injury is the corporeal harm *that results from* the defendant's alleged failure to meet the recognized standard of care."[24] Therefore, the Court of Appeals held that venue was proper in Wayne County —the county where the plaintiff suffered actual physical harm:

> The damage about which plaintiff complains in the case at bar is not the alleged misreading of the x-ray itself, but is the corporeal injury that plaintiff sustained as a result of defendants' alleged negligence. Contrary to defendants' contention, the mere misreading of the x-ray itself resulted in no actual harm, and therefore did not constitute an

[24] *Taha*, 275 Mich App at 79 (emphasis in original).

> "injury" for medical-malpractice purposes. Similarly, the x-ray misreading, without more, did not become an "injury" within the meaning of MCL 600.1629 until it *resulted in* an actual injury to the plaintiff.[25]

Taha highlights the importance of separating a breach of the standard of care from the injury caused by the breach. Many negligent acts or omissions may occur that for whatever reason do not result in an actual injury. This Court has made clear, however, that a claim for negligence does not exist without actual injury.[26] Because MCL 600.1629(1)(a) and (b), as amended, refer to the county where the "original injury" occurred, we hold that courts must look to the first injury *resulting from* an act or omission of a defendant to determine where venue is proper. It is the original *injury*, not the original breach of the standard of care, that establishes venue under MCL 600.1629(1)(a) and (b).

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[25] *Id.* at 79-80 (emphasis in original). The dissent's attempt to distinguish *Taha* fails. Justice KELLY notes that "the original injury in *Taha* was the *ineffective* treatment devised in reliance on the negligent radiological reading." *Post* at 635 (emphasis added). We agree. The plaintiff suffered an injury because he had been treated *ineffectively*, i.e., he was injured because he did not receive the treatment of his wrist that he needed for it to heal properly. The treatment plan created in reliance on the negligent reading of the x-ray created only a potential injury. Once that treatment plan proved ineffective, the plaintiff suffered an actual injury.

[26] *Henry v Dow Chem Co*, 473 Mich 63, 74-75; 701 NW2d 684 (2005). The dissent contends that *Henry* is inapposite because it involved the substantive merits of a negligence claim rather than the "matter[s] of convenience" involved in a determination of proper venue. *Post* at 633. Justice KELLY seems to advocate a different definition of "injury" within the context of the venue statute. The text of the venue statute does not, however, suggest or support such a distinction. MCL 600.1629(1)(a) and (b) refer to the county where the "original injury" occurred. In *Henry*, this Court defined "injury" as an actual injury rather than a potential injury. No principled basis exists to alter the definition of "injury" because the text of the venue statute does not suggest any different meaning than that used in *Henry*.

In this case, plaintiffs alleged that defendants had failed to comply with the standard of care for accounting professionals by negligently conducting audits and preparing financial reports. They claimed that this breach of the standard of care constituted the original injury, which occurred when defendants signed off on and mailed their faulty reports. As illustrated in *Taha*, this analysis fails. A breach of the standard of care does not constitute an injury.

Plaintiffs also did not suffer their original injury when they relied on defendants' reports. The Court of Appeals held that "plaintiffs suffered the original injury when they *relied* on defendants' allegedly faulty information in making investment decisions."[27] We have explained, however, that "Michigan law requires more than a merely speculative injury. . . . It is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory."[28] At the time of plaintiffs' reliance, plaintiffs suffered only a *potential* injury, namely, that their investment decisions based on defendants' negligence *might* turn out to be poor ones that *might* injure plaintiffs. The original injury did not occur until plaintiffs allegedly suffered an *actual* injury as a result of their reliance on defendants' services. The first actual injury plaintiffs allegedly suffered occurred when Dimmitt could not satisfy its financial obligations and was forced to liquidate its assets.[29] Both plaintiffs' principal places of business are in Oakland County, and, therefore, the alleged original

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[27] *Dimmitt*, 274 Mich App at 480 (emphasis added).

[28] *Henry,* 473 Mich at 72-73 (emphasis in original).

[29] While in this case a significant amount of time elapsed between plaintiffs' reliance and the injury, there may be situations in which reliance could produce an immediate injury that would constitute an original injury. We reiterate that the only relevant question for venue purposes is when a plaintiff suffered an actual injury.

injury was suffered in Oakland County. Accordingly, venue was properly laid in Oakland County.

IV. CONCLUSION

The Court of Appeals incorrectly focused its inquiry on where plaintiffs relied on defendants' work product, rather than where plaintiffs suffered the original, actual injury. Nevertheless, it reached the correct result in concluding that venue was proper in Oakland County. Both plaintiffs' alleged injuries occurred when Dimmitt was unable to satisfy its financial obligations and was forced to liquidate its assets. That injury occurred in Oakland County, the location of both plaintiffs' principal places of business.

For these reasons, we affirm the result reached by the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order changing venue to the Oakland Circuit Court.

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

KELLY, J. (*concurring in part and dissenting in part*). I agree that "original injury" as used in the tort venue statute[1] is not synonymous with the breach of a duty and that venue here is proper in Oakland County. But I disagree with the majority's conclusion that the "original injury" for venue purposes occurred when plaintiff Dimmitt & Owens Financial, Inc. (Dimmitt) became unable to meet its financial obligations and elected to liquidate its assets.

The majority focuses on when Dimmitt's damages emanating from the original injury became manifest.

[1] MCL 600.1629(1)(a) and (b).

But I find that the original injury occurred earlier, when Dimmitt made investment decisions in reliance on the allegedly negligent audit report of defendant Deloitte & Touche (ISC), L.L.C. The Court of Appeals reached a substantially similar conclusion when it stated that "plaintiffs suffered the original injury when they relied on defendants' allegedly faulty information in making investment decisions. The alleged damages flowed from this original injury, which occurred at Dimmitt's place of business in Oakland County."[2] I would affirm the Court of Appeals conclusion.

The majority relies heavily on *Henry v Dow Chem Co*[3] to redefine the phrase "original injury" as "actual," rather than "potential," injury.[4] I have several objections to this reliance on *Henry*.

First, I fail to see how *Henry* is relevant to determining venue. There, a majority of the Court refused to recognize a cause of action for medical monitoring. But venue is "a matter of convenience,"[5] not a question of whether a plaintiff has stated a legally cognizable cause of action.[6] Were venue tied to the legal sufficiency of a complaint, no plaintiff would ever have a forum in which to make "a good-faith argument for the exten-

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[2] *Dimmitt & Owens Financial, Inc, v Deloitte & Touche (ISC), LLC*, 274 Mich App 470, 480; 735 NW2d 288 (2007).

[3] *Henry v Dow Chem Co*, 473 Mich 63, 72-73; 701 NW2d 684 (2005).

[4] *Ante* at 631.

[5] *Peplinski v Employment Security Comm*, 359 Mich 665, 668; 103 NW2d 454 (1960).

[6] In order to avoid the plaintiffs' showing financial injury for the cost of medical monitoring, the majority in *Henry* unjustifiably attempted to limit Michigan negligence law to cases showing "present physical injury." *Henry*, 473 Mich at 75, 78. If Michigan law were so limited, the instant claim for accounting malpractice would not be cognizable in Michigan because plaintiffs have no basis to allege present physical injury.

sion, modification, or reversal of existing law," which is something Michigan's court rules expressly allow.[7]

Second, the majority in *Henry* effectively equated actual injury with manifest injury.[8] In his dissent in *Henry*, Justice CAVANAGH explained that injuries to legally protected interests are actual injuries, even when their manifestation is latent.[9] I joined the dissent in *Henry* and continue to disagree with the majority's definition of injury in that case to exclude latent injuries.

Third, the majority in *Henry* noted that this Court had not "finely delineated the distinction between an 'injury' and the 'damages' flowing therefrom . . . ."[10] The majority in *Henry* then immediately conflated the two.[11] But the words "injury" and "damages" appear in separate elements of the cause of action for negligence.[12] And "injury" in the first instance is a "violation of another's legal right . . . ."[13] Damages may eventually emanate from the violation.

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[7] MCR 2.114(D)(2).

[8] *Henry*, 473 Mich at 84, 100-101.

[9] *Id*. at 110 (CAVANAGH, J., dissenting) (citing cases from other jurisdictions).

[10] *Id.* at 75 (majority opinion).

[11] *Id*.

[12] The elements of a cause of action for negligence are:

> 1. The existence of a legal duty by defendant toward plaintiff;
>
> 2. the breach of such duty;
>
> 3. the proximate causal relation between the breach of such duty and an *injury* to the plaintiff; and
>
> 4. the plaintiff must have suffered *damages*. [*Lorencz v Ford Motor Co*, 439 Mich 370, 375; 483 NW2d 844 (1992) (citations omitted; emphasis added).]

[13] Black's Law Dictionary (7th ed).

In this case, the original injury to plaintiff occurred when it made business decisions in reliance on an allegedly negligent audit. Plaintiff, a business entity, had a right to expect that the audit results were correct and to make its business decisions on the basis of those results. Plaintiff was initially injured when it exercised this right. Damages followed.

This conclusion is in line with the Court of Appeals decision in *Taha v Basha Diagnostics, PC*,[14] which the majority quotes with approval.[15] The plaintiff in *Taha* was treated for a broken wrist in Wayne County. In beginning the treatment, plaintiff's physician relied on x-rays that the Oakland County defendants misread. The Court of Appeals held that "the location of plaintiff's treatment by [his doctor] following defendants' services was determinative of venue in this case."[16] The "actual harm" occurred "at [his doctor's] office in Wayne County."[17] While the Court of Appeals alternatively referred to plaintiff's "corporeal injury,"[18] it never identified that injury separately from the treatment of plaintiff's pre-existent broken wrist.

The plaintiff in *Taha* was entitled to receive proper medical treatment based on a correct reading of his x-ray. He was injured when an improper treatment plan was devised on the basis of an incorrect radiological reading. Thus, the original injury in *Taha* was the ineffective treatment devised in reliance on the negligent radiological reading. As a result of that injury, the plaintiff claimed some unspecified damage to his already broken wrist.

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[14] *Taha v Basha Diagnostics, PC*, 275 Mich App 76; 737 NW2d 844 (2007).

[15] *Ante* at 629-630.

[16] *Taha,* 275 Mich App at 80.

[17] *Id*.

[18] *Id*. at 79.

Acts done in reliance on someone's negligence may not always be at stake in tort venue cases. Additionally, the distinction between injury and damages may not always be relevant in determining the proper venue. In this case, both the original injury and the damages following from that injury occurred in Oakland County, where both Dimmitt and its investors' organization, plaintiff JMM Noteholder Representative, L.L.C., had their headquarters. Nevertheless, it is important not to conflate injury and damages, because the tort venue statute speaks of "original injury," and damages follow only after that original injury has occurred. Under the current tort venue statute, when and where damages manifest themselves is not important for venue purposes.

I would affirm the Court of Appeals decision.

CAVANAGH, J. I would deny leave to appeal.

MANUEL v GILL

Docket No. 131103. Decided July 16, 2008.

Iskandar Manuel and several members of his family brought an action in the Ingham Circuit Court against Timothy J. Gill and others, including the Tri-County Metro Narcotics Squad (TCM), some of the governmental entities comprising TCM, and several other police officers assigned to TCM. Manuel had agreed to act as an informant in an undercover drug investigation conducted by TCM. The plaintiffs alleged gross negligence, intentional or negligent infliction of emotional distress, violations of the plaintiffs' constitutional rights by the defendants' subjecting them to a state-created danger, and breach of contract, all related to allegations that the actions of TCM's agents allowed drug dealers targeted in the investigation to learn of Manuel's cooperation with law enforcement. The court, Paula J. Manderfield, J., granted the defendants summary disposition on all counts and dismissed the plaintiffs' claims with prejudice. The Court of Appeals, METER, P.J., WHITBECK, C.J., and SCHUETTE, J., affirmed. With regard to the contract claims, however, the Court of Appeals affirmed the dismissal on an alternative ground, concluding that TCM is a state agency and that any claim against a state agency must be brought in the Court of Claims rather than the circuit court. 270 Mich App 355 (2006). TCM sought leave to appeal the determination that it is a state agency. The Supreme Court initially denied leave to appeal, 477 Mich 1067 (2007), but on reconsideration ordered oral argument on whether to grant the application or take other peremptory action. 480 Mich 929 (2007).

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

TCM is a juridical entity subject to suit, but it is not a state agency under MCL 600.6419(1)(a), and the plaintiffs were not required to file their suit against TCM in the Court of Claims.

1. TCM had standing to appeal the judgment of the Court of Appeals despite the fact that it was a prevailing party in that Court. A party seeking appellate standing must be an aggrieved party. A party that received a favorable judgment may be an aggrieved party with appellate standing if the party has nonethe-

less suffered a concrete and particularized injury as a result of the judgment. TCM suffered a concrete harm in the Court of Appeals by the Court's holding that TCM is a state agency. Because that holding permitted the plaintiffs to refile their contract claims in the Court of Claims, TCM was aggrieved by the Court of Appeals decision.

2. TCM is a juridical entity that is subject to suit. TCM was formed pursuant to the Urban Cooperation Act, MCL 124.501 *et seq*., by means of an interlocal agreement. MCL 124.507(2) categorically provides that such an entity "may sue and be sued in its own name."

3. MCL 600.6419(1)(a) gives the Court of Claims exclusive jurisdiction over various claims, including contract actions, brought against state entities, including state agencies. To determine whether an entity is a state agency, a reviewing court should consider (1) whether the entity was created by the state constitution, a state statute, or state agency action, (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes.

4. TCM was created pursuant to an agreement between various local entities, the Michigan Department of State Police, and the Federal Bureau of Investigation, not by any state constitutional provision, state statute, or state agency action. Although the Department of State Police exercises control over TCM's daily operations, TCM's activities are ultimately controlled by a command board composed of a representative from each entity that created TCM. Only one state official sits on that board, so local officials preponderantly govern TCM. TCM is not funded by the state government, and its object is to fight drug distribution within three counties, which is a local purpose. Given these factors, TCM is not a state agency.

Affirmed in part, reversed in part, and remanded to the circuit court for further proceedings.

Justice KELLY, joined by Justices CAVANAGH and WEAVER, concurring in the result only, would not have addressed whether a prevailing party can prosecute an appeal because it was not a disputed issue and had not been adequately argued, making this case a poor vehicle for creating broad precedent in that area of the law.

1. APPEAL — STANDING — AGGRIEVED PARTIES — PREVAILING PARTIES.

A party that receives a judgment in its favor may have appellate standing if it nonetheless suffered a concrete and particularized injury as a result of the judgment.

2. COURTS — COURT OF CLAIMS — JURISDICTION — PARTIES — STATE AGENCIES.

To determine whether an entity is a state agency for purposes of deciding whether jurisdiction lies in the Court of Claims, a reviewing court should consider (1) whether the entity was created by the state constitution, a state statute, or state agency action, (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes (MCL 600.6419[1][a]).

Kevin L. McAllister for Iskandar Manuel and others.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *James T. Farrell* and *Ann M. Sherman*, Assistant Attorneys General, for the Tri-County Metro Narcotics Squad.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Patrick A. Aseltyne*), for Eaton County and the Eaton County Sheriff.

Cohl, Stoker, Toskey & McGlinchey, P.C. (by *John R. McGlinchey*), for Ingham County, the Ingham County Sheriff, and Rusty Banehoff.

MARKMAN, J. At issue in this case is (1) whether defendant Tri-County Metro Narcotics Squad (TCM) has standing to appeal the decision of the Court of Appeals despite prevailing on every issue in that Court, (2) if so, whether TCM is a juridical entity subject to suit, and (3) whether TCM is a "state agency" that may only be sued in the Court of Claims. We conclude that, because TCM was aggrieved by the Court of Appeals decision, which permitted plaintiffs to bring a subsequent suit on the same grounds in a different court, TCM has standing to appeal that decision. We further conclude that TCM is a juridical entity subject to suit. Finally, we hold that TCM is not a state agency under

MCL 600.6419(1)(a). Accordingly, the Court of Appeals erred in requiring suit to be filed in the Court of Claims. For these reasons, we affirm in part the judgment of the Court of Appeals, we reverse in part that judgment, and we remand this case to the Ingham Circuit Court for further proceedings in conformity with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The underlying events in this case unfolded in 1999, when plaintiff Iskandar Manuel agreed to assist TCM in combating area drug dealers. TCM, an entity formed under an interlocal agreement between various units of local, state, and federal government,[1] assisted Manuel in portraying himself as a drug dealer in order to earn the trust of local drug dealers and thereby secure evidence against them.

Although the partnership between Manuel and TCM existed for several years, the relationship ultimately soured. Manuel alleged that agents of TCM negligently exposed him and his family to danger by acting in such a manner that targeted drug dealers could readily deduce Manuel's cooperation with law enforcement. After several such alleged incidents, Manuel and members of his family filed the instant complaint in November 2003 in the Ingham Circuit Court. In an amended complaint, plaintiffs alleged 11 counts against TCM, various signatories to the interlocal agreement that

[1] TCM was created pursuant to an agreement between the Michigan State Police (MSP), the Ingham County Sheriff's Office, the Eaton County Sheriff's Department, the Clinton County Sheriff's Department, the Lansing Police Department, the East Lansing Police Department, the Lansing Township Police Department, and the Lansing office of the Federal Bureau of Investigation. The overarching responsibility for TCM rests in its command board; each of the signatories to the interlocal agreement appoints one representative to the command board. Day-to-day operations are run by a representative of the MSP.

created TCM, and several individuals associated with TCM. The complaint alleged that defendants had committed gross negligence, intentionally or negligently inflicted emotional distress on plaintiffs, violated plaintiffs' constitutional rights by subjecting them to a state-created danger, and breached an express or implied contract with plaintiffs. The only claim relevant in the instant case is the breach-of-contract claim.

The trial court granted summary disposition to defendants, holding that plaintiffs had failed to state a cause of action on all counts. With regard to the breach–of-contract claim, the trial court concluded that the statute of frauds, MCL 566.132(1)(b),[2] required a written agreement; because plaintiffs relied on an oral contract between Manuel and TCM, they failed to adequately substantiate their claim. The trial court dismissed plaintiffs' claims for failure to state a cause of action, and dismissed all 11 counts with prejudice.

The Court of Appeals affirmed, concluding that the trial court had properly dismissed the claims of gross negligence, infliction of emotional distress, and state-created danger. *Manuel v Gill*, 270 Mich App 355, 375, 380-381; 716 NW2d 291 (2006). With regard to the breach-of-contract claim, the Court of Appeals concluded that the trial court had erroneously determined

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[2] MCL 566.132 provides:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> * * *
>
> (b) A special promise to answer for the debt, default, or misdoings of another person.

that the statute of frauds was implicated. *Id*. at 376-377. However, "because the TCM is operated under the direction and supervision of the MSP, . . . the TCM is equivalent to a state agency." *Id*. at 377. Any claim brought against a state agency must be brought in the Court of Claims, not a circuit court. *Id*. at 377-378, citing MCL 600.6419. "Accordingly, albeit for the wrong reason, the trial court properly granted summary disposition for the TCM on the Manuels' breach of contract claim." *Id*. at 378. Thus, the Court of Appeals permitted suit to be brought against TCM in the Court of Claims on the breach-of-contract claim.

Despite obtaining an affirmance of the trial court's dismissal in the Court of Appeals, TCM filed an application for leave to appeal in this Court, asking us to consider whether the Court of Appeals properly concluded that TCM is a "state agency." We denied the application for leave to appeal. 477 Mich 1067 (2007). However, we subsequently granted TCM's motion for reconsideration, vacated our previous order, and ordered oral argument on whether to grant the application. 480 Mich 929 (2007).[3]

II. STANDARD OF REVIEW

"Whether a party has standing is a question of law that we review de novo." *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479

[3] We asked the parties to consider:

> (1) whether, in light of the statement in the Court of Appeals judgment that a breach of contract action against [TCM] was possibly viable in the Court of Claims, TCM was an aggrieved party entitled to appeal, despite the Court of Appeals affirmance of the Ingham Circuit Court's grant of summary disposition on all grounds; and (2) whether the Court of Appeals erred in ruling that TCM is equivalent to a state agency. [480 Mich 929 (2007).]

Mich 280, 291; 737 NW2d 447 (2007). We review de novo a trial court's grant of summary disposition. *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 83; 746 NW2d 847 (2008). We also consider questions of statutory and contractual interpretation de novo. *Ross v Auto Club Group*, 481 Mich 1, 6; 748 NW2d 552 (2008); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

III. ANALYSIS

A. APPELLATE STANDING

The first issue we must address is whether TCM has standing to appeal the decision of the Court of Appeals. In order to have appellate standing, the party filing an appeal must be "aggrieved." *People v Hopson*, 480 Mich 1061, 1061 (2008); *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). This requirement stems from the fact that this Court's "judicial power," established by Const 1963, art 6, § 1, extends only to " 'a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a "particularized" or personal injury.' " *Federated*, *supra* at 292, quoting *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 615; 684 NW2d 800 (2004). This Court recently clarified the requirement that a party seeking appellate standing must be aggrieved:

> "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." . . . An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially

> invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated*, *supra* at 291-292, quoting *In re Trankla Estate*, 321 Mich 478, 482; 32 NW2d 715 (1948).]

Federated further explained: " ' "A party who could not benefit from a change in the judgment has no appealable interest." ' " *Federated*, *supra* at 291 n 2, quoting *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 226; 249 NW2d 29 (1976) (citation omitted).

What makes this case unusual is that the appellant, TCM, was a prevailing party in the Court of Appeals. That is, the Court of Appeals decided *each* issue in TCM's favor and affirmed the trial court's grant of summary disposition to TCM. Ordinarily, a party who prevails on every claim cannot be considered to be aggrieved by a court's ruling. However, a prevailing party may possess appellate standing if, despite the judgment in its favor, it has nonetheless suffered a concrete and particularized injury as a result of the Court of Appeals decision.

Given the disparities between the holdings of the trial court and the Court of Appeals, TCM suffered a concrete harm in the Court of Appeals, and hence, in our judgment, may fairly be considered to be an aggrieved party. The trial court held that plaintiffs' complaint was too conclusory and thus was insufficient to state a claim for breach of contract, and that the contract claim was further barred by the statute of frauds. Accordingly, it dismissed the contract claim with prejudice. On appeal, the Court of Appeals affirmed the dismissal of the contract claim, albeit on separate jurisdictional grounds. Although it held that the complaint was sufficient to state a claim and that the

statute of frauds was inapplicable, it also concluded that plaintiffs' claim had to be filed in the Court of Claims because TCM is a "state agency." *Manuel*, *supra* at 376-378. Accordingly, the Court of Appeals judgment permitted plaintiffs to refile the contract claims in the Court of Claims. Hence, before the Court of Appeals judgment, plaintiffs' lawsuit against TCM had been dismissed with prejudice; however, after this judgment, the contract claim was revived. Plaintiffs had only to file it in a different court and, in fact, subsequently did so. Because the decision of the Court of Appeals revived the contract claim, TCM was aggrieved by that decision and therefore has standing to appeal.[4]

B. JURIDICAL ENTITY

TCM asserts that the suit against it should be dismissed because it is not a "juridical entity"—that is, it is not an entity that can be rendered subject to suit. TCM was formed pursuant to the Urban Cooperation Act (UCA), MCL 124.501 *et seq*. Both the trial court and the Court of Appeals concluded that, under the UCA, TCM was subject to suit, relying on MCL 124.507(2), which states:

> A separate legal or administrative entity created by an interlocal agreement shall possess the common power

[4] The most compelling objection to this conclusion is that any injury to TCM is merely hypothetical, because there was no certainty that plaintiffs would, in fact, sue TCM in the Court of Claims. To have standing, a party's injury must be "actual or imminent," not "conjectural or hypothetical." *Nat'l Wildlife Federation*, *supra* at 628. Whatever the merits of this argument immediately after the Court of Appeals decision, this argument is now moot because plaintiffs have already filed the contract claim against TCM in the Court of Claims. Hence, TCM's injury is not hypothetical; TCM is currently facing an actual lawsuit because of the Court of Appeals decision. Accordingly, TCM's injury is not conjectural or hypothetical.

> specified in the agreement and may exercise it in the manner or according to the method provided in the agreement. The entity may be, in addition to its other powers, authorized in its own name to make and enter into contracts, to employ agencies or employees, to acquire, construct, manage, maintain, or operate buildings, works, or improvements, to acquire, hold, or dispose of property, to incur debts, liabilities, or obligations that, except as expressly authorized by the parties, do not constitute the debts, liabilities, or obligations of any of the parties to the agreement, to cooperate with a public agency, an agency or instrumentality of that public agency, or another legal or administrative entity created by that public agency under this act, to make loans from the proceeds of gifts, grants, assistance funds, or bequests pursuant to the terms of the interlocal agreement creating the entity, and to form other entities necessary to further the purpose of the interlocal agreement. *The entity may sue and be sued in its own name*. [Emphasis added.]

TCM is a "separate legal or administrative entity created by an interlocal agreement." The second sentence of MCL 124.507(2) enumerates a range of activities that such an entity "may be . . . authorized" to undertake, such as entering contracts and acquiring buildings. The phrase "may be authorized" indicates that the entity is not necessarily entitled to undertake such actions; rather, the entity "may be authorized" to do so, but absent an authorization the entity would not be able to act.

In contrast to the second sentence of MCL 124.507(2), the third sentence simply states: "The entity may sue and be sued in its own name." This language indicates that an entity created pursuant to the UCA, such as TCM, may be sued. The third sentence does not contain the qualifying language of the second sentence, which lists certain activities in which an entity "may be *authorized*" to engage. This difference in language strongly suggests that the Legislature intended to distinguish between activities that must be

authorized and activities that do not require authorization. Because the third sentence of MCL 124.507(2) states categorically that an entity may sue and be sued, we conclude that TCM is a juridical entity subject to suit.

TCM raises two arguments against this conclusion. TCM first focuses on the term "may" in the third sentence: "The entity *may* sue and be sued in its own name." It argues that "may" indicates that an entity may be sued only if the agreement creating the entity so specifies. However, the term "may" is relevantly defined as being "used to express opportunity or permission . . . ." *Random House Webster's College Dictionary* (1997). In general, our courts have said that the term "may" is "permissive," *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 120; 523 NW2d 310 (1994), as opposed to the term "shall," which is considered "mandatory," *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008). In MCL 124.507(2), the term "may" indicates that an entity created by an interlocal agreement is susceptible to being held to account in a court of law. That is, MCL 124.507(2) first states, in the active voice, that an entity "may sue." This indicates that an entity is granted the discretionary ability to decide whether to bring suit. MCL 124.507(2) then uses the passive voice, stating that an entity "may be sued." This statement similarly indicates that persons suffering an injury from an entity are granted the discretionary ability to sue the entity. In other words, "may" here is permissive: it grants permission to persons injured to sue the entity. Because MCL 124.507(2) states that "[a]n entity may sue and be sued in its own name," the Legislature has signaled that such an entity may potentially be sued and is susceptible to suit.[5]

[5] Moreover, as argued above, MCL 124.507(2) distinguishes between activities that must be "authorized" before an entity may undertake

TCM also argues that the interlocal agreement must specifically authorize suit under MCL 124.505(c), which states:

> A joint exercise of power pursuant to this act shall be made by contract or contracts in the form of an interlocal agreement which may provide for:
>
> * * *
>
> (c) The precise organization, composition, and nature of any separate legal or administrative entity created in the interlocal agreement with the powers designated to that entity.

TCM contends that because the contract creating the entity "may provide for . . . [t]he precise organization, composition, and nature" of the entity, the formative contract must specify every aspect of such an entity; in particular, before an entity may be brought to court, the interlocal agreement must specify that the entity is subject to suit, for otherwise the "nature" of the entity would not permit a legal action against it. However, TCM's reliance on MCL 124.505(c) is, in our judgment, misplaced, because that statute states *generally* that aspects of an entity's nature may be specified in the interlocal agreement; on the other hand, MCL 124.507(2) states *specifically* that at least one aspect must be understood as characterizing an entity—namely, that it "may sue and be sued." Thus, even if we assume that the amenability to suit can be described as an aspect of an entity's "nature," because the more

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them and activities that do not require such authorization. Essentially, TCM asks this Court to rewrite the statute to include the permission to sue and be sued in the list of activities that must be authorized. However, "our job is not to rewrite the statute and we direct plaintiff to the Legislature for any relief that might be forthcoming." *Numerick v Krull*, 265 Mich App 232, 235; 694 NW2d 552 (2005).

specific provision prevails over the more general, *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 181; 730 NW2d 722 (2007), MCL 124.505(c) does not suggest that specific authorization is required before suit may be brought against TCM.

C. STATE AGENCY

Because TCM is a juridical entity subject to suit, we must now consider TCM's final argument, that the Court of Appeals erroneously held that TCM was a "state agency" and thereby subject to suit in the Court of Claims. MCL 600.6419(1)(a) of the Revised Judicature Act (RJA) indicates that the Court of Claims has exclusive jurisdiction "[t]o hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." Hence, if the Court of Appeals correctly concluded that TCM is a "state agency," then jurisdiction was proper only in the Court of Claims, barring any other law to the contrary. TCM contends that it is not a state agency, and hence that plaintiffs' original suit may proceed as originally filed in the Ingham Circuit Court.

The RJA does not define the term "state agency." Although the dictionary relevantly defines "agency" as "a government bureau or administrative division," *Random House Webster's College Dictionary* (1997), this definition does not afford guidance in distinguishing between what is a bureau or division of the government and what is not, and hence ultimately is not helpful.

The meaning of statutory terms may also be deduced from their context, under the principle of *noscitur a sociis*. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 215; 737 NW2d 670

(2007). A court does not "construe the meaning of statutory terms in a vacuum." *Tyler v Cain*, 533 US 656, 662; 121 S Ct 2478; 150 L Ed 2d 632 (2001). "Rather, we interpret the words 'in their context and with a view to their place in the overall statutory scheme.' " *Id*., quoting *Davis v Michigan Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989). " 'It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.' " *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421-422; 662 NW2d 710 (2003), quoting *Third Nat'l Bank in Nashville v Impac Ltd, Inc*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977).

Here, MCL 600.6419(1)(a) lists the following state entities: "departments, commissions, boards, institutions, arms, or agencies." State law establishes various "departments," such as the Department of State, MCL 16.125, the Department of the Attorney General, MCL 16.150, and the former Department of Labor, MCL 16.475, which is now the Department of Labor and Economic Growth. Numerous laws create "commissions," such as the former Michigan Superconducting Super Collider Commission, which subsequently had its powers and duties transferred to the Department of Labor and Economic Growth. MCL 3.814(1); MCL 3.821. State law also creates a "state board of assessors." MCL 207.1. The University of Michigan is designated an "institution" under MCL 390.1. Although we are unaware of any law creating an "arm" of the state, we note that the term is commonly defined as "an administrative or operational branch of an organization: *an investigative arm of the government*." *Random House Webster's College Dictionary* (1997). These statutes indicate that the other terms listed in MCL 600.6419(1)(a) besides "agencies" commonly refer to

entities created by state law, thereby suggesting that one aspect of a state agency is that it is created pursuant to state law.

Another statute sheds further light on the meaning of "state agency." MCL 600.6458 explains how a judgment against a state entity in the Court of Claims should be paid:

> (1) In rendering any judgment against the state, or any department, commission, board, institution, arm, or agency, the court shall determine and specify in that judgment the department, commission, board, institution, arm, or agency from whose appropriation that judgment shall be paid.
>
> (2) Upon any judgment against the state or any department, commission, board, institution, arm, or agency becoming final, . . . the clerk of the [Court of Claims] shall certify to the state treasurer the fact that that judgment was entered . . . and the claim shall thereupon be paid from the unencumbered appropriation of the department, commission, board, institution, arm, or agency if the state treasurer determines the unencumbered appropriation is sufficient for the payment. In the event that funds are not available to pay the judgment . . . , the state treasurer shall instruct the clerk of the court of claims to issue a voucher against an *appropriation made by the legislature* for the payment of judgment claims . . . . [Emphasis added.]

A judgment against a "state agency" is paid out of the "appropriation" made to or for the agency by the Legislature. MCL 600.6458 thus indicates that a state agency receives funding from the state government, through an act of the Legislature. Thus, a second aspect of a state agency for purposes of MCL 600.6419(1)(a) is that such an agency is funded, at least in part, by the state government.

In addition to considering relevant statutes to ascertain the meaning of "state agency," we should also consider prior caselaw. In *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168; 351 NW2d 544 (1984), we considered whether a concealed weapons licensing board was a "state board" under the Administrative Procedures Act of 1969 (APA), which defines "agency" as "a state . . . board . . . created by the constitution, statute, or agency action." MCL 24.203(2).[6] Because it was undisputed that the board at issue had been "created by . . . statute," *Hanselman*, *supra* at 183, the critical issue in *Hanselman* was whether the board was a "state" board. To make this determination, *Hanselman* adopted a general test, addressing "the characteristics of the board, the relationship between the board and the state, and the functions performed by the board." *Id*. at 184. *Hanselman* argued that the board did not have the characteristics of a state entity because only one of its three members was a state official and the board acted by majority vote,[7] the statute granted wide discretion to the board, the board had only local jurisdiction, and each board acted independently of any other concealed weapons licensing board. *Id*. at 187-192. *Hanselman* then argued that the relationship between the board and the state did not indicate that the board was a state entity, because no state agency controlled the decisions of the individual boards, each board exercised wide discretion, and the

[6] Although *Hanselman* addressed the APA, and not the RJA, which is at issue in this case, it did consider whether a board was a "state" board. Similarly, the critical issue here is whether TCM—which assuredly is an "agency" of some sort—is a "state" agency. Because *Hanselman* addressed a similar issue, we find *Hanselman* pertinent to this case.

[7] The licensing board consisted of the director of the Department of State Police, the county prosecuting attorney, and the county sheriff. *Hanselman*, *supra* at 188.

state did not control the participating local officials. *Id*. at 193-195. Finally, *Hanselman* contended that the board did not serve state functions because "a majority of the concealed weapon licensing board members [are] local officials who exercise their discretion according to local consideration." *Id*. at 196. For these reasons, *Hanselman* concluded that a concealed weapons licensing board was not a "state board." *Id*. at 196-197.

This review of *Hanselman* reveals substantial overlap in the relevant factors identified. Accordingly, we consider it necessary to refine the test enunciated in that case. In our judgment, *Hanselman* focused on two discrete inquiries: first, whether the state ultimately controlled the board, either through statutes that restricted a board's discretion or through a state employee's exercise of power on the board, and, second, whether the purposes served by the entity focused on local interests or statewide interests.

In light of the relevant statutes and *Hanselman*, we conclude that a reviewing court should consider the following factors to determine if an entity is a state agency under MCL 600.6419(1)(a): (1) whether the entity was created by the state constitution, a state statute, or state agency action,[8] (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes. This test essentially constitutes a "totality of the circumstances" test to determine

[8] We note that *Hanselman* concluded that the fact that an entity had been created by a state statute did not necessarily require a finding that the entity was a "state" entity. *Hanselman*, *supra* at 187. We agree that this factor is not dispositive; however, when an entity is created not by a state statute but pursuant to local action, as is the case here, this fact suggests that the entity is not a "state" entity.

the core nature of an entity, see *Hanselman*, *supra* at 186-187, i.e., whether it is predominantly state or predominantly local; hence, the fact that one factor suggests that the entity is an agency of the state is not necessarily dispositive.

Applying this test, we conclude that TCM is not a state agency. First, TCM was created pursuant to an agreement between various local entities, as well as the MSP and the Federal Bureau of Investigation. Hence, TCM was not specifically created by any state constitutional provision, state statute, or state agency action; rather, local actors were required to take affirmative steps to create TCM. Accordingly, this first factor suggests that TCM is a local entity.

Second, TCM is not ultimately controlled by any state entity or official. Although the MSP exercises control over the daily operations of TCM, all of TCM's activities are subject to the ultimate control of the command board, which is composed of a representative from each of the entities that created TCM. This command board acts by majority vote. Because only one state official sits on the command board, the state cannot unilaterally exercise control over TCM's activities. Rather, TCM is preponderantly governed by local officials. Accordingly, the second factor suggests that TCM is a local entity, not a state entity.

Third, according to the briefs of the parties, TCM is not funded by the state government, thereby further suggesting that TCM is not a state agency.[9]

Finally, TCM primarily serves predominantly local purposes. The object of TCM is to fight drug distribu-

[9] However, state employees of the MSP who work with TCM are paid with state funds. This limited use of state money does not, in our judgment, detract from the conclusion that TCM itself is not principally funded by the state.

tion within three counties: Ingham, Clinton, and Eaton. Indeed, the very name, "*Tri-County* Metro Narcotics Squad," indicates the local purpose of TCM. Although one could obviously argue that suppression of drug distribution in these counties will also have a salutary effect on the state as a whole, the primary purpose of TCM is to deter local drug distribution, for the benefit of the local community. Accordingly, this factor also suggests that TCM is not a state agency.

In light of the foregoing factors, we conclude that TCM is not a state agency, and thus plaintiffs were not required to file suit in the Court of Claims. Rather, plaintiffs properly filed the instant suit in the Ingham Circuit Court.

IV. CONCLUSION

We conclude that TCM, despite being the prevailing party in the Court of Appeals, has standing to appeal the decision of that Court because it was nonetheless aggrieved by the Court of Appeals decision. Moreover, we agree with the Court of Appeals that, under MCL 124.507(2), defendant TCM is a juridical entity that is subject to suit. Finally, we conclude that the Court of Appeals erred in concluding that TCM is a "state agency" under MCL 600.6419(1)(a). Instead, we hold that TCM is not a state agency, and thus plaintiffs were not required to file suit in the Court of Claims. Accordingly, we affirm the judgment of the Court of Appeals in part, reverse it in part, and remand this case to the Ingham Circuit Court for further proceedings consistent with this opinion.

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

KELLY, J. (*concurring in the result only*). The majority decides that defendant Tri-County Metro Narcotics Squad (TCM) is (1) an aggrieved party able to prosecute this appeal and (2) a juridical entity capable of being sued, but (3) not a state agency. I do not disagree with any of these conclusions. But I cannot sign the majority opinion because, in my view, it goes one bridge too far.

Whether a prevailing party can prosecute an appeal is an interesting legal issue. In the ordinary case, it would engender strong arguments from both sides. But not here. In this case, all parties agree that TCM is an aggrieved party capable of maintaining this appeal. As a result, standing is not a disputed issue that needs to be resolved. Moreover, there is an utter lack of advocacy for the position that TCM lacks standing.

Because of the absence of argument on one side of this nonissue, this case is not a good vehicle for creating broad precedent about it. Accordingly, I believe that we should decide the issues that have been presented and wait for a case in which standing is contested and there is advocacy by both sides. Because the majority disagrees with my assessment and finds it necessary to engage in a lengthy discussion of standing, I concur only in the result of the opinion.

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

MICHIGAN FEDERATION OF TEACHERS & SCHOOL RELATED PERSONNEL, AFT, AFL-CIO v UNIVERSITY OF MICHIGAN

Docket No. 133819. Argued March 5, 2008 (Calendar No. 4). Decided July 16, 2008.

The Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO, brought an action in the Washtenaw Circuit Court seeking to compel the University of Michigan to release the home addresses and telephone numbers of those of its employees who had not consented to have that information published in the defendant's faculty and staff directory. The defendant had refused to provide this information in response to the plaintiff's request for employee information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., on the ground that home addresses and telephone numbers need not be disclosed under FOIA's privacy exemption, MCL 15.243(1)(a). On cross-motions for summary disposition, the court, Timothy P. Connors, J., granted summary disposition in the defendant's favor, ruling that the home addresses and telephone numbers at issue were personal information protected by the privacy exemption. The Court of Appeals, HOEKSTRA, P.J., and ZAHRA, J. (WILDER, J., concurring), reversed on the ground that the information did not reveal intimate or embarrassing details of the individuals' private lives, as described by *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285 (1997). Unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 258666). The plaintiff sought leave to appeal, which the Supreme Court granted. 480 Mich 902 (2007).

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

The employees' home addresses and telephone numbers meet both prongs of FOIA's privacy exemption because that information is of a personal nature and its disclosure in this case would constitute a clearly unwarranted invasion of privacy.

1. The phrase "of a personal nature" in the privacy exemption includes not only intimate and embarrassing details relating to an individual, but also information that is private or confidential.

While *Bradley* correctly described information of a personal nature as including intimate or embarrassing details regarding an individual, that formulation does not exhaust the intended scope of the phrase "of a personal nature," as *Bradley* itself noted when indicating that none of the documents at issue in that case was embarrassing, intimate, private, or confidential. *Bradley*'s definition of "information of a personal nature" is modified to include private or confidential information relating to an individual.

2. Where a person lives and how that person may be contacted fits squarely within the privacy exemption because this information offers private or confidential details about that person's life and serves as a conduit into the sanctuary of the home.

3. The disclosure of information of a personal nature into the public sphere in certain instances, such as listing one's home address and telephone number in the phone book or on a website, does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance.

4. Disclosure of employees' home addresses and telephone numbers to the plaintiff would reveal little or nothing about a governmental agency's conduct, would not further the stated public policy undergirding FOIA, and would not shed light on whether the defendant and its officials are fulfilling their statutory and constitutional obligations and their duties to the public. When this tenuous interest in disclosure is weighed against the invasion of privacy that would result from the disclosure of employees' home addresses and phone numbers, the invasion of privacy would be clearly unwarranted.

Reversed; order of summary disposition for defendant reinstated.

Justice KELLY, joined by Justice WEAVER, concurring in part and dissenting in part, agreed with the expansion of *Bradley*'s interpretation of the privacy exemption to provide that private information is of a personal nature, but would not conclude that the home addresses and telephone numbers of all the defendant's employees constitute information of a personal nature, and would hold that only the home addresses and telephone numbers of employees whose telephone numbers are not listed in the public telephone directory and who have not allowed the defendant to publish this information are exempt from disclosure.

1. RECORDS — FREEDOM OF INFORMATION ACT — PRIVACY EXEMPTION — WORDS AND PHRASES.

The phrase "of a personal nature" in the privacy exemption of the Freedom of Information Act includes information relating to an individual that is intimate, embarrassing, private, or confidential (MCL 15.243[1][a]).

2. RECORDS — FREEDOM OF INFORMATION ACT — PRIVACY EXEMPTION — SCOPE OF EXEMPTION.

Where a person lives and how that person may be contacted fits within the privacy exemption of the Freedom of Information Act because this information offers private or confidential details about that person's life (MCL 15.243[1][a]).

3. RECORDS — FREEDOM OF INFORMATION ACT — PRIVACY EXEMPTION — PREVIOUSLY DISCLOSED INFORMATION.

The voluntary disclosure of information of a personal nature into the public sphere does not automatically remove the protection of the privacy exemption of the Freedom of Information Act (MCL 15.243[1][a]).

Mark H. Cousens for the plaintiff.

Debra A. Kowich for the defendant.

Amici Curiae:

Edward M. Thomas, Corporation Counsel, and *Susan M. Bisio*, Assistant Corporation Counsel, for Wayne County.

Theresa Kelley, *Carol Hustoles*, *Eileen K. Jennings*, *Victor A. Zambardi*, *Kenneth A. McKanders*, *Louis Lessem*, *William Collins*, *Paul J. Tomasi*, *Catherine L. Dehlin*, and *Miles J. Postema* for the boards of trustees of Michigan State University, Western Michigan University, Central Michigan University, Oakland University, Eastern Michigan University, and Wayne State University; Saginaw Valley State University; Michigan Technological University; the board of control of Northern Michigan University; and Ferris State University.

Bernardi, Ronayne & Glusac, A Professional Corporation (by *Katherine W. MacKenzie*), for the Michigan Press Association.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Thomas Quasarano*, Assistant Attorney General, for the Attorney General.

YOUNG, J. In this case, we must decide if the home addresses and telephone numbers of University of Michigan employees sought through a Freedom of Information Act (FOIA) request are exempt from disclosure under FOIA's privacy exemption.[1] We hold that employees' home addresses and telephone numbers meet both prongs of FOIA's privacy exemption because that information is "of a personal nature" and its disclosure would constitute a "clearly unwarranted invasion of an individual's privacy." In reaching this conclusion, we reexamine the definition of "information of a personal nature" set forth by this Court in *Bradley v Saranac Community Schools Bd of Ed*,[2] and conclude that it unnecessarily limited the intended scope of that phrase. We cure this deficiency and revise that definition to encompass information of an embarrassing, intimate, *private*, or *confidential* nature. We conclude that employees' home addresses and telephone numbers are information of an embarrassing, intimate, private, or confidential nature. Disclosure of this information would constitute a "clearly unwarranted invasion of an individual's privacy" in this case primarily because the core purposes of FOIA would not be advanced by its disclosure to plaintiff. With both prongs of the privacy exemption satisfied, we hold that the Uni-

[1] MCL 15.243(1)(a).

[2] 455 Mich 285; 565 NW2d 650 (1997).

versity of Michigan employees' home addresses and telephone numbers are exempt from disclosure.

Accordingly, the decision of the Court of Appeals is reversed and the circuit court's grant of summary disposition in favor of defendants is reinstated.

FACTS AND PROCEDURAL HISTORY

Plaintiff Michigan Federation of Teachers submitted a FOIA request to defendant University of Michigan's chief FOIA officer, seeking numerous items of information that defendant possessed regarding every University of Michigan employee. The information sought included first and last names, job title, compensation rate, and work address and telephone number. Two additional items of information sought by plaintiff, which are the subject of this appeal, are the employees' home addresses and telephone numbers.

Defendant timely responded to the FOIA request and provided nearly all the information plaintiff sought. With respect to the home addresses and telephone numbers, defendant released the information of 20,812 employees who had given defendant their permission to publish their home addresses and telephone numbers in the University of Michigan's faculty and staff directory. Defendant did not turn over the home addresses and telephone numbers of the remaining 16,406 employees who had withheld permission to publish that information in the directory. Thus, defendant denied the FOIA request in part, relying on the privacy exemption and stating that the information's release would constitute an unwarranted invasion of these employees' privacy.

Plaintiff filed suit in the Washtenaw Circuit Court, seeking to compel the release of the remaining home addresses and telephone numbers. The parties filed cross-motions for summary disposition. Defendant at-

tached to its motion six affidavits from employees who did not want their home addresses and telephone numbers released to the public. Some of the affiants attested that the release of this information would threaten their own or their family's safety.

The circuit court granted defendant's motion for summary disposition. It ruled that the employees' home addresses and telephone numbers were information of a personal nature and that "one would be hard pressed to argue that disclosure 'contributes significantly to public understanding of the operations or activities of the government.' "

The Court of Appeals reversed the circuit court in an unpublished opinion per curiam.[3] Relying on *Bradley,* the panel held that home addresses and telephone numbers were not "information of a personal nature" because they did not reveal intimate or embarrassing details of an individual's private life, even when considered against the "customs, mores, or ordinary views of the community." It also held that no caselaw supported the proposition that public employees' home addresses and telephone numbers were items of personal information,[4] and that in those reported cases where home addresses were held to be exempt from disclosure under the privacy exemption, the plaintiffs had sought disclosure of addresses to access other information that was personal.[5]

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[3] *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 258666).

[4] *Michigan Federation*, *supra* at 3, citing *Tobin v Civil Service Comm*, 416 Mich 661, 671; 331 NW2d 184 (1982), and *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 124; 404 NW2d 606 (1987).

[5] *Michigan Federation*, *supra* at 3, citing *Mager v Dep't of State Police*, 460 Mich 134; 595 NW2d 142 (1999); *Detroit Free Press, Inc v Dep't of State Police*, 243 Mich App 218; 622 NW2d 313 (2000); *Clerical-Technical*

The panel, however, recognized that certain employees might have legitimate reasons to avoid disclosure of their personal information. Relying on *Tobin v Civil Service Comm,* it ruled that on remand defendant "may determine whether any of its employees not included in the directory have demonstrated 'truly exceptional circumstances' to prevent disclosure of names, addresses, and telephone numbers."

Judge WILDER concurred with the majority's decision under *Bradley*, but raised two points. First, he suggested that *Bradley*'s reading of the statutory language was inconsistent with its plain meaning and was worthy of reexamination. Second, he questioned whether the advent of the national do-not-call registry[6] and the rising nationwide problem of identity theft had significantly altered the "customs, mores, or ordinary views of the community" concerning the disclosure of personal identifying information since the *Bradley* Court decided the issue in 1997.

Defendant filed an application seeking leave to appeal, which this Court granted.[7]

Union of Michigan State Univ v Michigan State Univ Bd of Trustees, 190 Mich App 300; 475 NW2d 373 (1991).

[6] PL 108-82, § 1, 117 Stat 1006.

[7] 480 Mich 902 (2007). The order granting leave asked the parties to address

> (1) whether this Court should reconsider its construction of MCL 15.243(1)(a)'s statutory phrase "information of a personal nature" as meaning information that "reveals intimate or embarrassing details of an individual's private life," as set forth in *Bradley v Saranac Bd of Ed*, 455 Mich 285, 294 (1997); (2) whether, on the facts presented in this case, information that might otherwise be considered "ordinarily impersonal . . . might take on an intensely personal character," (quoting *Kestenbaum v Michigan State Univ*, 414 Mich 510, 547 [1982]), such that the privacy exemption might properly be asserted as

STANDARD OF REVIEW

This Court reviews de novo the trial court's decision to grant a motion for summary disposition.[8] This Court reviews de novo as a question of law issues of statutory interpretation.[9] And as we stated in an earlier FOIA case,

> [b]ecause our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. We must give the words of a statute their plain and ordinary meaning.[10]

ANALYSIS

1. BACKGROUND TO FOIA AND THE PRIVACY EXEMPTION

Consistent with the legislatively stated public policy supporting the act,[11] the Michigan FOIA requires dis-

argued by the defendant; and (3) if the *Bradley* test is not modified, whether the advent of the National Do-Not-Call Registry, PL 108-82, § 1, 117 Stat 1006, as well as the creation of the host of methods, unknown to the Court in 1997, which are designed for illicit purposes such as identity theft, have any impact on whether the disclosure of the home addresses and telephone numbers requested is inconsistent with "the customs, mores, or ordinary views of the community" (quoting *Bradley*, at 294) by which the applicability of the privacy exemption is evaluated.

[8] *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

[9] *Wood v Auto-Owners Ins Co*, 469 Mich 401, 403; 668 NW2d 353 (2003); *Herald Co, Inc v Eastern Michigan Univ Bd of Regents,* 475 Mich 463, 471-472; 719 NW2d 19 (2006).

[10] *Herald Co*, 463 Mich at 117-118 (citations omitted).

[11] MCL 15.231(2).

closure of the "public record[s]"[12] of a "public body"[13] to persons who request to inspect, copy, or receive copies of those requested public records.[14] However, § 13 of FOIA[15] sets forth a series of exemptions granting the public body the discretion to withhold a public record from disclosure if it falls within one of the exemptions.[16] In the event a FOIA request is denied and the requesting party commences a circuit court action to compel disclosure of a public record, the public body bears the burden of sustaining its decision to withhold the requested record from disclosure.[17]

The FOIA exemption at issue in this case is the privacy exemption, MCL 15.243(1)(a), which states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

This Court has attempted to construe this provision on many occasions since the enactment of the Michigan FOIA in 1976 and struggled for nearly as many years to reach a consensus regarding its proper interpretation. *Kestenbaum v Michigan State Univ*,[18] marked the first occasion that this Court interpreted the privacy exemp-

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[12] MCL 15.232(e).

[13] MCL 15.232(d).

[14] MCL 15.233.

[15] MCL 15.243.

[16] See *Herald Co*, 463 Mich at 119 n 6 ("It is worth observing that the FOIA does not prevent disclosure of public records that are covered by § 13 exemptions. Rather, it requires the public body to disclose records unless they are exempt, in which case the FOIA authorizes *nondisclosure* at the agency's discretion.") (emphasis in original; citations omitted).

[17] MCL 15.240(4).

[18] 414 Mich 510; 327 NW2d 783 (1982).

tion. The plaintiff, for purposes of political mailings, requested a computer tape containing the names and addresses of the university's students. He sued when Michigan State denied the request. An equally divided Court affirmed the Court of Appeals decision that the tape was exempt.[19]

Chief Justice FITZGERALD's opinion held that the release of the computer tape would violate the privacy exemption. Focusing on the statutory requirement that "the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy," Chief Justice FITZGERALD opined that

> there has remained throughout this country's legal history one recognized situs of individual control—the dwelling place. Without exception, this bastion of privacy has been afforded greater protection against outside assaults than has any other location.[20]

He reasoned that disclosure of the magnetic tape would constitute an invasion of privacy because

> any intrusion into the home, no matter the purpose or the extent, is definitionally an invasion of privacy. *A fortiori*, the release of names and addresses constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home.[21]

Further, where the student information would be distributed in electronic rather than print form, Chief Justice FITZGERALD argued presciently that this invasion was "clearly unwarranted" because "the pervasiveness

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[19] Chief Justice FITZGERALD, joined by Justices WILLIAMS and COLEMAN, wrote the opinion affirming the Court of Appeals. Justice RYAN wrote an opinion advocating reversal of the Court of Appeals, joined by Justices KAVANAGH and LEVIN. The late Justice BLAIR MOODY did not participate.

[20] *Id.* at 524.

[21] *Id.* at 524-525.

of computer technology has resulted in an ever-increasing erosion of personal privacy."[22]

Justice RYAN's opinion would have ordered the release of the computer tape. Examining the privacy exemption, Justice RYAN argued for a two-part inquiry to analyze MCL 15.243(1)(a). First, the requested information must be "of a personal nature." Second, if the information is of a personal nature, its disclosure must constitute a "clearly unwarranted invasion of an individual's privacy." Justice RYAN argued that the information sought was not "of a personal nature" because he was "satisfied that names, addresses, telephone numbers, and other standard identifying information simply are not embarrassing information 'of a personal nature' for the overwhelming majority of students at Michigan State University."[23] He took the view that

> [m]ost citizens voluntarily divulge their names and addresses on such a widespread basis that any alleged privacy interest in the information is either absent or waived. People applying for employment reveal their names and addresses on their resumes; cashing a check or using a credit card requires the release of one's address; and ordering magazines or otherwise communicating through the mail reveals one's address. Being a licensed driver, a car owner, a property owner or taxpayer, an officer of a corporation, an applicant for a marriage license, or a registered voter requires revelation, at a minimum, of one's name and address, information which is often routinely made available to the public. While some people might *prefer* that their names and addresses not be known to certain individuals such as advertisers, bill collectors, or

[22] *Id*. at 531. Even in 1982, which some might consider part of the technological "stone age," Chief Justice FITZGERALD warned that "[w]hile it is true that the computer era has brought untold benefits for society, it also is fraught with potential dangers to our notions of individual autonomy." *Id*. at 531-532.

[23] *Id.* at 546.

> freeloading relatives, that preference is simply not based on the fact that one's address is a "personal", intimate, or embarrassing piece of information. We leave for another day the question whether, in certain unusual circumstances, ordinarily impersonal information might take on an intensely personal character.[24]

Justice RYAN concluded by arguing that even if the information was "of a personal nature," its disclosure was not a "clearly unwarranted invasion of privacy" because the students had ways to avoid unwanted mailings and because "the public benefits of voter registration and political campaigning contemplated in this case clearly outweigh any minimal invasion of privacy."[25]

After *Kestenbaum*, this Court decided several cases without being able to provide a majority rule for the proper construction of the privacy exemption. In *Tobin v Civil Service Comm*,[26] a "reverse" FOIA case,[27] this Court unanimously held that FOIA "authorizes, but does not require, nondisclosure of public records falling within a FOIA exemption."[28] The plaintiffs challenged the defendants' decision to release the names and addresses of all classified civil service employees. Even though the parties agreed that the privacy exemption was applicable, this Court declined to consider whether the names and addresses were exempt under FOIA because it rejected the plaintiff's threshold argument that the Michigan FOIA affirmatively prohibited their disclosure. In *Int'l Union, United Plant Guard Workers*

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[24] *Id.* at 546-547.

[25] *Id.* at 554.

[26] 416 Mich 661; 331 NW2d 184 (1982).

[27] In a reverse FOIA case, the plaintiff seeks to *prohibit* the release of public records sought by a third party, rather than compel their disclosure. *Id.* at 663.

[28] *Id.* at 667. Justice RILEY did not participate in the decision.

of America v Dep't of State Police,[29] another evenly divided Court affirmed the Court of Appeals decision ordering the release of reports containing the names and addresses of guards employed by certain security guard agencies.[30] Two years later, this Court issued another fractured decision in *State Employees Ass'n v Dep't of Mgt & Budget*.[31] Five members of this Court affirmed the Court of Appeals, which had ordered disclosure of the home addresses of certain state civil service bargaining units; one member dissented, and another did not participate.[32]

In *Swickard v Wayne Co Med Examiner*,[33] this Court finally reached a majority result and rationale applying the privacy exemption.[34] In *Swickard*, the plaintiff sought the autopsy report and toxicology test results of a judge who was found shot to death in his mother's home. Rejecting the defendant's argument that the privacy exemption protected their disclosure, Justice RILEY's majority opinion concluded, first, that the records were not "information of a personal nature." To

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[29] 422 Mich 432; 373 NW2d 713 (1985).

[30] Justices LEVIN and RYAN wrote opinions affirming the Court of Appeals, with Justice BOYLE concurring in both. Justices RILEY and BRICKLEY wrote opinions that would have reversed the Court of Appeals. Chief Justice WILLIAMS joined Justice RILEY's opinion. Justice CAVANAGH did not participate. Thus, this Court divided 2-2-2-1 on the proper analysis.

[31] 428 Mich 104; 404 NW2d 606 (1987).

[32] Although Justice CAVANAGH's lead opinion was joined by Justices LEVIN and ARCHER, it did not garner a majority on every point. Justices BRICKLEY and BOYLE concurred in the result, but disagreed with the lead opinion's rationale. Chief Justice RILEY dissented, arguing that the privacy exemption precluded disclosure of the addresses. Justice GRIFFIN did not participate.

[33] 438 Mich 536; 475 NW2d 304 (1991).

[34] Justice GRIFFIN concurred in the result only. Justices LEVIN and MALLETT dissented.

define "personal," the majority consulted a dictionary and discovered that it meant "[o]f or pertaining to a particular person; private; one's own . . . . Concerning a particular individual and his intimate affairs, interests, or activities; intimate . . . ."[35] The majority also approvingly noted that Justice RYAN, in his *Kestenbaum* opinion, had defined that statutory phrase as something "personal, intimate, or embarrassing." The majority further reasoned that it would look to the common law and constitutional law to determine if disclosure would violate a privacy right protected under FOIA.[36] It held that the scope of the privacy exemption would be gauged by reference to "the customs, mores, or ordinary views of the community . . . ."[37] After concluding that the deceased judge and his family had no common-law or constitutional right to privacy with respect to the records after his death, the majority concluded that the records were not "information of a personal nature" and thus their disclosure was not an invasion of privacy.

In *Booth Newspapers, Inc v Univ of Mich Bd of Regents,*[38] the plaintiff newspapers sought travel records created in conjunction with the university's search for a new president. The university argued that the records were exempt under the privacy exemption. This Court held that this information was not "of a personal nature" because there were no customs, mores, or ordinary views of the community that warranted

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[35] *Id*. at 547, quoting *The American Heritage Dictionary of the English Language, Second College Edition* (1976).

[36] *Swickard*, 438 Mich at 556 ("Our review of the common law and constitutional law is helpful insofar as we are given points of reference through a highly subjective area of the law where the Legislature has provided little statutory guidance on the notion of privacy contained in the FOIA.").

[37] *Id.* at 547.

[38] 444 Mich 211; 507 NW2d 422 (1993).

a finding that the travel expense records of a public body constituted information of a personal nature.[39]

In *Bradley,* the central case under consideration in the present appeal, this Court decided whether the personnel records of public school teachers and administrators were exempt from disclosure under the privacy exemption. The *Bradley* Court affirmed that this exemption contains two elements: first, that the information sought is "of a personal nature" and, second, that the disclosure of the information would be a "clearly unwarranted invasion of privacy." With respect to the first element, the majority observed:

> In the past, we have used two slightly different formulations to describe "personal nature." The first defines "personal" as "[o]f or pertaining to a particular person; private; one's own . . . . Concerning a particular individual and his intimate affairs, interests, or activities, intimate . . . . " We have also defined this threshold inquiry in terms of whether the requested information was "personal, intimate, or embarrassing." Combining the salient elements of each description into a more succinct test, we conclude that information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life. We evaluate this standard in terms of "the 'customs, mores, or ordinary views of the community' . . . ."[40]

Using this new definition, the majority concluded that the personnel records sought in *Bradley* were not "of a personal nature" because they did not contain any "embarrassing, intimate, private, or confidential" matters.[41]

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[39] *Id*. at 233. Justices BOYLE and RILEY dissented separately from the majority on the FOIA issue. Justice GRIFFIN joined Justice RILEY's dissent.

[40] *Bradley*, 455 Mich at 294.

[41] *Id.* at 295. Justice BOYLE, joined by Justices CAVANAGH and KELLY, dissented in part from the majority and criticized the majority for

Bradley has since served as the template for the first prong of the privacy exemption. This Court decided two cases involving this exemption after *Bradley*: *Mager v Dep't of State Police*[42] and *Herald Co v Bay City*.[43] In *Mager*, the plaintiff made a FOIA request for the names and addresses of persons who owned registered handguns. The State Police denied the FOIA request pursuant to the privacy exemption. Relying on the *Bradley* definition that " 'information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life,' "[44] this Court held in a unanimous per curiam decision that the records fell within this first prong because gun ownership was information of a personal nature as an intimate or perhaps embarrassing detail of one's personal life.[45]

The *Mager* Court then moved to the second prong of the test—whether "disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy"—and devised what has since been labeled the "core purpose test." *Mager* took guidance from the United States Supreme Court's decision in *United States Dep't of Defense v Fed Labor Relations Auth*,[46] in which the Court employed a balancing test

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significantly narrowing the definition of the term "personal nature" and adopting its more "succinct" definition. The dissenters would have retained the two definitions of "personal nature" from *Swickard* and *Kestenbaum*, "of or pertaining to a particular person; private; one's own . . . . Concerning a particular individual and his intimate affairs, interests, or activities; intimate" and "personal, intimate, or embarrassing," rather than narrowing the definition. They concurred in the result, however, because they did not believe that disclosure of the records would constitute a clearly unwarranted invasion of privacy.

[42] 460 Mich 134; 595 NW2d 142 (1999).

[43] 463 Mich 111; 614 NW2d 873 (2000).

[44] *Mager*, 460 Mich at 143, quoting *Bradley*, 455 Mich at 294.

[45] *Mager*, 460 Mich at 144. Justice CAVANAGH concurred in the result only.

[46] 510 US 487; 114 S Ct 1006; 127 L Ed 2d 325 (1994).

under the federal FOIA's privacy exemption.[47] Under that test, " 'a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect,' " and the " 'only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.' "[48] This Court, like the Court in *Dep't of Defense*, also quoted approvingly the statement that " 'disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct' " would not advance the core purpose of FOIA.[49] In addition, this Court noted that, like the United States Supreme Court, it was " 'reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.' "[50] Applying these principles, the *Mager* Court concluded that, under any reasonable balancing, disclosure of the gun-ownership information would constitute a clearly unwarranted invasion of an individual's privacy because it was entirely unrelated to any inquiry regarding the inner working of government or how well the Department of State Police was fulfilling its statutory functions.

In *Herald Co*, this Court unanimously held that the defendant, Bay City, violated FOIA when it refused to disclose public records concerning the final candidates

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[47] 5 USC 552(b)(6) ("This section does not apply to matters that are . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.").

[48] *Mager*, 460 Mich at 145, quoting *Dep't of Defense,* 510 US at 495.

[49] *Mager*, 460 Mich at 145, quoting *United States Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989).

[50] *Mager*, 460 Mich at 146 n 23, quoting *Dep't of Defense*, 510 US at 501.

for the position of Bay City fire chief, in particular the candidates' names, current job titles, cities of residence, and ages. Citing the *Bradley* definition, this Court stated the test for "information of a personal nature" that " 'information is of a personal nature if it reveals *intimate or embarrassing details of an individual's private life*. We evaluate this standard in terms of "the 'customs, mores, or ordinary views of the community'. . . . " ' "[51] This Court concluded that "the fact of application for a public job, or the typical background information one may disclose with such an application, is simply not 'personal' within the contemplation of this exemption."[52] Moreover, this Court held that the community's mores, customs, and views would not support that this information was of a personal nature.

Although the records failed to satisfy the first prong of the privacy exemption, this Court went on to discuss why the records would also fail the second prong. Citing the *Mager* core-purpose test, this Court noted that disclosure of the information concerning the final candidates for fire chief would serve the policy underlying FOIA because it would facilitate the public's access to information regarding the affairs of their city government. Thus, the invasion of privacy, assuming there was one, was not "clearly unwarranted."[53]

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[51] *Herald Co*, 463 Mich at 123-124, quoting *Mager,* 460 Mich at 142, quoting *Bradley,* 455 Mich at 294.

[52] *Herald Co*, 463 Mich at 125.

[53] *Id*. at 127. Since we decided *Bradley* and *Mager*, the Court of Appeals on several occasions has upheld a public body's decision to withhold identifying information under the privacy exemption. See, e.g., *Kocher v Dep't of Treasury*, 241 Mich App 378; 615 NW2d 767 (2000) (addresses of property owners in unclaimed property holder reports); *Detroit Free Press, Inc v Dep't of State Police*, 243 Mich App 218; 622 NW2d 313 (2000) (whether certain Michigan state legislators held concealed weapons permits); *Larry S Baker, PC v City of Westland*, 245 Mich App 90; 627 NW2d 27 (2001) (names, addresses, injury codes, and accident dates of all

Thus, the privacy exemption, as currently interpreted, has two prongs that the information sought to be withheld from disclosure must satisfy. First, the information must be "of a personal nature." Second, it must be the case that the public disclosure of that information "would constitute a clearly unwarranted invasion of an individual's privacy." We analyze whether the home addresses and telephone numbers in this case satisfy both prongs, particularly the tests for both that we articulated in *Bradley* and *Mager*.

2. "INFORMATION OF A PERSONAL NATURE"

In answering the first question whether the home addresses and telephone numbers of university employees are "information of a personal nature," we also reconsider whether *Bradley*'s exposition of that phrase fully captures its intended meaning. The concurring judge on the Court of Appeals suggested, and defendant argues, that the *Bradley* articulation is too narrow.[54]

We hold that the *Bradley* formulation, as far as it goes, is a correct description of what information is "of a personal nature." Thus, we continue to hold that "intimate" or "embarrassing" details of an individual are "of a personal nature." However, a case such as this leads us to conclude that "intimate" and "embarrassing" do not exhaust the intended scope of that statutory phrase. Indeed, the *Bradley* Court itself noted, whether

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injured, potentially injured, or deceased accident victims during a six-month period who were not at fault for the accident); *Detroit Free Press, Inc v Dep't of Consumer & Industry Services*, 246 Mich App 311; 631 NW2d 769 (2001) (all consumer complaints filed with defendant against property insurers in 1999); *Stone Street Capital, Inc v Bureau of State Lottery*, 263 Mich App 683; 689 NW2d 541 (2004) (personal information about prize winners and their assignees).

[54] Indeed, this was also the position of Justices BOYLE, CAVANAGH, and KELLY, who dissented in *Bradley*. See *Bradley,* 455 Mich at 307-308.

inadvertently or not, that "information of a personal nature" includes more than "intimate" or "embarrassing" details of a person's life. After articulating its "succinct test," the *Bradley* Court expanded it by concluding that "none of the documents [sought in that case] contain information of an embarrassing, intimate, *private*, or *confidential* nature."[55] After careful consideration, we conclude that the observation from *Bradley* that intimate, embarrassing, private, *or* confidential information is "of a personal nature" more accurately and fully describes the intended scope of the statutory text as assessed in the first prong of the privacy exemption. Indeed, the words "personal" and "private" are largely synonymous.[56] Thus, private or confidential information relating to a person, in addition to embarrassing or intimate details, is "information of a personal nature."[57]

With the test thus clarified, the next question is whether employees' home addresses and telephone numbers reveal embarrassing, intimate, private, or confidential details about those individuals. We hold that they do. Where a person lives and how that person may be contacted fits squarely within the plain meaning of this definition because that information offers private and even confidential details about that person's life. As Chief Justice FITZGERALD noted in *Kestenbaum*,

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[55] *Bradley*, 455 Mich at 295 (emphasis added).

[56] *The American Heritage Dictionary of the English Language, New College Edition*, p 978 (1976).

[57] While *Bradley* might not have created the most satisfying rubric for interpreting the privacy exemption, and while we might have approached the privacy exemption differently were we writing on a blank slate, we also consider that "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000). *Bradley* is not so unworkable or badly reasoned, in our view, that we must overrule rather than modify it.

"the release of names and addresses constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home."[58]

The potential abuses of an individual's identifying information, including his home address and telephone number, are legion. For example, some of the affiants in this case attested that they do not want their information added to mass mailings, perhaps seeking to avoid the inevitable harassing telephone calls of telemarketers or deluge of junk mail. On a more serious level, other affiants stated that their physical safety or the safety of their families would be jeopardized if their identifying information fell into the wrong hands, such as those of an ex-spouse or a disgruntled patient. These realistic concerns illustrate in practical ways why an individual's home address and telephone number are "information of a personal nature."[59]

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[58] *Kestenbaum*, 414 Mich at 524-525. This case is not the first occasion where this Court has considered whether home addresses and telephone numbers are "information of a personal nature." This Court has a checkered history of splintered and equally divided decisions attempting to determine whether this type of information is "of a personal nature." Compare *Kestenbaum* with *United Plant Guard Workers* and *State Employees Ass'n*. Under the more accurate definition of "information of a personal nature" we adopt today, however, we settle the question and hold that home addresses and telephone numbers constitute private information about individuals.

[59] This Court held in *Bradley*, and elsewhere, that the customs, mores, and ordinary views of the community inform our understanding of the privacy exemption, particularly where the Legislature has provided little statutory guidance about the FOIA's conception of privacy. See *Mager*, 460 Mich at 140 quoting *Swickard*, 438 Mich at 556 ("Our review of the common law and constitutional law is helpful insofar as we are given points of reference through a highly subjective area of the law where the Legislature has provided little statutory guidance on the notion of privacy contained in the FOIA.").

Although we need not reach the analysis that considers the customs, mores, and ordinary views of the community, we are mindful of changes

And, although the federal FOIA privacy exemption

in our society that the widespread introduction of electronic communications has occasioned. One increasingly pernicious problem is identity theft, the misuse of another individual's personal information to commit fraud, which costs businesses and consumers billions of dollars every year, ruins lives, and undermines the reliability of our financial transactions and institutions. See The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, April 2007 at pp 10-11. <http://www.identitytheft.gov/reports/StrategicPlan.pdf> (accessed April 17, 2008).

In 2004, the Michigan Legislature enacted 2004 PA 452, the Identity Theft Protection Act, MCL 445.61 *et seq*., whose title states, among other things, that it is an act "to prohibit certain acts and practices concerning identity theft." It seeks to protect "personal identifying information," which includes "a person's name, address, [and] telephone number," the very type of information sought by plaintiff in this case. MCL 445.63(o). See also, e.g., Identity Theft and Assumption Deterrence Act, as amended by PL 105-318, 112 Stat 3007; Identity Theft Penalty Enhancement Act, as amended by PL 108-275, 118 Stat 831; Fair and Accurate Credit Transactions Act of 2003, PL 108-159, 117 Stat 1952; see also recent state legislation regarding identity theft, e.g., Ala Code 13a-8-190 *et seq*.; Alas Stat 11.46.565 *et seq*.; Ariz Rev Stat Ann 13-2008 *et seq*.; Ark Code Ann 5-37-227 *et seq*.; Cal Penal Code 530.5 *et seq*.; Colo Rev Stat 18-5-901 *et seq*.; Conn Gen Stat 53a-129a *et seq*.; Del Code Ann tit 11, § 854 *et seq*.; DC Code 22-3227.01 *et seq*.; Fla Stat 817.568; Ga Code Ann 16-9-120 *et seq*.; Hawaii Rev Stat 708-839.6 *et seq*.; Idaho Code Ann 18-3124 *et seq*.; 720 Ill Comp Stat 5/16g-1 *et seq*.; Ind Code 35-43-5-3.5; Iowa Code 715a.8 *et seq*.; Kan Stat Ann 21-4018; Ky Rev Stat Ann 514.160 and 514.170; La Rev Stat Ann 14:67.16; Md Code Ann, Crim Law 8-301 *et seq*.; Mass Gen Laws ch 266, § 37e; Minn Stat 609.527; Miss Code Ann 97-45-1 *et seq*.; Mont Code Ann 45-6-332; Neb Rev Stat 28-608; Nev Rev Stat Ann 205.461 *et seq*.; NH Rev Stat Ann 638.25 *et seq*.; NJ Stat Ann 2c:21-17 *et seq*.; NM Stat 30-16-24.1; NY Penal Law 190.77 *et seq*.; NC Gen Stat 14-113.20 *et seq*.; ND Cent Code 12.1-23-11; Ohio Rev Code Ann 2913.49; Okla Stat tit 21, § 1533.1 *et seq*.; Or Rev Stat 165.800; 18 Pa Cons Stat 4120; RI Gen Laws 11-49.1-1 *et seq*.; SC Code Ann 16-13-500 *et seq*.; SD Codified Laws 22-40-8 *et seq*.; Tenn Code Ann 39-14-150; Tex Penal Code Ann 32.51; Utah Code Ann 76-6-1101 *et seq*.; Vt Stat Ann tit 13, § 2030; Va Code Ann 18.2-186.3; Wash Rev Code 9.35.001 *et seq*.; W Va Code 61-3-54; Wis Stat 943.201; Wyo Stat Ann 6-3-901.

Were it necessary to rely on the customs, mores, and ordinary views of the community, we think this recent, positive law enacted by our Legislature (and other jurisdictions) signals that the customs, norms, and

contains language different from Michigan's FOIA privacy exemption, the United State Supreme Court's treatment of that provision is useful to our analysis.[60] In *Dep't of Defense,* the Court unanimously rejected a union's federal FOIA request seeking the home addresses of federal civil service employees. Addressing the employees' interest in the nondisclosure of their home addresses, it opined:

> It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but "[i]n an organized society, there are few facts that are not at one time or another divulged to another." The privacy interest protected by [the federal exemption] "encompass[es] the individual's control of information concerning his or her person." An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.[61]

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ordinary views of the community regard personal identifying information such as home addresses and telephone numbers as being "of a personal nature." At the very least, this is *some* evidence buttressing the conclusion we reach independently.

[60] *Mager*, 460 Mich at 144 ("[T]he privacy exemption in the federal FOIA is worded differently than the corresponding state provision. For that reason, federal decisions concerning the privacy exemption are of limited applicability in Michigan. Nonetheless, federal law is generally instructive in FOIA cases."), citing *Evening News Ass'n v City of Troy*, 417 Mich 481, 494-495; 339 NW2d 421 (1983). The federal privacy exemption, 5 USC 552(b)(6), exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Both the Michigan and federal exemptions refer to disclosure that would constitute a clearly unwarranted invasion of an individual's, or personal, privacy, but the federal exemption covers "personnel and medical files and similar files" while the Michigan exemption covers, more generally, "information of a personal nature."

[61] *Dep't of Defense*, 510 US at 500 (citations omitted). *Dep't of Defense* relied heavily on *United States Dep't of Justice v Reporters Comm for*

The Court astutely recognized that an individual's control over his identifying information is essential where the information regards such personal matters.

An individual's home address and telephone number might be listed in the telephone book or available on an Internet website, but he might nevertheless understandably refuse to disclose this information, when asked, to a stranger, a co-worker, or even an acquaintance. The disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance.

Finally, while it is not critical to our holding that home addresses and telephone numbers are "information of a personal nature," the fact that in this case certain university employees actively asserted control over their identifying information by *withholding* their home addresses and telephone numbers from publication in the university faculty and staff directory undoubtedly lends credence to that conclusion.[62] Particularly in this case, then, the argument that this information is not "of a personal nature" reaches its nadir.[63]

Freedom of the Press, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989), in which the Court held that the disclosure of the contents of an FBI rap sheet to a third party could reasonably be expected to constitute an unwarranted invasion of personal privacy. It observed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Id*. at 763.

[62] See *Dep't of Defense*, 510 US at 501 ("Whatever the reason that these employees have chosen not to . . . provide . . . their addresses, however, it is clear that they have *some* nontrivial privacy interest in nondisclosure.").

[63] Plaintiff relies on the doctrine of *expressio unius est exclusio alterius* to argue that identifying information can never be exempt under the privacy exemption because a subset of identifying information is exempted specifically in the law-enforcement exemption, MCL 15.243(1)(s). Under this doctrine, "the expression of one thing suggests the exclusion of all others." *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712;

3. "PUBLIC DISCLOSURE OF THE INFORMATION WOULD CONSTITUTE A CLEARLY UNWARRANTED INVASION OF AN INDIVIDUAL'S PRIVACY"

Having reached this conclusion, we must move to the second prong of the privacy exemption and determine

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664 NW2d 193 (2003). It is a "long time legal maxim and a safe guide in the construction of statutes marking powers not in accordance with the common law." *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990) (opinion by RILEY, C.J.), quoting *Taylor v Pub Utilities Comm*, 217 Mich 400, 402-403; 186 NW 485 (1922).

Plaintiff notes that the law-enforcement exemption (not to be confused with the law-enforcement-*purposes* exemption, MCL 15.243[1][b]) exempts from disclosure, among other things, the addresses and telephone numbers of active or retired law-enforcement officers or agents, as well as the names, addresses or telephone numbers of their family members, relatives, children, or parents, unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance. Plaintiff contends that the express exemption of this identifying information in the law-enforcement exemption suggests that the Legislature intended the disclosure of identifying information of other public employees.

Plaintiff's reliance on *expressio unius est exclusio alterius* is misplaced. It overlooks the fact that each FOIA exemption, by its plain language, advances a separate legislative policy choice. We do not necessarily infer from the express exemption of law-enforcement-related identifying information in one FOIA exemption that the Legislature intended to make the remaining FOIA exemptions unavailable to exempt identifying information of non-law-enforcement public employees. The different policies underlying these exemptions manifest themselves in differently worded standards for disclosure. The Legislature defined the scope of the privacy exemption generally and did not articulate each and every instance where information would be "of a personal nature" and when its disclosure "would constitute a clearly unwarranted invasion of an individual's privacy." By contrast, the Legislature specifically targeted the law-enforcement exemption to exempt from disclosure specific public records originating from law-enforcement agencies "[u]nless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance." Simply because the Legislature saw fit to enact a specific provision to protect law-enforcement-related information from disclosure, it does not follow that non-law-enforcement-related identifying information *can never* be exempt. In short, plaintiff would have us compare apples to oranges.

whether disclosure of the information at issue would constitute a clearly unwarranted invasion of an individual's privacy. We conclude, under *Mager*'s core-purpose test, that it would result in a clearly unwarranted invasion of privacy. Simply put, disclosure of employees' home addresses and telephone numbers to plaintiff would reveal " 'little or nothing' " about a governmental agency's conduct,[64] nor would it further the stated public policy undergirding the Michigan FOIA.[65] Disclosure of employees' home addresses and telephone numbers would not shed light on whether the University of Michigan and its officials are satisfactorily fulfilling their statutory and constitutional obligations and their duties to the public. When this tenuous interest in disclosure is weighed against the invasion of privacy that would result from the disclosure of employees' home addresses and telephone numbers, the invasion of privacy would be "clearly unwarranted."

CONCLUSION

We hold that information is "of a personal nature" if it constitutes intimate, embarrassing, private, or confidential details about an individual. In this case, employees' home addresses and telephone numbers are information "of a personal nature." Moving to the second prong of the privacy exemption, we conclude that the

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[64] See *Mager*, 460 Mich at 145, quoting *United States Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989).

[65] MCL 15.231(2) ("It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.").

disclosure of employees' home addresses and telephone numbers does not further a core purpose of FOIA by shedding light on whether the University of Michigan is functioning properly and consistently with its statutory and constitutional mandates.

Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting defendant summary disposition.

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

KELLY, J. (*concurring in part and dissenting in part*). The issue is whether the privacy exemption[1] of the Freedom of Information Act[2] (FOIA) exempts from disclosure the home addresses and telephone numbers of University of Michigan employees. The majority decides that it does. I agree that the unlisted[3] home addresses and telephone numbers of employees who refused to give the university permission to publish that information are exempt from disclosure. But I believe that information that individuals allowed to be published is not exempt. Thus, I dissent from the majority opinion insofar as it holds that the home addresses and telephone numbers of *all* the defendant's employees are exempt from disclosure.

FACTS

Plaintiff Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO made a FOIA request to defendant University of Michigan. Plaintiff

[1] MCL 15.243(1)(a).

[2] MCL 15.231 *et seq.*

[3] When I use the term "unlisted" in this opinion, I am referring to information that is not published in the public telephone directory.

sought numerous items, including the home address and telephone number of each of defendant's employees. Defendant provided all requested information except for the addresses and telephone numbers of those employees who had withheld permission to have this information published in the faculty and staff directory. Defendant claimed that the information was exempt from disclosure under the privacy exemption to FOIA.

Plaintiff brought suit in Washtenaw Circuit Court seeking disclosure of this information. Both parties moved for summary disposition. In support of its motion, defendant included affidavits from six employees detailing their reasons for withholding consent. The reasons were wide-ranging. One employee was concerned that an ex-spouse could use the information to locate and hurt her. Another simply believed it would be unfair to disclose unlisted addresses and telephone numbers.

The circuit court granted summary disposition to defendant. It reasoned that the home addresses and telephone numbers of employees who had refused to give permission to publish that information was information of a personal nature. The court added that disclosure of this information would not contribute significantly to public understanding of the operations or activities of government.

In an unpublished opinion per curiam, the Court of Appeals reversed the circuit court decision.[4] The privacy exemption does not generally include home addresses and telephone numbers, it reasoned, because they do not reveal intimate or embarrassing details of an individual's private life. However, the majority also

[4] *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 258666).

held that defendant had persuasively argued that some employees could be exposed to harm if this information were disclosed. Accordingly, it remanded the case to the trial court to consider which of defendant's employees had demonstrated exceptional circumstances sufficient to exempt their addresses and telephone numbers from disclosure.

This Court granted defendant's application for leave to appeal to "reconsider its construction of [the privacy exemption]."[5]

THE PRIVACY EXEMPTION

The privacy exemption to FOIA provides:

> (1) A public body may exempt from disclosure as a public record under this act . . .
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.[6]

For years this Court has struggled to give meaning to this statutory provision. The Court arrived at its most recent interpretation in *Bradley v Saranac Community Schools Bd of Ed*.[7] It observed:

> The privacy exemption consists of two elements, both of which must be present for the exemption to apply. First, the information must be of a "personal nature." Second, the disclosure of such information must be a "clearly unwarranted invasion of privacy." In the past, we have used two slightly different formulations to describe "personal nature." The first defines "personal" as "of or per-

[5] 480 Mich 902 (2007).

[6] MCL 15.243(1)(a).

[7] *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285; 565 NW2d 650 (1997).

> taining to a particular person; private; one's own . . . . Concerning a particular individual and his intimate affairs, interests, or activities; intimate . . . ." We have also defined this threshold inquiry in terms of whether the requested information was "personal, intimate, or embarrassing." Combining the salient elements of each description into a more succinct test, we conclude that information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life. We evaluate this standard in terms of "the 'customs, mores, or ordinary views of the community.' "[8]

Defendant asks us to overrule *Bradley*'s interpretation of the phrase "of a personal nature," arguing that *Bradley* incorrectly interpreted the statutory language. The majority partly accepts the invitation, holding that the *Bradley* formulation of the phrase is overly narrow.

INFORMATION "OF A PERSONAL NATURE"

I did not join the majority opinion in *Bradley*. Instead, I joined Justice BOYLE's partial dissent. Justice BOYLE took issue with the majority's constricted interpretation of the phrase "of a personal nature,"[9] preferring the definitions arrived at in *Kestenbaum v Michigan State Univ*[10] and *Swickard v Wayne Co Med Examiner*.[11] In *Kestenbaum*, Justice RYAN concluded that information is of a personal nature if it is " 'personal,' intimate, or embarrassing."[12] *Swickard* defined the phrase "of a personal nature" as " '[o]f or pertaining to a particular person; private; one's own . . . . Concern-

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[8] *Id.* at 294.

[9] *Id.* at 306-307 (BOYLE, J., dissenting in part).

[10] *Kestenbaum v Michigan State Univ*; 414 Mich 510; 327 NW2d 783 (1982).

[11] *Swickard v Wayne Co Med Examiner*; 438 Mich 536; 475 NW2d 304 (1991).

[12] *Kestenbaum*, 414 Mich at 547 (opinion of RYAN, J.).

ing a particular individual and his intimate affairs, interests, or activities; intimate . . . .' "[13]

Although the majority does not explicitly recognize it, its interpretation of the phrase "of a personal nature" is consistent with the definitions arrived at in *Kestenbaum* and *Swickard*. In fact, the majority's interpretation represents a synthesizing of the two. When one combines the definitions in *Kestenbaum* and *Swickard*, information is "of a personal nature" if it reveals private, intimate, or embarrassing information about a particular person. The majority holds that "intimate, embarrassing, private, or confidential information is 'of a personal nature . . . .' "[14] The majority's interpretation of the privacy exemption is consistent with my position in *Bradley*, and I agree with it.[15]

But *Bradley,* being precedent of this Court, should be followed unless weighty reasons exist for abandoning it. As the United States Supreme Court recently recognized, "considerations [of stare decisis] impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle . . . Court precedents."[16] I am confident that substantial reasons exist for expanding *Bradley*'s interpretation of the privacy exemption.

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[13] *Swickard*, 438 Mich at 547, quoting *The American Heritage Dictionary of the English Language, Second College Edition* (1976).

[14] *Ante* at 676 (emphasis deleted).

[15] The majority's interpretation differs from those of *Kestenbaum* and *Swickard* in that neither case defined the phrase "of a personal nature" to include confidential information. They did provide that private information is "of a personal nature." If information is confidential, it is necessarily private. Thus, as I see it, private information includes confidential information. Therefore, any discrepancy between the *Kestenbaum* and *Swickard* definitions and the majority's interpretation is a distinction without a difference.

[16] *CBOCS West, Inc v Humphries*, ___ US ___, ___; 128 S Ct 1951, 1958; 170 L Ed 2d 864 (2008).

Bradley was decided 10 years ago. Since that time, society has come to recognize that identity fraud poses a major problem.[17] Because of it, individuals are encouraged not to make public their personal information for fear it could be used to victimize them.[18] And individuals have taken notice of this trend and are now more vigilant in protecting their personal information.[19]

Accordingly, it appears that, since *Bradley* was decided, increasing incidents of identity fraud have caused a change in behavior. When the facts underlying a court decision drastically change and render the decision outdated, a reexamination of the decision is required.[20] The changes that have occurred since *Bradley* was decided illustrate that individuals have an interest in preventing the disclosure of more than intimate or embarrassing information. They reasonably wish to prevent the disclosure of other information they keep private. These changes in fact make it appropriate for us to overrule *Bradley* to the extent it holds that private information is not "of a personal nature."

As a consequence, I concur with the majority's decision to expand *Bradley*'s interpretation of the privacy exemption. But I part company from the majority in its application of the new interpretation.

APPLICATION OF THE NEW INTERPRETATION OF THE PRIVACY EXEMPTION

I differ in two respects with the majority's application of the law to the facts of this case. First, defendant

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[17] See The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, April 2007, p 1 <http://www.identitytheft.gov/reports/StrategicPlan.pdf> (accessed May 29, 2008).

[18] *Id.* at 39.

[19] *Id.* at 11-12.

[20] *Parker v Port Huron Hosp,* 361 Mich 1, 24-25; 105 NW2d 1 (1960); *Brown v Bd of Ed*, 347 US 483, 492-495; 74 S Ct 686; 98 L Ed 873 (1954).

has already given plaintiff the home addresses and telephone numbers of those employees who consented to the publication of that information in the faculty and staff directory. Thus, to resolve this case, the majority need not decide whether the home addresses and telephone numbers of *all* of defendant's employees constitute information "of a personal nature." It need only decide whether the home addresses and telephone numbers of employees who refused to allow publication of this information in the school directory are exempt from disclosure. The majority overreaches by unnecessarily deciding the case on a broader basis.

Second, I disagree with the majority's decision insofar as it holds that the home addresses and telephone numbers of *all* defendant's employees are exempt. Merely because some of defendant's employees keep their addresses and telephone numbers private does not mean that the addresses and telephone numbers of *all* the employees is information "of a personal nature."

Employees whose addresses and home telephone numbers are unlisted and who refused to allow defendant to publish them in the school directory have done everything possible to keep that information private. And, by taking action to protect their addresses and telephone numbers from mass dissemination, these individuals have indicated that they consider the information private. Thus, it is reasonable to conclude that the home addresses and telephone numbers of those employees is information "of a personal nature."

Under the privacy exemption, information that is "of a personal nature" is exempt if disclosure of it would constitute a "clearly unwarranted invasion of an individual's privacy."[21] The disclosure of the addresses and

[21] MCL 15.243(1)(a).

telephone numbers of employees who have made efforts to keep this information private would constitute an unwarranted invasion of their privacy. Therefore, I would hold that this information is exempt from disclosure.

But it does not follow that the home addresses and telephone numbers of all defendant's employees is information "of a personal nature."[22] Employees who either have a listed telephone number or who have given defendant permission to publish their information have released their information for mass viewing. By so doing, they have allowed the information to become public.

Individuals who have allowed their information to be made public cannot be heard to argue that the information is private. It is illogical to decide that information pertaining to an individual is private information if the individual himself or herself does not treat it that way. Therefore, the home addresses and telephone numbers of those employees who either have a listed telephone number or who have allowed defendant to publish their information is generally not "of a personal nature." If information is not "of a personal nature," the privacy exemption does not apply to it.

Of course, public information could be "of a personal nature" if disclosure of it reveals something intimate or embarrassing about an individual. For instance, in *Mager v Dep't of State Police*,[23] the plaintiff requested the addresses of persons who owned registered handguns. The information sought in *Mager* is an example of

[22] The burden is on the public body to justify its refusal to disclose the requested information. MCL 15.240(4). The public body does not justify its refusal by showing that some of the requested information is exempt. It must show that all the requested information is exempt.

[23] *Mager v Dep't of State Police,* 460 Mich 134; 595 NW2d 142 (1999).

information that is "of a personal nature" regardless of whether the individual allows it to be made publicly available. Disclosing that information would reveal something intimate about the individual: that he or she owns a handgun. The information requested in the case on appeal would reveal that the employee works for defendant, not an intimate or embarrassing fact. Thus, I would hold that defendant must turn over the home addresses and telephone numbers of employees who have not taken steps to keep that information private.

CONCLUSION

I agree with the decision to expand *Bradley*'s interpretation of the privacy exemption to provide that private information is "of a personal nature." But unlike the majority, I do not believe that the home addresses and telephone numbers of *all* defendant's employees come within the terms of the privacy exemption. I would hold that the home addresses and telephone numbers of employees whose telephone numbers are unlisted and who have not allowed defendant to publish this information are exempt from disclosure. But defendant must disclose the home addresses and telephone numbers of its other employees.

WEAVER, J., concurred with KELLY, J.

STATE NEWS v MICHIGAN STATE UNIVERSITY

Docket No. 133682. Argued March 4, 2008 (Calendar No. 3). Decided July 16, 2008.

State News brought an action in the Ingham Circuit Court against Michigan State University after the university denied its request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The plaintiff had requested disclosure of a police incident report concerning several assaults that occurred in a dormitory room on the university's campus. The court, Joyce Draganchuk, J., dismissed the plaintiff's complaint with prejudice, concluding that the university had met its burden of showing that the report was exempt from disclosure under the privacy exemption, MCL 15.243(1)(a), and the law-enforcement-purposes exemption, MCL 15.243(1)(b), of FOIA. The court did not inspect the report in camera. The Court of Appeals, WHITBECK, C.J., and BANDSTRA and SCHUETTE, JJ., remanded the case to the trial court for it to review the report in camera and determine whether the report contained nonexempt material that could be separated from the exempt material and released to the plaintiff. In reaching its holding, the Court of Appeals observed that, in a FOIA dispute, the passage of time and the course of events, including any subsequent criminal proceedings against the assailants in this case, could strengthen or weaken the parties' argument concerning the applicability of the exemptions, and might render some information otherwise of a personal nature a matter of public knowledge and thus no longer subject to the privacy exemption. 274 Mich App 558 (2007). The university sought leave to appeal, which the Supreme Court granted, limited to the issue of the instructions to the trial court for its review on remand. 480 Mich 902 (2007).

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

The appropriate time to measure the applicability of a FOIA exemption is when the public body asserts it, unless the exemption provides otherwise. The passage of time and the course of events after the public body asserts the exemption do not affect whether

the public record was initially exempt from disclosure and are not relevant to judicial review of the denial of a FOIA request. The denial of a FOIA request occurs at a definite time, and the public body relies on the information available to it at that time to decide whether the record requested is fully or partially exempt from disclosure. If a party that unsuccessfully requested a record believes that, because of changed circumstances, the record can no longer be withheld from disclosure, the party can submit another FOIA request.

Justice WEAVER, concurring, agreed with the majority decision, but wrote separately to stress two points that she considered most important with respect to FOIA requests. Justice WEAVER agreed that the appropriate time to measure whether the public record is exempt is when the public body asserts the exemption. While also agreeing that a public body need not continue to monitor a FOIA request after denying it, Justice WEAVER noted that a party can submit another FOIA request for the record after the denial if the party believes that changed circumstances allow disclosure. The circumstances may have changed over time, but it is those changed circumstances rather than the passage of time that are critical.

Reversed in part and remanded to the trial court for further proceedings.

RECORDS — FREEDOM OF INFORMATION ACT — EXEMPTIONS.

The appropriate time to measure the applicability of an exemption under the Freedom of Information Act is when the public body asserts it, unless the exemption provides otherwise; the passage of time and the course of events after the public body asserts the exemption do not affect whether the public record was initially exempt from disclosure and are not relevant to judicial review of the denial of the request for disclosure (MCL 15.231 *et seq*.).

Honigman Miller Schwartz and Cohn LLP (by *Herschel D. Fink* and *Brian D. Wassom*) for the plaintiff.

Theresa Kelley for the defendant. East Lansing

Amici Curiae:

Debra A. Kowich, *Gloria A. Hage*, *Eileen K. Jennings*, *Kenneth A. McKanders*, *Miles J. Postema, Paul J. Tomasi*, *Catherine L. Dehlin*, *Victor A. Zambardi, Louis Lessem,* and *Carol Hustoles* for the Regents of the

University of Michigan, the boards of trustees of Central Michigan University, Ferris State University, Michigan Technological University, Oakland University, and Western Michigan University, the Eastern Michigan University Board of Regents, the Northern Michigan University Board of Control, and the Wayne State University Board of Governors.

Bernardi, Ronayne & Glusac (by *Katherine W. MacKenzie*) for the Michigan Association of Broadcasters and the Michigan Press Association.

Stuart J. Dunnings III, *Charles Koop*, and *Kahla D. Arvizu* for the Prosecuting Attorneys Association of Michigan, the Michigan Sheriffs' Association, and the Michigan Association of Chiefs of Police.

YOUNG, J. This case involves the applicability of the Freedom of Information Act (FOIA) privacy and law-enforcement-purposes exemptions to a police incident report. Following a notorious assault of several Michigan State University students in a dormitory room, plaintiff State News made a FOIA request that defendant Michigan State University disclose the report. Michigan State resisted this request, claiming that the FOIA privacy and law-enforcement-purposes exemptions permitted it to withhold the requested report. Litigation between the parties ensued, and the Court of Appeals eventually held that the circuit court had erred in determining that the entire report could be withheld. In its decision remanding the case to the circuit court, the Court of Appeals observed that the "subsequent availability of information as a result of later court proceedings in the criminal justice system may well strengthen or weaken the arguments of the parties to a FOIA dispute regarding the applicability" of the exemp-

tions at issue and instructed the circuit court to consider the effect of that availability.[1]

We conclude that this instruction from the Court of Appeals was erroneous and hold that unless the exemption asserted provides otherwise, the applicability of a FOIA exemption is measured when the public body asserts the exemption. The passage of time and the course of events after the assertion of a FOIA exception do not affect whether a public record was initially exempt from disclosure.

Accordingly, we reverse the judgment of the Court of Appeals in part and remand this case to the circuit court, in accordance with the remainder of the Court of Appeals judgment that ordered an in camera inspection of the police incident report for the circuit court to decide what information is exempt from disclosure and to make particularized findings to support its conclusion, as well as to separate, if possible, the exempt material from the nonexempt material.

FACTS AND PROCEDURAL HISTORY

On March 2, 2006, State News submitted a FOIA request to Michigan State seeking disclosure of a police incident report that detailed an incident at Hubbard Hall, a student dormitory at Michigan State, on February 23, 2006. Three male assailants, one of whom was a Michigan State student, allegedly entered a dorm room, threatened three victims with a gun, and poured gasoline on one of the individuals while threatening to light him on fire. The three men were later arraigned on charges of home invasion, felonious assault, and possessing a firearm during the commission of a felony. In

[1] *State News v Michigan State Univ*, 274 Mich App 558, 566-567, 583; 735 NW2d 649 (2007).

a story published several days later, the *State News* reported the names of the three men.

Michigan State denied the FOIA request, citing the privacy exemption[2] and subsections 1(b)(*i*) to (*iii*) of the law-enforcement-purposes exemption.[3] State News appealed administratively, and in a letter replying to State News, Michigan State University President Lou Anna K. Simon affirmed the original determination to deny the FOIA request. State News then filed a complaint in the circuit court, accompanied by a motion to show cause why Michigan State should not disclose the report and a motion for summary disposition.[4] The circuit court ordered a show cause hearing. Michigan State, in its response, attached affidavits from its FOIA officer, the Michigan State University Chief of Police, and the Ingham County Chief Assistant Prosecuting Attorney to support its decision to withhold the report. The affidavits stated that the police incident report contained "incident report persons sheets,"[5] "narrative incident reports,"[6] physical evidence documents,[7] inmate profiles and booking photographs, and other information about the suspects.

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[2] MCL 15.243(1)(a).

[3] MCL 15.243(1)(b)(*i*), (*ii*), and (*iii*).

[4] State News initially filed suit in Oakland County, but the Oakland Circuit Court granted Michigan State's motion to transfer venue to Ingham County. State News refiled its complaint in the Ingham Circuit Court.

[5] According to the affidavits, these documents contained "personally identifiable information about the victims, witnesses, responding police officers, and defendants (such as name, address, sex, race, weight, height, date of birth, driver's license number, student number, criminal history, and other personal and sensitive information)."

[6] According to the affidavits, these reports consisted of "statements from the responding officers, witnesses, victims, defendants, and a third party."

[7] According to the affidavits, these documents consisted of "photo-

At the show cause hearing, the circuit court heard arguments from the parties and ruled from the bench in favor of Michigan State, concluding that the report in its entirety was exempt under both the privacy exemption and subsections 1(b)(*i*) to (*iii*) of the law-enforcement-purposes exemption. However, the court did not inspect the police incident report in camera before it reached its decision. With respect to the privacy exemption, the court found that some of the information sought, such as names, addresses, birthdates, driver's license numbers, and criminal histories of the accused, victims, and witnesses, was information "of a personal nature" and that its disclosure would not further the core purpose of FOIA of shedding light on the workings of government. Thus, according to the circuit court, disclosure of this information would constitute a clearly unwarranted invasion of privacy.

Turning to the law-enforcement-purposes exemption, the court concluded that the analysis for the privacy exemption also applied to subsection 1(b)(*iii*) of that exemption, which protects against disclosure of investigating records that would constitute an unwarranted invasion of personal privacy. With respect to subsections 1(b)(*i*) and (*ii*) of the law-enforcement-purposes exemption, the court found that Michigan State had made a particularized showing that disclosure of the report would interfere with law-enforcement proceedings or deprive a person of a fair trial. The court relied on affidavits from the police chief and the chief assistant prosecuting attorney stating that the poten-

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graphs of evidence, property sheets, property inventory form[s], crime scene photographs, laboratory evidence documents, and advice of rights forms."

tial existed for retaliation against witnesses and victims, tainting of the jury pool, and tainting of witnesses' testimony if the report was disclosed to the public. The circuit court dismissed State News's complaint with prejudice.

State News appealed, and the Court of Appeals, in a published opinion per curiam, remanded this case to the circuit court for further proceedings.[8] The panel identified several errors committed by the circuit court. It first addressed the circuit court's handling of the law-enforcement-purposes exemption. Citing *Evening News Ass'n v City of Troy*,[9] the Court of Appeals held that with respect to subsections 1(b)(*i*) and (*ii*), the circuit court had failed to offer particularized reasons to justify its conclusion that the entire police incident report was exempt from disclosure. With respect to subsection 1(b)(*iii*), the panel, relying on *United States Dep't of Justice v Reporters Comm for Freedom of the Press*,[10] suggested the possibility that the names or addresses of the suspects or other information identifying them in the police incident report *might* be exemptible.

The panel then addressed the circuit court's handling of the privacy exemption. It followed the two-part test for the privacy exemption developed by this Court in *Bradley v Saranac Community Schools Bd of Ed*,[11] and *Mager v Dep't of State Police*.[12] Concerning the first prong of the test, the panel stated that, "as a hypotheti-

[8] *State News*, 274 Mich App at 582-583.

[9] 417 Mich 481; 339 NW2d 421 (1983).

[10] 489 US 749; 109 S Ct 1468; 103 L Ed 2d 774 (1989).

[11] 455 Mich 285; 565 NW2d 650 (1997). This Court recently slightly modified the *Bradley* test. See *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657; 753 NW2d 28 (2008).

[12] 460 Mich 134; 595 NW2d 142 (1999).

cal matter," the names and addresses of the victims, witnesses, and suspects and other information identifying them could constitute information "of a personal nature," but that the passage of time and the course of events might have rendered some, if not all, of this information matters of public knowledge and therefore not of a personal nature.[13] Concerning the second prong, which requires that the disclosure would create a clearly unwarranted invasion of an individual's privacy, the panel tentatively concluded that Michigan State had failed to demonstrate that the release of the police incident report would shed no light on its conduct as a public body. However, it declined to reach a firm conclusion with respect to the second prong because the panel could not review the report, which was not part of the circuit court record.

Next, the Court of Appeals, again citing *Evening News*, held that on remand the circuit court should review the requested information in camera. In addition, the panel held that the exempt and nonexempt material should be separated to the extent practicable, with the nonexempt material made available to State News.[14]

Michigan State sought leave to appeal in this Court. We granted leave to appeal on a limited basis and denied leave in all other respects.[15]

STANDARD OF REVIEW

This Court reviews de novo as a question of law issues of statutory interpretation.[16] We give effect to the Legislature's intent as expressed in the language of

[13] *State News*, 274 Mich App at 578.

[14] These aspects of the Court of Appeals judgment were not included in this Court's limited order granting leave to appeal.

[15] 480 Mich 902 (2007).

[16] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006).

the statute by interpreting the words, phrases, and clauses according to their plain meaning.[17]

THE EFFECT OF THE PASSAGE OF TIME

We granted leave to appeal,

> limited to the issue whether the Court of Appeals erred in instructing [the circuit court], on remand, regarding the "personal nature" of public records covered by the Freedom of Information Act privacy exemption[18] or the law enforcement purposes privacy exemption,[19] including whether the "personal nature" of such records may be affected by the contemporaneous or later public status of some or all of the information.[20]

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[17] *Bukowski v Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007).

[18] The privacy exemption, MCL 15.243(1)(a), provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

[19] The law-enforcement-purposes exemption, MCL 15.243(1)(b), provides, in pertinent part:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (*i*) Interfere with law enforcement proceedings.
>
> (*ii*) Deprive a person of the right to a fair trial or impartial administrative adjudication.
>
> (*iii*) Constitute an unwarranted invasion of personal privacy.

[20] 480 Mich 902 (2007) (citations omitted).

We are not determining in this appeal whether the police incident report ultimately is exempt from disclosure.[21]

The Court of Appeals made the following observation about the effect of the passage of time on the FOIA exemptions in this case:

> We note at the outset that the passage of time may have affected aspects of this appeal and that, while we can make some observations based on the record, there are other aspects about which we can only speculate. We know from the record that before it made its FOIA request to MSU, State News had already identified the three men arrested at Hubbard Hall. Thus, at least the names of these men and some identifying information about them were in the

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[21] Recently, in *Michigan Federation of Teachers,* 481 Mich at 675-676, we modified the definition of "information of a personal nature" in the privacy exemption to include "information of an embarrassing, intimate, private, or confidential nature." Thus, *Bradley* as modified by *Michigan Federation of Teachers* now governs the privacy exemption. On remand, then, the modified definition set forth in *Michigan Federation of Teachers* must guide the circuit court's application of the privacy exemption.

In *Michigan Federation of Teachers*, we also addressed whether information can be "of a personal nature" and whether an individual retains a privacy interest in that information if it might be found elsewhere in the public domain at the time of the FOIA request. We held that "[t]he disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance." *Id*. at 680. *Michigan Federation of Teachers* quoted with approval the United States Supreme Court's observation that " '[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.' " *Id*. at 679, quoting *United States Dep't of Defense v Fed Labor Relations Auth*, 510 US 487, 500; 114 S Ct 1006; 127 L Ed 2d 325 (1994). As with the modified *Bradley* definition, these holdings must guide the circuit court on remand when it applies the privacy exemption and the law-enforcement-purposes exemption to the facts of this case.

public domain. We know from the record that when President Simon issued her April 6, 2006, denial, these men had already been arraigned on charges of home invasion, felonious assault, and felony-firearm. Further information about these men might therefore have been in the public domain at that time, but the record before us does not disclose what that information might be. We also know from the record that when the trial court issued its June 8, 2006, decision, one of these men had been scheduled for trial and the preliminary examinations for the remaining two were scheduled for the next day. From the record before us, however, we do not know whether trials have now been held or, if so, what the results of those trials may have been and what information might have entered into the public domain during the course of later proceedings.

Rather obviously, public bodies and trial courts can only make decisions on FOIA matters on the basis of the information that is before them at the time, and it is not the function of appellate courts to second-guess those decisions on the basis of information that later becomes available. Here, because we do not have the any information about what may have transpired after the trial court's June 8 decision, we could not engage in such second-guessing in any event. We do observe, however, that the subsequent availability of information as a result of later court proceedings in the criminal justice system may well strengthen or weaken the arguments of the parties to a FOIA dispute regarding the applicability of the privacy exemption and the law-enforcement-purpose exemption.

As a practical matter, we suspect that this subsequent information, of which the trial court can take judicial notice on remand under appropriate procedures, will weaken MSU's position and strengthen State News's position. But, ironically, the newsworthiness of the information contained in the police incident report may also have decreased over time. However, FOIA is not concerned with newsworthiness. Rather, it is concerned with requiring the

> disclosure of nonexempt public records so as to ensure accountability.[22]

The panel reiterated this observation when it discussed the first prong of the privacy exemption and noted that "the passage of time and the course of events may have rendered some, if not all, of this information matters of public knowledge and therefore not of a personal nature."[23]

We agree with the Court of Appeals statement that "public bodies and trial courts can only make decisions on FOIA matters on the basis of the information that is before them at the time, and it is not the function of appellate courts to second-guess those decisions on the basis of information that later becomes available." We disagree, however, with the panel's further, contrary musings that the passage of time and subsequent events could negate the applicability of a FOIA exemption. Rather, we hold that unless the FOIA exemption provides otherwise,[24] the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption.

The denial of a FOIA request occurs at a definite point in time. The public body relies on the information available to it at that time to make a legal judgment whether the requested public record is fully or partially exempt from disclosure. The determinative legal question for a judicial body reviewing the denial is whether

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[22] *State News*, 274 Mich App at 565-567 (citation omitted).

[23] *Id*. at 578.

[24] Certain FOIA exemptions contain explicit time limitations on their applicability. See, e.g., MCL 15.243(1)(e), (i), (j), (p), and (x). However, we note that the applicability of even those FOIA exemptions would be measured at the time the public body invoked the exemption to deny the FOIA request.

the public body erred because the FOIA exemption applied *when it denied the request*. Subsequent developments are irrelevant to that FOIA inquiry.[25] There is no indication from the text of either the privacy or the law-enforcement-purposes exemption or from another, independent FOIA provision that the public body's assertion of a FOIA exemption may be reexamined by the circuit court or an appellate court while taking into consideration information not available to the public body when it denied the request.

Further, the procedures in FOIA for submitting a FOIA request, reviewing the FOIA request, and appealing that review suggest that the timing of the public body's response to the FOIA request is crucial to deciding whether the requested record is exempt. FOIA requires the public body to respond to a FOIA request within 5 business days, with a possible extension of not more than 10 business days.[26] There is no language in that provision or elsewhere in FOIA that requires a public body to continue to monitor FOIA requests once they have been denied.[27] FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record

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[25] Of course, release of the requested public record by the public body would render the FOIA appeal moot because there would no longer be a controversy requiring judicial resolution. See *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002). Mootness is not at issue in this case, however.

[26] MCL 15.235(2)(d).

[27] MCL 15.233(1) grants a person the right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. This provision, however, is inapposite in this case for the obvious reason that a police incident report is a single public record that would not be created, issued, or disseminated on a regular basis. Moreover, that provision does not necessarily entitle the requesting party to the full contents of those public records.

if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure.

CONCLUSION

We reverse the judgment of the Court of Appeals in part and hold that events that occur after a public body's denial of a FOIA request are not relevant to the judicial review of the decision. Thus, in this case, the passage of time and course of events have no bearing on whether Michigan State properly denied State News's FOIA request under the privacy exemption and the law-enforcement-purpose exemption. Accordingly, we remand this case to the circuit court for further proceedings consistent with this decision.[28]

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

WEAVER, J. (*concurring*). I concur in the decision reached by the majority, but write separately to stress

[28] On remand, the parties and the circuit court should take cognizance of the special protection afforded to crime victims by our constitution and legislative enactments, particularly those provisions that exempt certain information about victims from disclosure under FOIA. See Const 1963, art 1, § 24 and 1985 PA 87, which is the Crime Victim's Rights Act, MCL 780.751 *et seq*. For instance, § 8 of the Crime Victim's Rights Act provides that certain information about the victim is exempt from disclosure under FOIA, such as the home address, home telephone number, work address, and work telephone number, unless the address is used to identify the place of the crime, and any picture, photograph, drawing, or other visual representation of the victim, including any film, videotape, or digitally stored image. MCL 780.758 (3)(a) and (b). See also MCL 780.769(2), 780.769a(3), 780.771(4), 780.788(2), 780.798(5), 780.818(2), and 780.830. As the circuit court reconsiders on remand whether the police incident report is exempt from disclosure in whole or in part, and whether any exempt material is separable from the nonexempt material, it must respect the Legislature's determination that certain information about crime victims is exempt from disclosure.

the two points I consider most important with respect to a request for documents pursuant to the Freedom of Information Act (FOIA).[1]

First, I agree that the appropriate time to measure if a public record is exempt under a particular FOIA exemption is when the public body asserts the exemption. Second, while I agree that "[t]here is no language in [MCL 15.245(2)(d)] or elsewhere in FOIA that requires a public body to continue to monitor FOIA requests once they have been denied," *ante* at 704, it is important to note that "FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record if it believes that, because of *changed circumstances*, the record can no longer be withheld from disclosure," *ante* at 704-705 (emphasis added).[2]

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[1] MCL 15.231 *et seq*.

[2] Moreover, to my understanding, when a party resubmits a FOIA request because of "changed circumstances," it may very well be that those "changed circumstances" occurred over time. It is not the "passage of time" that is critical, but the "changed circumstances." For example, a document containing information that had formerly been private, but subsequently became public, may no longer be exempt under FOIA.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied May 7, 2008:

PEOPLE v BEEMAN, No. 134338. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275107.

KELLY, J. I would remand this case to the trial court for a decision on attorney fees that considers defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004), lv den 473 Mich 881 (2005).

PEOPLE v WHEELER, No. 134952; Court of Appeals No. 279569.

KELLY, J. I would remand this case to the trial court for a decision on attorney fees that considers defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004), lv den 473 Mich 881 (2005).

PEOPLE v RANDOLPH CARTER, No. 135001; Court of Appeals No. 279562.

KELLY, J. I would grant leave to appeal.

PEOPLE v ZIMMERMAN, No. 135176; Court of Appeals No. 279176.

KELLY, J. I would remand this case to the trial court for a decision on attorney fees that considers defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004), lv den 473 Mich 881 (2005).

HARBOR PARK MARKET, INC v GRONDA, Nos. 135383 and 135384; reported below: 277 Mich App 126.

KELLY, J. I would grant leave to appeal.

SEMON v CITY OF SAINT CLAIR SHORES, No. 135421; Court of Appeals No. 274777.

REDDEN v DAIMLERCHRYSLER CORPORATION, No. 135548; Court of Appeals No. 278673.

Leave to Appeal Granted May 9, 2008:

PEOPLE v MICHAEL MILLER, No. 135989. The application for leave to appeal the January 17, 2008, judgment of the Court of Appeals is granted, limited to the issues: (1) whether the Court of Appeals erred in reversing the defendant's conviction and remanding this case to the circuit court for a new trial pursuant to *People v DeHaven,* 321 Mich 327 (1948); (2) whether *DeHaven* was wrongly decided or has been superseded by MCL 600.1354(1); (3) whether a criminal defendant must establish actual

prejudice pursuant to MCL 600.1354(1) where the challenged juror was excusable for cause; (4) how the "actual prejudice" standard for purposes of MCL 600.1354(1) should be defined; and (5) whether the juror's failure to disclose his status as a felon, which disqualified him from serving on the jury, constituted structural error pursuant to *Neder v United States*, 527 US 1 (1999).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 273488.

Leave to Appeal Denied May 9, 2008:

In re WILLIAMS, No. 135232; Court of Appeals No. 279573.

CORRIGAN, J. (*dissenting*). I would grant the prosecutor's application for leave to appeal or remand to the Court of Appeals for consideration as on leave granted. MCR 3.932, which authorizes a court to transfer a case to the consent calendar without the approval of the prosecutor, may violate the separation of powers doctrine.[1] MCR 3.932 intrudes upon executive power belonging to the office of the prosecutor, as well as the Legislature's power to craft substantive law reflecting policy choices. Even in the absence of a separation of powers problem, however, the trial court abused its discretion in transferring the case to the consent calendar on the basis of its "philosophy" regarding sex offender registration requirements for juveniles, a philosophy that is 180 degrees opposite

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[1] MCR 3.932(C) provides, in relevant part:

> If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian agree to have the case placed on the consent calendar. The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.
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> (7) Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar.

the legislative choice. MCL 28.724(5). I do not believe that the court's decision is within the range of "principled outcomes" when it directly contradicts the statutory language.

The prosecutor charged defendant with four counts of first-degree criminal sexual conduct (CSC I). The petition alleged that defendant, who was 13 years old, digitally penetrated his two younger half-sisters, who were 8 and 9 years old. He pleaded guilty in juvenile court to one count each of second-degree criminal sexual conduct (CSC II) and third-degree criminal sexual conduct (CSC III) in exchange for dismissal of the CSC I charges after being advised that he would have to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.724 *et seq*., for 25 years. It was later discovered that defendant would have to register for life under SORA.[2] The court contacted the prosecutor's office to ask whether it would amend the plea agreement to remove the lifetime-registration requirement. The prosecutor declined to do so. Failing to convince the prosecution to change its plea agreement, the trial court transferred the case to the consent calendar. The prosecution objected to the transfer. Nevertheless, the court proceeded to undo the plea and place the matter on the consent calendar.

The trial court's decision to transfer defendant to the consent calendar over the prosecutor's objection subverted the prosecutor's discretion to decide the terms of a plea agreement and to enforce the statutory requirements under SORA. This Court has addressed court interference with prosecutorial discretion on two occasions. In *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 (1972) (*Genesee Prosecutor I*), the prosecutor challenged the trial court's ability, over the prosecutor's objection, to accept a plea to an offense that was not charged or to a lesser included offense. The defendant was bound over to the circuit court after a preliminary examination to stand trial on an information charging possession of a stolen motor vehicle in violation of MCL 257.254. *Id.* at 676. On the day of trial, the court granted defendant's motion to plead guilty of unlawfully driving away the automobile of another in violation of MCL 750.413, an offense that was neither charged nor a lesser included offense of MCL 257.254. *Id*. Before accepting the plea, the court asked the prosecutor whether he objected to the plea agreement. The prosecutor indicated he did object because the facts supported the charge as originally bound over and that charge was a more serious offense than the typical "joy riding" case covered by MCL 750.413. *Id*. The court overruled the prosecutor's objection. *Id*. During the plea taking procedure, after listening to defendant's recitation of his criminal actions, the court stated, "Actually, you are really guilty of the higher offense, but the court will accept your plea to the lesser offense." *Id* at 677.

The prosecution sought a writ of superintending control from the Court of Appeals, challenging the trial court's ability to accept a plea, over the prosecutor's objection, to an offense not charged or to a lesser

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[2] MCL 28.725(8)(b) requires lifetime registration for CSC II.

included offense. The Court of Appeals dismissed for lack of jurisdiction.[3] We granted leave, noting that "[w]hether the trial judge may amend an information and accept a plea *sua sponte* and over the objection of the prosecutor raises the question of constitutional separation of powers between the judicial and executive branch." *Id.* at 682. The Court explained that

> [t]he prosecutor is a constitutional officer whose duties are provided by law. The conduct of a prosecution on behalf of the people by the prosecutor is an executive act. . . . [T]he prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted. [*Id.* at 683 (citations omitted).]

A judge may not act as prosecutor, judge, and jury. *Id*. "For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. *Id.* at 684. Concluding its opinion, the Court noted that "[i]n . . . holding that the judge here acted without authority we express no opinion on the propriety of accepting a plea over the objection of the prosecutor where both offenses are charged by the prosecutor, nor do we express an opinion on the propriety of accepting a plea over the objection of the prosecutor to an offense which *is* a lesser included offense." *Id.* at 684-685 (emphasis in original).

The Court had the opportunity to address those issues not reached in *Genesee Prosecutor I* in *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115 (1974) (*Genesee Prosecutor II*). Specifically, the case addressed whether the court, over the prosecutor's objection, may accept a plea of guilty to one count of a multi-count information and whether, over objection, the court may accept a plea of guilty to a lesser included offense. In *Genesee Prosecutor II*, an information was filed charging that defendant did "kill and murder" another person. Over the prosecutor's objection, the court accepted the defendant's plea of guilty of the offense of manslaughter. *Id.* at 118.

In granting the prosecution's complaint for superintending control, this Court held that

> [a] circuit judge does not enjoy supervisory power over a prosecuting attorney. He may reverse a magistrate's decision only for abuse of discretion. He may not properly substitute his judgment for that of the magistrate or prosecuting attorney as if he were reviewing

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[3] This Court held that the Court of Appeals had jurisdiction to entertain the complaint for superintending control for the purpose of determining whether the trial judge acted without jurisdiction or in excess of jurisdiction. *Id.* at 682.

> the magistrate's decision *de novo* or acting in a supervisory capacity with respect to the prosecuting attorney. He may reverse or revise their decisions only if it appears on the record that they have abused the power confided in them. [*Id.* at 121.]

Because testimony tended to show that the defendant shot the victim once while the victim was standing and a second time five seconds after he had fallen to the ground, this Court held that the prosecutor did not exceed his power in refusing to authorize a plea of guilty of manslaughter. *Id.* at 122. The Court set aside the defendant's plea and the sentence imposed. *Id.* at 123. It remanded for trial on the information charging him with the offense of manslaughter and murder. *Id*.

The present case involves virtually the same problem presented in *Genesee Prosecutor I* and *Genesee Prosecutor II*—interference with prosecutorial discretion, in violation of the separation of powers doctrine. MCR 3.932 encourages unconstitutional interference by judges with the executive powers of prosecutors because it allows a trial court to transfer a case to the consent calendar even when a prosecutor objects to the transfer. MCR 3.932(C) only provides that "[n]o case may be placed on the consent calendar *unless the juvenile and the parent, guardian, or legal custodian agree* to have the case placed on the consent calendar." (Emphasis added.) The court rule has no regard for the charging official's executive decision. In this case, the trial judge disregarded the prosecution's objection to placing defendant's case on the calendar. This judicial action, even if allowed under the court rules, improperly encroached on the executive power vested in the prosecution.

MCR 3.932(C) may well also violate the separation of powers between the judicial and legislative branches as applied in this case. In *McDougall v Schanz*, 461 Mich 15 (1999), the Court addressed whether MCL 600.2169 (qualifications for expert witnesses in medical malpractice claims) impermissibly infringed on the Court's rule-making authority to promulgate court rules on practice and procedure. The Court determined that the Legislature intended that § 2169 would often compel different qualification determinations than MRE 702. *Id.* at 25. Because § 2169 and MRE 702 clearly conflicted, the Court had to determine whether the statute impermissibly infringed on the court's constitutional authority to enact rules governing practice and procedure. *Id.* at 26. The Court concluded that § 2169 was *substantive* law, and thus it did not impermissibly infringe on the court's constitutional rule-making authority. *Id.* at 37.

In so holding, the Court noted that "[i]t is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court. Indeed, this Court's primacy in such matters is established in our 1963 Constitution." *Id.* at 26. At the same time, the Court is not authorized to enact court rules that "establish, abrogate, or modify the substantive law." *Id.* at 27. Therefore, if a court rule contravenes a legislatively declared principle of public policy, the court rule should yield. *Id.* at 31.

On its face, MCR 3.932 does not necessarily contravene a legislatively declared principle of public policy. Nevertheless, in its application, as demonstrated by the present case, it can impermissibly invade the province of the Legislature. In MCL 28.721a, the Legislature made a very clear statement regarding the policy considerations undergirding the requirements of SORA:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

In order to implement this stated policy, the Legislature enacted MCL 28.725(7)(b), which requires lifetime registration for CSC II. MCL 28.724(5) expressly applies the registration requirements to juveniles. Transfer to the consent calendar, however, allows defendant to avoid SORA requirements by removing him from the adjudicative process. This thwarts the Legislature's clear policy that it is in the public's best interest to require all sex offenders to register.

The trial court's decision to transfer defendant's case to the consent calendar also circumvents the Legislature's policy decisions expressed in the Juvenile Diversion Act, MCL 722.821 *et seq*. The act allows for the removal of certain types of cases from the adjudicative process, *but specifically provides that CSC I, II and III cases may not be diverted*.[4] Placement on the consent calendar similarly removes a defendant from the adjudicative process, but the consent-calendar rule contains no restriction on the types of cases to which it might apply. Regardless of whether a defendant commits CSC I, II, or III, a defendant who successfully completes his consent calendar plan will avoid conviction and therefore avoid mandatory registration by SORA. The consent calendar is, in effect, diversion under a different name. The Juvenile Diversion Act, however, reflects a clear legislative policy that sex offenders, regardless of age, may not avoid the adjudicative process. The consent-calendar rule circumvents this legislative policy choice.

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[4] MCL 722.823(3) provides that "[a] minor accused or charged with an assaultive offense shall not be diverted." An assaultive offense is defined as, among other things, an offense against a person described in MCL 750.520b (CSC I), MCL 750.520c (CSC II), or MCL 750.520d (CSC III).

By allowing the trial court to transfer a case to the consent calendar and avoid the limits of the Juvenile Diversion Act and the requirements of SORA, the court rule invites abrogation of the stated public policy of protecting the public from convicted sex offenders where the executive charged with the prosecution decision concludes such regulation is essential. The Court's rule-making authority, however, is limited to rules of practice and procedure. When the rules we have crafted invade the province of the prosecutor's executive power or the Legislature's power to enact legislation reflecting policy considerations, our court rules must yield to the powers exercised by the other branches of government.

Even if MCR 3.932 does not implicate separation of powers problems, the trial court abused its discretion in transferring defendant to the consent calendar on the basis of its personal "philosophy" rather than the standards set forth in the rule. The trial court explained its reasons for undoing the plea and placing the matter on the consent calendar:

> The court feels, this is my philosophy, that that kind of—a punishment for a young man who did some very horrible things, at the age of 12 and 13, could be cruel and unusual punishment. It's very—it not only restricts him, it restricts college, it restricts jobs, it restricts his ability to live in neighborhoods, it restricts his ability to ever go on school property—ever. So if he were to marry and have children, he can't go to his children's school activities because sex offenders are not allowed on school property. They're not allowed on some church properties. They're not allowed in certain neighborhoods.
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> . . . I'm not convinced, at this point, that someone who did an offense when he was 12 or barely 13, require—requires lifetime registry on the sex offender internet.
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> So for those reasons, I felt that it was improper or inappropriate to have this young man pre-judged to be a lifetime member of the sex offender registry when we don't know yet whether or not he will make progress.

In further justifying its decision to transfer defendant to the consent calendar, the trial court made several troubling observations. It noted that "[t]his offense was a family matter that happened within your family while he was in your supervision. Um, he—as far as I know, he hasn't preyed on little girls on buses or anything like that." The court did not explain how an offense inside the home by a victim's family member ameliorates the severity of the offense. Instead, the trial court explained:

> [T]he doctor who evaluated him talked about a sex addiction, that it's a budding sex addiction. Those things are treatable. This court has dealt with dozens, if not scores, of young men sex offenders. And we have seen many of them, not all, but we have seen very many of them rehabilitate through intensive counseling and therapy, so that they know what the triggers are, they know how to avoid it, they do a recycle plan to show that they know how to avoid those kind of thoughts that lead them to inappropriate behaviors. They learn appropriate versus inappropriate sexual behaviors. And it is something that's treatable. And so we are going to make sure that [defendant] gets that kind of treatment.
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> But because of the, what I consider to be the draconian requirements of the sex offender registry for young children, and you know, I'm talking about a boy who was 12 and 13 when he committed these acts, um to make that a part of his sentence, and make it something that is um, quite likely, going to be unable to be changed in the future. Um, it just seems to me to be not giving him a chance to rehabilitate. And I—I want to give him the hope that—that he will—you know, that he may not have to register if he does successfully complete this.

The trial court acted outside the range of principled outcomes in focusing solely on the damage defendant would suffer if forced to register as a sex offender, rather than on harm to the public. The trial court's philosophical disagreement with public policy, specifically, the appropriateness of applying SORA to juveniles, cannot supersede the plain language of the court rule. MCR 3.932(C) only allows a trial court to transfer a case to the consent calendar if such an action "will serve the best interests of the juvenile *and the public*." (Emphasis added.) The Legislature has unequivocally expressed that it is in the best interest of the public to require *all* sex offenders to register, notwithstanding treatment or any other potential for rehabilitation. SORA contains no treatment or rehabilitation exceptions to the registration requirements.

Because I believe that the consent calendar violates separation of powers principles, and because the trial court abused its discretion in placing defendant on the consent calendar, I would grant the prosecution's application for leave to appeal or remand this case to the Court of Appeals for consideration as on leave granted.

BRASHERS v VANDERROEST, No. 135427; Court of Appeals No. 279999.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the denial by the majority of four (Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN) of plaintiff's application for leave to appeal requesting that this Court

reconsider its decision in *Kreiner v Fischer*, 471 Mich 109 (2004), because this Court needs to reexamine the misinterpretation of MCL 500.3135 contained in the majority of four's opinion in *Kreiner*. I would grant leave to appeal to reconsider and correct the majority's misinterpretation of MCL 500.3135 in *Kreiner*.

By importing the concept of permanency of injury into MCL 500.3135—a concept that is nowhere referenced in the text of the statute—the majority of four, in *Kreiner*, actively and judicially legislated a permanency and temporal requirement to recover noneconomic damages in automobile accident cases.[1] The *Kreiner* interpretation of MCL 500.3135 is an unrestrained misuse and abuse of the power of interpretation, masquerading as an exercise in following the Legislature's intent, which needs to be corrected to comport with the actual text of MCL 500.3135.

I would grant leave to appeal.

BOOTH V CLINTON MACHINE COMPANY, No. 135497; Court of Appeals No. 278004.

KELLY, J. (*dissenting*). In this case, the Court of Appeals reversed the Workers' Compensation Appellate Commission (WCAC) decision concluding that the WCAC had ignored relevant evidence supporting the magistrate's decision. I believe it was error to reverse the decision. This Court has made clear that

> [a]s long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive. [*Mudel v Great A & P Tea Co*, 462 Mich 691, 703-704 (2000).]

It does not appear that the WCAC misapprehended its role here. Plaintiff presented evidence that he was permanently disabled. Hence, the WCAC was entitled to rely on that evidence to find a permanent disability. It appears that the Court of Appeals reversed because it disagreed with the WCAC's view of the evidence. If so, the Court of Appeals misunderstood the standard of review.

This Court should grant leave to appeal to consider this question and, if it sees fit, modify the holding in *Mudel* to conform with its decision in this case. It should not allow inconsistent applications of *Mudel*.

In re ADOPTION OF PENDLETON (MANN V DEPARTMENT OF HUMAN SERVICES), No. 136292; Court of Appeals No. 278964.

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[1] For further analysis of the problems created by the majority of four's *Kreiner* opinion, see my dissenting statement in *Jones v Olson*, 480 Mich 1169, 1173.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal May 16, 2008:

PEOPLE v PARKS, No. 126509. By order of June 22, 2007, we remanded this case to the Shiawassee Circuit Court for an evidentiary hearing and directed the trial court to determine if there was any evidence that the complainant made a prior false accusation of sexual abuse against another person. On order of the Court, the evidentiary hearing having been held and the Shiawassee Circuit Court's finding and accompanying transcript of the hearing having been received, we again consider the application for leave to appeal the May 18, 2004, judgment of the Court of Appeals. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall file supplemental briefs within 56 days of the appointment or procurement of counsel by the defendant, and the parties shall include among the issues addressed: (1) whether the evidence of prior accusations of sexual abuse made by the complainant against another person that was revealed during the evidentiary hearing on remand is admissible under the Michigan Rules of Evidence; (2) whether the truth or falsity of those accusations makes a difference in assessing their admissibility, given the young age of the complainant at the time of trial; (3) whether the circuit court's ruling at the defendant's trial prohibiting the further discovery and introduction of this evidence constituted error requiring reversal; (4) whether such evidence is subject to the rape-shield statute, MCL 750.520j; (5) whether the sexual abuse of a young child constitutes "the victim's past sexual conduct" within the meaning of MCL 750.520j(a); and (6) whether the defendant in this case must be allowed to introduce the evidence of the complainant's prior accusations of sexual abuse in order to preserve his constitutional right of confrontation and to present a defense.

We further order the Shiawassee Circuit Court, in accordance with Administrative Order No. 2003-3, 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. Court of Appeals No. 244553.

CORRIGAN, J. (*concurring*). I join the order scheduling this case for oral argument. I write separately because I question the manner in which this Court frames the issues for argument. The order (1) injects a new issue that defendant has never raised in the prior history of this case and (2) overlooks the key issue arising from this Court's earlier remand of this case.

A jury found defendant guilty of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), arising out of the sexual abuse of his nine-year-old stepdaughter. On appeal, defendant contended that the trial court erred by excluding evidence that the victim had made prior false accusations of sexual abuse against another person. The Court of

Appeals rejected defendant's argument because defendant had "failed to offer any concrete evidence" of a prior false accusation.[1] This Court remanded the case to the trial court for "an evidentiary hearing, affording the defendant the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person."[2]

On remand, the trial court held hearings and reviewed the evidence presented. At the conclusion of the hearings, the court found no evidence that the victim had made a prior false accusation of sexual abuse against another person.

This Court's order now directs the clerk to schedule oral argument on the application. The order identifies issues that the parties "shall" address. Notably absent from those mandatory issues is one related to the very question for which we required an evidentiary hearing on remand to the trial court: whether the victim made a prior false accusation of sexual abuse against another person. The order does not ask the parties to address whether the trial court clearly erred when it found no evidence of a prior false accusation.

Instead, the Court's order mandates argument on issues that the parties themselves have never advanced. For example, the order asks whether the truth or falsity of the prior accusation affects its admissibility, whether the prior sexual abuse (implicitly assuming its truth) would constitute "the victim's past sexual conduct" under the rape-shield statute, MCL 750.520j(1)(a), and whether defendant must be allowed to present such evidence to preserve his constitutional rights of confrontation and to present a defense.

It appears that defendant has never argued on appeal that the prior accusation of sexual abuse was true and that he must be allowed to present such evidence. On the contrary, defendant's contention on appeal has always been that the victim made a prior *false* accusation of sexual abuse.

Accordingly, this Court's framing of the issues for argument is quite unusual given that (1) this Court has already remanded for an evidentiary hearing regarding whether the prior accusation was *false* and (2) this Court now invents a new theory that the prior accusation may be admissible because it is *true*. If the evidence is admissible *because it is true*, then the purpose of our previous remand for an evidentiary hearing to determine whether the accusation was *false* is not readily apparent.

In any event, I would invite the parties and the amici curiae to address (1) whether the issues now raised by this Court's order are properly before this Court, (2) the appropriate standard for reviewing those issues, if any, and (3) whether it is appropriate to grant relief on those issues. Further, I would suggest that the parties and the amici curiae may also wish to address the issue resulting from our remanding this case to the trial court, which this Court's order now overlooks: whether the trial court clearly erred when it found no evidence that the victim made a prior false accusation of sexual abuse against another person.

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[1] *People v Parks*, unpublished opinion per curiam, issued May 18, 2004 (Docket No. 244553), p 3.

[2] 478 Mich 910 (2007).

WEAVER, J. I join the statement of Justice CORRIGAN.

Leave to Appeal Granted May 16, 2008:

UNITED STATES FIDELITY INSURANCE & GUARANTY COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION AND HARTFORD INSURANCE COMPANY OF THE MIDWEST v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, Nos. 133466 and 133468. The parties shall include among the issues to be briefed whether MCL 500.3104(2) obligates the Michigan Catastrophic Claims Association (MCCA) to reimburse member insurers' reimbursement claims without regard to the reasonableness of the member's payments to PIP claimants. In addressing this issue, the parties shall consider:

(1) Whether factors to consider in determining whether the MCCA is precluded from questioning the reasonableness of the reimbursement claims in these cases include the MCCA's failure to exercise to their full extent, before entry of the consent judgment in Docket No. 133466 and the settlement agreement in Docket No. 133468, its powers under MCL 500.3104(7)(b) and (g) to:

(a) require notice of claims likely to involve the MCCA;

(b) require notice of subsequent developments likely to materially affect the MCCA's interests;

(c) establish claims procedures and practices for MCCA members; and,

(d) if the MCCA considers a member's claims procedures and practices inadequate, to undertake to adjust or assist in adjusting the claim, at the member's expense, so as to ensure that member claims submitted to the MCCA for reimbursement are, in fact, reasonable; and

(2) Whether, like the terms of declaratory judgments pertaining to PIP benefits payable in the future, the terms of consent judgments and settlement agreements pertaining to PIP benefits that embody terms that prove over time to call for reimbursement at a rate higher than the actual cost incurred are subject to:

(a) reduction based on the requirement that an expense must be actually incurred before a no-fault insurer is obliged to pay it; and

(b) redetermination from time to time of the amounts properly allowable, based on a change in facts or circumstances after entry of the consent judgment or settlement agreement. Cf. *Manley v DAIIE*, 425 Mich 140, 157 (1986); *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 483-484 (2003).

The motions for leave to file briefs amicus curiae are granted. The Commissioner of Insurance, Michigan Defense Trial Counsel, Inc., 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. Reported below: 274 Mich App 184.

Summary Disposition May 16, 2008:

DEPARTMENT OF TRANSPORTATION v INITIAL TRANSPORT, INC, No. 134798. On May 7, 2008, the Court heard oral argument on the application for

leave to appeal the July 26, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion. The Motor Carrier Safety Act, in MCL 480.11a, did not create an exception to the $1 million cap on property damages established by the Michigan no-fault act in MCL 500.3121(5). We remand this case to the Wayne Circuit Court for further proceedings regarding the defendant Employers Mutual Casualty Company's penalty interest payment obligation, as unanimously ordered by the Court of Appeals. *Dep't of Transportation v North Central Cooperative, LLC*, 277 Mich App 633 (2008), which relied on the decision of the Court of Appeals in this case, is overruled. The motion by the Insurance Institute of Michigan for leave to file a brief amicus curiae is granted. Reported below: 276 Mich App 318.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the peremptory order reversing the judgment of the Court of Appeals for the reasons stated in the Court of Appeals opinion. I would deny leave to appeal.

Leave to Appeal Denied May 16, 2008:

MILJEVICH CORPORATION v NORTH COUNTRY BANK & TRUST, No. 134780; Court of Appeals No. 268356.

WEAVER, J. I would grant leave to appeal.

PEOPLE v BOND, No. 135402; Court of Appeals No. 267679.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v PECK, No. 135613; Court of Appeals No. 278360.

CORRIGAN, J. (*concurring*). I concur in the order denying leave because it is clear that the trial judge properly corrected defendant's erroneous maximum sentence. The judge reasonably explained that the error was clerical in nature and therefore correctable under MCR 6.435(A). The judge also aptly cited caselaw holding that an erroneously imposed maximum sentence is a "nullity"—and correctable at any time—because the Legislature generally fixes maximum sentences and courts have no discretion to depart from the statutorily defined maximums. *People v Bannan (In re O'Dell),* 365 Mich 429, 431 (1962); *People v Smith,* 35 Mich App 349, 351-352 (1971).

As Justice KELLY observes, at the sentencing hearing following defendant's probation violation, the judge erroneously imposed a five-year maximum sentence for second-degree home invasion, which carries a statutory maximum sentence of 15 years. Defendant was informed of the 15-year maximum at his original guilty-plea hearing and at the later hearing when he pleaded guilty to violating probation. The judge observed that all of his notes in the case reflected the 15-year maximum. When the judge later amended the sentence, he characterized his error as "a clerical mistake (by the judge, not his clerk)."

The judge also advised defendant that he could request appointment of counsel in order to challenge the amendment, if defendant so chose.

Defendant did so and moved for resentencing. The judge denied defendant's motion, correctly observing that the maximum sentence for defendant's offense is set by statute, as are the maximum sentences for most offenses in Michigan. See *People v Harper,* 479 Mich 599, 612 (2007). Sentencing courts are not empowered to deviate from fixed statutory maximums. MCL 769.8(1). The judge quoted *Bannan, supra* at 431, in which this Court cited decisions establishing that "the maximum term is fixed by law, that a lesser maximum provided in a sentence is a nullity and that the maximum fixed by statute should be read into the sentence." The *Bannan* Court also observed that "imposition of an unlawful sentence by a sentencing judge does not so exhaust his sentencing power as to preclude his exercising it again to impose a valid sentence." *Id.* The judge also cited *Smith, supra* at 351-352, which held: "The duty to impose a maximum sentence is ministerial . . . . The entry of a Nunc pro tunc order is a proper method to correct a maximum sentence."

MCR 6.435(A) provides: "Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it." The 1989 staff comment to the rule illustrates: "A prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under subrule (A)." Justice KELLY asserts that, here, the judge did not state that he misspoke at defendant's sentencing. Yet the judge appears to mean exactly this when he characterizes the error as a clerical mistake by the judge. Moreover, regardless that the judge's notes indicating the correct maximum sentence are not in the lower court file, there is no evidence that the judge intentionally imposed the incorrect maximum because he misapprehended the law. Rather, the record shows that the judge and the parties were aware, throughout the case, that defendant's offense carried a 15-year maximum term.

Regardless of whether I agree that a violation of the *Tanner* rule may not be corrected by the court on its own initiative, the erroneous sentence in this case is not akin to a violation of the *Tanner* rule, as Justice KELLY suggests. The rule, now codified in MCL 769.34(2)(b), prohibits a sentencing court from imposing a minimum sentence that exceeds two-thirds of the statutory maximum sentence. MCL 769.34(2)(b); *People v Tanner,* 387 Mich 683, 690 (1972); *People v Garza,* 469 Mich 431, 435 (2003) (acknowledging codification). When a judge violates the *Tanner* rule, he exercises his sentencing discretion to intentionally impose what he believes to be an appropriate minimum sentence. He imposes an erroneous sentence because he misapprehended or misapplied the relevant law. But the ministerial act of imposing a statutory maximum sentence is not susceptible to the same kind of mistake. Only the statutory maximum sentence is appropriate and the trial judge does not exercise discretion in imposing the maximum.

I would also note that trial judges are not generally precluded from correcting substantive mistakes in their judgments. Rather, under MCR 6.429, a judge may correct an invalid judgment—and may even correct a valid judgment "as provided by law"—even after judgment has entered.

At a minimum, if the period for appeal or correction has passed, a defendant may seek post-appeal relief under subchapter 6.500. MCR 6.429(B)(4).

For these reasons, the judge in this case appropriately corrected the error. Most significantly, defendant has not suffered injustice; his sentence was merely conformed to the correct statutory maximum, of which he was informed when he pleaded guilty of second-degree home invasion and again when he pleaded guilty of violating probation. Indeed, were we to conclude that resentencing is required, the judge would simply be bound to impose the correct 15-year maximum upon resentencing. Accordingly, I concur in the order denying leave.

KELLY, J. (*dissenting*). I would grant leave to appeal in this case. At sentencing, the circuit judge informed defendant that he was imposing a term of imprisonment of 1½ to 5 years. After defendant had served nearly five years in prison and was ready for release, the Department of Corrections advised the judge that he had erred in imposing a five-year maximum sentence. Less than one month before defendant's release date, the judge notified defendant that he was changing defendant's sentence to a maximum term of 15 years' imprisonment. The judge entered the new judgment of sentence *nunc pro tunc*. Thus, just as defendant was preparing for imminent release from prison, he learned that he would remain there for as many as 10 additional years.

There is no question that the correct statutory maximum sentence in this case is 15 years' imprisonment. In fact, defendant was informed of the statutory maximum at his original guilty-plea hearing and at a later hearing when he pleaded guilty of violating probation. But the fact remains that he was sentenced to five years' maximum imprisonment and five years elapsed between entry of the original judgment of sentence and discovery of the error. Because of the time lapse, it is not clear by what means the sentence can be legally changed.

The judge has tried the device of denominating the error a "clerical mistake" under MCR 6.435(A). If the error was not clerical, it was substantive. The staff comment to the court rule provides some guidance for distinguishing between clerical and substantive mistakes.[1] It suggests that, if the trial judge simply misspoke or if the clerk made a typing error, the mistake is clerical in nature.[2] However, the comment further suggests that, if the judge relied on mistaken facts "or made a mistake of law (for example, unintentionally imposed a sentence in violation of the *Tanner*[3] rule)," the mistake is substantive.[4] A substantive mistake cannot be corrected under this court rule after judgment has been entered. Assuming that the staff comment to MCR 6.435 correctly interprets the court rule, the error in this case may not have been correctable.

When he characterized his error as "clerical," the judge added that his notes reflected the correct 15-year maximum. However, his notes are not

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[1] MCR 6.435, 1989 staff comment.

[2] *Id*.

[3] *People v Tanner*, 387 Mich 683 (1972).

[4] *Id*.

part of the lower court record. Moreover, the judge did not claim that he misspoke at defendant's sentencing. If the judge did misspeak, why did he sign a judgment of sentence that reflected the same sentence?

The record suggests that the error in this case may be an error of law akin to an unintentional violation of the *Tanner* rule. In *Tanner*, this Court held that a minimum sentence exceeding two-thirds of the maximum is improper because it does not comply with the indeterminate sentence act.[5] The Legislature later codified this rule.[6] A minimum term that fails to comply with the *Tanner* rule is invalid.[7]

The sentencing court has no discretion in imposing the statutory maximum. But it has discretion in imposing a minimum sentence. However, the legislative sentencing guidelines, which incorporate the *Tanner* rule, limit the sentencing court's discretion in imposing a minimum term.[8] If the sentencing court violates the *Tanner* rule, it does so because it has misapprehended or misapplied the relevant law. Thus, if a sentencing court unintentionally pronounces an invalid minimum term in violation of the *Tanner* rule, it commits an error of law.

A sentencing court that imposes an invalid maximum sentence has also misapprehended or misapplied the relevant law. An unintentional violation of a statutory requirement to impose the statutory maximum sentence renders the sentence invalid just as a *Tanner* violation would render the sentence invalid. Therefore, both errors are errors of law.

And both errors generally are corrected in the same manner. When an appellate court concludes that a *Tanner* violation has occurred, it should direct the sentencing court to reduce the minimum term to two-thirds of the maximum.[9] Similarly, to correct an error concerning the statutory maximum challenged in accord with our court rules, an appellate court should direct that the maximum term be that which is required by law. These errors are similar in kind.

Because a *Tanner* violation and an error in the imposition of the statutory maximum are similar, both may be substantive. However, the remedy generally applied to *Tanner* violations challenged on appeal cannot clearly be applied here. The error in this case was not timely challenged on appeal as was the *Tanner* error. Nor did either party timely move to correct the invalid sentence under MCR 6.429. And, only a defendant may seek relief from an invalid sentence by filing a postconviction motion under subchapter 6.500. Defendant did not file such a motion.

There is Michigan caselaw holding that the imposition of a maximum sentence that is below the statutory maximum is a nullity.[10] Entry of a

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[5] *Id*. at 690.

[6] MCL 769.34(2)(b).

[7] *People v Thomas*, 447 Mich 390, 393-394 (1994).

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

[9] *Id*. at 392-394.

[10] *In re O'Dell*, 365 Mich 429, 431 (1962).

nunc pro tunc order is proper to correct the error.[11] However, this caselaw predates the current court rules. Unless the imposition of an invalid maximum sentence was a clerical error, the court rules appear to provide no method to correct an error in the maximum sentence discovered five years later. The apparent gap between our court rules and prior caselaw argues loudly for this Court to grant leave to appeal in this case.

The proper interpretation of MCR 6.435(A) is jurisprudentially significant because, if "clerical errors" are defined too broadly, judgments will lose their finality. Trial judges may be encouraged to amend their judgments by characterizing the amendment as the mere correction of a clerical mistake. As Justice MARKMAN notes, the unique facts of this case may also implicate defendant's constitutional rights.

The issues presented merit full appellate review. Because they raise important questions of law, I would grant leave to appeal.

MARKMAN, J. (*dissenting*). Defendant was sentenced to a maximum term of five years in prison, and had served virtually the entirety of his sentence when the trial court took the remarkable step of *adding ten additional years to defendant's maximum sentence less than one month before its completion*. That is, as defendant was presumably anticipating his imminent release from prison, and after he had apparently fulfilled his debt to society, the trial court suddenly tripled his maximum sentence to 15 years.

This extraordinary and—to the best of my recollection—unprecedented sequence of events merits appellate review. Just as finality in the appellate process is necessary to ensure that the rehabilitative functions of the criminal justice system can begin to have an effect, so too is finality in the sentencing process. I would remand to the Court of Appeals for consideration as on leave granted whether defendant's constitutional or statutory rights were in any way implicated by the timing of events in this case. I also share Justice KELLY's concerns that the trial court's error in this case is not properly characterized as a "clerical" error.[1]

CAVANAGH, J. I join the statement of Justice MARKMAN.

Summary Disposition May 21, 2008:

PEOPLE V GEORGE, No. 135640. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals

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[11] *People v Smith,* 35 Mich App 349, 352 (1971).

[1] Justice CORRIGAN suggests that MCR 6.429, pertaining to the correction and appeals of sentences, may be applicable. However, that court rule requires that a "motion" be "filed" by a "party" before a trial court may correct a sentence. Here, neither the prosecutor nor defendant filed a motion to amend the sentence. Moreover, under MCR 6.429(B)(4), only a defendant may seek an amended sentence if that defendant "is no longer entitled to appeal by right or by leave," as is the case here. Hence, MCR 6.429 does not lend support to the majority's argument.

for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Oakland Circuit Court for a new trial. Court of Appeals No. 271892.

Leave to Appeal Denied May 21, 2008:

PEOPLE v JOSEPH JOHNSON, No. 135270; Court of Appeals No. 280510.

PEOPLE v REUTHER, No. 135621; Court of Appeals No. 281059.

KELLY, J. I would remand this case to the Court of Appeals for consideration, as on leave granted, of the defendant's claim that his plea of guilty of assault of a prison employee was the product of threats and coercion resulting from beatings and threats of beatings by Livingston County Jail corrections officers.

AMERICAN AXLE & MANUFACTURING HOLDINGS, INC v NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, No. 135631; Court of Appeals No. 270043.

PEOPLE v VESCOSO, No. 135818; Court of Appeals No. 272404.

CORRIGAN, J. I would grant leave to appeal.

PEOPLE v KELLY, No. 135958; Court of Appeals No. 272820.

Summary Dispositions May 23, 2008:

PEOPLE v WILLEY, No. 134368. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the November 22, 2005, amended judgment of sentence of the St. Clair Circuit Court that ordered the defendant to pay attorney fees, and we remand this case to that court for a decision on attorney fees that considers the defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004), lv den 473 Mich 881 (2005). At the trial court's discretion, the decision may be made on the basis of the record without the need for a formal evidentiary hearing. If the court decides to order the defendant to pay attorney fees, it shall do so in a separate order. *Id*. In all other respects, the application for leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 277805.

CORRIGAN, J. (*concurring in part and dissenting in part*). I dissent from the majority's decision to vacate the trial court's order requiring defendant to repay his court-appointed attorney fees and to remand the case for the trial court to consider defendant's ability to pay. Because an order for the repayment of attorney fees must be separate from the judgment of sentence, however, I join the Court's order insofar as it remands to the trial court to order the repayment of attorney fees in a separate order.

Defendant had notice of the fees and an opportunity to object, but failed to do so. Because defendant did not timely object to the trial court's order and the court has not yet enforced the order, the court was not required to state on the record that it had considered his ability to pay.

Further, because the trial court already stated on reconsideration that it *did* consider defendant's ability to pay, any error was harmless.

I. FACTS AND PROCEDURAL POSTURE

Defendant was charged with operating a motor vehicle while under the influence of liquor, third offense (OUIL 3d), driving while his license was suspended or revoked, second offense (DWLS 2d), and with being a third-offense habitual offender after his vehicle was stopped and a test indicated that he had a blood-alcohol content of 0.21 percent. Defendant signed a petition for a court-appointed attorney based on indigence, which stated that he agreed that he might be ordered to repay the court for his attorney fees. The trial court granted the petition and appointed counsel. Defendant pleaded guilty of OUIL 3d, DWSL, and habitual offender, second offense. The judgment of sentence required defendant to repay the cost of his court-appointed attorney "in an amount to be determined." Defendant did not object to the judgment of sentence.

Later, the trial court entered an amended judgment of sentence, which established the specific amount ($1,155.08) of attorney fees. Defendant moved to delete the attorney-fee requirement from the amended judgment of sentence, arguing that the order to repay violated his equal protection and due process rights. The court denied the motion because defendant had agreed in his petition for a court-appointed attorney that he might be required to repay his attorney fees, and the original judgment of sentence stated that defendant must repay his court-appointed attorney fees in an amount to be determined later. Defendant sought reconsideration of the order, citing *People v Dunbar*, 264 Mich App 240 (2004). The trial court denied the motion for reconsideration, specifically stating that it had considered defendant's financial status when he applied for counsel and that the amount required as repayment was reasonable.

The Court of Appeals denied defendant's application for leave to appeal for lack of merit.

II. STANDARD OF REVIEW

Because defendant did not timely object to the trial court's reimbursement order, this Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774 (1999); *Dunbar, supra* at 251.

III. ANALYSIS

In *Dunbar, supra* at 252, the issue was whether a sentencing court may constitutionally require a defendant to contribute to the cost of his court-appointed attorney without first assessing his ability to pay. The *Dunbar* panel adopted the test from *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984), to determine whether a sentencing court's procedure

passes constitutional muster. In *Alexander*, the Fourth Circuit Court of Appeals discussed *James v Strange*, 407 US 128 (1972), *Fuller v Oregon*, 417 US 40 (1974), and *Bearden v Georgia*, 461 US 660 (1983),[1] which all involved challenges to the constitutionality of statutory attorney-fee recoupment schemes. The Fourth Circuit held that the following constitutional principles emerged from those cases:

> From the Supreme Court's pronouncements in *James, Fuller*, and *Bearden*, five basic features of a constitutionally acceptable attorney's fees reimbursement program emerge. First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. *Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required.* The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy. [*Alexander, supra* at 124 (emphasis added).]

After the *Dunbar* panel quoted these factors, it held that a sentencing court may order reimbursement of a court-appointed attorney's fees without specific findings on the record regarding the defendant's ability to pay, unless the defendant objects to the reimbursement amount at the time it is ordered. *Dunbar, supra* at 254. The panel held, however, that even if the defendant does not object, "the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255.[2]

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[1] See my statement in *People v Carter*, 480 Mich 1063, 1068-1070 (2008), for a summary of the holdings in *James*, *Fuller*, and *Bearden*.

[2] The Court of Appeals then held that in deciding the amount that should be reimbursed, the court should consider the defendant's foreseeable ability to pay. *Id.* at 255.

This case involves the second and third factors of the *Dunbar* test. First, the trial court satisfied the second *Dunbar* factor. Defendant knew a repayment obligation might be imposed, but failed to object, despite having an opportunity to do so. When the court appointed counsel, defendant signed a form that stated: "REPAYMENT I understand that I may be ordered to repay the court for all or part of my attorney and defense costs." In *Dunbar, supra* at 254, the defendant's petition and order appointing counsel similarly stated that he "may be ordered to repay the court" for his court-appointed attorney fees. *Dunbar* held that this petition and order sufficiently notified the defendant of the court's decision to order the repayment of attorney fees. *Id.* The petition and order here is virtually identical to the one at issue in *Dunbar*. It plainly notified defendant about his responsibility to repay the attorney fees.

Defendant also had an opportunity to object. *Dunbar* held that the defendant, who was given notice of the fees by the petition and order appointing counsel, was given the opportunity to object at sentencing. *Id.* at 254. "In regard to defendant's opportunity to be heard, defendant was not prevented from objecting at sentencing and asserting his indigency." *Id.* Similarly in this case, defendant, who had prior notice of the fees through the petition and order appointing counsel, had an opportunity to object at sentencing. The sentencing court ordered that defendant "be required to pay attorney fees in an amount to be determined." The judgment of sentence also stated, "HE SHALL PAY ATTORNEY FEES IN AN AMOUNT TO BE DETERMINED." Although defendant did not know at sentencing the exact amount of attorney fees he would be required to repay, he could have objected to the general repayment order at sentencing by asserting an inability to repay any fees because of his indigence. Thus, defendant had notice of the obligation and a meaningful opportunity to object to the fees.

In regard to the third *Dunbar* factor, I think that *Dunbar* misinterpreted Supreme Court precedent when it followed *Alexander*. As I explained in my dissent in *People v Carter*, 480 Mich 1063, 1068-1071 (2008), nothing in *James, Fuller,* or *Bearden* requires a sentencing court to state on the record that it considered the defendant's ability to pay when the defendant has not timely objected on indigency grounds to the reimbursement order. In my view, the court must consider the defendant's ability to pay when it decides to enforce collection or sanction the defendant for nonpayment.

> Supreme Court precedents compel a sentencing court to inquire into a defendant's financial status and make findings on the record *when the court decides to enforce collection or sanction the defendant for failure to pay the ordered amount*. . . . The Alaska Supreme Court correctly explained that "*James* and *Fuller* do not require a prior determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors . . . ." *State v Albert,* 899 P2d 103, 109 (Alas, 1995). See also the Washington Supreme Court's interpretation of *James, Fuller,* and *Bearden*:

> "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before *enforced collection* or any *sanction is imposed* for nonpayment, there must be an inquiry into ability to pay. [*State v Blank,* 131 Wash 2d 230, 242; 930 P2d 1213 (1997).]"
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> Nothing in *James*, *Fuller*, [or] *Bearden* . . . states that a sentencing court must state on the record that it considered the defendant's ability to pay when the defendant does not timely object on indigency grounds to the order requiring him to pay attorney fees. I would overrule *Dunbar*'s contrary holding. [*Carter, supra* at 1070-1071 (CORRIGAN, J., dissenting) (emphasis added to *Blank*).]

Applying this conclusion to the facts of this case, I would hold that the court satisfied its constitutional duties. It had no responsibility under the federal constitution to state on the record that it had inquired into defendant's indigency before imposing attorney fees. Further, the recoupment order does not state when payment must commence. The court has not enforced collection by sanctioning defendant for nonpayment. Therefore, defendant's challenge to the reimbursement order is premature. See *Dunbar, supra* at 256 ("in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment"); see also *Blank, supra* at 242.

Finally, even if the trial court erred in not stating at the time it ordered the recoupment that it had considered defendant's ability to pay, such error did not affect defendant's substantial rights. In denying defendant's motion for reconsideration, the trial court clarified that it *had* considered defendant's ability to pay: "The Court properly considered Defendant's financial status at the time he applied for appointment of counsel and the amount required in repayment is reasonable given the information." Because *Dunbar* requires the court only to state that it considered the defendant's ability to pay, *Dunbar, supra* at 254-255, the trial court's statement would have satisfied *Dunbar* if it had been made when the court ordered the reimbursement. Thus, the majority's remand to the trial court to consider defendant's ability to pay will most likely amount to an exercise in futility.

I concur that the trial court erred in ordering reimbursement in the judgment of sentence. When a court decides to order a defendant to repay the cost of his court-appointed attorney, it must do so in a separate order, and not the judgment of sentence. *Id.* at 256; *People v Arnone*, 478 Mich 908 (2007). Therefore, I join the majority insofar as it remands to the trial court to order reimbursement by a separate order.

WEAVER, J. I join the statement of Justice CORRIGAN.

FUNDUNBURKS v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 134408. On May 7, 2008, the Court heard oral argument on the application for leave to appeal the May 31, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the portion of the Court of Appeals decision affirming the circuit court ruling that there are genuine issues of material fact as to whether defendant Beard was grossly negligent. We remand this case to the Ingham Circuit Court for entry of an order granting defendant Beard's motion for summary disposition.

This case involves the claim that defendant Beard was grossly negligent in closing the bus doors as plaintiff was exiting. Defendant Beard moved to dismiss on the ground that plaintiff's claim was barred by governmental immunity under MCR 2.116(C)(7). In response to that motion, plaintiff did not present any evidence to show that defendant Beard's action of closing the doors of the bus while the plaintiff was attempting to exit the vehicle was anything more than ordinary negligence but asserted that the trial court should deny the motion because discovery had not been completed and that Beard's deposition had not been taken. The trial court denied the motion, citing the fact that discovery had not been completed, and the Court of Appeals affirmed on that ground, adding that there were genuine issues of material fact. This was not a valid basis for denying the motion. Defendant Beard was named as a defendant on July 25, 2006. Defendant's motion was filed on September 15, 2006, and the hearing was not held until November 15, 2006. Plaintiff had several months during which it not only failed to take Beard's deposition, but, as plaintiff acknowledged at oral argument, she never even attempted to schedule it. At the time the motion was argued, discovery had closed. Thus, where discovery was closed and it was plaintiff's own fault that Beard's deposition was never taken, it cannot be said that it was premature to rule on Beard's motion.

From the evidence in this record, no reasonable juror could conclude that defendant Beard's conduct amounted to gross negligence—reckless conduct showing a substantial lack of concern whether injury would result, MCL 691.1407(2)(c), (7)(a), which plaintiff must establish to overcome defendant Beard's statutory governmental immunity defense. See *Stanton v City of Battle Creek*, 466 Mich 611, 620-621 (2002); *Jackson v Saginaw Co*, 458 Mich 141, 146 (1998). Thus, the plaintiff has failed to demonstrate that defendant Beard's conduct constituted gross negligence under MCL 691.1407(2)(c). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 274928.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. I would grant leave to appeal.

PEOPLE v COBB, No. 135483. Pursuant to MCR 7.302(G)(1), and given the particular facts of this case, in lieu of granting leave to appeal, we remand this case to the Court of Appeals. On remand, that court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). Court of Appeals No. 278973.

CORRIGAN, J. I would direct appellate counsel, Susan K. Walsh, to file a supplemental brief addressing the reasons for her failure to file the defendant's delayed application for leave to appeal in the Court of Appeals within the deadline set forth in MCR 7.205(F), which led to the administrative dismissal of the application on jurisdictional grounds.

Summary Dispositions May 27, 2008:

VERBRUGGHE v SELECT SPECIALTY HOSPITAL MACOMB COUNTY, INC, Nos. 131475, 131489, and 131498. By order of October 17, 2007, the application for leave to appeal the March 23, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Braverman v Garden City Hosp* (Docket Nos. 134445, 134446). On order of the Court, the case having been decided on April 9, 2008, 480 Mich 1159 (2008), the application is again considered, and in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412 (2007), and *Braverman*, *supra*. Reported Below 270 Mich App 383.

SMITH v TRINITY HEALTH-MICHIGAN, Nos. 131958, 131959, and 131960. By order of November 29, 2007, the application for leave to appeal the July 18, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Braverman v Garden City Hospital* (Docket Nos. 134445-134446). On order of the Court, the case having been decided on April 9, 2008, 480 Mich 1159 (2008), the application is again considered, and in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the other issues raised in the defendant's application to that court. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals Nos. 266635, 266636 and 266701.

VANDE LUYSTER v SAK, No. 132882. By order of November 29, 2007, the application for leave to appeal the November 28, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Braverman v Garden City Hospital* (Docket Nos. 134445-134446). On order of the Court, the case having been decided on April 9, 2008, 480 Mich 1159 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Ottawa Circuit Court for reinstatement of the complaint. The plaintiff is within the class of plaintiffs identified in this Court's order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). Furthermore, as noted in *Braverman*, *supra*, the decision in *Lindsey v Harper Hosp*, 455 Mich 56 (1997), is no longer controlling; thus, the plaintiff had an additional two years in which to file the complaint. Court of Appeals No. 257046.

PEOPLE v WHITMAN, No. 135837. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the defendant's sentences and we remand these cases to the Genesee Circuit Court for resentencing. The reduction in the defendant's offense variable score resulting from the

correction of the score for offense variable 9, which the prosecutor conceded should be zero points in both cases, reduces the defendant's minimum sentencing guidelines range to 78 to 130 months in Docket No. 07-019851-FH, and to 72 to 120 months in Docket No. 07-019867-FH. Moreover, the sentencing court's statements on the record in denying the defendant's postjudgment motion for resentencing do not clearly indicate whether the court would impose the same sentences regardless of any scoring error. Therefore, resentencing is required. MCL 769.34(10); *People v Francisco*, 474 Mich 82 (2006); *People v Lathrop*, 480 Mich 1036 (2008). 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. We do not retain jurisdiction. Court of Appeals No. 281518.

PEOPLE v CORRION, No. 135939. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Livingston Circuit Court and remand this case to that court for resentencing in light of *People v Hendrick*, 472 Mich 555 (2005), and *People v Babcock*, 469 Mich 247 (2003). 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 *Babcock, supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 282703.

Leave to Appeal Denied May 27, 2008:

MACOR v KOWALSKI, No. 130260; Court of Appeals No. 264076.

JACKSON v HENRY FORD HEALTH SYSTEM, Nos. 130529, 130591, and 130594; Court of Appeals Nos. 263766.

MITCHELL-CRENSHAW v JOE, Nos. 130747 and 130756; Court of Appeals No. 263057.

FLEMISTER v TRAVELING MEDICAL SERVICES, PC, No. 130869; Court of Appeals No. 266223.

BRANCHE v SINAI-GRACE HOSPITAL, Nos. 130957 and 130970; Court of Appeals Nos. 266255 and 266467.

CLARK v ABDALLAH, No. 131034; Court of Appeals No. 266632.

RHEINSCHMIDT v FALKENBERG, No. 131061; Court of Appeals No. 261318.

MYERS v MARSHALL MEDICAL ASSOCIATES, PC, No. 131096; Court of Appeals No. 264667.

COLE v KEATING, No. 131275; Court of Appeals No. 268688.

WALLER v ATKINSON, No. 131281; Court of Appeals No. 266288.

MAYS v MICHIGAN HEART, PC, Nos. 131357 and 131367; Court of Appeals Nos. 261734 and 261403.

COLTON v NANDAMUDI, Nos. 131372, 131403, and 131404; Court of Appeals Nos. 268524 and 268533.

SMITH v TRINITY HEALTH-MICHIGAN, No. 131962; Court of Appeals No. 266701.

FINDLING v PARKER, No. 132417; Court of Appeals No. 267519.

WOODS v FARMINGTON FAMILY PHYSICIANS, PC, No. 132583; Court of Appeals No. 270600.

SHANES v SHAIKH, Nos. 133924, 133930, and 133944; Court of Appeals No. 264651.

PEOPLE v EARVIN, No. 134340. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272593.

KELLY, J. I would grant leave to appeal.

PEOPLE v MERIDY, No. 134417; Court of Appeals No. 262371.

BRAVERMAN v GARDEN CITY HOSPITAL, No. 134750; reported below: 272 Mich App 72 and 801.

WASHINGTON v GLACIER HILLS NURSING CENTER, Nos. 134948 and 134951; Court of Appeals No. 266487.

CAVANAGH, J., did not participate because of a familial relationship with counsel of record.

PEOPLE v BLANKS, No. 135221. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278628.

PEOPLE v ERVIN, No. 135266. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277787.

PEOPLE v WESLEY, No. 135309. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279093.

PEOPLE v HOLLAND, No. 135310. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275108.

PEOPLE v ROBY DAVIS, No. 135341. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279049.

PEOPLE v SEWARD, No. 135363. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280201.

KELLY, J. I would grant leave to appeal.

PEOPLE v REISCHAUER, No. 135389; Court of Appeals No. 281732.

PEOPLE v HADLEY, No. 135470. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277368.

PEOPLE v HATHORN, No. 135488. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277559.

PEOPLE v WALTER, No. 135506. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278293.

PEOPLE v WARD, No. 135529; Court of Appeals No. 280907.

PEOPLE v FORD, No. 135618; Court of Appeals No. 270542.

PEOPLE v LEE, No. 135646; Court of Appeals No. 281720.

HEALTHCALL OF DETROIT, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 135708; Court of Appeals No. 278316.

PEOPLE v THOMAS MOORE, No. 135718; Court of Appeals No. 273238.

PEOPLE v BENNETT, No. 135733; Court of Appeals 273236.

PEOPLE v BLOUNT, No. 135743; Court of Appeals No. 270875.

DELL v ST CLAIR CIRCUIT COURT, No. 135745; Court of Appeals No. 281475.

PEOPLE v HARP, No. 135766; Court of Appeals no. 274468.

PEOPLE v MARTIN DAVIS, No. 135767; Court of Appeals No. 281958.

GAUTHIER v D & T EMERALD CREEK, INC, No. 135782; Court of Appeals No. 278654.

PEOPLE v CHESTER WILLIAMS, No. 135790; Court of Appeals No. 267951.

PEOPLE v BRANDON JOHNSON, No. 135791, Court of Appeals No. 273693.

G & V INC v AL-JUFAIRI, No. 135793; Court of Appeals No. 271246.

PEOPLE v SWANIGAN, No. 135806; Court of Appeals No. 273671.

PEOPLE v LONNIE JOHNSON, No. 135808; Court of Appeals No. 282405.

KELLY, J. I would remand this case to the Court of Appeals to decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2).

PEOPLE v COTTON, No. 135825; Court of Appeals No. 282133.

PEOPLE v MULLINS, No. 135826; Court of Appeals No. 281346.

PEOPLE v HASEAN JONES, No. 135833; Court of Appeals No. 275101.

PEOPLE v MATTHEWS, No. 135834; Court of Appeals No. 281948.

PEOPLE v FORTUNE, No. 135838; Court of Appeals No.282260.

PEOPLE v VIVODA, No. 135843; Court of Appeals No. 271292.

PEOPLE v VAUGHN, No. 135845; Court of Appeals No. 282366.

O'REILLY v ANGELO IAFRATE CONSTRUCTION COMPANY, No. 135852; Court of Appeals No. 280866.

DAVIS v EDDY-DAVIS, No. 135853; Court of Appeals No. 275319.

PEOPLE v HUDSON, No. 135862; Court of Appeals No. 271062.

PEOPLE v SMIGIELSKI, No. 135863; Court of Appeals No. 268418.

PEOPLE v JACKSON, No. 135871; Court of Appeals No. 273310.

PEOPLE v STEVENSON, No. 135872; Court of Appeals No. 270380.

PEOPLE v FAHRNER, No. 135875; Court of Appeals No. 269255.

PEOPLE v MOYE, No. 135877; Court of Appeals No. 282035.

PEOPLE v SANTIAGO, No. 135880; Court of Appeals No. 277075.

PEOPLE v DOUGLAS, No. 135885; Court of Appeals No. 281752.

PEOPLE v BEREAN, No. 135890; Court of Appeals No. 281718.

MORGAN v MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC, No. 135904; Court of Appeals No. 276119.

PEOPLE v ADAMS, No. 135906; Court of Appeals No. 274028.

PEOPLE v FRENCH, No. 135909; Court of Appeals No. 282456.

PEOPLE v OLLIE, No. 135910; Court of Appeals No. 272247.

PEOPLE v ELBERT GILBERT, No. 135911; Court of Appeals No. 282536.

PEOPLE v BAKER, No. 135912; Court of Appeals No. 274718.

PEOPLE v BEARY, No. 135916; Court of Appeals No. 282338.

PEOPLE v STORY, No. 135917; Court of Appeals No. 273919.

DENNIS v WATERLAND TRUCKING SERVICE, INC, No. 135920; Court of Appeals No. 278942.

PEOPLE v SEAN JONES, No. 135921; Court of Appeals No. 275812.

PEOPLE v TYRONE MOORE, No. 135922; Court of Appeals No. 274714.

PEOPLE v HENRY, No. 135923; Court of Appeals No. 274096.

PEOPLE v VANRENSELAAR, No. 135924; Court of Appeals No. 279666.

SOUTH MACOMB DISPOSAL AUTHORITY v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 135925; Court of Appeals No. 280209.

PEOPLE v TULLOS, No. 135935; Court of Appeals No. 281169.

PEOPLE v DENNARD, No. 135936; Court of Appeals No. 275879.

PEOPLE v RONALD ALLEN, No. 135938; Court of Appeals No. 272183.

PEOPLE v KIRK SMITH, No. 135944; Court of Appeals No. 282150.

PEOPLE v KENNETH ALLISON, No. 135953; Court of Appeals No. 272743.

GREYDANUS v NOVAK, No. 135954; Court of Appeals No. 273221.

PEOPLE v MEDLEY, No. 135957; Court of Appeals No. 272069.

KELLY, J. I would grant leave to appeal to consider whether being a felon in possession of a firearm can be the underlying felony for a conviction of possession of a firearm during the commission of a felony and whether double jeopardy is implicated for the reasons stated in my concurring opinion in *People v Calloway*, 469 Mich 448, 457 (2003).

PEOPLE v DARABAN, No. 135961; Court of Appeals No. 274870.

PEOPLE v DURR, No. 135963; Court of Appeals No. 275096.

PEOPLE v RODERICK CANNON, No. 135964; Court of Appeals No. 274617.

PEOPLE v PINGLE, No. 135965; Court of Appeals No. 282645.

PEOPLE v CLARK, No. 135967; Court of Appeals No. 272988.

PEOPLE v EDWARD THOMAS, No. 135968; Court of Appeals No. 274469.

PEOPLE v MEANS, No. 135970; Court of Appeals No. 274888.

PEOPLE v HILDEBRANT, No. 135971; Court of Appeals No. 271840.

PEOPLE v SIMMONS, No. 135974; Court of Appeals No. 271675.

PEOPLE v MCGORMAN, No. 135981; Court of Appeals No. 272423.

PEOPLE v BODELL, No. 135983; Court of Appeals No. 274098.

PEOPLE v HARTGER, No. 135984; Court of Appeals No. 282914.

PEOPLE v SEKLAWI, No. 135986; Court of Appeals No. 281938.

PEOPLE v JOHN ROBINSON, No. 135988; Court of Appeals No. 282918.

PEOPLE v HERNANDEZ-PEREZ, No. 135992; Court of Appeals No. 273050.

PEOPLE v ADKINS, No. 135994; Court of Appeals No. 273167.

PEOPLE v MARTINEZ, No. 135998; Court of Appeals No. 281750.

PEOPLE v MOTT, No. 136001; Court of Appeals No. 275196.

PEOPLE v JAMES RODRIGUEZ, No. 136007; Court of Appeals No. 282527.

PEOPLE v DAILEY, No. 136009; Court of Appeals No. 281885.

PEOPLE v BUGGS, No. 136012; Court of Appeals No. 275481.

PEOPLE v SEAN SMITH, No. 136014; Court of Appeals No. 274422.

SMITH v EXEMPLAR MANUFACTURING COMPANY, No. 136015; Court of Appeals No. 272749.

PEOPLE v SIMMONS, No. 136018; Court of Appeals No. 274172.

PEOPLE v DISNEY, No. 136019; Court of Appeals No. 273367.

PEOPLE v BELL, No. 136020; Court of Appeals No. 267248.

PEOPLE v BURKS, No. 136021; Court of Appeals No. 273647.

PEOPLE v LOWE, No. 136023; Court of Appeals No. 273055.

FARLEY v CARP, No. 136028; Court of Appeals No. 283418.

GALLANT v BOARD OF EDUCATION OF THE KALAMAZOO PUBLIC SCHOOLS, No. 136033; Court of Appeals No. 279055.

PEOPLE v LETEFF, No. 136034; Court of Appeals No. 282538.

BOSS v LOOMIS, EWERT, PARSLEY, DAVIS & GOTTING, PC, No. 136038; Court of Appeals No. 280716.

PEOPLE v OZOMARO, No. 136039; Court of Appeals No. 273903.

PEOPLE v TORRI BERRY, No. 136040; Court of Appeals No. 270383.

PEOPLE v CHARLES MILLER, JR, No. 136041; Court of Appeals No. 274616.

PEOPLE v BAILEY, No. 136043; Court of Appeals No. 273483.

PEOPLE v BOWMAN, No. 136044; Court of Appeals No. 270342.

PEOPLE v RANDALL REEVES, No. 136048; Court of Appeals No. 269503.

PEOPLE v MICSAK-TOLBERT, No. 136051; Court of Appeals No. 282680.

PEOPLE v JACOBSEN, No. 136054; Court of Appeals No. 283041.

In re CHIPCHASE ESTATE (CHIPCHASE v CHIPCHASE), No. 136057; Court of Appeals No. 274599.

PEOPLE v FREES, No. 136059; Court of Appeals No. 275095.

PEOPLE v STANLEY, No. 136060; Court of Appeals No. 275140.

PEOPLE v GRIMSLEY, No. 136062; Court of Appeals No. 281784.

PEOPLE v ZABORSKI, No. 136063; Court of Appeals No. 274844.

PEOPLE v KENNEDY, No. 136075; Court of Appeals No. 275753.

PEARSALL v CANTON TOWNSHIP, No. 136082; Court of Appeals No. 279423.

PEOPLE v NICHOLS, No. 136083; Court of Appeals No. 283029.

PEOPLE v HARVEY, No. 136089; Court of Appeals No. 276691.

PEOPLE v SHAFER, No. 136090; Court of Appeals No. 283221.

PEOPLE v SHIPP, No. 136092; Court of Appeals No. 276003.

PEOPLE v RIGGINS, No. 136102; Court of Appeals No. 274093.

PEOPLE v TYRAN, No. 136105. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281825.

PEOPLE v LEAPHEART, No. 136109; Court of Appeals No. 276694.

KORRECK v POWER BRITE OF MICHIGAN, INC, No. 136144; Court of Appeals No. 280724.

Reconsiderations Denied May 27, 2008:

In re APPLICATION OF INDIANA MICHIGAN POWER COMPANY, No. 134474. Leave to appeal denied at 480 Mich 1032. Court of Appeals No. 264859.

PEOPLE v FAVORS, No. 134835. Leave to appeal denied at 480 Mich 1134. Court of Appeals No. 275048.

PEOPLE v ODOM, No. 135162. Leave to appeal denied at 480 Mich 1141. Court of Appeals No. 267867.

GUOAN v DEPARTMENT OF CORRECTIONS, No. 135289. Leave to appeal denied at 480 Mich 1134. Court of Appeals No. 277823.

PEOPLE v WORDELL, No. 135386. Leave to appeal denied at 480 Mich 1141. Court of Appeals No. 280683.

PEOPLE v AARON BROWN, No. 135409. Leave to appeal denied at 480 Mich 1135. Court of Appeals No. 272784.

PEOPLE v SPENCER, No. 135444. Leave to appeal denied at 480 Mich 1135. Court of Appeals No. 271844.

PEOPLE v COLLINS, No. 135450. Leave to appeal denied at 480 Mich 1136. Court of Appeals No. 280560.

PEOPLE v FONVILLE, No. 135471. Leave to appeal denied at 480 Mich 1136. Court of Appeals No. 280968.

PEOPLE v CLEMENTS, No. 135477. Leave to appeal denied at 480 Mich 1136. Court of Appeals No. 271808.

PEOPLE v SPACHER, No. 135665. Leave to appeal denied at 480 Mich 1139. Court of Appeals No. 273408.

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 132986, 132987, 132988, 133759, 133760, 134564. Leave to appeal denied at 480 Mich 1132. Court of Appeals Nos. 246823, 248593, 251390, 256129, 257234, and 252335.

Rehearing Denied May 28, 2008:

LATHAM v BARTON MALOW COMPANY, No. 132946; Court of Appeals No. 264243.

CAVANAGH, J. I would grant a rehearing.

Summary Dispositions May 29, 2008:

GOODMAN v DAHRINGER, No. 134696. By order of March 21, 2008, the Court of Appeals was directed to "provide an explanation . . . of why it has jurisdiction over this case, given its procedural history." The Court of Appeals "advises that upon an opportunity to reconsider the July 2007 motion for reinstatement this Court would deny the July 11, 2007, motion for reinstatement for failure to establish 'mistake, inadvertence, or excusable neglect' under MCR 7.217(D)." On order of the Court, the explanation having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals reinstating the defendant's appeal, and we remand this case to the Court of Appeals for entry of an order dismissing the defendant's appeal. Court of Appeals No. 273680.

PEOPLE v ARTHUR, No. 136064. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the opinion of the Court of Appeals addressing the issue of the right to self-representation, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Saginaw Circuit Court for further proceedings not inconsistent with this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 273577.

Leave to Appeal Denied May 29, 2008:

PEOPLE v TINCHER, No. 134816. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277654.

PEOPLE v KAHLEY, No. 135540; reported below: 277 Mich App 182.

PEOPLE v D'OYLY, No. 135592; Court of Appeals No. 281222.

KELLY, J. I note that the defendant's conviction for attempt to commit fourth-degree criminal sexual conduct may be subject to the provisions of MCL 780.621 upon the expiration of the five-year period from the date sentence was imposed.

PEOPLE v JUNKER, No. 135801; Court of Appeals No. 271851.

Reconsiderations Denied May 29, 2008:

ORAM v ORAM, No. 134670. Summary disposition entered at 480 Mich 1162. Court of Appeals No. 267077.

WEAVER and CORRIGAN, JJ. We would grant reconsideration.

PANDY v BOARD OF WATER AND LIGHT, No. 132891. Summary disposition entered at 480 Mich 899. Court of Appeals No. 259784.

Summary Disposition May 30, 2008:

In re CREDIT ACCEPTANCE CORPORATION, No. 133292. On April 9, 2008, the Court heard oral argument on the application for leave to appeal the January 16, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals and make the following additional observations. MCR 3.101(D) requires compliance with MCR 2.114, and MCR 2.114(E) permits *the court* to order "appropriate sanctions" when a party violates MCR 2.114. The court's authority to sanction parties cannot be delegated to the court clerks. See *In re Huff*, 352 Mich 402, 415 (1958) (holding that the contempt power is "inherent and a part of the judicial power of constitutional courts"); Const 1963, art 3, § 2; Const 1963, art 6, § 1 ("The judicial power of the state is vested *exclusively* in one court of justice . . . .") (emphasis added). Here, Chief Judge Stephen C. Cooper sent an internal memorandum authorizing court clerks to return deficient writs of garnishment "where there has been a clear procedural or administrative error." Acting on that authorization, the defendant's clerks rejected approximately 69 deficient writs submitted by the plaintiff and requested that the plaintiff resubmit each writ with an itemized statement of postjudgment interest, costs, and payments. After the plaintiff's second submission was rejected, the chief judge sent the plaintiff's counsel a letter explaining that the writs were once again being returned and requesting that the plaintiff resubmit legible writs with an itemized statement for each. Returning the plaintiff's writs constitutes an "appropriate sanction" for the plaintiff's failure to provide a "statement verified in the manner provided in MCR 2.114(A)," MCR 3.101(D), if properly ordered by a judge under MCR 2.114(E). The court may also order on resubmission of those writs additional documentation that it deems helpful in making a determination whether the writs are conforming. However, none of the court clerk's communications rejecting the plaintiff's writs or requesting the itemized statements was ordered by the chief judge or the judge assigned to each respective writ, and the chief judge's letter to the plaintiff's counsel was not an order, see MCR 2.602. Indeed, the defendant expressly disclaimed reliance on MCR 2.114(E) in a letter from the deputy court administrator that stated: "The Court's position has been that it is reasonable to request documentation in these instances *rather than* pursue possible violations and sanctions" (emphasis added). Because the rejections were not ordered by a judge authorized to impose such sanctions, the Court of Appeals correctly concluded that the judgment of the Oakland Circuit Court should be reversed and that the plaintiff is entitled to a writ of

superintending control. We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. Reported below: 273 Mich App 594.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. I would grant leave to appeal.

PEOPLE v BREEDING, No. 135466. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the defendant's claim that his constitutional right to confront the witnesses against him was violated by the trial court's admission, at the probation revocation hearing, of certain statements by out-of-court declarants. See *Crawford v Washington*, 541 US 36 (2004). In considering this claim, the Court of Appeals shall address whether the federal circuit Court of Appeals decisions addressing this issue are correct that *Crawford* does not apply to probation revocation hearings. See, e.g., *United States v Kelley*, 446 F3d 688 (CA 7, 2006); *United States v Rondeau*, 430 F3d 44 (CA 1, 2005); *United States v Hall*, 419 F3d 980 (CA 9, 2005); *United States v Kirby*, 418 F3d 621 (CA 6, 2005); *United States v Martin*, 382 F3d 840 (CA 8, 2004); and *United States v Aspinall*, 389 F3d 332 (CA 2, 2004). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 280708.

NSK CORPORATION v DEPARTMENT OF TREASURY, No. 135997. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals opinion ruling that claim for a refund was made under MCL 205.30(2) on the date the Department of Treasury notified the plaintiff that it was entitled to a refund. Section 30(2) requires that the claim be one made by the taxpayer seeking a refund either in a tax return or by separate request. In this case, the plaintiff made such a claim when it responded, on April 26, 2005, to the Treasury Department's Audit Determination Letter, agreeing with the amount of the refund, but demanding interest on the refund. Pursuant to MCL 205.30(3), interest on the plaintiff's refund accrues 45 days after the later of the date that the tax return requesting a refund was filed or a separate claim for a refund was made. In this case interest accrues 45 days after April 26, 2005, beginning on June 10, 2005. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the question presented should be reviewed by this Court. We remand this case to the Court of Claims for further proceedings not inconsistent with this order. Reported below: 277 Mich App 692.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Leave to Appeal Granted May 30, 2008:

PEOPLE v CARLETUS WILLIAMS, No. 135271. The parties are directed to include among the issues to be briefed: (1) whether the defendant was entitled to separate trials under MCR 6.120; (2) whether *People v Tobey*,

401 Mich 141 (1977), is consistent with MCR 6.120; and (3) if the joinder was erroneous, whether the error may be deemed harmless.

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.

We further order the Oakland Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court. Court of Appeals No. 266807.

BENEFIEL v AUTO-OWNERS INSURANCE COMPANY, No. 135778. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals correctly held that review of a plaintiff's "whole life" in order to determine the plaintiff's "normal lifestyle" should include the time period before the onset of pre-existing impairments if those impairments are not permanent, and, if so, which party bears the burden of establishing that the pre-existing impairments are not permanent; (2) whether the Court of Appeals correctly held that, in this case, the appropriate period under consideration included the period before the plaintiff's 2002 accident; (3) whether, in reviewing the Livingston Circuit Court's decision granting the defendant's motion for summary disposition, it was proper for the Court of Appeals to both reverse the trial court's decision and to hold that the plaintiff established a serious impairment as a matter of law; and (4) whether the Court of Appeals correctly instructed the trial court that if the jury finds it impossible to differentiate between the damages caused by the first and second accidents, the defendant must be deemed responsible for all the injuries and damages sustained by the plaintiff, despite the fact that the plaintiff brought and settled a prior suit involving the first accident.

The Michigan Association for Justice, the Coalition Protecting Auto No-Fault, the Michigan Defense Trial Counsel, Inc., and the Insurance Institute 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. Reported below: 277 Mich App 412.

Leave to Appeal Denied May 30, 2008:

AMMEX v DEPARTMENT OF TREASURY, No. 135340; reported below: 277 Mich App 13.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether Michigan motor-fuel taxes imposed on fuel sold by plaintiff at its duty-free facility are preempted by the federal regulatory scheme that governs the operation of that facility.

PEOPLE v PUERTAS, No. 135485. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279557.

HALL v DETROIT FORMING, INC, No. 135686; Court of Appeals No. 274059.

MARKMAN, J. (*concurring in part and dissenting in part*). With regard to the 'failure to promote' claim, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order granting defendant's motion for summary disposition for the reasons stated in part II of the Court of Appeals dissenting opinion. I would affirm the judgment of the Court of Appeals on the 'hostile environment' claim.

BROWNSTOWN CHARTER TOWNSHIP v FARM BUREAU INSURANCE COMPANY, No. 135836; Court of Appeals No. 279794.

MARKMAN, J. (*dissenting*). I would reverse the Court of Appeals and remand the case to the trial court for further proceedings. MCL 500.3123(1)(a) excludes property damage coverage for motor vehicles operated on a public highway "unless the vehicle is parked in a manner as not to cause unreasonable risk of the damage which occurred." In *Stewart v Michigan*, 471 Mich 692, 695, 698-699 (2004), this Court considered similar language in MCL 500.3106 to determine that a police cruiser that was parked partially on a roadway to assist the driver of a stalled vehicle did not present an unreasonable risk of bodily injury because there was "nothing in the record to suggest that an oncoming northbound driver would not have ample opportunity to observe, react to, and avoid the hazard posed by the police cruiser." *Id*. at 699. In the instant case, the police cruiser was parked in the left lane at the top of an incline and around a curve. Another police cruiser was parked on the opposite shoulder, substantially limiting the area through which a vehicle could pass. The roadway was icy, it was dark outside, and two other vehicles had spun out near the scene within the previous 20 minutes. There is a question of fact, I believe, regarding whether the cruiser in the left lane created an unreasonable risk of the damage that occurred.

Summary Disposition June 4, 2008:

SALT v GILLESPIE, BOLANOWSKI v GILLESPIE, AND ANCONA v GILLESPIE, Nos. 135424, 135425, 135426, 135453, 135454, 135455, 135458, 135459, and 135460. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for miscellaneous relief is granted. Court of Appeals Nos. 277391, 277392, 277393, 277434, 277435, 277436, 277400, 277402, and 277404.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied June 4, 2008:

TACCO FALCON POINT, INC v CLAPPER, 133430; Court of Appeals No. 271525.

CAVANAGH, J. I would remand this case to the trial court for the reasons stated in the Court of Appeals dissenting opinion.

RIEPEN v KELSEY HOMES COMPANY-MILFORD, No. 135115; Court of Appeals No. 275413.

ALLSTATE INSURANCE COMPANY v PRICE, No. 135166; Court of Appeals No. 270599.

OWCZAREK v STATE OF MICHIGAN, No. 135241; reported below: 276 Mich App 602.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v WESTBROOK, No. 135417; Court of Appeals No. 279544.

PEOPLE v HUNT, Nos. 135439, 135440, and 135441; Court of Appeals Nos. 280566, 280567, and 280568.

PEOPLE v DARRYL JOHNSON, No. 135649; Court of Appeals No. 271442.

PEOPLE v ALONSO, No. 135680; Court of Appeals No. 282164.

PEOPLE v SPENCER ROBINSON, No. 135685; Court of Appeals No. 281522.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MCCLUSKEY, No. 135731; Court of Appeals No. 271803.

KELLY, J. I would grant leave to appeal.

PEOPLE v SESSIONS, No. 135752; Court of Appeals No. 275023.

KELLY, J. I would grant leave to appeal.

PEOPLE v BINGLEY, No. 135770; Court of Appeals No. 277693.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v WILLIE SMITH, III, No. 135828; Court of Appeals No. 281126.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

Summary Disposition June 6, 2008:

HERSCHFUS v HERSCHFUS, No. 135788. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the trial court for entry of an order setting a parenting-time schedule that accommodates the plaintiff's religious observances in accordance with the parties' agreement regarding the child's upbringing. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 278016.

CORRIGAN, J. (*dissenting*). In this highly acrimonious child-custody case, I would deny leave to appeal rather than remand the case to the trial court to set a new parenting-time schedule. This tragic record reflects that both parties have used this litigation as a tool to mount continuing, ugly attacks on one another. Their destructive behavior has served only to prolong this case to the obvious detriment of their son. I urge that, in lieu of continuing their harmful behavior, the parties on remand behave in the best interest of their son. I fear that our remand order provides a platform for these parties to lob their grievances against one another yet again.

WEAVER, J. I join the statement of Justice CORRIGAN.

Leave to Appeal Denied June 6, 2008:

TYSON v FARM BUREAU GENERAL INSURANCE COMPANY, No. 135514; Court of Appeals No. 277200.

MARKMAN, J. (*dissenting*). Aluminum siding and a screen door were stolen from plaintiff's house. Defendant, plaintiff's insurer, refused to cover the loss. Following a bench trial, plaintiff obtained a judgment for almost $6,000. The circuit court affirmed, and the Court of Appeals denied leave to appeal. I would reverse.

The contract at issue states, "We insure for direct loss to the property covered by a peril listed below, unless the loss is excluded in the General Exclusions." One of the listed covered perils is "vandalism or malicious mischief." However, immediately after the provision that states that "vandalism and malicious mischief" are covered, the contract states that it does not cover losses suffered as a result of "pilferage, theft, burglary, or larceny."

Defendant argues that theft is not covered because the contract specifically states that theft is not a covered loss. Plaintiff argues that theft is covered because it is "not excluded in the General Exclusions." The district and circuit courts held that the contract is "ambiguous," and, thus, should be construed against the drafter.

However, a provision is ambiguous "only if it 'irreconcilably conflicts' with another provision, or when it is equally susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm,* 470 Mich 154, 166 (2004) (citation and emphasis omitted). I agree with defendant that the contract at issue here is not ambiguous. Instead, it very specifically states that it does not cover losses suffered as a result of "pilferage, theft, burglary, or larceny." The fact that theft is not listed in the General Exclusions section does not create an ambiguity. The contract explicitly states that only "the perils listed below" are covered. The contract then states that the peril of theft is not covered. Therefore, there was no need to subsequently list theft as an excluded loss in the General Exclusions. It makes no sense to exclude from the coverage of a legal document something that already is expressly not included.

HERSCHFUS v HERSCHFUS, No. 135794; Court of Appeals No. 278016.

LEIB v OAKLAND COUNTY CLERK, No. 136607; Court of Appeals No. 285768.

Summary Dispositions June 11, 2008:

PEOPLE v RAYMOND DAVIS, No. 135979. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 282886.

KELLY, J. I would deny leave to appeal.

PEOPLE v BRAY, No. 136006. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals

and the Oakland Circuit Court, and we remand this case to the circuit court for reconsideration of appellant's motion to set aside the bond forfeiture judgment under the standards set forth in MCL 765.28(2) and MCL 600.4835. We do not retain jurisdiction. Court of Appeals No. 271042.

KIRBY v VANCE, No. 136050. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The arbitrator exceeded her authority under the domestic relations arbitration act, MCL 600.5070 *et seq.*, when she failed to adequately tape-record the arbitration proceedings. The circuit court erred when it failed to remedy the arbitrator's error by conducting its own evidentiary hearing; a truly independent review of the arbitrator's findings was not possible in light of the inadequacy of the arbitration record. We remand this case to the Wayne Circuit Court for entry of an order vacating the arbitration award and ordering another arbitration before the same arbitrator. Should the parties agree, in lieu of ordering another arbitration, the circuit court may conduct an evidentiary hearing. Court of Appeals No. 278731.

CORRIGAN J. I would deny leave to appeal.

PEOPLE v TRAPP, No. 136056. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the issue whether the Berrien Circuit Court, before ordering reimbursement of attorney fees of court-appointed counsel pursuant to MCL 769.1k(1)(b)(*iii*) (which took effect January 1, 2006), was required to comply with the procedural safeguards set forth in *People v Dunbar*, 264 Mich App 240, 251-256 (2004), and in particular the requirement that the court consider the defendant's current and future financial circumstances and ability to repay the fees. We direct the Court of Appeals to issue a decision on the appeal by October 11, 2008. 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. We retain jurisdiction. Court of Appeals No. 282662.

Leave to Appeal Denied June 11, 2008:

PEOPLE v GOLDMAN, No. 135102; Court of Appeals No. 268842.

PEOPLE v STEVEN WILLIAMS, JR, No. 135658; Court of Appeals No. 272779.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v FREDERICK SMITH, No. 135725; Court of Appeals No. 271036.

PEOPLE v HEACOCK, No. 135738; Court of Appeals No. 272354.

PEOPLE v RODGERS, No. 135926; Court of Appeals No. 282253.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE V LARRY SMITH, JR, No. 135929; Court of Appeals No. 282409.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE V ANGELO TAYLOR, No. 135973; Court of Appeals No. 282305.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

APPLEGATE, INC V JOHN M OLSON COMPANY, No. 135995; Court of Appeals No. 275098.

DONOVAN V METRO PLANT SERVICES, INC, No. 136113; Court of Appeals No. 275373.

MICHALAK V OAKLAND COUNTY CLERK, No. 136618; Court of Appeals No. 285803.

BOGAERT V SECRETARY OF STATE, No. 136631; Court of Appeals No. 285826.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 13, 2008:

FEDEWA V ROBERT CLANCY CONTRACTING, INC, Nos. 136065 and 136096. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address (1) whether the decedent was a trespasser or an implied licensee and whether the plaintiff has established genuine issues of material fact on this question, (2) whether the defendants owed a duty to the decedent and, if so, whether they breached that duty, (3) whether the sand pile where the accident occurred was an attractive nuisance and whether the plaintiff has established genuine issues of material fact on this question, (4) whether the defendants engaged in willful and wanton misconduct and whether the plaintiff has established genuine issues of material fact on this question, and (5) whether the recreational land use act, MCL 324.73301(1), has any applicability in this case and, if so, whether it bars the plaintiff's claims. The parties shall file supplemental briefs within 42 days of the date of this order addressing the fifth question, and they may address the other issues in this case as well, but they should avoid submitting mere restatements of the arguments made in their application papers. The motion for stay of trial court proceedings is granted. Court of Appeals No. 274088.

KELLY, J. (*concurring in part and dissenting in part*). I concur in the decision to schedule oral argument on the application. But I dissent from that part of the order directing the parties to address "whether the

recreational land use act, MCL 324.73301(1), has any applicability in this case and, if so, whether it bars the plaintiff's claims." Although this may be an interesting issue to address in the appropriate case, it is not properly before the Court because defendants have not raised the recreational land use act as a defense.

WEAVER, J. I join the statement of Justice KELLY.

Summary Dispositions June 13, 2008:

KYSER v DETROIT MEDICAL CENTER, No. 135029. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 276871.

CORRIGAN, J. (*concurring*). I concur with the order remanding this case to the Court of Appeals for consideration as on leave granted. I write separately to ask that the Court of Appeals consider, among the issues to be addressed, the legal significance of the appointment of a guardian after the malpractice claim accrued and after decedent Edith Kyser became mentally incapacitated. The insanity saving provision, MCL 600.5851(1), provides:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane 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. This section does not lessen the time provided for in section 5852. [Emphasis added.]

The legal significance of the "or otherwise" language in MCL 600.5851(1) seems to relate to a guardian's authority to bring suit on behalf of the incapacitated person. Specifically, the relevant question is whether the disability was "otherwise" removed when plaintiff was appointed decedent's guardian and was authorized to commence an action on decedent's behalf.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v LAMORAND, No. 135247. On May 14, 2008, the Court heard oral argument on the application for leave to appeal the September 17, 2007, order of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the Macomb Circuit Court's order denying the defendant's motion to withdraw his plea and remand this case to the Macomb Circuit Court for further proceedings not inconsistent with this order. At the plea hearing, there was an insufficient factual basis to support a plea of guilty of maintaining a drug house, MCL 333.7405(1)(d). Contrary to the prosecutor's argument, this issue was adequately preserved under MCR 6.310(D) when the defendant argued with respect to

his motion to withdraw that the factual basis was insufficient and the trial court denied the motion. The motion to strike is denied. Court of Appeals No. 279776.

KELLY, J. (*concurring*). I concur in the decision to allow defendant to withdraw his plea. But my reasoning differs from that of my colleagues. I would adopt the test set forth by the California Supreme Court in *In re Ibarra*.[1] This test requires trial courts to consider certain factors before accepting a guilty plea rendered as part of a "package deal" plea agreement. Because the trial court in this case never considered these factors, I would allow defendant to withdraw his guilty plea.

FACTS

In February 2006, a fire destroyed the home of Mary and David Cunningham. Mary is defendant Brian Lamorand's mother. She is also the mother of Roger Lamorand and the stepmother of Michael Tooman. David is the father of Michael Tooman and the stepfather of defendant and Roger.

Firefighters battling the blaze found marijuana growing in the home. After an investigation, the prosecutor charged each family member, Mary, David, Roger, Michael, and defendant, with manufacturing marijuana, a felony.[2]

Roger pleaded guilty of manufacturing marijuana. His conviction was deferred under the Holmes Youthful Trainee Act.[3] The prosecutor offered to allow each of the other family members to plead guilty of maintaining a drug house, a misdemeanor.[4] The offer provided that, if any one of the family members declined the offer, it would be available to none of them.

A joint plea hearing was conducted. At the hearing, defendant, along with the others in the family, pleaded guilty of maintaining a drug house. The trial court accepted all the guilty pleas.

But before sentencing, defendant moved to withdraw his plea, arguing that the plea offer had been coercive because, if he had not accepted it, his family would have faced more serious charges. He also argued that he was innocent of the crime. Defendant admitted that his driver's license showed the family home as his address and that he received mail there. But he claimed that he did not live at the home. The trial court denied the motion. Later, defendant was ordered to pay $1000 in costs but was not sentenced to incarceration or probation.

After sentencing, defendant again moved to withdraw his plea. He offered evidence in the form of letters from his employer, neighbors, family, and friends stating that defendant did not live at the family home

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[1] *In re Ibarra*, 34 Cal 3d 277 (1983).

[2] MCL 333.7401(2)(d)(*iii*).

[3] MCL 762.11 *et seq*.

[4] MCL 333.7405(1)(d); MCL 333.7406.

and was not involved with drugs.[5] The trial court again denied the motion. The Court of Appeals denied defendant's application for leave to appeal for lack of merit in the grounds presented. We scheduled oral argument on defendant's application for leave to appeal.[6]

THE *IBARRA* DECISION

In *Ibarra*, it was alleged that the petitioner participated in an armed robbery. Initially, he was charged with robbery by use of a firearm and six counts of assault with intent to commit murder. The prosecutor made a package-deal plea offer to defendant and his two codefendants, which required all three men to plead guilty of robbery while armed and assault with a deadly weapon. In exchange for their guilty pleas, the men would be sentenced to a five-year term of imprisonment. This sentence was considerably lower than the maximum the men could have received if convicted as charged. The accused accepted the package deal and pleaded guilty. Thereafter, petitioner sought a writ of habeas corpus, arguing that the package deal was coercive. He claimed that he was innocent and had pleaded guilty only from fear that the other men would harm him if he did not accept the package-deal offer.

The California Supreme Court concluded that package deals are not intrinsically coercive,[7] but a given package deal might be coercive, depending on the facts of the case.[8] It explained:

> "Package-deal" plea bargains . . . may approach the line of unreasonableness. Extraneous factors not related to the case or the prosecutor's business may be brought into play. For example, a defendant may fear that his wife will be prosecuted and convicted if he does not plead guilty; or, a defendant may fear, as alleged in this case, that his codefendant will attack him if he does not plead guilty. Because such considerations do not bear any direct relation to whether the defendant himself is guilty, special scrutiny must be employed to ensure a voluntary plea . . . .[9]

The California Supreme Court decided that the only way to ensure that defendants were not coerced by package deals into pleading guilty

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[5] There are 10 letters. They tend to show that defendant (1) had not lived in the home for at least six months, (2) had his own apartment, (3) was a good employee, and (4) was not involved with drugs. Included among the letters is one from a codefendant, Mary Cunningham, exonerating defendant of the crime.

[6] *People v Lamorand*, 480 Mich 1111 (2008).

[7] *Ibrarra,* 34 Cal 3d at 286.

[8] *Id.* at 286-287.

[9] *Id.* at 287.

was to impose a new duty on trial courts.[10] In those cases involving package-deal plea agreements, it concluded, the trial court must conduct an inquiry into the totality of the circumstances surrounding the agreement before deciding whether to accept the plea.[11]

The California Supreme Court directed trial courts to consider the following factors: (1) The inducement for the plea. The likelihood of coercion is greater if the prosecutor misrepresents facts to the party promised leniency or does not have a good-faith case against him or her.[12] (2) The factual basis for the plea. If the facts show that the defendant is not guilty or has a reasonable defense, it is less likely that the plea is the product of the defendant's free will.[13] (3) The nature and degree of coerciveness. If the party promised leniency is a close friend or family member whom the defendant feels compelled to help, the pressure may be sufficient to create an involuntary plea.[14] Impermissible coercion possibly exists, also, if a third party threatened harm to the defendant or a loved one in the event the defendant does not plead guilty. (4) Whether the promise of leniency to a third party is a significant consideration in the defendant's choice to plead guilty.[15] In those cases where the evidence against the defendant is overwhelming, the promise of leniency likely plays a lesser role in the decision to plead guilty.[16] (5) Other relevant factors including the age of the defendant, which party initiated the plea negotiations, and whether a third party was charged first.[17]

CONCLUSION

The Alaska, Arizona, and Minnesota supreme courts have adopted the *Ibarra* holding.[18] They have opined that the *Ibarra* factors must be considered before it can be determined that a defendant's plea is voluntary and not coerced by the pressures that accompany package-deal plea agreements. Michigan should join the California, Alaska, Arizona, and Minnesota courts in adopting *Ibarra.* It is because no consideration was given to the *Ibarra* factors when the court accepted defendant's plea that I agree with the decision to allow defendant to withdraw his plea.

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[10] *Id.* at 288.

[11] *Id.*

[12] *Id.* at 288-289.

[13] *Id.* at 289.

[14] *Id.*

[15] *Id*. at 290.

[16] *Id.* at 289-290.

[17] *Id.* at 290.

[18] See *Resek v State*, 715 P2d 1188, 1191 n 2 (Alas, 1986); *State v Solano*, 150 Ariz 398, 402 (Ariz, 1986); *State v Danh*, 516 NW2d 539, 542-543 (Minn, 1994).

I recognize that adoption of this test will increase the burden on trial courts. But I believe that this is both necessary and appropriate. By considering the *Ibarra* factors, courts can find a middle ground. Prosecutors can continue to use the valuable tool[19] of package-deal plea agreements, and those accused can be protected in accordance with their constitutional rights from unlawful coercion to plead guilty.[20]

WEAVER, J. (*dissenting*). I dissent from the majority's order to reverse and remand. I would deny leave to appeal because I am not persuaded that the decision of the Court of Appeals to deny leave was clearly erroneous or that defendant has suffered any injustice in this case.

CORRIGAN, J. (*dissenting*). I dissent from the order reversing the Court of Appeals and remanding the case to the Macomb Circuit Court. The order reverses and remands on the basis of the majority's conclusion that an insufficient factual basis existed to support defendant's guilty plea to a charge of maintaining a drug house. This ground for reversal was not briefed in any court—not in the trial court, the Court of Appeals, or the Supreme Court. Although defendant briefly stated at the hearing on his motion to withdraw the plea that the plea lacked a sufficient factual basis, the circuit court did not rule on this issue. I believe that the issue was not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549 (1999).

At the plea taking of all five codefendants on June 12, 2006, defendant testified as follows:

> *The Court*: Brian Lamorand, tell the Court what it is you did on or about February 18, 2006 in the Township of Clinton. What did you do?
>
> *The Defendant*: I kept my driver's license at 35618 Rutherford where marijuana was kept.

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[19] As the *Ibarra* Court recognized, I acknowledge that

> the "package-deal" may be a valuable tool to the prosecutor, who has a need for all defendants, or none, to plead guilty. The prosecutor may be properly interested in avoiding the time, delay and expense of trial of all the defendants. He is also placed in a difficult position should one defendant plead and another go to trial, because the defendant who pleads may become an adverse witness on behalf of his codefendant, free of jeopardy. Thus, the prosecutor's motivation for proposing a "package-deal" bargain may be strictly legitimate and free of extrinsic forces. [*Ibarra*, 34 Cal 3d at 289 n 5 (emphasis omitted).]

[20] E.g., *Henderson v Morgan*, 426 US 637, 644-645 (1976) ("[A] plea cannot support a judgment of guilt unless it [i]s voluntary in a constitutional sense."); *Solano*, 150 Ariz at 402 (Ariz, 1986); *Danh*, 516 NW2d at 542-543 (Minn, 1994).

The Court: And the purpose of that residence at least in part was to be maintained for the maintaining of the marijuana.

The Defendant: Yes.

The Court: Any questions?

The Prosecutor: I'm satisfied.

The Court: Has the Court complied with MCR 6.302?

The Defense Counsel: Yes, you have.

The Prosecutor: Yes.

The Court: Then to the charge of maintaining a drug house, how is it you wish to plead?

The Defendant: Guilty.

The Court: The Court's going to accept your plea.

Thus defense counsel and the prosecutor agreed that the factual basis satisfied MCR 6.302.

Defendant and his family members were scheduled to be sentenced together. On the date of sentencing, defendant sought a one-week adjournment to discuss the conditions of his plea. One week later, on July 31, 2006, he moved to withdraw his plea under MCR 6.311 on grounds of coercion, claiming his innocence. Nowhere in that motion did defendant claim that the factual basis was insufficient. Defendant's claim of coercion is the only basis on which this case has been litigated in all courts until today.

At a minimum, defendant's brief comment at the hearing on the motion to withdraw the plea does not satisfy MCR 6.311(C):

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

Nor does it constitute " 'rais[ing] objections at a time when the trial court has an opportunity to correct the error . . . .' " *People v Pipes*, 475 Mich 267, 277 (2006), quoting *People v Grant*, 445 Mich 535, 551 (1994).

Moreover, when a court determines that the prosecutor has failed to establish a sufficient factual basis for the plea, the proper remedy is not reversal of defendant's conviction. Rather, on remand the prosecution may supplement the record to cure any defect in the plea proceedings. *People v Kedo*, 108 Mich App 310, 313 (1981). The defendant may only withdraw his plea if he controverts the supplementation. *Id.* at 314.

The parties did not brief the factual-basis question for this Court. In fact, the suggestion that an insufficient factual basis existed for defendant's guilty plea was not raised in this Court until oral argument. The

prosecutor did not concede this point. I believe that the Court should request supplemental briefing from the parties before concluding that defendant's plea lacked a sufficient factual basis.

This is a court of review. In the absence of a proper opportunity to brief the issue on which we are reversing, I dissent from the court's order.

Leave to Appeal Denied June 13, 2008:

UNITED PARCEL SERVICE, INC v BUREAU OF SAFETY AND REGULATION, No. 135509; reported below: 277 Mich App 192.

KELLY, J. (*dissenting*). Mich Admin Code, R 408.13308(1), provides that "[a]n employer shall assess the workplace to determine if hazards that necessitate the use of personal protective equipment are present or are likely to be present."[1] Petitioner United Parcel Service, Inc. (UPS), received two civil citations for violating this rule. It is undisputed that UPS did not assess either of its Michigan workplaces. In a published opinion, the Court of Appeals vacated the citations, holding that UPS need not perform a separate hazard assessment at each workplace to comply with the rule.[2] This decision will have serious implications on workplace safety in Michigan and appears to be contrary to the language of Rule 408.13308(1). The Supreme Court should grant leave to appeal to give this important issue the full consideration it deserves.

CAVANAGH, J. I join the statement of Justice KELLY.

DONKERS v KOVACH, No. 135712; reported below: 277 Mich App 366.

MARKMAN, J. (*dissenting*). For the reasons set forth in Judge MARKEY'S thoughtful dissent, I would affirm the decision of the trial court to dismiss plaintiff's case after plaintiff refused to affirm, with her right hand raised, to give truthful testimony. Plaintiff Catherine Donkers is not a law unto herself and cannot unilaterally determine the circumstances under which she will participate in the judicial process and communicate to the judge and the jury that she is a credible witness. Rather, there are rules and procedures—in this instance, having a pedigree of half a millennium or so—by which our system of law seeks to ensure that the truth of matters is discerned in legal disputes.

Typically, witnesses must swear to tell the truth and outwardly communicate their commitment to do so by raising their right hand during the process of swearing. To accommodate those with conscientious objections to such swearing, Michigan law affords an alternative procedure by which witnesses may "affirm" to tell the truth. MCL 600.1434. For the reasons set forth by Judge MARKEY, I do not believe that this alternative procedure vitiates the requirement of an upraised right hand. Because plaintiff refused to participate in the legal process by

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[1] This rule was promulgated under the authority of the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*.

[2] *United Parcel Service, Inc v Bureau of Safety & Regulation,* 277 Mich App 192 (2007).

the rules and procedures established by law, I do not believe the trial court abused its discretion by dismissing plaintiff's lawsuit.

I would only add to what Judge MARKEY has stated that I am not convinced that the instant case is properly characterized as a "free exercise" case, as plaintiff asserts. Although the trial court provided ample opportunity for plaintiff to explain her objections to affirming to tell the truth with her right hand raised, plaintiff offered no explanation for her refusal to act in accord with the law other than vaguely claiming that she holds contrary "religious beliefs." Yet plaintiff entirely failed to specify the nature and source of these beliefs. Thus, it is not only impossible to know whether plaintiff's "free exercise" of religion is truly implicated here, but it is impossible to know whether either plaintiff's insistence upon affirming, rather than swearing, or her refusal to raise her right hand, was truly a matter of "conscientious opposition," as is required by MCL 600.1434. Although "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," a person making a free exercise claim must provide some showing of the "sincerity" of the professed belief. *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 531 (1993). Moreover, as Judge MARKEY noted, the requirement of raising the right hand "has a secular origin and fosters the secular purposes of reinforcing the solemnity of the occasion and ensuring truthful testimony." *Donkers v Kovach*, 277 Mich App 366, 384 (2007) (MARKEY, J., dissenting). Cf. *West Virginia State Bd of Ed v Barnette*, 319 US 624 (1943).

Even if factual developments established this as a bona fide "free exercise" claim, I would still not affirm the Court of Appeals, but rather would grant leave to appeal to determine under what standard such claims are to be evaluated in Michigan, and then remand to the trial court to properly apply that standard to plaintiff's claim. Under the federal constitutional standard, the right of free exercise does not generally 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 his religion prescribes (or proscribes). *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872, 879 (1990) (quotations omitted). See also *Greater Bible Way Temple v City of Jackson*, 478 Mich 373 (2007).

However, this Court has apparently held, post-*Smith*, that Michigan's Free Exercise Clause, Const 1963, art 1, § 4, requires the application of "strict scrutiny" to even neutral laws and that they must serve a "compelling state interest." *McCready v Hoffius*, 459 Mich 131, 143 (1998); see also *Reid v Kenowa Hills Pub Schools*, 261 Mich App 17, 26 (2004). However, *McCready* cited no Michigan cases, or otherwise explained in any way why the Michigan Constitution, art 1, § 4, imposes a greater burden upon the government to justify even neutral laws than the United States Constitution, US Const, Am I. In my judgment, this is a substantial constitutional issue that is worthy of far more thorough analysis than was provided in *McCready*. *Id*. at 150 n 4 (BOYLE, J., dissenting) (stating that the parties had not been given "an opportunity to thoroughly argue the issues").

Before this Court effectively jettisons an institution that has served this state well since its inception, and that has always been viewed by our system of law as essential to the achievement of a fair trial, I would accord this issue significantly more careful consideration.

TAYLOR, C.J., and CORRIGAN, J. We join the statement of Justice MARKMAN.

In re KEAST (COPPESS v ATWOOD), DEPARTMENT OF HUMAN SERVICES v ATWOOD, and *In re* KEAST (ATWOOD v DEPARTMENT OF HUMAN SERVICES), Nos. 136349, 136350, 136351, and 136352; Court of Appeals Nos. 279820, 279834, 279844, and 279845.

BOGAERT v SECRETARY OF STATE, No. 136656; Court of Appeals No. 285826.

Rehearing Denied June 19, 2008:

CITY OF DETROIT v AMBASSADOR BRIDGE COMPANY, No. 132329; Court of Appeals No. 257415.

Summary Disposition June 20, 2008:

In re BROOKS (DEPARTMENT OF HUMAN SERVICES v GREGORY), No. 136383. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the respondent's claim of appeal as having been timely filed, reinstate the appeal, and decide the case on an expedited basis. The respondent's pro bono counsel failed to file a claim of appeal within 14 days after entry of the order terminating parental rights or a motion for rehearing in the trial court within the 14-day period set out in MCR 7.204(A)(1)(c), resulting in the Court of Appeals administratively dismissing the respondent's claim of appeal. Thus, the respondent was deprived of his appeal of right as a result of ineffective assistance of counsel. We do not retain jurisdiction. Court of Appeals No. 283281.

CORRIGAN, J. (*concurring*). I join the order remanding this matter to the Court of Appeals. I write separately only to observe that the Attorney Grievance Commission (AGC) may wish to investigate the conduct of respondent's appellate counsel. On February 20, 2008, the Court of Appeals dismissed respondent's claim of appeal as untimely. The Court of Appeals noted that respondent had "failed to file the motion for rehearing within 14 days of the November 13, 2007 order terminating parental rights as required by MCR 7.204(A)(1)(c)." Respondent's counsel argues that MCR 3.992(A) should control, but his motion was untimely under that rule as well. This missed deadline not only prejudices counsel's client and the future of respondent's child, but also Michigan's compliance with federal audit requirements pursuant to the current Child and Family Services Review. For these reasons, the dismissal by the Court of Appeals warrants AGC scrutiny.

Leave to Appeal Denied June 20, 2008:

PEOPLE v DABB, No. 135734; Court of Appeals No. 271566.

KELLY, J. (*concurring*). I concur in the decision to deny the prosecution's application for leave to appeal because I believe the Court of Appeals correctly analyzed the issues in its unpublished opinion. In holding that the trial court erred by excluding the evidence of the victims' prior sexual acts, it wrote:

> Defendant argues that the trial court erred when it excluded evidence that: the male complainant first accused defendant of abuse after the male complainant's mother caught him abusing his younger cousin; that the male complainant had sexual relations with the younger female complainant (his half-sister); and, that the female complainant was previously abused. Generally, a trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id*. "Questions of statutory interpretation are also reviewed de novo," *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005), as are constitutional issues, *Mahaffey v Attorney General,* 222 Mich App 325, 334; 564 NW2d 104 (1997). Preserved constitutional error requires reversal unless the error is shown to be harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).
>
> Evidence of the sexual conduct of an alleged victim of a sexual assault is strictly limited by MCL 750.520j, [which] provides in relevant part:
>
> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."
>
> This statute is reflected in MRE 404(a)(3), providing an exception allowing admission when "[i]n a prosecution for criminal sexual conduct, [it is] evidence of the alleged victim's past sexual conduct with the defendant and [it is] evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."
>
> However, while the statute does not explicitly allow it, "in certain limited situations, such evidence may not only be relevant,

but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). "[W]here the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted." *Id*. "[E]vidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge." *Id*. The decision to admit this evidence is still within the sound discretion of the trial court, which "should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id*. at 349.

Defendant sought to introduce evidence of the male complainant's prior sexual conduct for the express purpose of showing bias and an ulterior motive for making the charge. Specifically, defendant sought to introduce evidence that the male complainant was caught with his pants off while molesting his three-year-old cousin, and that it was following this incident that the male complainant first made an accusation against defendant of sexual abuse. Such evidence falls within the constitutional exception to the statute as outlined in *Hackett*. Testimony was admitted that both complainants had a tendency to try to blame others when they got into trouble. The male complainant admitted that when accused of doing something bad, he has in the past indicated that someone else was responsible. Being caught committing sexual assault on a three-year-old child provides a very strong ulterior motive for making a false charge, i.e., to deflect blame for the assault the male complainant had committed.

Given the nature of this case, any evidence relating to the bias of either complainant is significant. Moreover, the prosecutor argued in closing to the jury that "there's been no evidence to suggest that these children avoided some kind of trouble by disclosing the sexual abuse, or that it benefited them in any way whatsoever." Under these circumstances, reversal and remand for a new trial is required. *Carines*, *supra* at 774.

Further, evidence regarding the sexual activity between the complainants and the molestation of the female complainant by her biological father may also be relevant for similar reasons. Arguably, the male complainant's testimony that he obtained knowledge about sex from defendant opened the door to evidence that he obtained this information from a different source, i.e., through sexual relations with his sister who had been the subject of her father's abuse.

> However, evidence of the female complainant's prior abuse and her sexual relations with her brother first needs to be analyzed in light of *People v Morse*, 231 Mich App 424, 433-436; 586 NW2d 555 (1998), which holds that the prior sexual history of a child complainant may come in, despite the rape-shield statute, and even in absence of evidence of bias, to offer an alternative source for a child complainant's sexual knowledge that otherwise would be fairly damning evidence of a defendant's guilt. *Morse* requires that, prior to the admission of such evidence, the trial court must hold,
>
> "an in-camera hearing . . . to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding. [*Id*. at 437.]"
>
> The trial court in this case did not hold any such hearing and so, on remand, we order the trial court to do so. *Id*. at 437-438. [*People v Dabb*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2007 (Docket No. 271566).]

WEAVER, J. I dissent from the denial order and would grant leave to appeal.

CORRIGAN, J. (*dissenting*). I would grant the Attorney General's application for leave to appeal the Court of Appeals decision reversing this criminal sexual conduct conviction. The Court of Appeals ruled that the trial court abused its discretion by excluding evidence of prior sexual conduct under MCL 750.520j, the "rape-shield" statute. Specifically, the Court of Appeals held that the trial court erred in excluding evidence of the prior sexual abuse of one victim, sexual conduct between the victims, and an alleged sexual assault committed by one victim. In my view, the trial court properly determined that the evidence defendant sought to admit did not satisfy the standards for admissibility of prior sexual conduct in MCL 750.520j. Moreover, the excluded evidence did not infringe defendant's right of confrontation, US Const, Am VI, because the evidence defendant sought to admit was not relevant to rebut claims that the victim obtained unique sexual knowledge from defendant.[1] Nor was it relevant to show bias or motive.[2] To the extent that the excluded evidence might have been minimally relevant, the prejudicial and inflammatory nature of the evidence far exceeded any probative value, justifying exclusion under MRE 403.[3] Therefore, I would grant leave to

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[1] *People v Morse*, 231 Mich App 424, 433-436 (1998).

[2] *People v Hackett*, 421 Mich 338, 348 (1984).

[3] MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair preju-

determine whether the trial court acted within the range of principled outcomes in excluding the evidence.[4]

I. FACTUAL BACKGROUND

Defendant was charged with four counts of second-degree criminal sexual conduct (CSC II)[5] for having sexual contact with a person under the age of 13. These charges stemmed from allegations of sexual abuse by defendant's two stepgrandchildren, a girl and a boy, who were approximately six and nine years old, respectively, when they first reported the abuse. The victims were stepsiblings.

Defendant's wife provided day care for the victims and other children in her home for several years. In 2000, the boy told his mother that defendant had sexually touched him. Approximately three days later, the girl made a similar allegation. The victims' mother did not report these allegations to the police and continued to send her children to day care at defendant's home.

Four years later, in April 2004, the victims were placed in a foster home because their stepfather had physically abused them. Approximately one week after moving into their foster home, the victims told their foster mother that defendant had sexually abused them. The foster mother reported the allegations to the Dickinson County Department of Human Services. A criminal investigation followed, leading to the instant CSC II charges against defendant. Some time after telling their foster mother about defendant's abuse, but before the trial, the victims admitted to a Department of Human Services caseworker that they had engaged in sexual activities with each other.

Relying on the rape-shield statute, the prosecutor moved in limine to exclude evidence of the children's sexual activities with each other and the girl's prior sexual abuse by her biological father when she was four years old.[6] The trial court granted the prosecutor's motion. Defendant then moved to admit the same evidence in order to show bias or motive. The trial court denied defendant's motion.

During the trial, defendant sought to introduce testimony from the victim's mother to explain the circumstances of the incident in 2000 when the victims first informed their mother of defendant's sexual abuse. The victims' mother contended that she caught her son with his pants off on top of his three-year-old cousin and that when she asked him what he was doing, he said that defendant had taught him that. Defendant argued

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dice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[4] *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006).

[5] MCL 750.520c(1)(a).

[6] The biological father pleaded nolo contendere to attempted CSC II.

that this evidence was admissible to show the boy's motive in making sexual abuse allegations against defendant as a way to avoid punishment for his own sexual misconduct.

The trial court ruled the testimony inadmissible. Therefore, the victim's mother eliminated from her testimony any reference to the sexual nature of the incident. Instead, she testified that she had caught the boy "doing a bad thing" and that he had responded by making a "statement" about defendant that he "had done something to him." She testified that her son frequently blamed others when he was facing punishment.

Defendant testified on his own behalf, denying all allegations of sexual abuse. Throughout trial and in closing argument, defendant vigorously contended that the victims were liars who made up stories whenever they were in trouble. Despite these repeated attacks on the victims' credibility, the jury convicted defendant as charged.

II. LEGAL ANALYSIS

MCL 750.520j provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct *shall not be admitted* under sections 520b to 520g *unless and only* to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct *with the actor*.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). [Emphasis added.]

The trial court squarely complied with the strict requirements of MCL 750.520j by excluding the evidence of the girl's previous sexual abuse, the evidence of sex acts between the two victims, and the evidence involving the boy's cousin. Evidence of sexual history is only admissible if: (1) the evidence involves the victim's past sexual conduct with the actor; or (2) the evidence involves specific instances of sexual activity showing the

source or origin of semen, pregnancy, or disease. Even if either of those situations is applicable, the evidence still must be excluded unless the evidence is material to a fact at issue and the inflammatory or prejudicial nature of the evidence does not outweigh its probative value. The statute plainly states that any other sexual history evidence "*shall not be admitted*."

None of the evidence defendant sought to admit satisfies the requirements for admissibility established by the rape-shield statute. The prior sexual conduct defendant sought to admit did not involve prior sexual conduct with defendant. Rather, it involved acts with people other than defendant, namely, the girl's sexual abuse by her stepfather, the victims' sex acts with each other, and the incident between the boy and his cousin. Moreover, defendant did not seek to admit the evidence to explain the source or origin of semen, pregnancy, or disease. Under the plain language of the statute, the trial court did not abuse its discretion in excluding this evidence.

Nevertheless, the Court of Appeals held that the evidence was admissible to show bias and an ulterior motive for making the sexual abuse charge against defendant. In *People v Hackett*, 421 Mich 338, 348 (1984), this Court explained that evidence otherwise excluded under the rape-shield statute might be required to be admitted to preserve a defendant's constitutional right to confrontation. The Court limited those circumstances to "the narrow purpose of showing the complaining witness' bias" or to show "a complainant's ulterior motive for making a false charge."[7] We also explained, however, that

> [t]he determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.[8]

Ultimately, "[c]lose questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently. The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion."[9]

Defendant sought to admit testimony of three different incidents of prior sexual conduct. The first involved the girl's sexual abuse by her father when she was four years old. The prosecutor did not contend that the girl had unique sexual knowledge that could only have been obtained through the acts allegedly committed by defendant. Therefore, prior

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[7] *Id*.

[8] *Id*. at 349.

[9] *People v Smith*, 456 Mich 543, 550 (1998) (citation omitted).

abuse of this child was irrelevant.[10] Nevertheless, the Court of Appeals opined that the boy may have obtained his sexual knowledge from the girl, rather than defendant, and therefore the evidence may have been relevant. The Court of Appeals' bootstrapping of the girl's abuse to the boy in order to support admissibility is also irrelevant. The prosecutor never contended that the boy had sexual knowledge that could only have been obtained through defendant's sexual abuse.[11] Evidentiary issues are left to the sound discretion of the trial court. Here, the trial court acted within the range of principled outcomes in holding that the evidence was inadmissible. In reversing the trial court, the Court of Appeals merely substituted its judgment for that of the trial court and engaged in speculation outside the record.

Defendant also sought to admit testimony that the victims had engaged in sexual acts with one another. Defendant contended that the victims were motivated to allege sexual abuse by defendant to their foster mother in order to deflect punishment for their inappropriate actions. The record does not support any such inference. At the time the victims told their foster mother about defendant's sexual abuse, they had not disclosed to her that they had committed sexual acts with one another. They had no motive to lie about the sexual abuse because they were not facing any punishment from anyone at that time. Rather, the foster mother testified that the children only disclosed the abuse because they felt comfortable with her and "just started opening up." The foster

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[10] In *Morse*, *supra* at 433-436, citing *People v Hill,* 289 Ill App 3d 859 (1997), the Court of Appeals held that the prior sexual history of a child complainant may be admissible to offer an alternative source for the child's sexual knowledge, but that this exception must be narrowly interpreted.

[11] Defendant contends that the boy's testimony opened the door to evidence that he obtained sexual information from a source other than defendant:

> *Prosecutor*: Let's talk about the time you told your mom when you were in Ishpeming. Was Scott [stepfather] around?
>
> *Witness*: No.
>
> *Prosecutor*: Okay, was [the victim's sister] around?
>
> *Witness*: Um, no. No one was around. I was sitting on the couch in my auntie's living room, and—'cause she was talking to me, and I went in and she asked me how I knew about that kind of stuff, and I told her what happened between me and my Grandpa Wayne [defendant].

The victim's testimony was not responsive to the prosecutor's question and no other mention was made of this testimony throughout the remainder of the trial.

mother, who had 20 years of experience working with children, testified that the children were very sad, scared, fearful, and hurt when telling her about the abuse. Because the evidence failed to establish any motive for the children to lie, the testimony regarding the victims' sexual acts did not fall within the confrontation clause exception to the rape-shield statute. Therefore, the trial court properly excluded the evidence.

Moreover, any minimal relevance would have been offset by the prejudicial nature of such testimony. MRE 403 allows a trial court to preclude evidence offered for any purpose when the prejudice caused by the evidence will outweigh its probative value.[12] The testimony that the two child-victims had engaged in sexual acts with each other would have been highly inflammatory. Defendant merely hoped to shock the jury with allegations that the stepsiblings were sexually deviant.

Finally, defendant sought to admit evidence that the first time the boy told his mother about defendant's sexual abuse occurred when his mother discovered the victim lying with his pants off on top of his three-year-old cousin. When seeking to admit evidence of this incident, defendant contended that the victim accused defendant of abuse in order to escape punishment for his conduct. This argument, however, is premised on the contention that defendant never sexually assaulted the victim and that the victim was, in fact, lying when making that statement. It is just as, if not more, probable that the victim learned about the sexual conduct from defendant and was repeating it with his cousin. The victim's mother never reported the allegation of abuse, so the authorities never investigated whether there was any merit to the victim's accusation. Therefore, defendant was not seeking to introduce evidence of a *false* accusation of sexual abuse. He was seeking to introduce evidence of an accusation of sexual abuse that was simply ignored. Because the evidence sought to be introduced could be interpreted as either a propensity to lie or evidence of a history of abuse, the evidence was irrelevant to establish motive. Therefore, this evidence did not qualify as an exception to the rape-shield statute and the trial court did not abuse its discretion in excluding it.

Even if this evidence had been admissible, however, it had, at best, minimal probative value. That probative value could not offset the significant prejudice that would have occurred if the victim's mother had been allowed to testify that her son had lied about the abuse in order to avoid punishment for his own sexual deviancy, especially because no evidence supported the mother's contention that her son was lying. In fact, the mother's own testimony refuted her contention that she believed her son was lying about the abuse in order to avoid punishment. She

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[12] MRE 403; see also *Delaware v Van Arsdall*, 475 US 673, 679 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.").

testified that she did not have any fears about leaving her children with defendant because she had discussed her son's accusations with defendant and his wife *and they agreed that defendant would never be alone with the children*. If the victim's mother was truly convinced that her son was lying, there would have been no need for her to separate her son from defendant. Because the evidence failed to establish motive to lie about the sexual abuse and any probative value was outweighed by its prejudicial effect, the trial court did not abuse its discretion in excluding testimony of the victim's conduct with his cousin.

All the evidence of prior sexual conduct that the defendant sought to introduce was irrelevant and was barred by the rape-shield statute, and excluding the evidence did not create a Confrontation Clause issue. Assuming the admissibility issues in this case were close questions, however, this Court has explained that "[c]lose questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently. The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion."[13]

III. CONCLUSION

The trial court properly excluded the evidence of the victims' prior sexual acts. Those acts did not satisfy the requirements for admissibility under the rape-shield statute and they did not qualify as a Confrontation Clause exception to the statute. The defense merely sought to introduce the testimony of prior sexual acts to call the victims' credibility into question. The rape-shield statute plainly prohibits the admission of this type of evidence. Therefore, I believe the Court of Appeals erred in reversing and remanding for a new trial. I would grant the Attorney General's application for leave to appeal.

YOUNG, J. I would grant leave to appeal.

BOWERS V VANDERMEULEN-BOWERS, No. 136373; reported below: 278 Mich App 287.

Summary Disposition June 23, 2008:

MAREK V SB MAREK, LLC, No. 136135. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Workers' Compensation Appellate Commission solely for the ministerial task of issuing an order that conforms to the commission's opinion regarding the minor child's entitlement to death benefits after 500 weeks. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 279607.

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[13] *Smith*, *supra* at 550.

Leave to Appeal Denied June 23, 2008:

PEOPLE v IVES, No. 128466. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 260379.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v CAIN, No. 130140; Court of Appeals No. 130140.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v DOWDELL, No. 130199. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261597.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v CHURCH, No. 130267; Court of Appeals No. 264934.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v HUMMEL, No. 130451; Court of Appeals No. 130451.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v QUINTANILLA, No. 130599; Court of Appeals No. 266178.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v STACEY, No. 131361; Court of Appeals No. 267636.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v HACKWORTH, No. 131465. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 131465.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v DOWTIN-EL, No. 131674. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 131674.

KELLY, J. I would grant leave to appeal to consider whether the Parole Board's policy of "life means life" improperly converted the defendant's sentence into a nonparolable life term.

PEOPLE v STEVEN JONES, No. 132002. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267276.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v MCELWAIN, No. 132638; Court of Appeals No. 273480.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v HOSS, No. 132815; Court of Appeals No. 272028.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v ABSOLEM THOMAS, No. 132845; Court of Appeals No. 132845.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v DEWEESE, No. 133123; Court of Appeals No. 271958.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v WALKER, No. 133564; Court of Appeals No. 276027.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v CHASTAIN, No. 133715; Court of Appeals No. 276255.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v SHARP, No. 134120. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272866.

PEOPLE v GATES, No. 134162. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272492.

PEOPLE v NESEN, No. 134336. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273850.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v MILLEGE, No. 134680; Court of Appeals No. 279050.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v PUCKETT, No. 135084; Court of Appeals No. 279168.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v MCNEAL, No. 135265. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277577.

PEOPLE v GREGORY GIBSON, No. 135420. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275512.

PEOPLE v VLIET, No. 135500. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278197.

PEOPLE v FERQUERON, No. 135516. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 281278.

PEOPLE v EUGENE CARTER, No. 135522. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 135522.

PEOPLE v ANTHONY, No. 135524. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 281912.

KELLY, J., did not participate because of her participation, while a member of the Court of Appeals, in the affirmance of defendant's conviction.

PEOPLE v MINNEY, No. 135533. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280364.

PEOPLE v MARC BERRY, No. 135534. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279663.

PEOPLE v MIDGYETTE, No. 135539. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 281142.

PEOPLE v LANDRUM, No. 135560. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278409.

PEOPLE v CARLESS, No. 135564. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277913.

PEOPLE v RICHARDSON, No. 135567. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 135567.

KELLY, J. I would grant leave to appeal.

PEOPLE v LOGAN, No. 135568. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280160.

PEOPLE v SANDERS, No. 135569. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282440.

PEOPLE v HUNTER, No. 135577. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280280.

PEOPLE v KINARD, No. 135579. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 281191.

PEOPLE v BAUGH, No. 135586. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280250.

PEOPLE v WOODARD, No. 135588. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278112.

PEOPLE v CURTIS JONES, No. 135589. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278294.

PEOPLE v TORONTO MOORE, No. 135596. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282167.

KELLY, J. I would grant leave to appeal.

PEOPLE v GAREL, No. 135598. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278931.

PEOPLE v BENJAMIN ALLISON, No. 135606. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280754.

PEOPLE v PARISH, No. 135610. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279568.

PEOPLE v SEVREY, No. 135634. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277939.

PEOPLE v SEUELL, No. 135637. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279637.

PEOPLE v IBARRA-PEREZ, No. 135638. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278523.

PEOPLE v HILL, No. 135648. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278435.

PEOPLE v FEWLESS, No. 135667. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277635.

PEOPLE v JOHNNY MURPHY, No. 135669. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 281337.

PEOPLE v STEWART, No. 135671. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280893.

PEOPLE v DAWSON, No. 135688. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279817.

PEOPLE v DEWALD, No. 135709. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280034.

PEOPLE v CATO, No. 135750. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278290.

PEOPLE v LAWSON, No. 135756. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278631.

PEOPLE v HAYES, No. 135760. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281392.

PEOPLE v OWENS, No. 135761. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277784.

PEOPLE v CARICO, No. 135763. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277960.

PEOPLE v ROBERT WILLIAMS, III, No. 135769. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279813.

PEOPLE v BENTLEY, No. 135773. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278296.

PEOPLE v SULLENDER, No. 135789; Court of Appeals No. 282615.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v BITTERS, No. 135817; Court of Appeals No. 282364.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v DUGAN, No. 135839; Court of Appeals No. 280801.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

FISHER v ZEBROWSKI, No. 135850; Court of Appeals No. 278819.

PEOPLE v PODLASZUK, No. 135864; Court of Appeals No. 273554.

In re STODDARD TRUST (PEERY v STODDARD), No. 135894; Court of Appeals No. 270508.

PEOPLE v KING, No. 135897; Court of Appeals No. 274173.

COLUMBUS TOWNSHIP v WRESSELL, No. 135942; Court of Appeals No. 278765.

PEOPLE v SCHMELING, No. 135945; Court of Appeals No. 275220.

LASHER v WRIGHT, No. 135991; Court of Appeals No. 268975.

PEOPLE v BRAUER, No. 136004; Court of Appeals No. 275139.

JODIS v BRUBAKER, No. 136024; Court of Appeals No. 271649.

BOB TURNER, INC v FRISBEE, No. 136027; Court of Appeals No. 279850.

PEOPLE v DITTIS, No. 136030; Court of Appeals No. 275734.

MITCHELL STREET PROPERTY TRUST v LAKESHORE TIRE & SUPPLY CO, INC, No. 136035; Court of Appeals No. 279228.

BLANCHARD v DEPARTMENT OF CORRECTIONS, No. 136036; Court of Appeals No. 282362.

PEOPLE OF THE CITY OF WARREN v NYILOS, No. 136053; Court of Appeals No. 271008.

BATTLE v TITAN INSURANCE COMPANY, No. 136058; Court of Appeals No. 280663.

PEOPLE v COMSTOCK, No. 136061; Court of Appeals No. 274133.

PEOPLE v BLUE CROSS & BLUE SHIELD OF MICHIGAN, No. 136066; Court of Appeals No. 268448.

PEOPLE v STERHAN, No. 136079; Court of Appeals No. 282492.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v BOGARD, No. 136080; Court of Appeals No. 276166.

PEOPLE v ALHAYADIR, No. 136084; Court of Appeals No. 275369.

PEOPLE v PARKER, No. 136087; Court of Appeals No. 275682.

PEOPLE v LALONE-SITZLER, No. 136088; Court of Appeals No. 275016.

PEOPLE v ROBERT REEVES, No. 136091; Court of Appeals No. 283236.

PEOPLE v JUMEKE JONES, No. 136095; Court of Appeals No. 271414.

CITY OF PONTIAC v PRICEWATERHOUSECOOPERS, LLP, No. 136098; Court of Appeals No. 275416.

RUSSELL PLASTERING COMPANY v MICHIGAN CONSTRUCTION INDUSTRY MUTUAL INSURANCE COMPANY, No. 136099; Court of Appeals No. 274049.

PEOPLE v AYERS, No. 136103; Court of Appeals No. 267766.

PEOPLE v WILLIE BROWN, No. 136104; Court of Appeals No. 273062.

PEOPLE v CHATMAN, No. 136107; Court of Appeals No. 282580.

PEOPLE v WIGGINS, No. 136108; Court of Appeals No. 273920.

BOARD OF COUNTY ROAD COMMISSIONERS FOR OAKLAND COUNTY v BALD MOUNTAIN WEST, No. 136110; Court of Appeals No. 275230.

DINOTO v SINAI-GRACE HOSPITAL, No. 136115; Court of Appeals No. 280309.

PEOPLE v BRADY WILLIAMS, No. 136116; Court of Appeals No. 283006.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

CORRION v LIVINGSTON CIRCUIT JUDGE, No. 136121. The provisions of the Court of Appeals March 19, 2008, order remain in effect, and the 21-day period for payment of the initial partial filing fee pursuant to MCL 600.2963(1) shall run from the date of this order. Court of Appeals No. 284024.

PEOPLE v DOTSON, No. 136126; Court of Appeals No. 283258.

PEOPLE v MCINTIRE, Nos. 136127, 136129, and 136131; Court of Appeals Nos. 283231, 283232, and 283233.

PEOPLE v COLE, No. 136128; Court of Appeals No. 277874.

PEOPLE v SWAIN, No. 136130; Court of Appeals No. 283529.

PEOPLE v NORDSTROM, No. 136132; Court of Appeals No. 279709.

MCKAY v GENERAL MOTORS CORPORATION, No. 136136; Court of Appeals No. 279523.

JONES v SAGINAW SCHOOL DISTRICT, No. 136137; Court of Appeals No. 279552.

PEOPLE v RONALD JOHNSON, No. 136138; Court of Appeals No. 282968.

PEOPLE v DRAYTON, No. 136139; Court of Appeals No. 279236.

ADAMS v ORION CHARTER TOWNSHIP, No. 136141; Court of Appeals No. 275376.

HINTON v GENERAL MOTORS CORPORATION, No. 136145; Court of Appeals No. 279525.

GLASNAK v GARMO, No. 136148; Court of Appeals No. 275555.

JENKINS v DEPARTMENT OF CORRECTIONS, No. 136149; Court of Appeals No. 278012.

PEOPLE v OFIARA, No. 136150; Court of Appeals No. 283088.

PEOPLE v KIPFER, No. 136151; Court of Appeals No. 279981.

PEOPLE v SPRUILL, No. 136153; Court of Appeals No. 274946.

PEOPLE v FARMER, No. 136155; Court of Appeals No. 275906.

BEAR LAKE TRADING CO v ERICKS, No. 136163; Court of Appeals No. 276725.

PEOPLE v SERBICK, No. 136165; Court of Appeals No. 274174.

SMILEY v GROSSE POINTE WAR MEMORIAL ASSOCIATION, No. 136172; Court of Appeals No. 275937.

FISHER v JACKSON NATIONAL LIFE INSURANCE COMPANY, No. 136173; Court of Appeals No. 272655.

PEOPLE v CAGE, No. 136174; Court of Appeals No. 273645.

PEOPLE v BOONE, No. 136178; Court of Appeals No. 283140.

PEOPLE v SCHIZAS, No. 136182; Court of Appeals No. 272730.

PEOPLE v VICTOR JONES, No. 135185; Court of Appeals No. 273051.

PEOPLE v KAMARA, No. 136188; Court of Appeals No. 283391.

PEOPLE v PELTIER, No. 136189; Court of Appeals No. 282913.

PEOPLE v BARBARA SMITH, No. 136190; Court of Appeals No. 271504.

WOODS v SLB PROPERTY MANAGEMENT, LLC, No. 136191; Court of Appeals No. 272257.

PEOPLE v CHISM, No. 136192; Court of Appeals No. 283436.

PEOPLE v TERRELL SMITH, No. 136193; Court of Appeals No. 283047.

PEOPLE v GIBBS, No. 136194; Court of Appeals No. 283254.

PEOPLE v POELINITZ, No. 136201; Court of Appeals No. 271065.

STEVENS v CITY OF FLINT, No. 136206; Court of Appeals No. 272329.

PEOPLE v CISNEROS, No. 136213; Court of Appeals No. 274029.

PEOPLE v SCOTT, No. 136214; Court of Appeals No. 283255.

PEOPLE v VINCENT, No. 136215; Court of Appeals No. 283339.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v GAFFNEY, No. 136218; Court of Appeals No. 272908.

PEOPLE v LATHROP, No. 136223; Court of Appeals No. 283512.

BASAT v DEPARTMENT OF CORRECTIONS, No. 136228; Court of Appeals No. 282091.

PEOPLE v JAMES GIBSON, No. 136237; Court of Appeals No. 276688.

RESSLER v HUNTERS CREEK ESTATES, No. 136252; Court of Appeals No. 280110.

PEOPLE v KEENAN ROBINSON, No. 136253; Court of Appeals No. 269605.

PEOPLE v HICKS, No. 136257; Court of Appeals No. 283302.

PEOPLE v CASTELL, No. 136259; Court of Appeals No. 276270.

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, No. 136260; Court of Appeals No. 273708.

PEOPLE v PERDUE, No. 136261; Court of Appeals No. 275838.

PEOPLE v MCCOY, No. 136266; Court of Appeals No. 275627.

GITLER v CLARK CLAWSON, No. 136270; Court of Appeals No. 279846.

PEOPLE v TANEICA ALLEN, No. 136278; Court of Appeals No. 273445.

PEOPLE v LEWIS, No. 136282; Court of Appeals No. 273234.

PEOPLE v SPRATT, No. 136285; Court of Appeals No. 277814.

PEOPLE v PEREZ-CHICA, No. 136288; Court of Appeals No. 276153.

MIER v ZIMMERMAN, No. 136290; Court of Appeals No. 273312.

PEOPLE v MINGO, No. 136301; Court of Appeals No. 272912.

PEOPLE v SANDUSKY, No. 136307; Court of Appeals No. 272544.

Reconsideration Denied June 23, 2008:

WATTS v HENRY FORD HEALTH SYSTEMS, No. 133588. Summary disposition entered at 480 Mich 1055. Court of Appeals No. 267551.

RED RIBBON PROPERTIES, LLC v BRIGHTON TOWNSHIP, No. 134865. Summary disposition entered at 480 Mich 1107. Court of Appeals No. 279017.

PEOPLE v ACEVAL, No. 135149. Summary disposition entered at 480 Mich 1108. Court of Appeals No. 275048.

Leave to Appeal Granted June 25, 2008:

VANSLEMBROUCK v HALPERIN, No. 135893. The parties shall address whether, in this medical malpractice case involving a minor who was allegedly injured at birth, the plaintiffs are entitled to the benefit of the tolling provision in MCL 600.5856(c) where the plaintiffs provided a notice of intent before the minor had reached 10 years of age but filed their complaint after the minor had reached 10 years of age. The parties shall address in their arguments whether MCL 600.5851(7) provides a period of limitation.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 277 Mich App 558.

DAVIS v FOREST RIVER, INC, No. 136114. The parties shall address: (1) whether the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 USC 2301 *et seq*. (MMWA), provides for a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract; (2) whether Michigan law provides a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract; (3) whether the economic-loss doctrine and the Uniform Commercial Code, MCL 440.1101 *et seq.*, applies to the plaintiff consumer's claims for breach of warranty; (4) whether, if the UCC applies, revocation of acceptance, MCL 440.2608, is available in the absence of privity, and whether the revocation-of-acceptance provisions of the UCC supplanted any former common-law action for rescission; and (5) whether, if the plaintiff is confined to the UCC, either privity or third-party-beneficiary status was required for an action for breach of warranty.

The Michigan Consumer Federation and the Attorney General on behalf of the Consumer Protection Division are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 278 Mich App 76.

Summary Dispositions June 25, 2008:

PEOPLE v BERNARD MURPHY, No. 132421. On order of the Court, having granted leave to appeal and having heard oral argument, the October 12, 2006, order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), we reverse the Court of Appeals decision to grant the defendant a new trial rather than a new appeal. See *Roe v Flores-Ortega*, 528 US 470 (2000); *United States ex rel Thomas v O'Leary*, 856 F2d 1011 (CA 7, 1988). Given the prosecutor's concession that the defendant is entitled to a new appeal because of defense counsel's absence during the prosecutor's successful interlocutory appeal, we remand this case to the Court of Appeals for a new appeal. On remand, the defendant is entitled to appointed appellate counsel. In reviewing its prior decision to reverse the trial court's order suppressing the shotgun evidence, the Court of Appeals is not bound by the law of the case doctrine. See *Locricchio v Evening News Ass'n,* 438 Mich 84, 109-110 (1991) (stating that "the law of the case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts"). We vacate as moot the remainder of the Court of Appeals analysis.

If the Court of Appeals determines after the appeal that it would have upheld the trial court's original evidentiary ruling, it must then assess the impact of the improperly admitted evidence on the defendant's trial under the appropriate standard of review. *People v Carines*, 460 Mich 750 (1999). The defendant is entitled to a new trial only if he meets his burden of proof under *Carines, supra* at 774. On remand, the Court of Appeals is directed to consider the issue raised by the defendant but not addressed by that court during its initial review of this case. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 258397.

CAVANAGH and KELLY, JJ. We concur in the reversal and remand.

MARKMAN, J. (*concurring*). I write separately because I disagree with the majority's basis for the order of remand. Rather than remanding to the Court of Appeals to consider anew the merits of the trial court's suppression ruling, I would hold that: (1) under *Strickland v Washington*, 466 US 668 (1984), a claim for ineffective assistance of counsel generally requires a criminal defendant to demonstrate that defense counsel's representation was objectively unreasonable, and that the defendant suffered prejudice as a result; (2) as an exception to *Strickland*, *United States v Cronic*, 466 US 648 (1984), established that prejudice may be presumed when defense counsel is absent at a critical stage, thereby granting automatic relief to a defendant; (3) as an exception to *Cronic*, *Satterwhite v Texas*, 486 US 249 (1988), indicates that an absence of counsel at a critical stage only requires automatic relief for a defendant if that absence cannot be sufficiently separated from the entire criminal proceedings; and (4) in this case, where the absence of counsel merely resulted in the addition of a single discrete piece of evidence, the absence can be sufficiently separated from the entire proceedings. Accordingly, under *Satterwhite*, the remaining question is whether the absence of counsel was harmless under the standard in *Chapman v California*, 386

US 18 (1967). Because that issue was never briefed by the parties or considered by the lower courts, I would remand to the Court of Appeals so that it can address whether the absence of counsel constituted harmless error.

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with two counts of armed robbery and one count of possession of a firearm during the commission of a felony. Before trial, the prosecutor sought to admit into evidence a shotgun that had been found at a gas station where defendant had stopped immediately before his arrest; the shotgun allegedly had been used in the charged crimes. When the trial court denied the prosecutor's motion to admit the shotgun, the prosecutor filed an emergency interlocutory appeal in the Court of Appeals. Despite the prosecutor's efforts, defense counsel was not actually informed of the appeal until after the Court of Appeals had issued an order reversing the trial court and permitting the shotgun to be admitted. Although the trial court subsequently stayed the trial so that defense counsel could appeal the adverse appellate ruling, no further action was taken by defendant. At trial, the shotgun was admitted, and defendant was convicted on all counts.

On appeal, the Court of Appeals reversed defendant's conviction and remanded for a new trial. *People v Murphy*, unpublished opinion per curiam, issued October 12, 2006 (Docket No. 258397). The Court of Appeals concluded that, in the original interlocutory appeal, defendant had been denied the effective assistance of counsel under *Cronic*; such a complete absence of counsel at a critical stage of the proceedings meant that defendant did not need to show actual prejudice. We granted the prosecutor's application for leave to appeal. 477 Mich 1019 (2007).

II. ANALYSIS

The Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI; see also Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense").[1] The United States Supreme Court has held that " 'the right to counsel is the right to the *effective* assistance of counsel.' " *Strickland*, *supra* at 686 (emphasis added), quoting *McMann v Richardson*, 397 US 759, 771 n 14 (1970). *Strickland* established a two-part test for determining whether a counsel's representation was ineffective under the Sixth Amendment, *People v Frazier*, 478 Mich 231, 243 (2007); a

[1] This Court has held that "the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." *People v Pickens*, 446 Mich 298, 338 (1994).

defendant must show that "counsel's performance was deficient," and that "the deficient performance prejudiced the defense." *Strickland*, *supra* at 687.

On the same day that *Strickland* was decided, the United States Supreme Court also issued *Cronic*, in which it identified "three rare situations in which the attorney's performance is so deficient that prejudice is presumed." *Frazier*, *supra* at 243. The Court recently summarized the first of these situations: "First and 'most obvious' was the 'complete denial of counsel.' " *Bell v Cone*, 535 US 685, 695-696 (2002), quoting *Cronic*, *supra* at 659.[2] *Bell* elaborated: "A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at 'a critical stage.' " *Id*. at 695, quoting *Cronic*, *supra* at 659, 662.[3]

Here, defense counsel was unaware of the interlocutory appeal until after the Court of Appeals had rendered its decision. A portion of a criminal proceeding constitutes a "critical stage" if "potential substantial prejudice to defendant's rights inheres in the . . . confrontation and . . . counsel [may] help avoid that prejudice." *Coleman v Alabama*, 399 US 1, 9 (1967). Defendant in this case faced the prejudice of having inculpatory evidence admitted against him, and an attorney could have assisted in avoiding this potential harm; accordingly, defense counsel was absent at a "critical stage." See also *United States ex rel Thomas v O'Leary*, 856 F2d 1011 (CA 7, 1988) (concluding that an interlocutory appeal is a "critical stage"). Thus, the Court of Appeals correctly concluded that *Cronic*, rather than *Strickland*, was implicated.

However, our analysis cannot stop there. Although *Cronic* appears to require that the complete absence of counsel at a "critical stage" warrants an irrebuttable presumption of prejudice,[4] the Supreme Court nonetheless has applied harmless-error review when defense counsel was absent at a critical stage in *Satterwhite*, a post-*Cronic* case decided in 1988. Thus, an apparent tension exists between *Cronic* and *Satterwhite*: under *Cronic*, an absence of counsel at a critical stage results in an irrebuttable presumption of prejudice, while under *Satterwhite*, the same

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[2] Although *Cronic* uses the term "denial," it makes clear that this prong is implicated either when counsel is "totally absent" or when counsel has been "prevented from assisting the accused." *Cronic*, *supra* at 659 n 25.

[3] The other two *Cronic* situations are: (1) where defense counsel "*entirely* fails to subject the prosecution's case to meaningful adversarial testing," *Cronic*, *supra* at 659 (emphasis added); and (2) where the circumstances are such that, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Cronic*, *supra* at 659-660. Neither of these two situations is implicated here.

[4] See *Moss v Hofbauer*, 286 F3d 851, 859 (CA 6, 2002) (*Cronic* creates an "irrebuttable presumption of prejudice").

may be analyzed for harmless error. Hence, in order to evaluate whether the Court of Appeals correctly decided this case, we must first reconcile *Cronic* and *Satterwhite*.

In *Satterwhite*, the defendant was subjected by the prosecutor to a psychiatric examination before trial without actual notice having been provided to defense counsel. *Id*. at 252. *Satterwhite* held that the absence of counsel was in "violation of the Sixth Amendment right set out in *Estelle* [*v Smith*, 451 US 454 (1981)]," *id*. at 258, in which the Court had earlier held that a pretrial psychiatric examination constituted a "critical stage." *Estelle*, *supra* at 470. Although the defendant in *Satterwhite* contended that this absence of counsel at a critical stage necessitated automatic relief, the Court held that automatic relief was only warranted in "cases in which the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Satterwhite*, *supra* at 257. Because the Sixth Amendment violation was "limited to the admission into evidence of [the examining psychiatrist's] testimony," the deprivation of counsel did not "contaminate the entire criminal proceeding," and hence automatic relief was not warranted. Instead, where the absence of counsel has not contaminated the entire proceeding, a reviewing court should first consider whether the error is harmless. *Id*. at 257-258.

Were this Court to conclude that every absence of counsel at a critical stage requires automatic relief for a defendant, such a result would give no effect to *Satterwhite*. The only method to harmonize these cases, and to give reasonable effect to both, is to understand *Satterwhite* as carving out an exception to the general rule of *Cronic*, which itself carves out an exception to *Strickland*. That is, a reviewing court should first determine whether the effect of the absence of counsel can be sufficiently separated from the entire proceeding, enabling an appellate court to meaningfully compare the flawed proceeding with an unflawed proceeding. If the effect cannot be sufficiently separated, then the defendant is entitled to an irrebuttable presumption of prejudice under *Cronic*; if the effect can be sufficiently separated, then it may be reviewed for harmless error under *Satterwhite*.

This harmonization comports with the purpose of *Cronic*, which is that prejudice should be presumed where the circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic, supra* at 658. If the absence of counsel permeates or infects an entire proceeding, the rationale underlying *Cronic* warrants an irrebuttable presumption of prejudice, because under such circumstances a defendant is highly likely to be prejudiced and because the extent and nature of such prejudice "cannot be discerned from the record." *Satterwhite*, *supra* at 256. Consequently, "any inquiry into its effect on the outcome of the case would be purely speculative." *Id*. However, this rationale does not apply when, as in *Coleman*, the absence of counsel at a critical stage does not permeate or infect the entire proceeding.[5] Thus, the merits of litigating whether the defendant suf-

[5] In *Coleman*, none of the testimony given at the preliminary hearing was admitted into evidence at trial. *Coleman*, *supra* at 10.

fered prejudice is warranted because in at least some cases the absence of counsel will constitute mere harmless error and there will be no need for a retrial.

Other courts have reached a similar conclusion. Indeed, every federal circuit court of appeals has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error. *Ellis v United States*, 313 F3d 636, 643 (CA 1, 2002) (absence of counsel at critical stage would require presumption of prejudice only if "pervasive in nature, permeating the entire proceeding"); *Yarborough v Keane*, 101 F3d 894, 897 (CA 2, 1996) ("a less significant denial of the right to counsel . . . has been held to be subject to harmless error review"); *Ditch v Grace*, 479 F3d 249, 256 (CA 3, 2007) ("A denial of counsel at any critical stage at which the right to counsel attaches does not require a presumption of prejudice. Rather, a presumption of prejudice applies only in cases where the denial of counsel would necessarily undermine the reliability of the entire criminal proceeding."); *United States v Owen*, 407 F3d 222, 226 (CA 4, 2005) ("[H]armless-error analysis applies to the denial of the Sixth Amendment right to counsel at all stages of the criminal process, except for those where such denial affects and contaminates the entire subsequent proceeding."), cert den 546 US 1098 (2006); *United States v Lampton*, 158 F3d 251, 255 (CA 5, 1998) (applying harmless-error review when counsel was absent during adverse testimony); *Mitzel v Tate*, 267 F3d 524, 534 (CA 6, 2001) ("In 'cases where the evil caused by [denial of counsel at critical stage] is limited to the erroneous admission of particular evidence at trial[,] harmless error analysis applies.' ") (citation omitted); *Sanders v Lane*, 861 F2d 1033, 1040 (CA 7, 1988) ("[I]n *Satterwhite* . . . the Supreme Court explained that not all violations of the right to counsel warrant per se reversal."); *Smith v Lockhart*, 923 F2d 1314, 1321-1322 (CA 8, 1991) (noting that harmless-error review may apply under some circumstances when counsel is denied at a critical stage); *Hoffman v Arave*, 236 F3d 523, 540 (CA 9, 2001) (after concluding that the defendant had been denied counsel at a critical stage, "[t]he next step of our analysis is to ask whether this constitutional violation is 'harmless error' "); *United States v Lott*, 433 F3d 718, 722 (CA 10, 2006) ("Some Sixth Amendment right to counsel violations are amenable to harmless error analysis, while others are not."); *Hammonds v Newsome*, 816 F2d 611, 613 (CA 11, 1987) (applying harmless-error review to a denial of counsel at a preliminary hearing); *United States v Klat*, 332 US App DC 230, 235 (1998) (whether a denial of counsel at a critical stage "requires automatic reversal turns on the extent to which the violation pervades the entire criminal proceeding").

In the instant case, the effect of the absence of counsel can, in my judgment, be sufficiently separated from the entire proceeding to enable an appellate court to meaningfully compare the flawed proceeding with an unflawed proceeding. *Satterwhite* applied harmless-error analysis "where the evil caused by a Sixth Amendment violation is limited to the admission into evidence of [a psychiatrist's] testimony," *id.* at 257, that is, where the absence of counsel merely resulted in the admission of one piece of evidence. Because the interlocutory appeal in this case simply

resulted in the admission of additional physical evidence, the effect of the absence of counsel can be relatively easily separated from the entire proceeding. Accordingly, *Satterwhite* provides the relevant constitutional standard, not *Cronic*.

Under *Satterwhite*, the absence of counsel should be reviewed for harmless error. Thus, it must be determined "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* at 258-259, quoting *Chapman*, *supra* at 24. Because the parties have not briefed this issue, I would remand this case to the Court of Appeals to consider whether the absence of counsel constituted harmless error in the present circumstances.

III. CONCLUSION

The majority remands to the Court of Appeals to consider anew the trial court's suppression of the shotgun, concluding that the prosecutor conceded the necessity of such a result. However, at oral argument, the prosecutor stated that *if this Court decided to simply resolve the entire case by "resolv[ing] the legal issue" in the prosecutor's favor,* rather than remanding to the Court of Appeals, such a course of action would be warranted. Moreover, the prosecutor argued that this Court should deem *Strickland*, rather than *Cronic*, applicable. The majority's order avoids addressing the legal issues that warranted our initial grant of leave to appeal.

An opportunity to clarify the Constitution in an important realm has been lost here: namely, an opportunity to clarify the relationship between *Satterwhite* and *Cronic*, and thereby to provide a clear standard for the lower courts in assessing claims of ineffective assistance of counsel. I would harmonize these cases by concluding, in accordance with United States Supreme Court precedent, that only an absence of counsel at a critical stage that cannot be sufficiently separated from the remainder of the proceedings necessitates automatic relief. In the present case, in which the absence of counsel resulted in the admission of a discrete piece of evidence, a reviewing court is capable of reasonably determining whether that admission was harmless. Accordingly, rather than remand to the Court of Appeals to consider the merits of the trial court's original order suppressing the shotgun evidence, I would remand to that same court to consider whether the absence of counsel contributed to the verdict. If not, there is no need to consider the merits of the suppression order.

The failure of the majority to settle these issues has real-world consequences. Because its order does not set forth any criticism or analysis of the rationale of the Court of Appeals with respect to the application of *Cronic*, but avoids substantive issues, significant legal questions remain. Does *Cronic* always apply when defense counsel is unaware of a judicial proceeding, or does *Satterwhite* establish an exception? If so, what is the extent of this exception? Can a trial court ever cure an absence of counsel? If a trial court attempts to cure such a violation, but the defendant fails to take advantage of the opportunity, does *Strickland* or *Cronic* or *Satterwhite* apply? Without any answers to

these questions, under the rationale of the Court of Appeals, of which the majority's order does not disapprove, *Cronic* would continue to apply to a class of cases that, in my judgment, should be governed by the much different rule of *Satterwhite*. That is, cases in which an error stemming from an absence of counsel can be effectively evaluated for its effect on the verdict will nonetheless necessitate automatic relief for defendants under the rationale of the Court of Appeals, despite the fact that such cases fall well beyond the underlying rationale of *Cronic*—namely, that a defendant should be granted automatic relief when the effect of an absence of counsel is indiscernible or otherwise impossible to evaluate. For example, a defendant whose counsel was absent for a prosecutor's motion to admit a shotgun will receive a retrial, whereas another defendant whose attorney simply made a poor argument against the admission of a shotgun will be required to demonstrate prejudice before being granted a retrial. Thus, despite the fact that the error in both hypothetical cases leads to the admission of the same piece of evidence, two widely different outcomes will occur. Such a result is anomalous and renders increasingly arbitrary the right to counsel.

Because the majority has failed to afford meaningful guidance for ineffective-assistance-of-counsel cases, and because this failure will almost certainly bear adverse fruit in some unknown number of later cases, I do not join in its order.

In re ASHMAN (DEPARTMENT OF HUMAN SERVICES V ASHMAN), No. 136358. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Macomb Circuit Court's order terminating the respondent's parental rights to her children. There was clear and convincing evidence supporting termination of the respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). There was also clear and convincing evidence that termination of the respondent's parental rights was not contrary to the best interests of the children. MCL 712A.19b(5). Court of Appeals No. 277222.

Leave to Appeal Denied June 25, 2008:

GRIEVANCE ADMINISTRATOR V MCDONALD, No. 133985; ADB: 06-03-GA.

In re MORDEN (MORDEN V GRAND TRAVERSE COUNTY), No. 134072; reported below: 275 Mich App 325.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

VENESS V TOWN CENTER DEVELOPMENT, LLC, No. 134822; Court of Appeals No. 273298.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE V MCKINNEY, No. 135318; Court of Appeals No. 269823.

KELLY, J. I would reverse and remand this case for a new trial.

PEOPLE V POWELL, No. 135730; Court of Appeals No. 272403.

KELLY, J. I would remand this case to the Court of Appeals for consideration of the issues raised by new counsel in the defendant's motion for reconsideration in that court.

PAVLOVSKIS v CITY OF EAST LANSING, No. 135742; Court of Appeals No. 275236.

PEOPLE v WEBER, No. 135947; Court of Appeals No. 282540.

PEOPLE v QUINTINO, No. 135996; Court of Appeals No. 269646.

PEOPLE v HOUZE, No. 136008; Court of Appeals No. 274470.

Summary Dispositions June 27, 2008:

PEOPLE v RANSOM, No. 134545. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the sentence of the Wayne Circuit Court that ordered the defendant to pay attorney fees and we remand this case to the trial court for a decision on attorney fees that considers the defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004), lv den 473 Mich 881 (2005). At the trial court's discretion, the decision may be made based on the record without the need for a formal evidentiary hearing. If the court decides to order attorney fees, it shall do so in a separate order which indicates that the court considered defendant's ability to pay. *Id*. In all other respects, the application for leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 277844.

CORRIGAN, J. (*dissenting*). I dissent from the order remanding the case to the trial court to consider defendant's ability to repay his attorney fees under *People v Dunbar*, 264 Mich App 240 (2004). For the reasons set out in my dissenting statements in *People v Carter*, 480 Mich 1063 (2008), and *People v Willey*, 481 Mich 868 (2008), neither the Sixth Amendment nor the Fourteenth Amendment compels a sentencing court to state that it considered a defendant's ability to pay before ordering him to repay the cost of his court-appointed attorney when the defendant does not timely object to the repayment order. When the court decides to enforce collection or sanction the defendant for nonpayment, it must consider the defendant's ability to pay. In this case, although the judgment of sentence states that overdue payments are subject to a 20 percent late penalty, the court has not enforced the repayment order or the late penalty. Therefore, the court was not required to state either on the record or in the court file that it had considered defendant's ability to pay. Accordingly, I would deny leave to appeal.

I. FACTS AND PROCEDURAL POSTURE

Defendant pleaded guilty of second-degree murder and possession of a firearm during the commission of a felony in connection with the beating and shooting death of a man at a Detroit house. The day before

sentencing, defendant filed a request for appointment of appellate counsel, which included a financial schedule listing all of defendant's income, assets, and financial obligations. Additionally, defendant's presentence investigation report (PSIR) listed his employment history, education, vocational training, health status, income, assets, and financial liabilities. At sentencing, the trial court stated, "the Court is going to enter a final order for reimbursement of attorney fees" of $940. Defendant did not object. The court entered an "Order of Conviction and Sentence" and a separate "Final Order for Reimbursement of Attorney Fees," both of which ordered defendant to repay $940 in attorney fees. The "Final Order for Reimbursement of Attorney Fees" states that if the attorney fees are not paid within 56 days of the final order,[1] they are subject to a 20 percent late fee on any outstanding balance.

On appeal, defendant challenged the reimbursement order for the first time, arguing that the trial court erred in failing to hold a hearing or consider defendant's ability to pay as required by *Dunbar*. The Court of Appeals denied defendant's application for leave to appeal for lack of merit.

II. STANDARD OF REVIEW

Defendant did not object at sentencing to the attorney-fee reimbursement order. This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774 (1999); *Dunbar, supra* at 251.

III. ANALYSIS

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI.[2] This right is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335, 342 (1963). This right requires the states to provide counsel for indigent defendants in criminal cases. *Id.* at 344. Michigan indisputably accorded defendant his Sixth Amendment rights, as he had the benefit of court-appointed counsel.

Under a recoupment scheme, an indigent defendant is provided counsel regardless of his ability to pay, but might be ordered to repay the cost of counsel at a later date. In *James v Strange*, 407 US 128, 134 (1972), the United States Supreme Court, discussing an attorney-fee recoupment scheme requiring defendants to repay the cost of court-

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[1] The order was entered on May 5, 2006.

[2] The Michigan Constitution contains a similar provision: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20.

appointed counsel, held, "[t]here is certainly no denial of the right to counsel in the strictest sense." Further, in *Fuller v Oregon*, 417 US 40, 51-52 (1974), the United States Supreme Court held that an attorney-fee recoupment scheme did not "chill" the defendants' constitutional right to counsel. "The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel." *Id.* at 53. The Court held that Oregon's recoupment scheme, which was designed to impose an obligation to pay only on those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship, did not violate the Sixth Amendment. *Id.* at 54.

Attorney-fee recoupment schemes have also been challenged under the Equal Protection and Due Process clauses of the Fourteenth Amendment. Due process and equal protection principles converge in this area of the law. *Bearden v Georgia*, 461 US 660, 665-666 (1983). In *James*, *supra*, the United States Supreme Court held that Kansas's recoupment scheme violated the Equal Protection Clause because it did not accord indigent defendants the same statutory protections accorded to other judgment debtors. In *Bearden, supra* at 672-673, the Court held that the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine or restitution if the defendant has demonstrated bona fide efforts to pay.

When defendant committed this offense, Michigan had no statutory scheme governing court orders requiring criminal defendants to reimburse the costs of court-appointed counsel. See *Dunbar, supra* at 254.[3] Nonetheless, the court had the authority to order a criminal defendant to

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[3] Effective January 1, 2006, the Legislature enacted MCL 769.1k(1)(b)(*iii*), which allows the court to impose the expense of providing legal assistance on the defendant:

> (1) If a defendant enters a plea of guilty or nolo contendre or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
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> (b) The court may impose any or all of the following:
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> (*iii*) The expenses of providing legal assistance to the defendant.

Defendant committed the offenses before MCL 769.1k(1)(b)(*iii*) went into effect.

reimburse the government for the cost of court-appointed counsel unless prohibited by statute or the United States or Michigan constitution. See *Davis v Oakland Circuit Judge*, 383 Mich 717, 720 (1970) (the trial court has the discretionary power to order that a defendant's assets be used to repay the cost of court-appointed attorney); *People v Nowicki*, 213 Mich App 383, 388 (1995) ("We conclude that the trial court had authority to order defendant to reimburse the county for costs paid for his representation."). In *Dunbar*, our Court of Appeals articulated a test to determine whether a trial court's attorney-fee recoupment procedure is constitutionally sound under this United States Supreme Court precedent. In my dissenting statement in *Willey*, I described the holding in *Dunbar* as follows:

> In *Dunbar, supra* at 252, the issue was whether a sentencing court may constitutionally require a defendant to contribute to the cost of his court-appointed attorney without first assessing his ability to pay. The *Dunbar* panel adopted the test from *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984), to determine whether a sentencing court's procedure passes constitutional muster. In *Alexander*, the Fourth Circuit Court of Appeals discussed *James v Strange*, 407 US 128 (1972), *Fuller v Oregon*, 417 US 40 (1974), and *Bearden v Georgia*, 461 US 660 (1983),[4] which all involved challenges to the constitutionality of statutory attorney-fee recoupment schemes. The Fourth Circuit held that the following constitutional principles emerged from those cases:
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> "From the Supreme Court's pronouncements in *James, Fuller*, and *Bearden*, five basic features of a constitutionally acceptable attorney's fees reimbursement program emerge. First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. *Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required.* The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of

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[4] See *Carter, supra* at 1068-1070, for a summary of the holdings in *James*, *Fuller*, and *Bearden*.

> work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy. [*Alexander, supra* at 124 (emphasis added).]"
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> After the *Dunbar* panel quoted these factors, it held that a sentencing court may order reimbursement of a court-appointed attorney's fees without specific findings on the record regarding the defendant's ability to pay, unless the defendant objects to the reimbursement amount at the time it is ordered. *Dunbar, supra* at 254. The panel held, however, that even if the defendant does not object, "the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. [*Willey, supra* (CORRIGAN, J., dissenting).]

This case, like *Willey*, involves the second and third factors of the *Dunbar* test. First, the trial court satisfied the second *Dunbar* factor; defendant had notice of the fees and an opportunity to object, but failed to do so. At sentencing, the trial court specifically told defendant that he would be required to repay $940 in attorney fees. Defendant had an opportunity to object to this order and assert his indigency at sentencing, but did not do so. Thus, defendant had notice of the fees and a meaningful opportunity to object to those fees. *Dunbar, supra* at 254.

As I explained in *Carter* and *Willey*, I think that *Dunbar* misinterpreted Supreme Court precedent when it followed *Alexander* in regard to the third factor necessary for a constitutionally sufficient recoupment scheme. As I explained in my dissent in *Carter, supra* at 1068-1071, nothing in *James, Fuller,* or *Bearden* requires a sentencing court to indicate that it considered a defendant's ability to pay when a defendant has not timely objected on indigency grounds to the reimbursement order:

> Supreme Court precedents compel a sentencing court to inquire into a defendant's financial status and make findings on the record *when the court decides to enforce collection or sanction the defendant for failure to pay the ordered amount*. . . . The Alaska Supreme Court correctly explained that "*James* and *Fuller* do not require a prior determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors . . . ." *State v Albert,* 899 P2d 103, 109 (Alas, 1995). See also the Washington Supreme Court's interpretation of *James, Fuller,* and *Bearden*:
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> "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant

> as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before *enforced collection* or any *sanction is imposed* for nonpayment, there must be an inquiry into ability to pay. [*State v Blank,* 131 Wash 2d 230, 242; 930 P2d 1213 (1997).]" [*Carter, supra* at 1070-1071 (CORRIGAN, J., dissenting) (emphasis added to *Blank*).]

As I stated previously in *Carter* (CORRIGAN, J., dissenting), I would overrule *Dunbar*'s contrary holding.

Applying this conclusion to the facts of this case, I would hold that the court satisfied its constitutional duties. First, defendant was not denied his right to counsel. He was provided court-appointed counsel despite his inability to pay for an attorney at the time. He was not required to repay the cost of counsel as a condition of representation. In any case, before ordering reimbursement, the trial court clearly considered defendant's ability to pay, as defendant filed his financial schedule with the court the day before the court ordered the repayment of attorney fees. Additionally, the PSIR, which was available when the court ordered the reimbursement, described defendant's financial situation.

Second, the federal constitution does not require the court to inquire into a defendant's indigency before imposing the repayment obligation. Although the recoupment order stated that defendant would be subject to a 20 percent late fee on any outstanding balance, the circuit court has not enforced this provision. The 20 percent late fee arises from MCL 600.4803(1), which provides:

> A person who fails to pay a penalty, fee, or costs[5] in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. *A late penalty may be waived by the court upon the request of the person subject to the late penalty*. [Emphasis added.]

As discussed, the trial court is required to consider the defendant's financial situation only when it *enforces* the repayment order by sanc-

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[5] "Costs" are defined, in part, as "the cost of providing court-ordered legal assistance to the defendant." MCL 600.4801(a).

tioning the defendant for nonpayment. Including a 20 percent late-fee provision in the recoupment order is not the same as actually *enforcing* the late fee. MCL 600.4803(1) specifically contemplates that the trial court retains the discretion to waive the late fee (i.e., decline to enforce it) even when a defendant has failed to pay his attorney fees within 56 days of the due date. In other words, the inclusion of a late-fee provision in the recoupment order is not equivalent to enforcing the recoupment order or the late fee. A sanction is not imposed until the court requires the defendant to pay the attorney fees (with the 20 percent late penalty) or sanctions him in some other way for nonpayment. Because the court has not yet enforced collection by sanctioning defendant for nonpayment, defendant's challenge to the reimbursement order is premature. See *Dunbar, supra* at 256 ("in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment"); see also *Blank, supra* at 242. Therefore, the trial court did not err in failing to indicate its consideration of defendant's ability to pay, and the Court of Appeals did not err in denying leave to appeal. For these reasons, I would deny leave to appeal.

PEOPLE V ROUNSOVILLE, No. 134841. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the sentence of the St. Clair Circuit Court that ordered the defendant to pay attorney fees and we remand this case to the trial court for a decision on attorney fees that considers the defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004), lv den 473 Mich 881 (2005). At the trial court's discretion, the decision may be made on the basis of the record without the need for a formal evidentiary hearing. If the court decides to order attorney fees, it shall do so in a separate order that indicates that the court considered the defendant's ability to pay. *Id*. In all other respects, the application for leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 279235.

CORRIGAN, J. (*dissenting*). I dissent from the order remanding this case to the trial court to consider defendant's ability to repay his attorney fees under *People v Dunbar*, 264 Mich App 240 (2004). For the reasons set out in my dissenting statements in *People v Carter*, 480 Mich 1063 (2008), and *People v Willey*, 481 Mich 868 (2008), neither the Sixth Amendment nor the Fourteenth Amendment compels a sentencing court to state that it considered a defendant's ability to pay before ordering him to repay the cost of his court-appointed attorney when the defendant does not timely object to the repayment order. When the court decides to enforce collection or sanction the defendant for nonpayment, it must consider the defendant's ability to pay. In this case, although the judgment of sentence states that overdue payments are subject to a 20 percent late penalty, the court has not enforced the repayment order or the late penalty. Therefore, the court was not required to state either on the record or in the court file that it had considered defendant's ability to pay. Accordingly, I would deny leave to appeal.

I. FACTS AND PROCEDURAL POSTURE

In 2004, defendant pleaded guilty of fourth-degree criminal sexual conduct (CSC IV) and of being a fourth–offense habitual offender, for sexually assaulting his 14-year-old stepdaughter. Defendant was sentenced to one year in jail and two years' probation. The order of probation, which defendant signed, stated, "You must pay attorney fees in an amount to be determined as ordered by the court."[1] In 2006, after serving his jail sentence, defendant violated his probation. He signed a petition for court-appointed counsel, which stated that he understood that he may be ordered to repay the cost of his court-appointed attorney. On November 1, 2006, defendant pleaded guilty of a probation violation and, on December 13, 2006, was sentenced to 3½ to 15 years' imprisonment. Defendant's presentence investigation report (PSIR) listed his employment history, education, vocational training, health status, income, assets, and financial liabilities. At sentencing on the probation violation, the trial court did not state that defendant would be required to reimburse the cost of his appointed counsel. The judgment of sentence, however, ordered defendant to pay $930.05 in attorney fees. The form judgment order stated that fees not paid within 56 days of the December 4, 2006, due date were subject to a 20 percent late penalty on the amount owed. Defendant did not object to this reimbursement order.

On appeal, defendant challenged the reimbursement order for the first time, arguing that the trial court erred in failing to hold a hearing or consider defendant's ability to pay as required by *Dunbar*. The Court of Appeals denied defendant's application for leave to appeal for lack of merit.

II. STANDARD OF REVIEW

Defendant did not argue at sentencing that the court was required to inquire into his ability to pay before ordering him to reimburse the court for attorney fees. This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774 (1999); *Dunbar, supra* at 251.

III. ANALYSIS

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI.[2] This right is

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[1] The order, however, designated "$.00" as the amount of attorney fees to be paid.

[2] The Michigan Constitution contains a similar provision: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20.

made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335, 342 (1963). This right requires the states to provide counsel for indigent defendants in criminal cases. *Id.* at 344. Michigan indisputably accorded defendant his Sixth Amendment rights, as he had the benefit of court-appointed counsel.

Under a recoupment scheme, an indigent defendant is provided counsel regardless of his ability to pay, but might be ordered to repay the cost of counsel at a later date. In *James v Strange*, 407 US 128, 134 (1972), the United States Supreme Court, discussing an attorney-fee recoupment scheme requiring defendants to repay the cost of court-appointed counsel, held, "[t]here is certainly no denial of the right to counsel in the strictest sense." Further, in *Fuller v Oregon*, 417 US 40, 51-52 (1974), the United States Supreme Court held that an attorney-fee recoupment scheme did not "chill" the defendants' constitutional right to counsel. "The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel." *Id.* at 53. The Court held that Oregon's recoupment scheme, which was designed to impose an obligation to pay only on those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship, did not violate the Sixth Amendment. *Id.* at 54.

Attorney-fee recoupment schemes have also been challenged under the Equal Protection and Due Process clauses of the Fourteenth Amendment. Due-process and equal-protection principles converge in this area of the law. *Bearden v Georgia*, 461 US 660, 665-666 (1983). In *James*, *supra*, the United States Supreme Court held that Kansas's recoupment scheme violated the Equal Protection Clause because it did not accord indigent defendants the same statutory protections accorded to other judgment debtors. In *Bearden, supra* at 672-673, the Court held that the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine or restitution if the defendant has demonstrated bona fide efforts to pay.

When defendant committed this offense, Michigan had no statutory scheme governing court orders requiring criminal defendants to reimburse the costs of court-appointed counsel. See *Dunbar, supra* at 254.[3]

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[3] Effective January 1, 2006, the Legislature enacted MCL 769.1k(1)(b)(*iii*), which allows the court to impose the expense of providing legal assistance on the defendant:

> (1) If a defendant enters a plea of guilty or nolo contendre or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
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> * * *

Nonetheless, the court had the authority to order a criminal defendant to reimburse the government for the cost of court-appointed counsel unless prohibited by statute or the United States or Michigan constitution. See *Davis v Oakland Circuit Judge*, 383 Mich 717, 720 (1970) (the trial court has the discretionary power to order that a defendant's assets be used to repay the cost of a court-appointed attorney); *People v Nowicki*, 213 Mich App 383, 388 (1995) ("We conclude that the trial court had authority to order defendant to reimburse the county for costs paid for his representation."). In *Dunbar*, our Court of Appeals articulated a test to determine whether a trial court's attorney-fee recoupment procedure is constitutionally sound under this United States Supreme Court precedent. In my dissenting statement in *Willey*, I described the holding in *Dunbar* as follows:

> In *Dunbar*, *supra* at 252, the issue was whether a sentencing court may constitutionally require a defendant to contribute to the cost of his court-appointed attorney without first assessing his ability to pay. The *Dunbar* panel adopted the test from *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984), to determine whether a sentencing court's procedure passes constitutional muster. In *Alexander*, the Fourth Circuit Court of Appeals discussed *James v Strange*, 407 US 128 (1972), *Fuller v Oregon*, 417 US 40 (1974), and *Bearden v Georgia*, 461 US 660 (1983),[4] which all involved challenges to the constitutionality of statutory attorney-fee recoupment schemes. The Fourth Circuit held that the following constitutional principles emerged from those cases:
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> "From the Supreme Court's pronouncements in *James, Fuller*, and *Bearden*, five basic features of a constitutionally acceptable attorney's fees reimbursement program emerge. First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. *Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's re-*

(b) The court may impose any or all of the following:

* * *

(*iii*) The expenses of providing legal assistance to the defendant.

Defendant committed the offenses before MCL 769.1k(1)(b)(*iii*) went into effect.

[4] See *Carter*, *supra* at 1068-1070, for a summary of the holdings in *James*, *Fuller*, and *Bearden*.

> *sources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required.* The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy. [*Alexander, supra* at 124 (emphasis added).]"
>
> After the *Dunbar* panel quoted these factors, it held that a sentencing court may order reimbursement of a court-appointed attorney's fees without specific findings on the record regarding the defendant's ability to pay, unless the defendant objects to the reimbursement amount at the time it is ordered. *Dunbar, supra* at 254. The panel held, however, that even if the defendant does not object, "the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. [*Willey, supra* at 869-870 (CORRIGAN, J., dissenting).]

This case, like *Willey*, involves the second and third factors of the *Dunbar* test. First, the trial court satisfied the second *Dunbar* factor; defendant had notice of the fees and an opportunity to object, but failed to do so. When the court appointed counsel for defendant, he signed a form order that stated as follows: "REPAYMENT I understand that I may be ordered to repay the court for all or part of my attorney and defense costs." In *Dunbar, supra* at 254, the defendant's petition and order appointing counsel similarly stated that he "may be ordered to repay the court" for his court-appointed attorney fees. *Dunbar* held that this petition and order sufficiently notified the defendant of the court's decision to order the payment of attorney fees. *Id.* The petition and order in the instant case, which is virtually identical to the one at issue in *Dunbar*, similarly notified defendant about his responsibility to pay the attorney fees.

Defendant also had an opportunity to object. *Dunbar* held that the defendant, who was given notice of the fees by the petition and order appointing counsel, was given the opportunity to object at sentencing. *Id.* at 254. "In regard to defendant's opportunity to be heard, defendant was not prevented from objecting at sentencing and asserting his indigency." *Id.* Similarly in the instant case, defendant had an opportunity to object at sentencing. The judgment of sentence specifically stated, "Defendant shall pay as follows: $930.05 ATTORNEY FEE . . . ." He could have objected to the fees on the record at any time. Thus, defendant had notice of the fees and a meaningful opportunity to object to those fees.

As I explained in *Carter* and *Willey*, I think that *Dunbar* misinterpreted Supreme Court precedent when it followed *Alexander* in regard to the third factor necessary for a constitutionally sufficient recoupment scheme. As I explained in my dissent in *Carter, supra* at 1068-1071, nothing in *James, Fuller,* or *Bearden* requires a sentencing court to state

on the record or in the court file that it considered a defendant's ability to pay when a defendant has not timely objected on indigency grounds to the reimbursement order:

> Supreme Court precedents compel a sentencing court to inquire into a defendant's financial status and make findings on the record *when the court decides to enforce collection or sanction the defendant for failure to pay the ordered amount*. . . . The Alaska Supreme Court correctly explained that "*James* and *Fuller* do not require a prior determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors . . . ." *State v Albert,* 899 P2d 103, 109 (Alas, 1995). See also the Washington Supreme Court's interpretation of *James, Fuller,* and *Bearden*:
>
> > "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before *enforced collection* or any *sanction is imposed* for nonpayment, there must be an inquiry into ability to pay. [*State v Blank,* 131 Wash 2d 230, 242; 930 P2d 1213 (1997).]" [*Carter, supra* at 1070-1071 (CORRIGAN, J., dissenting) (emphasis added to *Blank*).]

As I stated previously in *Carter* (CORRIGAN, J., dissenting), I would overrule *Dunbar*'s contrary holding.

Applying this conclusion to the facts of this case, I would hold that the court satisfied its constitutional duties. First, defendant was not denied his right to counsel. He was provided court-appointed counsel despite his inability to pay for an attorney at the time. He was not required to repay the cost of counsel as a condition of representation. In any case, before ordering reimbursement, the trial court clearly considered defendant's ability to pay, as the PSIR, which was available when the court ordered the reimbursement, described defendant's financial situation.

Second, the federal constitution does not require the court to inquire into a defendant's indigency before imposing the repayment obligation. Although the recoupment order stated that defendant would be subject to a 20 percent late fee on any outstanding balance, the circuit court has not enforced this provision. The 20 percent late fee arises from MCL 600.4803(1), which provides:

> A person who fails to pay a penalty, fee, or costs[5] in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will

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[5] "Costs" are defined, in part, as "the cost of providing court-ordered legal assistance to the defendant." MCL 600.4801(a).

> be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. *A late penalty may be waived by the court upon the request of the person subject to the late penalty*. [Emphasis added.]

As discussed, the trial court is required to consider the defendant's financial situation only when it *enforces* the repayment order by sanctioning the defendant for nonpayment. Including a 20 percent late-fee provision in the recoupment order is not the same as actually *enforcing* the late fee. MCL 600.4803(1) specifically contemplates that the trial court retains the discretion to waive the late fee (i.e., decline to enforce it) even when a defendant has failed to pay his attorney fees within 56 days of the due date. In other words, the inclusion of a late-fee provision in the recoupment order is not equivalent to enforcing the recoupment order or the late fee. A sanction is not imposed until the court requires the defendant to pay the attorney fees (with the 20 percent late penalty) or sanctions him in some other way for nonpayment. Because the court has not yet enforced collection by sanctioning defendant for nonpayment, defendant's challenge to the reimbursement order is premature. See *Dunbar, supra* at 256 ("in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment"); see also *Blank, supra* at 242. Therefore, the trial court did not err in failing to indicate its consideration of defendant's ability to pay, and the Court of Appeals did not err in denying leave to appeal. For these reasons, I would deny leave to appeal.

PEOPLE V FLOYD, No. 135940. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, we vacate the sentence of the Macomb Circuit Court, and we remand this case to the trial court for resentencing. The 62-year minimum sentences imposed for first-degree criminal sexual conduct, second-degree criminal sexual conduct, breaking and entering a building with intent to commit larceny, first-degree home invasion, assault with intent to do great bodily harm, and kidnapping exceed two-thirds of the 80-year maximum sentences imposed, in violation of MCL 769.34(2)(b) and *People v Tanner,* 387 Mich 683 (1972). On remand, the trial court shall resentence the defendant on these counts in accordance with *People v Thomas,* 447 Mich 390 (1994), which provides that the proper remedy for a *Tanner* violation is a reduction in the minimum sentence. The trial court shall also resentence the defendant as ordered by the Court of Appeals. 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. We do not retain jurisdiction. Court of Appeals No. 272425.

MARKMAN, J. (*concurring*). Although I continue to believe that defendant, in asserting that all of his offenses must be scored under the sentencing guidelines, not simply the most serious one, raises an issue that deserves consideration by this Court, see *People v Getscher*, 478 Mich 887, 888 (MARKMAN, J., dissenting), it is apparent that the majority of this Court believes otherwise. Thus, I concur in its decision to remand only on the violation of MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683 (1972).

LAWRENCE M CLARKE, INC v RICHCO CONSTRUCTION, INC, No. 136619. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 285567.

Leave to Appeal Denied June 27, 2008:

PEOPLE v MCCAA, No. 135251. Court of Appeals No. 270829.

CORRIGAN, J. (*dissenting*). I dissent from the order denying the prosecution's application for leave to appeal. I would grant leave to consider the appropriate standards governing the state's efforts to collect reimbursement, including court-appointed attorney fees, from prisoners facing nonparolable life sentences. Because defendant will be housed and fed at taxpayer expense for the rest of his natural life, and the Legislature has directed a comprehensive scheme for prisoner reimbursement that accounts for this situation, I see a remand for assessment of defendant's ability to pay under *People v Dunbar*, 264 Mich App 240 (2004), as a pointless exercise.

I. FACTS AND PROCEDURAL POSTURE

Defendant was convicted of first-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony after shooting a man to death at a house party in Detroit in 2005. Defendant's presentence investigation report (PSIR) listed his employment history, education, vocational training, health status, income, assets, and financial liabilities. A week before sentencing, the trial court entered a "Final Order for Reimbursement of Attorney Fees," ordering defendant to repay $1,610 for his court-appointed attorney. The order stated that fees not paid within 56 days were subject to a 20 percent late penalty on the amount owed. Defendant was then sentenced to a mandatory term of nonparolable life in prison for his murder conviction. He did not object to this reimbursement order at sentencing. The trial court included the $1,610 attorney-fee reimbursement order as part of the judgment of sentence. The court also entered an "Order to Remit Prisoner Funds for Fines, Costs, and Assessments," directing the Michigan Department of Corrections to collect 50 percent of any amount over

$50 from defendant's prison account to satisfy the financial obligations under the judgment, pursuant to MCL 769.1*l*.

The Court of Appeals vacated the part of the judgment of sentence ordering defendant to repay $1,610 in attorney fees and remanded for the trial court to consider defendant's ability to pay as required by *Dunbar*.

II. ANALYSIS

For the reasons set out in my dissenting statements in *People v Carter*, 480 Mich 1063 (2008), *People v Willey*, 481 Mich 868 (2008), *People v Rounsoville*, 481 Mich 932 (2008), and *People v Ransom*, 481 Mich 926 (2008), defendant is not entitled to a remand to the Court of Appeals for consideration of his ability to pay. First, defendant had notice of the fees and a meaningful opportunity to object to those fees. Second, neither the Sixth Amendment nor the Fourteenth Amendment compels a sentencing court to state that it considered a defendant's ability to pay before ordering him to repay the cost of his court-appointed attorney when the defendant does not timely object to the repayment order. When the court decides to enforce collection or sanction the defendant for nonpayment, it must consider the defendant's ability to pay. Although the judgment of sentence states that overdue payments are subject to a 20 percent late penalty, the court has not enforced the repayment order or the late penalty.

Although this case is similar in many respects to *Carter*, *Willey*, *Rounsoville*, and *Ransom*, one distinguishing feature is the order requiring the Department of Corrections to collect 50 percent of defendant's prison account after the account exceeds $50. This order articulates the statutory provision regarding the recoupment of attorney fees that was effective when defendant was sentenced. MCL 769.1*l* provides:[1]

> If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in section 1k[2] and the department of corrections receives an order from the court on a form prescribed by the state court administrative office, the department of corrections shall deduct 50% of the funds received by the prisoner in a month over $50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds $100.00, or the entire amount if the prisoner is paroled, is transferred to community programs, or is discharged on the maximum sentence.

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[1] MCL 769.1*l* became effective on January 1, 2006, which was after defendant committed the crimes, but before the trial court ordered him to repay the cost of his court-appointed attorney.

[2] MCL 769.1k(1)(b)(*iii*) expressly permits the trial court to order a defendant to repay the costs of his court-appointed attorney.

The statutory procedure negates consideration of defendant's ability to pay under *Dunbar* before ordering repayment of attorney fees. The Department of Corrections must deduct funds from defendant's prison account according to the above-noted statutory formula. Under the trial court's order, defendant will continue to have some discretionary income for incidentals in his prison account even if collection takes place because he will retain $50 and half of his account above this amount.[3] Further, the 28-year-old defendant is not indigent in the same manner as a person who is not incarcerated or will one day be released from prison. He is serving a mandatory term of nonparolable life in prison, so the state provides for the cost of his transportation, room, board, clothing, security, medical care, and other normal living expenses for the rest of his life. See, e.g., MCL 800.401a(b) (defining the "cost of care" as it relates to prisoners).[4] The futility of remanding for consideration of a defendant's ability to pay is especially apparent in cases involving prisoners serving nonparolable life sentences, because those prisoners have no living expenses or income-earning potential outside the prison walls for the rest of their lives. The Legislature has spoken on the subject by offering the remission procedure articulated in MCL 769.1*l*. The trial court properly followed that procedure here.[5]

For all of these reasons, the court's repayment plan does not enforce the repayment of attorney fees at a time when defendant cannot afford to pay those fees. Moreover, because the court has not yet enforced collection by sanctioning defendant for nonpayment, defendant's challenge to the reimbursement order was premature. See *Dunbar, supra* at 256 ("in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment"); see also *State v Blank*, 131 Wash 2d 230, 242 (1997). Therefore, the trial court did not plainly err in failing to expressly consider defendant's ability to pay, and the Court of Appeals erred in vacating the trial court's repayment order and remanding for consideration of defendant's ability to pay.

PEOPLE V MCCAA, No. 135377; Court of Appeals No. 270829.

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[3] As the prosecution points out, collection on amounts over $50 will occur because defendant still owes restitution, fines, and other costs.

[4] Granted, the State Correctional Facility Reimbursement Act (SCFRA) permits the trial court to order a prisoner with any "assets" as defined by the act to reimburse the state for expenses incurred in caring for the prisoner. MCL 800.404(3); see also *State Treasurer v Abbott*, 468 Mich 143, 149 (2003). A prisoner without "assets," however, is not required to reimburse the state for his living expenses.

[5] During the last three years, the State Court Administrative Office has worked with the Department of Corrections and circuit courts statewide to collect more than $3.5 million from prisoners who have outstanding financial obligations. This was done by issuing orders to remit prisoner funds (sweep orders) similar to the one entered in this case.

YOUNT v YOUNT, No 136634; Court of Appeals No. 285388.

Summary Dispositions July 2, 2008:

PEOPLE v BARBARA WILLIAMS, No. 135851. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. In *People v Boyd*, 174 Mich 321, 324 (1913), this Court discussed common-law obstruction of justice, and stated as follows: "At the common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying upon the trial of a cause is an indictable offense." Actual intimidation of the witness is not required; a defendant is guilty of common-law obstruction of justice who uses an unlawful means to attempt to intentionally dissuade a witness from testifying. See *People v Coleman*, 350 Mich 268, 274 (1957); see also *People v Davis*, 408 Mich 255, 294 (1980) (LEVIN, J.). In this case, the defendant knowingly violated a no-contact order when she wrote to the victim, asking her to drop the embezzlement charges. In an attempt to conceal her violation of the no-contact order, the defendant put a false return address on the envelope. Given this evidence, a factfinder could properly convict the defendant of common-law obstruction of justice. Accordingly, we remand this case to the Genesee Circuit Court for reinstatement of the trial court's order denying the defendant's motion to withdraw her guilty plea to common-law obstruction of justice. Court of Appeals No. 271870.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

MORGAN v MENASHA CORPORATION, No. 135861. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the November 15, 2007, judgment remanding this case to the Allegan Circuit Court "for entry of judgment in favor of [the third-party defendant] Fairhaven [Wood Harvesting, Inc.]." We do not disturb the Court of Appeals ruling concerning third-party plaintiff Menasha Corporation's argument under Article 9 of the Chip Purchase Agreement. But the third-party complaint further alleged that the third-party defendant breached its obligation under Article 10 of the Chip Purchase Agreement to procure and maintain insurance coverage. Because the circuit court has not yet resolved this aspect of the third-party complaint, we remand this case to the circuit court for further proceedings not inconsistent with 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. Court of Appeals No. 272837.

ADRINE v EVENT STAFFING, INC, No. 135980. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 281360.

Leave to Appeal Denied July 2, 2008:

OAK PARK PUBLIC SAFETY OFFICERS ASSOCIATION v CITY OF OAK PARK, No. 135349; reported below: 277 Mich App 317.

FRIENDS OF PORTSMOUTH TOWNSHIP v PORTSMOUTH CHARTER TOWNSHIP, No. 135547; Court of Appeals No. 277433.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MOORE v PRESTIGE PAINTING, No. 135783; reported below: 277 Mich App 437.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

CALDWELL v WASTE MANAGEMENT OF MICHIGAN, INC, No. 135946; Court of Appeals No. 280386.

Leave to Appeal Denied July 9, 2008:

MARTIN v SECRETARY OF STATE, No. 136767. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is denied, because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals. However, pursuant to MCR 7.316(A)(1), the Court orders that the appellants shall file their Court of Appeals brief within 21 days of the Court of Appeals June 27, 2008, order, and that the appellees' briefs will be due 14 days after service of the appellants' brief. The Court of Appeals is directed to issue a decision in this case no later than August 21, 2008. Court of Appeals No. 286015.

Leave to Appeal Denied July 11, 2008:

PEOPLE v GERACER TAYLOR, No. 134206. 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 November 27, 2007. The application for leave to appeal the April 5, 2007, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Reported below: 275 Mich App 177.

PULSIPHER v STATEWIDE FOREST PRODUCTS, No. 135704; Court of Appeals No. 278407.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal. The Workers' Compensation Appellate Commission (WCAC) panel's result does not appear to be erroneous and the case does not involve issues of significance for Michigan jurisprudence. But, as noted by Justice MARKMAN, the panel committed numerous analytical errors that future WCAC panels should not repeat. I generally concur with Justice MARKMAN. I also note other significant errors in the WCAC's analysis.

Most notably, the WCAC offers very questionable applications of estoppel and the two-year-back rule, MCL 418.381. The WCAC concluded that the deceased employee's dependent relied on misrepresentations by the insurance agent when she chose not to file for weekly benefits within two years of her husband's death. It concluded that, therefore, she could claim benefits covering a period beginning two years before the estimated date that she gained accurate information regarding

her eligibility for benefits. Under this logic, the panel purported to exclude eligibility for benefits from January 22, 1998, the date of death, to May 19, 1999, two years before the approximate date that the claimant learned of her claim, which the panel estimated was May 19, 2001. The logic of this approach is dubious. Assuming that estoppel may be applied, it would seem that it should render the claimant eligible for benefits from the date of death, when the misrepresentations began, until she would have reasonably stopped relying on the misrepresentations. Then the two-year-back rule should apply as usual from when she filed the claim, on October 14, 2002, back to October 14, 2000. Thus, no amount of benefits would be time-barred because the two-year back rule covers the period between her awareness of her claim and the date she filed. Although the WCAC's application of estoppel appears erroneous, its result nonetheless appears correct because it effectively awards the claimant the maximum allowable benefit; its order allows her to recoup up to 500 times the weekly benefit rate.

I also question the panel's conclusions that the claimant, who worked full time, was 100 percent dependent on the decedent and that the decedent's relevant annual earnings were $293 because he happened to earn this amount over a few days of work before his accident. I would still deny leave on these issues, however, because I find no injustice in the amount of the claimant's benefit award. The WCAC declined to increase the amount of the weekly benefit awarded by the magistrate because the claimant did not properly appeal the amount. The panel acknowledged that the magistrate likely and significantly underestimated the weekly benefit amount, however. Therefore, even if the claimant was less than 100 percent dependent on the decedent, her current benefit award is likely equal to or less than the correct amount due and, therefore, defendants are not prejudiced by any error.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal because the Workers' Compensation Appellate Commission (WCAC) reached the right result. I write separately to note several errors committed by the WCAC in its legal analysis. Although the WCAC reached a proper result under the correct legal standards applicable to the question whether the plaintiff's decedent was an employee of Statewide Forest Products, the WCAC erred to the extent that it concluded that federal income-tax forms alone may never determine the legal question of employment. Federal tax forms are always compelling evidence of the employer-employee relationship and, in some cases, federal tax forms alone may be sufficient evidence of this relationship. See, e.g., *Blanzy v Brigadier Gen Contractors, Inc*, 240 Mich App 632, 642-643 (2000); *Betancourt v Ronald Smith*, 1999 Mich ACO 608. I also note that the WCAC majority erred in concluding that payment of a deceased employee's earnings after his death is the determining factor in deciding the extent of the dependency pursuant to MCL 418.321 and *Lesner v Liquid Disposal, Inc*, 466 Mich 95 (2002). However, under the unique circumstances of this case, the majority's conclusion that the plaintiff was 100 percent dependent on the decedent's earnings did not result in an increased benefit award to the plaintiff, and, therefore, any error in the WCAC's decision is harmless. I further note that the WCAC

clearly erred in concluding that the instructions for the weekly benefit rate tables to "deduct one dependent for death cases" are not authorized by MCL 418.313(1). That provision requires an injured employee to be included as a dependent in calculating the weekly wage-loss benefit in disability cases. Because a deceased employee cannot be his or her own dependent, the benefit rate table instruction is correct. In this case, the magistrate correctly determined that there was one dependent of the deceased employee.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

In re MATTSON (DEPARTMENT OF HUMAN SERVICES V MATTSON), No. 136637; Court of Appeals No. 281258.

GRAND TRAVERSE COUNTY V MICHIGAN PUBLIC SERVICE COMMISSION, No. 136785; Court of Appeals No. 285896.

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 June 19, 2008:

PEOPLE v DENDEL, No. 132042. In this cause, the parties' joint motion for rehearing is considered and, in lieu of granting rehearing, it is ordered that the opinion of the Court and the judgment order are amended to provide that the judgment of the Court of Appeals is reversed and the cause is remanded to the Court of Appeals for consideration of the remaining issues raised on appeal. Court of Appeals No. 247391.

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claimant to prove a work-related injury and that the injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training; the claimant must show more than a mere inability to perform a previous job. (MCL 418.301[4]). *Stokes v Chrysler LLC*, 481 Mich 266.

2. To establish the element of a reduction in wage-earning capacity in work suitable to his qualifications and training, a workers' compensation claimant must (1) disclose all of his qualifications and training, including education, skills, experience, and training, regardless of whether they are relevant to the claimant's job at the time of the injury; (2) prove what jobs he is qualified and trained to perform that are within the same salary range as the claimant's maximum earning capacity at the time of injury and provide some reasonable means to assess employment opportunities within his maximum salary range to which his qualifications and training might translate; (3) show that the claimant's work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay the claimant's maximum wage; and (4) show that he cannot obtain any of the jobs identified as within the claimant's qualifications and training that he is capable of performing. (MCL 418.301[4]). *Stokes v Chrysler LLC*, 481 Mich 266.
3. Once a workers' compensation claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing; if discovery is necessary for the employer to sustain its burden of production and present a meaningful defense, the employer has a right to discovery, and, if the employer hires an expert to challenge the claimant's proofs, that expert must be permitted to interview the claimant and present the employer's analysis or assessment; the claimant, on whom the burden of persuasion continues to rest, may come forward with additional evidence to challenge the employer's evidence. (MCL 418.301[4]). *Stokes v Chrysler LLC*, 481 Mich 266.

ZONING

COUNTIES 2