MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

May 12, 2006 to July 26, 2006

DANILO ANSELMO
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SUPREME COURT

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

Commissioners

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

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

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	
WILLIAM C. WHITBECK, Lansing	2011
Chief Judge Pro Tem	
BRIAN K. ZAHRA, Northville	2007
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2007
MARK J. CAVANAGH, Royal Oak	2009
JANET T. NEFF, Grand Rapids	2007
KATHLEEN JANSEN, St. Clair Shores	2007
E. THOMAS FITZGERALD, Owosso	2009
HELENE N. WHITE, Detroit	2011
HENRY WILLIAM SAAD, Bloomfield Hills	2009
RICHARD A. BANDSTRA, Grand Rapids	2009
JOEL P. HOEKSTRA, Grand Rapids	2011
JANE E. MARKEY, Grand Rapids	2009
PETER D. O'CONNELL, Mt. Pleasant	2007
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
MICHAEL R. SMOLENSKI, Grand Rapids	2007
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
JESSICA R. COOPER, Beverly Hills	2007
KIRSTEN FRANK KELLY, Grosse Pointe Park	2007
CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2009
PAT M. DONOFRIO, Clinton Township	2011
KAREN FORT HOOD, Detroit	2009
BILL SCHUETTE, Midland	2009
STEPHEN L. BORRELLO, Saginaw	2007
ALTON T. DAVIS, Grayling	2007
DEBORAH A. SERVITTO, Mt. Clemens	2007

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

CIRCUIT JUDGES

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

[1] To June 14, 2006.

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

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

		Term Expires January 1 of
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Twp.,	2011
	DIANE M. DRUZINSKI, Shelby Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2007
	PETER J. MACERONI, Clinton Twp.,	2009
	DONALD G. MILLER, Harrison Twp.,	2007
	EDWARD A. SERVITTO, Jr., Warren,	2007
	MARK S. SWITALSKI, Ray Twp.,	2007
	MATTHEW S. SWITALSKI, Clinton Twp.,	2009
	ANTONIO P. VIVIANO, Clinton Twp.,	2011
	TRACEY A. YOKICH, St. Clair Shores,	2013
17.	GEORGE S. BUTH, Grand Rapids,	2011
	KATHLEEN A. FEENEY, Rockford,	2009
	DONALD A. JOHNSTON, III, Grand Rapids,	2007
	DENNIS C. KOLENDA, Rockford,	2007
	DENNIS B. LEIBER, Grand Rapids,	2007
	STEVEN MITCHELL PESTKA, Grand Rapids,	2011
	JAMES ROBERT REDFORD, East Grand Rapids,	2011
	PAUL J. SULLIVAN, Grand Rapids,	2009
	DANIEL V. ZEMAITIS, Grand Rapids,	2009
18.	LAWRENCE M. BIELAWSKI, Linwood,	2009[2]
	WILLIAM J. CAPRATHE, Bay City,	2011
	KENNETH W. SCHMIDT, Bay City,	2007
	JOSEPH K. SHEERAN, Essexville,	2009[3]
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2007
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2007
	MELINDA MORRIS, Ann Arbor,	2007
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009
23.	RONALD M. BERGERON, Standish,	2009
	WILLIAM F. MYLES, East Tawas,	2009
24.	DONALD A. TEEPLE, Sandusky,	2009

[2] To June 30, 2006.
[3] From July 19, 2006.

		Term Expires January 1 of
25.	THOMAS L. SOLKA, Marquette,	2011
	JOHN R. WEBER, Marquette,	2009
26.	JOHN F. KOWALSKI, Alpena,	2009
27.	ANTHONY A. MONTON, Pentwater,	2007
	TERRENCE R. THOMAS, Newaygo,	2009
28.	CHARLES D. CORWIN, Cadillac,	2009
29.	JEFFREY L. MARTLEW, DeWitt,	2011
	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2007
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2007
	BEVERLEY NETTLES-NICKERSON, Okemos,	2009
31.	JAMES P. ADAIR, Port Huron,	2007
	PETER E. DEEGAN, Port Huron,	2011
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Corunna,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2007
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2007
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2007
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2007
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	PAUL J. CLULO, Midland,	2009
	THOMAS L. LUDINGTON, Sanford,	2007
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2007
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2006

		Term Expires January 1 of
46.	JANET M. ALLEN, Gaylord,	2007
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	HARRY A. BEACH, Otsego,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2007
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2007
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Bad Axe,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2007
55.	THOMAS R. EVANS, Beaverton,	2007
56.	THOMAS S. EVELAND, Dimondale,	2007
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2007

DISTRICT JUDGES

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

		Term Expires January 1 of
14B.	JOHN B. COLLINS, Ypsilanti,	2009
15.	JULIE CREAL GOODRIDGE, Ann Arbor,	2007
	ELIZABETH POLLARD HINES, Ann Arbor,	2011
	ANN E. MATTSON, Ann Arbor,	2009
16.	ROBERT B. BRZEZINSKI, Livonia,	2009
	KATHLEEN J. McCANN, Livonia,	2007
17.	KAREN KHALIL, Redford,	2011
	CHARLOTTE L. WIRTH, Redford,	2009
18.	C. CHARLES BOKOS, Westland,	2009
	GAIL McKNIGHT, Westland,	2007
19.	WILLIAM C. HULTGREN, Dearborn,	2011
	MARK W. SOMERS, Dearborn,	2009
	RICHARD WYGONIK, Dearborn,	2007
20.	LEO K. FORAN, Dearborn Heights,	2007
	MARK J. PLAWECKI, Dearborn Heights,	2009
21.	RICHARD L. HAMMER, Jr., Garden City,	2009
22.	SYLVIA A. JAMES, Inkster,	2007
23.	GENO SALOMONE, Taylor,	2007
	WILLIAM J. SUTHERLAND, Taylor,	2009
24.	JOHN T. COURTRIGHT, Allen Park,	2009
	RICHARD A. PAGE, Allen Park,	2011
25.	DAVID A. BAJOREK, Lincoln Park,	2009
	DAVID J. ZELENAK, Lincoln Park,	2011
26-1.	RAYMOND A. CHARRON, River Rouge,	2009
26-2.	MICHAEL F. CIUNGAN, Ecorse,	2009
27.	RANDY L. KALMBACH, Wyandotte,	2007
28.	JAMES A. KANDREVAS, Southgate,	2009
29.	LAURA REDMOND MACK, Wayne,	2011
30.	BRIGETTE R. OFFICER, Highland Park,	2011
31.	PAUL J. PARUK, Hamtramck,	2009
32A.	ROGER J. La ROSE, Harper Woods,	2009
33.	JAMES KURT KERSTEN, Trenton,	2009
	MICHAEL K. McNALLY, Trenton,	2007
	EDWARD J. NYKIEL, Grosse Ile,	2011
34.	TINA BROOKS GREEN, New Boston,	2007
	BRIAN A. OAKLEY, Romulus,	2011
	DAVID M. PARROTT, Belleville,	2009
35.	MICHAEL J. GEROU, Plymouth,	2011
	RONALD W. LOWE, Canton,	2007
	JOHN E. MacDONALD, Northville,	2009
36.	LYDIA NANCE ADAMS, Detroit,	2011
	ROBERTA C. ARCHER, Detroit,	2007
	MARYLIN E. ATKINS, Detroit,	2007
	JOSEPH N. BALTIMORE, Detroit,	2009
	NANCY McCAUGHAN BLOUNT, Detroit,	2009

	DAVID MARTIN BRADFIELD, DETROIT,	2009[1]
	IZETTA F. BRIGHT, DETROIT,	2011
	RUTH C. CARTER, DETROIT,	2007
	DONALD COLEMAN, DETROIT,	2007
	NANCY A. FARMER, DETROIT,	2007
	DEBORAH GERALDINE FORD, DETROIT,	2011
	RUTH ANN GARRETT, DETROIT,	2007
	JIMMYLEE GRAY, DETROIT,	2009
	KATHERINE HANSEN, DETROIT,	2011
	BEVERLY J. HAYES-SIPES, DETROIT,	2009
	PAULA G. HUMPHRIES, DETROIT,	2011
	PATRICIA L. JEFFERSON, DETROIT,	2009
	VANESA F. JONES-BRADLEY, DETROIT,	2007
	KENNETH J. KING, DETROIT,	2009[2]
	DEBORAH L. LANGSTON, DETROIT,	2007
	WILLIE G. LIPSCOMB, JR., DETROIT,	2009
	LEONIA J. LLOYD, DETROIT,	2011
	MIRIAM B. MARTIN-CLARK, DETROIT,	2011
	DONNA R. MILHOUSE, DETROIT,	2007
	B. PENNIE MILLENDER, DETROIT,	2011
	CYLENTHIA L. MILLER, DETROIT,	2007
	JEANETTE O'BANNER-OWENS, DETROIT,	2009
	MARK A. RANDON, DETROIT,	2009
	KEVIN F. ROBBINS, DETROIT,	2007
	DAVID S. ROBINSON, JR., DETROIT,	2007
	C. LORENE ROYSTER, DETROIT,	2007
	RUDOLPH A. SERRA, DETROIT,	2007
37.	JOHN M. CHMURA, WARREN,	2007
	JENNIFER FAUNCE, WARREN,	2009
	DAWNN M. GRUENBURG, WARREN,	2011
	WALTER A. JAKUBOWSKI, JR., WARREN,	2007
38.	NORENE S. REDMOND, EASTPOINTE,	2009
39.	JOSEPH F. BOEDEKER, ROSEVILLE,	2009
	MARCO A. SANTIA, FRASER,	2007
	CATHERINE B. STEENLAND, ROSEVILLE,	2011
40.	MARK A. FRATARCANGELI, ST. CLAIR SHORES,	2007
	JOSEPH CRAIGEN OSTER, ST. CLAIR SHORES,	2009
41A.	MICHAEL S. MACERONI, STERLING HEIGHTS,	2009
	DOUGLAS P. SHEPHERD, MACOMB TWP.,	2007
	STEPHEN S. SIERAWSKI, STERLING HEIGHTS,	2011
	KIMBERLEY ANNE WIEGAND, STERLING HEIGHTS,	2007
41B.	LINDA DAVIS, CLINTON TWP.,	2009

[1] To May 31, 2006.
[2] From July 3, 2006.

		Term Expires January 1 of
	SEBASTIAN LUCIDO, Clinton Twp.,	2007
	SHEILA A. MILLER, Clinton Twp.,	2009
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2007
43.	KEITH P. HUNT, Ferndale,	2007
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2007
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	STEPHEN C. COOPER, Southfield,	2011
	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2007
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2007
	KIMBERLY SMALL, West Bloomfield,	2009
50.	LEO BOWMAN, Pontiac,	2007
	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2007
52-1.	ROBERT BONDY, Milford,	2007
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2007
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2007
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2007
	MICHAEL A. MARTONE, Troy,	2011
53.	THERESA M. BRENNAN, Brighton,	2005
	L. SUZANNE GEDDIS, Brighton,	2011
	A. JOHN PIKKARAINEN, Brighton,	2007
54A.	LOUISE ALDERSON, Lansing,	2011
	PATRICK F. CHERRY, Lansing,	2009
	FRANK J. DeLUCA, Lansing,	2007

		Term Expires January 1 of
	CHARLES F. FILICE, Lansing,	2009
	AMY R. KRAUSE, Lansing,	2011
54B.	RICHARD D. BALL, East Lansing,	2011
	DAVID L. JORDON, East Lansing,	2007
55.	ROSEMARIE ELIZABETH AQUILINA, East Lansing,	2011
	THOMAS P. BOYD, Okemos,	2007
56A.	HARVEY J. HOFFMAN, Grand Ledge,	2011
	JULIE H. REINCKE, Eaton Rapids,	2007
56B.	GARY R. HOLMAN, Hastings,	2007
57.	STEPHEN E. SHERIDAN, Saugatuck,	2007
	JOSEPH S. SKOCELAS, Plainwell,	2007
58.	SUSAN A. JONAS, Spring Lake,	2009
	RICHARD J. KLOOTE, Grand Haven,	2007
	BRADLEY S. KNOLL, Holland,	2009
	KENNETH D. POST, Zeeland,	2011
59.	PETER P. VERSLUIS, Grand Rapids,	2011
60.	HAROLD F. CLOSZ, III, North Muskegon,	2009
	FREDRIC A. GRIMM, Jr., North Muskegon,	2009
	MICHAEL JEFFREY NOLAN, Twin Lake,	2007
	ANDREW WIERENGO, Muskegon,	2011
61.	PATRICK C. BOWLER, Grand Rapids,	2009
	DAVID J. BUTER, Grand Rapids,	2009
	J. MICHAEL CHRISTENSEN, Grand Rapids,	2011
	JEANINE NEMESI LaVILLE, Grand Rapids,	2007
	BEN H. LOGAN, II, Grand Rapids,	2007
	DONALD H. PASSENGER, Grand Rapids,	2011
62A.	PABLO CORTES, Wyoming,	2007
	STEVEN M. TIMMERS, Grandville,	2007
62B.	WILLIAM G. KELLY, Kentwood,	2009
63-1.	STEVEN R. SERVAAS, Rockford,	2009
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	2009
64A.	RAYMOND P. VOET, Ionia,	2009
64B.	DONALD R. HEMINGSEN, Sheridan,	2009
65A.	RICHARD D. WELLS, DeWitt,	2009
65B.	JAMES B. MACKIE, Alma,	2009
66.	WARD L. CLARKSON, Corunna,	2007
	TERRANCE P. DIGNAN, Owosso,	2009
67-1.	DAVID J. GOGGINS, Flushing,	2009
67-2.	JOHN L. CONOVER, Davison,	2009
	RICHARD L. HUGHES, Otisville,	2011

		Term Expires January 1 of
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2007
68.	WILLIAM H. CRAWFORD, II, Flint,	2007
	HERMAN MARABLE, Jr., Flint,	2007
	MICHAEL D. McARA, Flint,	2009
	NATHANIEL C. PERRY, III, Flint,	2009
	RAMONA M. ROBERTS, Flint,	2011
70-1.	TERRY L. CLARK, Saginaw,	2007
	M. RANDALL JURRENS, Saginaw,	2011
	M. T. THOMPSON, Jr., Saginaw,	2009
70-2.	CHRISTOPHER S. BOYD, Saginaw,	2011
	ALFRED T. FRANK, Saginaw,	2009
	KYLE HIGGS TARRANT, Saginaw,	2007
71A.	LAURA CHEGER BARNARD, Metamora,	2009
	JOHN T. CONNOLLY, Lapeer,	2007
71B.	KIM DAVID GLASPIE, Cass City,	2009
72.	RICHARD A. COOLEY, Jr., Port Huron,	2011
	DAVID C. NICHOLSON, Port Huron,	2007
	CYNTHIA SIEMEN PLATZER, Lakeport,	2009
73A.	JAMES A. MARCUS, Applegate,	2009
73B.	KARL E. KRAUS, Bad Axe,	2009
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2007
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	ROBERT L. DONOGHUE, Midland,	2007
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2007
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009

		Term Expires January 1 of
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE, Grosse Pointe,	2008
CARL F. JARBOE, Grosse Pointe Park,	2010
LYNNE A. PIERCE, Grosse Pointe Woods,	2008
MATTHEW R. RUMORA, Grosse Pointe Farms,	2010

PROBATE JUDGES

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

Grand Traverse	DAVID L. STOWE	2007
Gratiot	JACK T. ARNOLD	2007
Hillsdale	MICHAEL E. NYE	2007
Houghton	CHARLES R. GOODMAN	2007
Huron	DAVID L. CLABUESCH	2007
Ingham	R. GEORGE ECONOMY	2007
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2007
Iosco	JOHN D. HAMILTON	2007
Iron	C. JOSEPH SCHWEDLER	2007
Isabella	WILLIAM T. ERVIN	2007
Jackson	SUSAN E. VANDERCOOK	2007
Kalamazoo	CURTIS J. BELL, JR.	2007
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2007
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2007
Kent	JANET A. HAYNES	2009
Kent	G. PATRICK HILLARY	2007
Keweenaw	JAMES G. JAASKELAINEN	2007
Lake	MARK S. WICKENS	2007
Lapeer	JUSTUS C. SCOTT	2007
Leelanau	JOSEPH E. DEEGAN	2007
Lenawee	MARGARET MURRAY-SCHOLZ NOE	2007
Livingston	SUSAN L. RECK	2007
Luce/Mackinac	THOMAS B. NORTH	2007
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2007
Manistee	JOHN R. DeVRIES	2007
Marquette	MICHAEL J. ANDEREGG	2007
Mason	MARK D. RAVEN	2007
Mecosta/Osceola	LaVAIL E. HULL	2007
Menominee	WILLIAM A. HUPY	2007
Midland	DORENE S. ALLEN	2007
Missaukee	CHARLES R. PARSONS	2007
Monroe	JOHN A. HOHMAN, JR.	2007
Monroe	PAMELA A. MOSKWA	2009
Montcalm	EDWARD L. SKINNER	2007
Montmorency	JOHN E. FITZGERALD	2007

Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2007
Newaygo	GRAYDON W. DIMKOFF	2007
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2007
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	WALTER A. URICK	2007
Ogemaw	EUGENE I. TURKELSON	2007
Ontonagon	JOSEPH D. ZELEZNIK	2007
Oscoda	KATHRYN JOAN ROOT	2007
Otsego	MICHAEL K. COOPER	2007
Ottawa	MARK A. FEYEN	2007
Presque Isle	KENNETH A. RADZIBON	2007
Roscommon	DOUGLAS C. DOSSON	2007
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2007
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN R. MONAGHAN	2007
St. Joseph	THOMAS E. SHUMAKER	2007
Sanilac	R. TERRY MALTBY	2007
Shiawassee	JAMES R. CLATTERBAUGH	2007
Tuscola	W. WALLACE KENT, JR.	2007
Van Buren	FRANK D. WILLIS	2007
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	DARLENE A. O'BRIEN	2007
Wayne	JUNE E. BLACKWELL-HATCHER	2007
Wayne	FREDDIE G. BURTON, JR.	2007
Wayne	JUDY A. HARTSFIELD	2007
Wayne	JAMES E. LACEY	2007
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wexford	KENNETH L. TACOMA	2007

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

23 CASES; 64 OPINIONS; 433 ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL GRANTED OR DENIED

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

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TABLE OF SPECIAL ORDERS NOT RELATED TO SPECIFIC CASES

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

ADMINISTRATIVE ORDER
No. 2006-5

ADOPTION OF THE MICHIGAN CHILD SUPPORT FORMULA
AS JUVENILE COURT REIMBURSEMENT GUIDELINE

Entered May 30, 2006, effective July 1, 2006 (File No 2005-44.)—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 Court adopts the Michigan Child Support Formula Schedules Supplement from the Michigan Child Support Formula Manual to replace the July 30, 1990, Schedule of Payments in the Guideline for Court Ordered Reimbursement, effective July 1, 2006.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted May 30, 2006, effective July 1, 2006 (File No. 2005-44)—REPORTER.

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

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(E) [Unchanged.]

(F) Dispositional Orders

(1)-(4) [Unchanged.]

(5) Child Support. The court may include an order requiring one or both of the child's parents to pay child support. All child support orders entered under this subrule must comply with MCL 552.605 and MCR 3.211(D).

(G)-(H) [Unchanged.]

Staff Comment: The amendment provides that the court may enter a child support order at the dispositional hearing and that it must use the Michigan Child Support Formula as required by statute and the Uniform Support Order required by court rule in establishing the child support order.

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

Adopted June 15, 2006, effective immediately (File No. 2006-02)—REPORTER.

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

RULE 3.602. ARBITRATION.

(A)-(H) [Unchanged.]

(I) Award; Confirmation by Court. An arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

(J) Vacating Award.

(1) On application of a party, the court shall vacate an award if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;

(c) the arbitrator exceeded his or her powers; or

(d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(2) An application to vacate an award must be made within 21 days after delivery of a copy of the award to the applicant, except that if it is predicated on corruption, fraud, or other undue means, it must be made within 21 days after the grounds are known or should have been known.

(3) In vacating the award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement, or, if there is no such provision, by the court. If the award is vacated on grounds stated in subrule (J)(1)(c) or (d), the court may order a rehearing before the arbitrator who made the award. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(4) If the application to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award.

(K) Modification or Correction of Award.

(1) On application made within 21 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award if:

(a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;

(b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or

(c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If the application is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.

(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

(L) Judgment. The court shall render judgment giving effect to the award as corrected, confirmed, or modified.

The judgment has the same force and effect, and may be enforced in the same manner, as other judgments.

(M) Costs. The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action.

(N) Appeals. Appeals may be taken as from order or judgments in other civil actions.

Staff Comment: Subrules (I)-(N), which were deleted in error in the order dated February 23, 2006, are reinstated.

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

Adopted June 26, 2006, effective September 1, 2006 (File No. 2003-04)—REPORTER.

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

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(B) [Unchanged.]

(C) Form of Motion. The motion may not be noticed for hearing, and must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 50 pages double-spaced, exclusive of attachments and exhibits. If the court enters an order increasing the page limit for the motion, the same order shall indicate that the page limit for the prosecutor's response provided for in MCR 6.506(A) is increased by

the same amount. The motion must be substantially in the form approved by the State Court Administrative Office, and must include:

(1)-(15) [Unchanged.]

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, or evidence to support the relief requested.

(F)-(G) [Unchanged.]

RULE 6.503. FILING AND SERVICE OF MOTION.

(A) Filing; Copies.

(1) defendant seeking relief under this subchapter must file a motion and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced.

(2) Unchanged.]

(B) Service. The defendant shall serve a copy of the motion and notice of its filing on the prosecuting attorney. Unless so ordered by the court as provided in this subchapter, the filing and service of the motion does not require a response by the prosecutor.

RULE 6.504. ASSIGNMENT; PRELIMINARY CONSIDERATION BY JUDGE; SUMMARY DENIAL.

(A) Assignment to Judge. The motion shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction. If the appropriate judge is not available, the motion must be assigned to another judge in accordance with the court's procedure for the reassignment of cases. The chief judge may reassign cases in order to correct docket control problems arising from the requirements of this rule.

(B) Initial Consideration by Court.

(1) [Unchanged.]

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the prosecutor. The court may dismiss some requests for relief or grounds for relief while directing a response or further proceedings with respect to other specified grounds.

(3)-(4) [Unchanged.]

RULE 6.506. RESPONSE BY PROSECUTOR.

(A) Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. The trial court shall allow the prosecutor a minimum of 56 days to respond. If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response. Except as otherwise ordered by the court, the response shall not exceed 50 pages double-spaced, exclusive of attachments and exhibits.

(B) [Unchanged.]

RULE 6.509. APPEAL.

(A)-(B) [Unchanged.]

(C) Responsibility of the Prosecutor. If the prosecutor has not filed a response to the defendant's application for leave to appeal in the appellate court, the prosecutor must file an appellee's brief if the appellate court grants the defendant's application for leave to appeal. The prosecutor must file an appellee's brief within 56 days after an order directing a response pursuant to subrule (D).

(D) Responsibility of the Appellate Court. If the appellate court grants the defendant's application for leave to appeal and the prosecutor has not filed a response in the appellate court, the appellate court must direct the prosecutor to file an appellee's brief, and give the prosecutor the opportunity to file an appellee's brief pursuant to subrule (C), before granting further relief to the defendant.

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

The Court adopted the committee's recommendations with respect to the amendments of Rules 6.503 and 6.504.

With regard to Rules 6.502 and 6.506, the Court adopted a 50-page limitation rather than the 25-page limitation recommended by the committee. The Court did not adopt the committee's recommendation that the successive motion limitation of Rule 6.502(G) be eliminated; however, the Court did adopt remaining amendments of Rules 6.502 and 6.506 as recommended by the committee.

Instead of adopting the committee's recommendations regarding amendments of Rule 6.509, the Court adopted alternative language similar to language recommended by the Court of Appeals.

The Court did not adopt the committee's recommendation to amend Rules 6.501 and 6.508.

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

CORRIGAN, J. (*dissenting in part*). I respectfully dissent from the Court's rejection of the proposal of the Committee on the Rules of Criminal Procedure to amend our court rules to provide a 25-page limit for motions for relief from judgment and to institute a one-year time limit for filing them. I agree with the recommendation of the Committee on the Rules of Criminal Procedure to adopt (1) a page limit of 25 pages under MCR 6.502(C)[1] and MCR 6.506(A)[2] and (2) a time limit of one year under MCR 6.508(E)[3] for pursuing

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[1] As amended, MCR 6.502(C), in relevant part, would have provided:

> Form of Motion. The motion may not be noticed for hearing, and must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 25 pages double spaced, exclusive of attachments and exhibits. An expansion of the pages permitted shall apply also to any answer ordered by the court. . . .

[2] As amended, MCR 6.506(A) would have provided:

> Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. The trial court shall allow the prosecutor a minimum of 56 days to respond. If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response. Except as otherwise ordered by the court, the response shall not exceed 25 pages double spaced, exclusive of attachments and exhibits.

[3] As amended, MCR 6.508(E) would have provided:

Time Limitation. (1) If brought under subsection (D)(1), the motion must be filed within 1 year (a) after the fully retroactive change in the law is established when relief is sought under subsection (D)(1)(a); (b) after the judgment of conviction is final when relief is sought under subsection (D)(1)(b), unless the facts on which the claim

motions for relief from judgment. Our failure to value finality and impose page and time limits on cases on collateral review reminds me of Chief Justice Rehnquist's statement: "We believe the adoption of the *Francis* rule [requiring cause and prejudice] in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v Sykes*, 433 US 72, 90 (1977). Following rejection of the committee's recommendation, Michigan courts will continue to make trial the road-show tryout for the collateral hearings to follow.

I. PAGE LIMITS

Regarding the new 50-page limit of MCR 6.502(C) and its corollary in MCR 6.506(A), I respectfully dissent. Instead, I support the committee's recommendation of 25 pages. Circuit judges in Michigan have heavy trial dockets and little assistance on motions for collateral attack. They frequently operate without even responses to such petitions from prosecutors because those offices also operate with scarce resources. Generally, under civil practice rules, trial courts receive briefs limited to 20 pages. See MCR 2.119(A)(2). In contrast to the federal courts or to our state appellate courts, our

is predicated were unknown to the defendant and could not have been discovered earlier with due diligence, in which case the claim must be brought within 1 year of the discovery of these facts. (2) If brought under subsection (D)(2), the motion must be filed within 1 year (a) of the discovery of the new evidence, or the discovery of the significance of existing evidence, when relief is sought under subsection (D)(2)(a); (b) after the judgment of conviction is final when relief is sought under subsection (D)(2)(b).

trial courts lack a comparable support and research staff, so lengthy briefs on collateral review create a systemic burden.

Before filing a motion for relief from judgment, the petitioner has already exhausted his or her direct appeals. The appellate briefs have a limit of 50 pages. See MCR 7.212(B). The subsequent pursuit of collateral relief ought not require the same length of argument and so warrants a shorter page limit.

By imposing the same page limit that governs direct appeals, our Court suggests that collateral relief is nothing more than a second appeal. We do not require petitioners to narrow their focus on issues that reach the heightened standard of good cause and actual prejudice. In so doing, our Court repeats the error that misguides the efforts of many pro se petitioners. The new page limit will encourage a relitigation of issues. It invites litigants to ritual incantation of previously appealed issues.[4] By this rules decision, our Court also now directs scarce resources away from current criminal cases, in the form of ensuring a second full bite at the apple in matters where criminal defendants have already enjoyed the full and fair opportunity of a direct appeal.

II. TIME LIMIT

Regarding MCR 6.508(E),[5] I support a one-year time limit on filing motions for relief from judgment, as proposed by the committee. This time limit promotes consistency with the federal requirements for habeas

[4] As a means to avoid ceaseless relitigation of issues, I propose that we require that petitioners attach to motions for relief from judgment the statement of issues from the direct appeal, so courts can easily identify whether the petitioner previously raised an issue.

[5] See n 3 of this statement.

corpus relief under the provisions of the federal Anti-Terrorism and Effective Death Penalty Act. Under 28 USC 2244(d)(1), petitioners have one year to file for federal habeas corpus relief from a state sentence. Under 28 USC 2244(d)(2), pursuing state postconviction relief tolls that limitations period. Requiring petitioners to act within one year ensures that they will not inadvertently forfeit a claim to federal habeas corpus relief, because pursuing a state claim within one year tolls the federal limitations period. MCR 6.508(E), under the proposed amendment, would have encouraged timely pursuit of state court relief and would have prevented pro se petitioners from inadvertently losing the option to later pursue federal relief. Thus, adopting a one-year time limit here would coordinate state and federal postconviction relief and so promote the full availability of both remedies.

Additionally, incorporating a one-year time limit promotes our interest in finality.[6] "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey v United States*, 401 US 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part). Beyond requiring petitioners to eventually reconcile themselves to their sentences, the deterrent effect of criminal law owes much to the certainty of finality. See *Teague v Lane*, 489 US 288, 309 (1989) (Opinion by O'Connor, J.). Also, the failure to provide finality would permit the

[6] Although significant, this interest in finality need not foreclose postconviction relief sought on the basis of later discovered evidence. As proposed, the one-year time limit would only commence upon the discovery of new evidence or the discovery of the significance of existing evidence.

continued expenditure of limited judicial, prosecutorial, and defense resources on collateral proceedings, even as other defendants awaited initial proceedings. See *Mackey*, *supra* at 691. Further, the absence of any time limit increases the likelihood that prosecutors will bear the burden of responding to long-stale motions. Although claims of actual innocence could still proceed under the committee's approach, the attacks on the trial and appellate procedure, after a petitioner receives a full and fair opportunity to litigate, should end. Thus, the importance of finality in criminal proceedings further supports the adoption of a time limit for seeking postconviction relief.

For the foregoing reasons, I respectfully dissent. I would adopt a 25-page limit under MCR 6.502(C) and MCR 6.506(A) and a one-year time limit under MCR 6.508(E).

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

MARKMAN, J. (*dissenting in part*). I concur fully in Justice CORRIGAN's statement and write only to elaborate briefly on the issue of "reconciliation." Until a criminal offender finally "reconciles" himself to the wrongfulness of his conduct, I believe that there cannot be any reasonable hope for his personal rehabilitation. As long as there is yet another legal brief to be filed, and yet another lawbook to be scoured, I do not believe that this renewing process can truly begin.

Although an offender must always be allowed to introduce genuinely new evidence of actual innocence, absent such evidence, there must come some reasonable point at which the criminal appellate process is finalized. As the United States Supreme Court observed in *Kuhlmann v Wilson*, 477 US 436, 453 (1986), "finality serves the State's goal of rehabilitating those who commit crimes because '[r]ehabilitation demands that the convicted de-

fendant realize that "he is justly subject to sanction, that he stands in need of rehabilitation. " ' " (Opinion by Powell, J.; citations omitted.) Yet, as the result of innumerable judicial decisions in recent decades, this point of finality has increasingly been delayed. While there may be limits to what this Court on its own can do to repair this situation, the committee proposal reasonably points in the right direction.

Justice Harlan has written, "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the [offender] can be restored to a useful place in the community." *Sanders v United States*, 373 US 1, 24-25 (1963) (Harlan, J., dissenting). Similarly, Justice Powell has written, " At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with a view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." *Schneckloth v Bustamonte*, 412 US 218, 262 (1973) (Powell, J., concurring).

By imposing a shortened time frame for the filing of a motion for relief from judgment, while preserving existing exceptions from such a deadline, the committee's proposal would maintain fundamental protections for the criminal offender while ensuring that the reconciliation, and rehabilitation, processes begin earlier rather than later. The committee's proposal would reasonably hasten the point at which the criminal, rather than looking into yet another lawbook, would be

compelled to confront the wrong that he has committed by looking into his own soul.

CORRIGAN, J., concurred with MARKMAN, J.

KELLY, J. *(dissenting in part).* I oppose the addition of MCR 6.509(D). No need for this subrule has been demonstrated to us. Moreover, it could be viewed by prosecutors as an invitation to stop filing answers to appeals from orders denying a petition for relief from judgment. Because of this new subrule, prosecutors will know that the Court of Appeals will tell them when, if at all, it is necessary for them to respond to such an appeal. This renders the Court of Appeals a case screener for prosecutors, giving prosecutors a favored status as compared with other litigants in that Court. For example, if a prosecutor appeals from a grant of relief from judgment, a defendant must answer within 21 days. The rules make no provision for the defendant to have a second bite of the apple.

CAVANAGH, J., concurred with KELLY, J.

Adopted July 20, 2006, effective September 1, 2006 (File No. 2004-26)—REPORTER.

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

RULE 8.110. CHIEF JUDGE RULE.

(A) [Unchanged.]

(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.

(1) The Supreme Court shall select a judge of each trial court to serve as chief judge. No later than September 1 of each odd-numbered year, each trial court with two or more judges may submit the names of no

fewer than two judges whom the judges of that court recommend for selection as chief judge.

(2)-(4) [Unchanged.]

(C)-(D) [Unchanged.]

Staff Comment: The amendment of MCR 8.110(B)(1) changed the requirement that recommendations for chief judge be submitted no later than October 1 of each odd-numbered year to September 1.

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

AMENDMENTS OF LOCAL COURT RULES

THIRD JUDICIAL CIRCUIT

Approved June 27, 2006, effective September 1, 2006 (File No. 2005-23)—REPORTER.

RULE 3.920(B)(4). SIMULTANEOUS ATTEMPTS AT SERVICE IN JUVENILE PROCEEDINGS.

(b) Service of a summons on the persons listed in MCR 3.920(B)(2) shall be attempted simultaneously by:

(i) personal service in accord with MCR 3.920(B)(4)(a);

(ii) registered mail directed to the person's last known address; and

(iii) publication in accord with MCR 3.920(B)(4)(b).

Personal service, service by registered mail, and service by publication shall be made in accord with the time standards in MCR 3.920(B)(5). If the court finds on the record that reasonable attempts have been made to personally serve persons required to be served and that personal service is impracticable or has not been achieved, the court may then rely on the service by registered mail or publication.

Staff Comment: LCR 3.920(B)(4)(b) allows simultaneous service of process by personal service, registered mail, and publication. If a court finds personal service is impracticable or cannot be achieved, service by one of the other methods may be relied on.

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

SUPREME COURT CASES

PEOPLE v ROBINSON

Docket No. 126379. Argued October 20, 2005 (Calendar No. 8). Decided May 31, 2006.

Kevin M. Robinson was convicted following a bench trial in the Wayne Circuit Court, Daniel P. Ryan, J., of second-degree murder. The conviction was under an aiding and abetting theory. A codefendant, Samuel Pannell, was convicted by a jury of first-degree murder. The Court of Appeals, MURPHY, P.J., and COOPER and C. L. LEVIN, JJ., reversed the defendant's conviction of second-degree murder, reduced the charge on which the defendant was convicted to assault with intent to do great bodily harm less than murder, and remanded for resentencing. Unpublished opinion per curiam, issued April 29, 2004 (Docket No. 237036). The Court of Appeals held that the trial court improperly convicted the defendant of second-degree murder because there was no evidence that the defendant, who went to the victim's home intending to commit an aggravated assault of the victim, was aware of or shared the codefendant's intent to kill the victim. The Supreme Court granted the prosecution's application for leave to appeal. 472 Mich 898 (2005).

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

A defendant who intends to aid, abet, counsel, or procure the commission of a crime is liable for that crime was well as the natural and probable consequences of that crime. The defendant in this case committed and aided the commission of an aggravated assault. One of the natural and probable consequences of such a crime is death. The trial court properly convicted the defendant of second-degree murder. The Court of Appeals erred in holding that the defendant must have been aware of or shared the codefendant's intent to kill the victim in order to be convicted of second-degree murder as an aider and abettor. The judgment of the Court of Appeals must be reversed and the conviction of second-degree murder must be reinstated.

Reversed; conviction reinstated.

Justice CAVANAGH, dissenting, stated his agreement with the conclusion of the majority that a defendant who intends to aid,

abet, counsel, or procure the commission of a crime is liable for that crime, as well as the natural and probable consequences of that crime. However, the trial court's findings do not support the imposition of criminal liability for second-degree murder under an aiding and abetting theory. An evenhanded review of the trial court's findings does not support the conclusion that the victim's death was a natural and probable consequence of this beating because the shooting death was not foreseen or agreed to by the defendant. The trial court's findings that the victim did not die from injuries inflicted during the beating, that the defendant did not intend to kill, and that the defendant did not know that his codefendant would shoot and kill the victim do not support a finding that this death was the natural and probable consequence of this beating. It is also insufficient under MCL 767.39 to convict the defendant of second-degree murder because there is no connection in this case between the intent to cause great bodily harm and an act that effectuated that intent and caused the death. The judgment of the Court of Appeals should be affirmed.

Justice KELLY, dissenting, would affirm the Court of Appeals decision to reverse the defendant's second-degree murder conviction and remand for resentencing on a reduced charge. There was no evidence establishing that the defendant was aware of or shared his codefendant's intent to kill. An aider and abettor must have the same criminal intent as the principal. A defendant cannot be convicted of second-degree murder under the theory of aiding and abetting if the defendant did not intend the act that caused the death. The defendant intended only to beat the victim, and the beating was not the cause of death. The trial court's findings of fact support only a conviction of assault with intent to do great bodily harm less than murder. The victim's death was not within the common enterprise of the defendant and his codefendant. The majority posits an alternative theory of culpability that imposes criminal liability beyond the natural and probable consequences of a crime the commission of which a person aids and abets, thereby extending the reach of MCL 767.39 beyond the statutory language.

CRIMINAL LAW — AIDING AND ABETTING.

The three elements necessary for a conviction under an aiding and abetting theory are (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time

> the defendant gave aid and encouragement; a defendant is liable for the crime the defendant intends to aid or abet as well as for the natural and probable consequences of that crime; the prosecution must prove that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the commission of the charged offense, knew the principal intended to commit the charged offense or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense (MCL 767.39).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Larry L. Roberts*, Assistant Prosecuting Attorney, for the people.

Neil J. Leithauser for the defendant.

YOUNG, J. Defendant and a codefendant, Samuel Pannell, committed an aggravated assault, and Pannell shot and killed the victim, Bernard Thomas. After a bench trial, the trial court convicted defendant of second-degree murder under an aiding and abetting theory. The Court of Appeals reversed the trial court's judgment, because it concluded that there was insufficient evidence that defendant shared or was aware of Pannell's intent to kill.

We hold that under Michigan law, a defendant who intends to aid, abet, counsel, or procure the commission of *a* crime, is liable for that crime as well as the natural and probable consequences of that crime. In this case, defendant committed and aided the commission of an aggravated assault. One of the natural and probable consequences of such a crime is death. Therefore, the trial court properly convicted defendant of second-degree murder. We reverse the judgment of the Court of Appeals and reinstate defendant's conviction of second-degree murder.

FACTS AND PROCEDURAL HISTORY

According to the evidence adduced at trial, defendant and Pannell went to the house of the victim, Bernard Thomas, with the stated intent to "f*** him up." Under Pannell's direction, defendant drove himself and Pannell to the victim's house. Pannell knocked on the victim's door. When the victim opened the door, defendant struck him. As the victim fell to the ground, defendant struck the victim again. Pannell began to kick the victim. Defendant told Pannell that "that was enough," and walked back to the car. When defendant reached his car, he heard a single gunshot.[1]

Following a bench trial, the trial court found defendant guilty of second-degree murder "on the prong of great bodily harm only."[2] Specifically, the court found that defendant drove Pannell to the victim's house with the intent to physically attack the victim. The court also found that once at the victim's home, defendant initiated the attack on the victim, and that defendant's attack enabled Pannell to "get the upper-hand" on the victim. The court sentenced defendant to a term of 71 months to 15 years.

The Court of Appeals reversed defendant's murder conviction, holding that there was insufficient evidence to support defendant's second-degree murder conviction.[3] The Court held that the trial court improperly convicted defendant of second-degree murder because there was no evidence establishing that defendant was aware of or shared Pannell's intent to kill the victim.

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[1] The parties stipulated that the victim died from a gunshot wound. Defendant stated that he did not shoot the victim and that only he, Pannell, and the victim were at the victim's house.

[2] A jury convicted Pannell of first-degree murder.

[3] Unpublished opinion per curiam of the Court of Appeals, issued April 29, 2004 (Docket No. 237036).

This Court granted the prosecution's application for leave to appeal, directing the parties to address the elements of accomplice liability and the *mens rea* required to support a conviction of aiding and abetting second-degree murder.[4]

STANDARD OF REVIEW

The requirements of the aiding and abetting statute[5] are a question of law that this Court reviews de novo.[6] "[W]ords and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject."[7] In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.[8] Findings of fact by the trial court may not be set aside unless they are clearly erroneous.[9]

ANALYSIS

This case involves liability under our aiding and abetting statute, MCL 767.39, which provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commis-

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[4] 472 Mich 898 (2005).

[5] MCL 767.39.

[6] *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

[7] *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994).

[8] *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002).

[9] MCR 2.613(C).

> sion may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Unlike conspiracy[10] and felony murder,[11] which also allow the state to punish a person for the acts of another, aiding and abetting is not a separate substantive offense. Rather, "being an aider and abettor is simply a theory of prosecution"[12] that permits the imposition of vicarious liability for accomplices.

This Court recently described the three elements necessary for a conviction under an aiding and abetting theory:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement."[13]

The primary dispute in this case involves the third element. Under the Court of Appeals analysis, the third element would require the prosecutor to prove beyond a reasonable doubt that a defendant intended to commit the identical offense, here homicide, as the accomplice or, alternatively, that a defendant knew that the accomplice intended to commit the homicide. We reaffirm that evidence of defendant's specific intent to commit a crime or knowledge of the accomplice's intent constitutes sufficient *mens rea* to convict under our aiding

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[10] MCL 750.157a.

[11] MCL 750.316(1)(b).

[12] *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999).

[13] *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (change in *Moore*).

and abetting statute. However, as will be discussed later in this opinion, we disagree that evidence of a shared specific intent to commit the crime of an accomplice is the exclusive way to establish liability under our aiding and abetting statute.

AIDING AND ABETTING STATUTE

The theory that a defendant could be liable for another's criminal actions as an "aider and abettor" goes back to the common law. At common law, there were four categories of offenders to a felony:

> (1) principal in the first degree–he actually engaged in the felonious conduct; (2) principal in the second degree–he was present when the felony was committed and aid and abetted its commission; (3) accessory before the fact–he was not present when the felony was committed but aided and abetted prior to its commission; (4) accessory after the fact–he was not present when the felony was committed but rendered aid thereafter in order to protect the felon or to facilitate his escape.[14]

Principals in the second degree had to intend to commit the crime charged or else be aware of the intent of the principal in the first degree to commit that crime.[15] But accessories before the fact were "guilty of all incidental consequences which might reasonably be expected to result from the intended wrong."[16] Thus, at common law, one could be guilty of the natural and probable consequences of the intended crime or the intended crime itself, depending on whether the actor was a principal in the second degree or an "accessory before the fact." Michigan's aiding and abetting statute has been in force and substantively unchanged since the

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[14] Wharton's Criminal Law (15th ed), p 181.

[15] Perkins, Criminal Law (3d ed), pp 741-743.

[16] *Id.* at 745.

mid-1800s.[17] The 1855 statute, 1855 PA 77, § 19, which is nearly identical to the current statute, stated:

> The distinction between an accessory before the fact, and a principal, and between principals in the first and second degree in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offence, or aid and abet in its commission, though not present, may hereafter be indicted, tried and punished, as principals, as in the case of a misdemeanor.[18]

When a statute employs general common-law terms, courts will interpret the statute by looking to common-law definitions, absent clear legislative intent to change the common law.[19] As this Court has previously indicated, the aiding and abetting statute was a legislative abolition of the common-law distinctions between principals and accessories.[20] Beyond that, there has been little case law from this Court interpreting *the language* of this statute.[21] However, we note that there is no language in the statute that demonstrates a legislative

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[17] In 1927, the Legislature amended the language to its present form, which substitutes "procures, counsels, aids, or abets" for "aid and abet." This change did not affect the meaning of the statute because the common-law definition of "aid and abet" is to "[h]elp, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission." Black's Law Dictionary (5th ed), p 63. The Legislature merely added terms that were synonymous with the common-law definition of "aid and abet."

[18] See also 1857 CL 6065 (same); 1897 CL 11930 (same); 1915 CL 15757 (changing "c" to "s" in "offence"); 1927 PA 175, ch VII, § 39 (same as MCL 767.39); 1929 CL 17253 (same); 1948 CL 767.39 (same); and 1970 CL 767.39 (same).

[19] *People v Riddle*, 467 Mich 116, 125-126; 649 NW2d 30 (2002).

[20] *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1973).

[21] As will be discussed later in this opinion, there have been numerous cases discussing aiding and abetting liability, but none of those cases focused on the language of the statute.

intent to abrogate the common-law theory that a defendant can be held criminally liable as an accomplice if: (1) the defendant intends or is aware that the principal is going to commit a specific criminal act;[22] or (2) the criminal act committed by the principal is an "incidental consequence[] which might reasonably be expected to result from the intended wrong." [23]

Accordingly, we hold that when the Legislature abolished the distinction between principals and accessories, it intended for all offenders to be convicted of the intended offense, in this case aggravated assault, as well as the natural and probable consequences of that offense, in this case death. The case law that has developed since the Legislature codified these common-law principles provides examples of accomplice liability under both theories.

NATURAL AND PROBABLE CONSEQUENCES

Under the natural and probable consequences theory, "[t]here can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it."[24] In *Knapp*, the defendant and several other men engaged in sexual intercourse with

[22] Perkins, Criminal Law (3d ed), pp 741-743.

[23] *Id.* at 745. Justice KELLY misapprehends our holding as "improperly extend[ing] the reach of Michigan's aiding and abetting statute, MCL 767.39." *Post* at 20. When the Legislature first codified the aiding and abetting statute in 1855, it reflected an express intent to abrogate the common-law distinction between principals and accessories. However, in all other regards, the Legislature did *not* utilize language reflecting an intent to abrogate the common-law theories under which an accessory can be held criminally liable for the acts of a principal. One such theory of liability is predicated on the "natural and probable consequences" of a planned criminal act. Perkins, *supra*.

[24] *People v Knapp*, 26 Mich 112, 114 (1872).

the victim. After the defendant left, one of the men threw the woman from a second-story window. A jury convicted the defendant of manslaughter. This Court reasoned that because there was no evidence that the defendant threw the victim out the window, the jury must have held him accountable for the actions of the other men.

The *Knapp* Court reversed the defendant's conviction for manslaughter because there was no proof that the woman's death was a part of the "common enterprise" of prostitution because one would not expect it "to happen if the occasion should arise to do it."[25] Therefore, the defendant could not be held to be an accomplice to the manslaughter.

Similarly, in *People v Chapman*, this Court held that a defendant was " 'responsible criminally for what of wrong flows directly from his corrupt intentions . . . .' "[26] *Chapman* involved a defendant who paid another man $25 to commit adultery with the defendant's wife so the defendant could divorce her. The defendant watched through a hole in the wall as the other man raped his wife. This Court held that the jury properly convicted the defendant of rape under an accomplice theory of liability because that crime directly flowed from the original corrupt intention to aid adultery.[27]

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[25] *Id.* at 115. See also *People v Foley*, 59 Mich 553, 556; 26 NW 699 (1886) (Defendants, who brutally assaulted the victim, "should nevertheless not be convicted of robbery unless robbery was *within their common purpose*.") (emphasis added).

[26] 62 Mich 280, 286; 28 NW 896 (1886) (quoting 1 Bishop, Criminal Law, § 641).

[27] However, this Court ultimately overturned his conviction on other grounds because the preliminary examination testimony did not meet statutory requirements.

In view of the framework established by these early cases, the propriety of the trial court's verdict is clear. The victim's death is clearly within the common enterprise the defendant aided because a homicide "might be expected to happen if the occasion should arise" within the common enterprise of committing an aggravated assault. The evidence establishes that the victim threatened his children in Pannell's presence, enraging Pannell.[28] When defendant woke up at 10:00 that evening, Pannell was still "ranting and raving" in the house. Despite knowing that Pannell was in an agitated state, defendant agreed to drive to the victim's house with the understanding that he and Pannell would "f*** him up."[29] When the pair arrived at the victim's home, defendant initiated the assault by hitting the victim once in the face and once in the neck with the back of his hand. After the victim fell to the ground, Pannell punched him twice and began kicking him. In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder. Just as the planned seduction of the defendant's wife in *Chapman* escalated into a rape,[30] Pannell's anger toward the victim esca-

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[28] Prosecution witness Brandi Brewer, defendant's fiancé, testified that the victim "told his wife he was going to beat the kids ass, and do something to her . . . ."

[29] Justice KELLY argues that "[a]s a practical matter, f***ing up someone necessarily entails leaving them alive." *Post* at 26. However, literally in the next breath, she includes in the definition of "f***": " '[t]o break or destroy.' " *Id.* at 26 n 7, quoting <http://en.wiktionary.org/wiki/f***> (accessed April 19, 2006). We note that the word "destroy" is also defined as "2. to put an end to, extinguish; 3. *to kill; slay*." *Random House Webster's College Dictionary* (1997) (emphasis added). Thus, Justice KELLY's own definition belies her statement that the word cannot, in any context, be used to mean actions that are likely to result in a killing.

[30] Justice KELLY notes that *Chapman* defined an accomplice's liability as follows: " ' "If one person sets in motion the physical power of another

lated during the assault into a murderous rage. Defendant argues that he should not be held liable for the murder because he left the scene of the assault after telling Pannell, "That's enough." We disagree. Defendant was aware that Pannell was angry with the victim even before the assault. Defendant escalated the situation by driving Pannell to the victim's house, agreeing to join Pannell in assaulting the victim, and initiating the attack. He did nothing to protect Thomas and he did nothing to defuse the situation in which Thomas was ultimately killed by Pannell. A "natural and probable consequence" of leaving the enraged Pannell alone with the victim is that Pannell would ultimately murder the victim. That defendant serendipitously left the scene of the crime moments before Thomas's murder does not under these circumstances exonerate him from responsibility for the crime.

The fact that Pannell shot the victim, rather than beat him to death, does not alter this conclusion. It cannot be that a defendant can initiate an assault, leave an already infuriated principal alone with the victim, and then escape liability for the murder of that victim simply because the principal shot the victim to death,

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person, the former is criminally responsible for its results. If he contemplated the result, he is answerable, *though it is produced in a manner he did not contemplate*." ' " *Post* at 27, quoting *Chapman, supra* at 286 (citations omitted) (emphasis added).

Justice KELLY argues that because defendant never contemplated Pannell's shooting the victim, he cannot be held answerable under the law for that shooting. We disagree. Here, defendant set into motion the violent physical assault of the victim perpetrated by himself and Pannell. The evidence clearly demonstrates that defendant "contemplated" causing great bodily harm to the victim. One of the potential consequences of causing great bodily harm is that the ultimate result could be the death of the victim. That the death in this case was produced by Pannell's shooting of the victim rather than because of beating injuries sustained by the victim does not absolve defendant from his criminal responsibility.

instead of kicking the victim to death. Like the defendant in *Chapman*, whose accomplice used rape, as opposed to seduction, to accomplish their common criminal purpose, the defendant is criminally liable as long as the crime is within the natural and probable consequences of the intended assaultive crime.

INTENDED OFFENSES

The Court of Appeals panel in this case focused on cases that reflect the intended offenses theory, such as *People v Kelly*[31] to hold that an aider or abettor must have the identical criminal intent as the principal.[32] *Kelly* involved a murder that occurred during the course of an armed robbery. The jury convicted the defendant as either a principal or an aider and abettor of the felony murder. The *Kelly* Court affirmed his conviction. In analyzing the aiding and abetting charge, this Court cited *Meister v People*[33] for the proposition that "[t]he requisite intent is that necessary to be convicted of the crime as a principal."[34]

Under *Kelly*, a defendant is liable for the offense the defendant intended to commit or intended to aid and abet. However, the Court of Appeals panel in this case went further than *Kelly*, and required the accomplice to have the identical intent as the principal.[35] This narrow

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[31] 423 Mich 261; 378 NW2d 365 (1985).

[32] The Court of Appeals panel also relied on *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996), but in that case this Court merely quoted from *Kelly* without any additional analysis. Further, the discussion of *Kelly* was in response to the dissent in *Barrera*, not part of the substantive analysis of the opinion that dealt with MRE 804(b)(3).

[33] 31 Mich 99 (1875).

[34] *Kelly, supra* at 278.

[35] This Court has recently repudiated the notion that conviction under an aiding and abetting theory can require a higher level of intent than would be necessary to convict a principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

construction is not compelled by *Kelly*. *Kelly* addressed aiding and abetting felony murder. Under *People v Aaron*, to sustain a felony murder conviction, the prosecution must prove that each defendant had the necessary malice to be convicted of murder.[36] *Aaron* makes clear that one who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal. This principle extends to other crimes: sharing the same intent as the principal allows for accomplice liability. However, sharing the identical intent is not a *prerequisite* to the imposition of accomplice liability under the common-law principles discussed earlier.

The Court of Appeals misread *Kelly*. In accordance with the common-law principles incorporated in the statute, *Kelly* simply stands for the proposition that, at a minimum, the aider and abettor is liable for the crime he or she had the intent to commit. Even under the intended offense theory, the defendant's conviction must stand. The intent necessary for second-degree murder is the intent to kill, the *intent to inflict great bodily harm*, or the willful and wanton disregard for whether death will result.[37] In this case, the judge specifically found that defendant intended to inflict great bodily harm, which is sufficient to convict him of second-degree murder.

The two approaches outlined above are not in conflict. Instead, they merely represent two different tests for liability under an aiding and abetting theory.[38] Under these two tests, a defendant is liable for the

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[36] *People v Aaron*, 409 Mich 672, 731; 299 NW2d 304 (1980).

[37] *People v Langworthy*, 416 Mich 630, 650-651; 331 NW2d 171 (1982).

[38] We note that none of the older aiding and abetting cases, such as *Chapman*, has been overruled, and they remain sound law in Michigan.

crime the defendant intends to aid or abet[39] as well as the natural and probable consequences of that crime. In this case, the trial court found that defendant intended to inflict great bodily harm.[40] That intent is sufficient for a conviction of aggravated assault or second-degree murder. Alternatively, defendant is liable for the homicide because death is one of the natural and probable consequences of aggravated assault, the crime defendant committed and aided. Either analysis is sufficient to support defendant's conviction.

CONCLUSION

We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Under either prong of the aiding and abetting analysis, defendant was properly convicted. Because the

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[39] This includes both intending to commit the crime and aiding someone with knowledge that he or she intends to commit the crime.

[40] We fail to see how Justice KELLY can conclude that we concluded that defendant was aware of or shared Pannell's intent to kill. On the contrary, we have explicitly based our holding on the fact that defendant's intent to inflict great bodily harm is sufficient to maintain his conviction for the resulting death of the victim.

Court of Appeals erred in reversing defendant's conviction of second-degree murder, we reverse the judgment of the Court of Appeals and reinstate defendant's conviction.

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

CAVANAGH, J. (*dissenting*). I agree with the majority's conclusion that under Michigan law, a defendant who intends to aid, abet, counsel, or procure the commission of a crime is liable for *that* crime, as well as the natural and probable consequences of *that* crime. But the majority's sweeping application of this principle to the facts of this case prevents me from fully embracing this interpretation of MCL 767.39.[1] Specifically, I believe that today's decision sets a dangerous precedent for how MCL 767.39 will be applied in the future, and it stretches aider and abettor liability beyond any defensible bounds. Accordingly, I must respectfully dissent.

In a nutshell, the majority opines that defendant and his codefendant, Samuel Pannell, committed an aggravated assault. Next, the majority posits that "one of" the natural and probable consequences of an aggravated assault is death. Thus, the majority reasons that the trial court properly convicted defendant of second-degree murder, MCL 750.317, under an aiding and abetting theory, MCL 767.39. But, as Justice KELLY

[1] MCL 767.39 provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

notes in her dissent, such an approach completely ignores the trial court's findings of fact.

For example, the trial court specifically found that defendant only intended to beat up the victim. Further, the trial court found that the victim did not die from the beating; rather, the victim died from a gunshot wound after being shot by Pannell. Importantly, the trial court also found that defendant did not intend for or know that Pannell was going to shoot and kill the victim. Therefore, the trial court's findings do not support the imposition of criminal liability for second-degree murder under an aiding and abetting theory based on how MCL 767.39 has been traditionally interpreted. See, e.g., *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (" 'To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) *the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement*.' ") (emphasis added; citation omitted).

But even under the majority's interpretation of MCL 767.39, these same factual findings do not support a second-degree murder conviction. Here, an evenhanded review of the trial court's findings does not support the conclusion that this death was a natural and probable consequence of this beating because the shooting death was not foreseen and not agreed to. Accordingly, even if I were prepared to accept the majority's interpretation of MCL 767.39, the majority's application of its interpretation defies logic and well-established principles of our criminal law.

For example, the majority's rationale that defendant's second-degree murder conviction was proper because "one of" the natural and probable consequences of a beating is death is akin to saying that defendant's conviction was proper because, in general, a death might be the natural and probable consequence of some abstract beating. However, this rationale utterly destroys one of the most basic principles on which our criminal law is grounded: there can be no criminal liability without individual culpability. See, e.g., *People v Aaron*, 409 Mich 672, 708; 299 NW2d 304 (1980). Accordingly, it does not matter that in some hypothetical sense, a death could result from some beating. What should matter under the majority's interpretation of MCL 767.39 is whether *this* death was the natural and probable consequence of *this* beating. But in this particular case, the trial court answered this question in the negative. Again, it cannot fairly be said that this death was the natural and probable consequence of this beating where the trial court found that the victim did not die from injuries inflicted during the beating, defendant did not intend to kill, and defendant did not know Pannell would shoot and kill the victim. Thus, I disagree with the majority's rationale that because under some circumstances a death *may* result from a beating, defendant's conviction of second-degree murder was proper.

Alternatively, the majority opinion could be read as using the following rationale to reach its result: because a death is *always* the natural and probable consequence of a beating, defendant's conviction of second-degree murder was proper under an aiding and abetting theory. But this rationale likewise destroys the bedrock principle of criminal law that there can be no criminal liability without individual culpability. See *Aaron*, *supra* at 708. Moreover, this rationale is ludicrous because it

flies in the face of common experience and knowledge; a death does not *always* result from a beating.

In any event, regardless of whether the majority opinion can be fairly read to employ a "may be" or an "always" rationale, I cannot join today's decision. In my view, the majority's opinion is at odds with the way our law views criminal liability and disregards the trial court's factual findings that the death in this case was not the natural and probable consequence of the assistance defendant provided. In doing so, the majority's application of its interpretation of MCL 767.39 imprudently extends the scope of aider and abettor liability. Here, I believe that defendant's conduct was deplorable and criminal. And I agree with the majority that the facts of this case do not "absolve defendant from his criminal responsibility." *Ante* at 12 n 30. But on the basis of the trial court's actual findings of fact, which are not clearly erroneous, I simply disagree that defendant is criminally responsible for second-degree murder under an aiding and abetting theory.

Additionally, I disagree with the majority's alternative basis for reversing the Court of Appeals judgment and reinstating defendant's conviction of second-degree murder under an aiding and abetting theory merely because defendant was found to have possessed a general intent to cause great bodily harm. For reasons similar to those noted earlier in this opinion, it is insufficient under MCL 767.39 to convict defendant of second-degree murder because "[*o*]*ne of* the potential consequences of causing great bodily harm is that the ultimate result *could be* the death of the victim." *Ante* at 12 n 30 (emphasis added). Moreover, even though defendant was found to have possessed an intent to cause great bodily harm, the trial court's factual findings do not support defendant's conviction of second-degree murder.

Granted, the malice requirement for second-degree murder is satisfied where the defendant has the intent to cause great bodily harm. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). But, in light of the trial court's other findings of fact, causation has not been established in this case because the injuries inflicted with the intent to cause great bodily harm were not the cause of death. In other words, it is largely irrelevant that the trial court may have found that defendant generally had the intent to cause great bodily harm and that defendant's actions allowed Pannell to ultimately get the upper hand because the trial court also found that the assault with intent to cause great bodily harm did not result in injuries that caused death. As such, the trial court's latter finding fails to make the necessary criminal connection between the intent to cause great bodily harm and an act that effectuated that intent *and* caused the death. Again, I believe that defendant's conduct was deplorable and criminal. But the trial court's findings of fact are not clearly erroneous and, thus, require that defendant's second-degree murder conviction under an aiding and abetting theory be reversed. Thus, I disagree with the majority's alternative basis for reversing the Court of Appeals judgment as well.

In sum, because this death was not the natural and probable consequence of this beating and defendant's intent and actions did not criminally cause this death, defendant cannot be convicted of second-degree murder under an aiding and abetting theory. Therefore, I would affirm the judgment of the Court of Appeals.

KELLY, J. (*dissenting*). With this decision, the majority improperly extends the reach of Michigan's aiding and abetting statute, MCL 767.39. It will now include a rationale for finding criminal liability without the requisite element of intent.

I agree with the Court of Appeals decision in this case. A defendant cannot be convicted of second-degree murder under an aiding and abetting theory where the defendant did not intend the act that causes the death. In this case, defendant Robinson intended only to beat the victim, and the beating was not the cause of death. In order to convict Robinson of aiding and abetting murder, the majority must append language to the statute.

It currently states:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39.]

The majority effectively adds to it the phrase "as well as the natural and probable consequences of any such crime." Reading language into a statute to reach a result not intended by the Legislature is an abuse of this Court's power.

PROPER STANDARD FOR REVIEW OF FACTS

I concur in the majority opinion's "Facts and Procedural History" except to the extent that it picks and chooses among the trial court's findings of fact relating to evidence of defendant's intent. There was no evidence establishing that Robinson was aware of or shared codefendant Pannell's intent to kill. Instead, the trial court's findings support only a conviction of assault with intent to do great bodily harm less than murder. MCL 750.84.

In fact, the trial judge's findings actually preclude Robinson's conviction of second-degree murder. One of

the judge's most pertinent determinations was that Robinson did not share or know of Pannell's intent to kill. In its 18-page opinion, the Court of Appeals thoroughly reviewed the judge's factual findings and correctly held that Robinson had been improperly convicted of second-degree murder. It observed:

> The judge's factual findings that
>
> • Robinson "agreed" and "understood" he was "only there to beat up" the victim, and
>
> • the shooting "was beyond the scope of what [Robinson] had intended to have happen; and
>
> • Robinson intended to inflict great bodily harm only,
>
> require that his conviction of second-degree murder, as an aider and abettor, be reversed.
>
> * * *
>
> The judge did not recognize that since the death of the victim did not result from injuries inflicted during the physical assault committed by Robinson with the intent to inflict great bodily harm only, Robinson could not be found guilty of second-degree murder because the victim of the physical assault [as the judge put it] "happened to die." Robinson could properly he [sic] convicted of second-degree murder as an aider and abettor only if he provided aid to Pannell in killing the victim with the intent to so aid Pannell in killing the victim, sharing or aware of Pannell's intent to kill. [*People v Robinson*, unpublished opinion per curiam of the Court of Appeals, issued April 29, 2004 (Docket No. 237036), slip op at 8, 14 (emphasis in original).]

This Court, like the Court of Appeals, should defer to the trial court's findings of fact, setting them aside only if they are clearly erroneous.

As the Court of Appeals observed, "Another finder of fact, a jury or another judge, might have assessed Robinson's credibility and the other evidence differ-

ently [finding sufficient evidence to support a conviction of second-degree murder]." *Id*., slip op at 4. But this judge did not. The trial court's factual determinations simply do not include the necessary element of shared or known intent to support a second-degree murder conviction using an aiding and abetting theory.

Facts are indeed "stubborn things,"[1] and we are not the finders of fact here. Like the Court of Appeals, we normally apply the law only to the facts as found by the trial court. The rule is that those findings may not be set aside unless they are clearly erroneous. MCR 2.613(C). Thus, this Court's review of the factual record is limited. But the majority in this case is not following the rule.

"NATURAL AND PROBABLE CONSEQUENCES" CANNOT SUBSTITUTE FOR REQUISITE INTENT UNDER AN AIDING AND ABETTING THEORY OF PROSECUTION

As the majority correctly points out, aiding and abetting is not a separate substantive offense. It is simply a theory of prosecution that permits imposing vicarious liability on accomplices if they share or have knowledge of the principal's intent.[2]

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[1] "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, "Argument in Defense of the Soldiers in the Boston Massacre Trials," December 1770, quoted at The Quotations Page, <http://www.quotationspage.com/quote/3235.html> (accessed April 19, 2006).

[2] See *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), in which this Court abrogated the common-law felony-murder doctrine. That doctrine had allowed the element of malice required for murder to be satisfied by the intent to commit the underlying felony. The Court held "that in order to convict a defendant of murder, . . . it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to

The majority asserts that "evidence of a shared specific intent to commit the crime of an accomplice is [not] the exclusive way to establish liability under our aiding and abetting statute." *Ante* at 7. The majority argues an alternative theory of culpability that extends criminal liability beyond the "natural and probable consequences" of the crime a person aids or abets. *Ante* at 9. As Justice CAVANAGH notes in his dissent, what matters here, even under the majority's rationale, "is whether *this* death was the natural and probable consequence of *this* beating." *Ante* at 18 (emphasis in original). Instead, the majority would have the death by gunshot flow naturally from the beating, contrary to the trial judge's specific finding that Robinson intended to inflict great bodily harm alone.[3]

The defendant in *People v Knapp*[4] was granted a new trial because the victim's death was not "part of the 'common enterprise' of prostitution because one would not expect it 'to happen if the occasion should arise to [throw the victim out a window].' "[5] *Ante* at 10, quoting *Knapp*, *supra* at 115. However, the "common enterprise" was a core issue in *Knapp*. In fact, the prosecuted "common enterprise" in *Knapp* was rape and murder, not prostitution.

> The evidence for the prosecution tends to show that the deceased was, before the accident, in the upper story of a building belonging to defendant, and used as a paint shop, in Howell, in company with him and several other young

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cause death or great bodily harm." The Court further held "that the issue of malice must always be submitted to the jury." *Id.* at 733.

[3] I can find no authority for the proposition that a defendant can be held liable for all the potential or hypothetical results of an intended act. See the Court of Appeals example on page 28 of my opinion.

[4] 26 Mich 112 (1872).

[5] In *Knapp*, the victim fell or was thrown from an upper-story window. She broke her leg and died as a result of that injury.

> men, and that *they had sexual intercourse with her; and this was claimed by the prosecution to have been forcible, and against her will, and that she had been forcibly taken there for that purpose*. [*Id*. at 113 (emphasis added).]

The defense claimed that there was no common purpose or offense at all. Rather, the death "was either accidental, or caused by some act in which [the defendant] had no part." *Id*. at 114.

> The conviction of manslaughter could only have been under certain portions of the [trial court's] charge, permitting the jury to find it in case the injury was caused in an attempt of the various persons assembled in the paint shop to avoid arrest. [*Id*.]

The jury was able to find the defendant guilty of manslaughter because the court's charge allowed it to find that he, along with the others, was " 'engaged in an act against public morals, and unlawful.' " *Id*. at 115. And, that " 'in order to avoid arrest or exposure, [they] threw her out of the window . . . .' " *Id*.

On appeal, this Court did not approve of the trial court's charge to the jury:

> *The effect of these rulings was practically to hold that parties who have combined in a wrong purpose must be presumed*, not only to combine in some way in escaping arrest, but also *to be so far bound to each other as to be responsible severally for every act done by any of them* during the escape.
>
> *It is impossible to maintain such a doctrine*. It is undoubtedly possible for parties to combine in order to make an escape effectual, but no such agreement can lawfully be inferred from a combination to do the original wrong. *There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for anyone to do it.* [*Id.* (emphasis added).]

In the case at hand, the trial court found that the common enterprise was to beat the victim. There was no common enterprise to kill the victim. Robinson went along "only to beat up" the victim. *Robinson, supra,* slip op at 8, 11, and 13. In Robinson's words, "it was understood between us that we were going to f*** him up." As a practical matter, f***ing up someone necessarily entails leaving them alive. In the context of this case,[6] it most likely means to "put [the victim] in an extremely difficult or impossible situation."[7] Offensive as the word is, it is not used to mean "to kill." We have many other slang words that mean "to kill," such as "bump off," "ice," "knock off," "waste," "rub out," and "whack." Applying the trial judge's factual findings, it is clear that Robinson agreed to harm the victim, not to kill him.

The majority cites *People v Chapman*,[8] in which this Court held that a defendant is " 'responsible criminally for what of wrong flows directly from his corrupt intentions . . . .' " See *ante* at 10. The more complete citation contained in *Chapman* is:

> "Every man is responsible criminally for what of wrong flows directly from his corrupt intentions; *but no man*

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[6] In its footnote 29, the majority mistakenly cites me as stating that the word cannot, "in any context, be used to mean actions that are likely to result in a killing." *Ante* at 11. In fact, I am discussing the word "in the context of this case."

[7] Apart from its first two definitions as an obscene or extremely vulgar verb for sexual intercourse, the word "f***" also means "3. . . . To put in an extremely difficult or impossible situation. . . . 4. . . . To break or destroy. . . . 5. . . . To defraud. . . . 6. . . . To play with, to tinker. <http://en.wiktionary.org/wiki/f***> (accessed April 19, 2006). And "2. to treat unfairly or harshly," *Random House Webster's College Dictionary* (2001), or "2. damage or ruin," *Oxford Color Dictionary* (2d ed). When used synonymously with "destroy" and "damage," the reference normally is to a physical object, not to a person.

[8] 62 Mich 280, 286; 28 NW 896 (1886) (citation omitted).

> *intending wrong is responsible for an independent act of wrong committed by another.* If one person sets in motion the physical power of another person, the former is criminally guilty for its results. *If he contemplated the result, he is answerable,* though it is produced in a manner he did not contemplate." [*Chapman*, *supra* at 286, quoting 1 Bishop, Criminal Law (7th ed) (emphasis added).]

In this case, the trial court specifically found that Robinson did not intend or contemplate the result, Pannell's fatal shooting of the victim. Because Robinson did not share Pannell's intent to kill, he cannot be held answerable under the law for the fact that Pannell fatally shot the victim. The common enterprise was a beating. The fact that Pannell shot the victim, rather than beat him to death, is dispositive.

The framework established by *Knapp* and *Chapman* continues to be sound law. It simply does not support the majority's conclusion that the victim's death in this case is "clearly within the common enterprise the defendant aided because a homicide 'might be expected to happen if the occasion should arise' within the common enterprise of committing an aggravated assault." *Ante* at 11.

The victim's death here was not within Robinson and Pannell's common enterprise; a homicide by gun is not a natural and probable consequence of an intended assault and battery. The majority is mistaken in concluding otherwise. It errs by determining that the unintended result of an intentional act was a "natural and probable consequence" for which a defendant may be held criminally liable.[9]

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[9] The majority states, "In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder." *Ante* at 11. In this case, the majority believes that "[a] 'natural and probable consequence' of leaving

As the Court of Appeals explained in the following example, a defendant must share or have knowledge of the principal's criminal intent.

> Suppose two persons are walking to the bank, and one asks the other to carry his briefcase. And, after they arrive at the bank, the owner of the briefcase opens it and holds up the bank. His friend no doubt provided aid and assistance in holding up the bank, by accompanying the thief and carrying the briefcase, but is not subject to liability as an aider and abettor unless he provided the assistance with the intention of so assisting the owner of the briefcase in holding up the bank, while either sharing or aware of his criminal intent. [*Robinson, supra*, slip op at 12-13.]

An aider and abettor must have the same criminal intent as the principal. The majority incorrectly faults the Court of Appeals discussion of *People v Kelly*[10] on this point.[11] The Court of Appeals reliance on *Kelly* is not misplaced. The *Kelly* Court wrote:

> In *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980), this Court held that
>
> "malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. We further hold

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the enraged Pannell alone with the victim is that Pannell would ultimately murder the victim." *Ante* at 12.

[10] 423 Mich 261; 378 NW2d 365 (1985).

[11] Justice LEVIN concurred in the result reached in *Kelly* on the aiding and abetting issue because no objection to the instruction of the trial court was raised. However, he dissented with regard to the felony-murder issue. The judge incorrectly instructed the jury, over objection by the defense, that it might infer from the defendant's participation in the robbery that he had the requisite intent to murder.

Retired Justice LEVIN sat on the Court of Appeals panel in *Robinson*, this case.

> that malice is an essential element of any murder . . . whether the murder occurs in the course of a felony or otherwise."
>
> We therefore decided that the malice necessary for a felony-murder conviction could not be inferred *merely* from the intent to commit the underlying felony. However, we went on to state:
>
> > "The facts and circumstances involved in the perpetration of a felony *may* evidence an intent to kill, an intent to cause great bodily harm, or a wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm; however, the conclusion must be left to the jury to infer from all the evidence. [Emphasis added. *Id*., pp 728-729.]" [*Kelly, supra* at 272-273.]

The finder of fact here concluded that defendant did not have the requisite intent to kill the victim. Absent proof of the requisite intent, defendant's conviction of second-degree murder must be reversed.

CONCLUSION

I agree with and completely support the Court of Appeals opinion in this matter. I would affirm the panel's decision to reverse Robinson's conviction of second-degree murder. I would reduce the charge of which Robinson was convicted to assault with intent to do great bodily harm less than murder and remand for resentencing on that reduced charge.

JOLIET v PITONIAK

Docket No. 127175. Decided May 31, 2006. On application by the defendants for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave, reversed the judgment of the Court of Appeals and remanded the case to the circuit court for entry of an order granting the defendants' motion for summary disposition. Rehearing denied 475 Mich 1236.

Virginia Joliet brought an action in the Wayne Circuit Court against Gregory E. Pitoniak, the mayor of the city of Taylor; and Frank Bacha, who was the former executive director of the city's Department of Public Works. The plaintiff alleged quid pro quo sex discrimination, hostile work environment sex discrimination, age discrimination, breach of contract, and misrepresentation. The defendants moved for summary disposition, asserting that the plaintiff's claims were barred by the three-year period of limitations in MCL 600.5805(9). The court, Louis F. Simmons, Jr., J., denied the defendants' motion, concluding that the plaintiff had three years from the last day she worked to file suit and that her complaint was timely filed within that period. The defendants appealed by leave granted, and the Court of Appeals, NEFF, P.J., and SMOLENSKI, J. (ZAHRA, J., concurring), affirmed in an unpublished opinion per curiam, issued August 31, 2004 (Docket No. 247590). The defendants sought leave to appeal in the Supreme Court, which ordered oral argument on the application. 472 Mich 908 (2004).

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

Following the decision in *Magee v DaimlerChrysler Corp*, 472 Mich 108 (2005), a claim of discrimination accrues when the adverse discriminatory acts occur. Thus, if a plaintiff's complaint does not make out a claim of discriminatory discharge, a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination. *Jacobson v Parda Fed Credit Union*, 457 Mich 318 (1998), which held that allegations of constructive discharge could operate to extend the applicable period of limitations, is overruled.

In this case, the plaintiff's claims accrued on the date that the alleged discriminatory acts or misrepresentations occurred, regardless of when damage resulted. The relevant date for the three-year period of limitations under MCL 600.5805(9), now MCL 600.5805(10), is the date of the last discriminatory incident or misrepresentation, not the plaintiff's last day of work. The plaintiff did not claim discriminatory termination, so the necessary examination is whether the discriminatory conduct occurred within the three years that preceded the filing of the complaint. All the discriminatory acts or misrepresentations alleged took place more than three years before the plaintiff filed her complaint. The plaintiff's complaint was not timely filed.

Reversed and remanded for entry of an order granting summary disposition for the defendants.

Justice KELLY, dissenting, stated that while the lower courts erred in relying on *Collins v Comerica Bank*, 469 Mich 628 (2003), their reliance on *Jacobson v Parda Fed Credit Union*, 457 Mich 318 (1998), was not misplaced. Because *Magee v DaimlerChrysler Corp*, 472 Mich 108 (2005), was wrongly decided, the majority should not overrule *Jacobson*. Leave to appeal should be denied in this case, and the decision in *Jacobson* should be affirmed.

Justice CAVANAGH would deny leave to appeal.

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — ACCRUAL OF CLAIMS.

A claim of unlawful discrimination against a former employer, which claim does not involve an allegation of discriminatory discharge, accrues for the purposes of the three-year period of limitations on the date the alleged discriminatory act occurred, not on the plaintiff employee's last day of work (MCL 600.5805[9], now [10]; MCL 600.5827).

E. Philip Adamaszek for the plaintiff.

Secrest Wardle (by *Janet Callahan Barnes*) and *Johnson, Rosati, LaBarge, Aseltyne & Field, P.C.* (by *Edward D. Plato*), for the defendants.

WEAVER, J. The issue before us is whether plaintiff's claims for violations of the Civil Rights Act (CRA),[1] breach of contract, and misrepresentation accrue on the

[1] MCL 37.2101 *et seq*.

dates that the alleged discriminatory acts or misrepresentations occur or on the plaintiff's last day of work. Following our decision in *Magee v DaimlerChrysler Corp,* 472 Mich 108; 693 NW2d 166 (2005), we hold that a claim of discrimination accrues when the adverse *discriminatory acts* occur. Thus, if a plaintiff's complaint does not make out a claim of *discriminatory discharge*, a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination. Because *Jacobson v Parda Fed Credit Union*, 457 Mich 318; 577 NW2d 881 (1998), held that allegations of constructive discharge could operate to extend the applicable period of limitations for discriminatory acts falling outside the period of limitations, and is inconsistent with *Magee, supra,* it is overruled.

Here, plaintiff does not assert a claim of discriminatory discharge. All the discriminatory acts or misrepresentations alleged in plaintiff's complaint took place before November 30, 1998. Therefore, plaintiff's November 30, 2001, complaint was not timely filed under the applicable three-year statute of limitations, MCL 600.5805.[2] Accordingly, we hold that the trial court and the Court of Appeals erred in denying defendants' motion for summary disposition. We reverse and remand to the Wayne Circuit Court for entry of an order of summary disposition in defendants' favor.

FACTS

Plaintiff worked for the city of Taylor as a data processing manager. Plaintiff testified by deposition

[2] The language formerly found in MCL 600.5805(9) is now set forth in MCL 600.5805(10).

that beginning in 1997, she was subjected to continual sexist remarks and derogatory treatment because of her age by defendant Frank Bacha, the former executive director of the Department of Public Works in the city of Taylor.

On August 31, 1998, the city hired a much younger man, Randy Wittner, as the new director of information systems. Plaintiff testified that many of her prior job duties were shifted to Wittner, and that she suffered a $15,000 reduction in income because she no longer received overtime pay.[3]

In late September 1998, Bacha went on leave, and then formally left his position on October 8, 1998. Bacha was apparently the subject of sexual harassment complaints from other women, and it was arranged for him to leave his job with the city of Taylor. After Bacha went on leave, plaintiff never saw him again.

Plaintiff testified that she became uncertain about her status at work in the fall of 1998. She attempted to meet with defendant Gregory Pitoniak, mayor of the city of Taylor, about her concerns, but he avoided meeting with her. Plaintiff repeatedly requested an "at will termination" by the city, which would have allowed her to receive 30 weeks' severance pay, but she testified that Pitoniak refused to discuss her requests.

Plaintiff went on vacation on November 24, 1998. While on vacation she decided that she could no longer work for the city. Plaintiff sent in her resignation on November 30, 1998, to be effective December 1, 1998. In her letter of resignation, plaintiff again requested that she be given severance pay.

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[3] Plaintiff's January 17, 2003, affidavit.

On November 30, 2001, plaintiff filed a complaint against Pitoniak and Bacha.[4] Plaintiff claimed quid pro quo sex discrimination, hostile work environment sex discrimination, age discrimination, breach of contract, and misrepresentation.

Defendants filed a motion for summary disposition under MCR 2.116(C)(7), asserting that plaintiff's suit was barred by the three-year period of limitations in MCL 600.5805(9). At the February 21, 2003, hearing on the motion for summary disposition, plaintiff conceded that all her claims, including her claims for breach of contract and misrepresentation, were governed by the three-year period of limitations in MCL 600.5805(9).

The trial court denied defendants' motion for summary disposition, concluding that plaintiff had three years from the last day that she worked, which was sometime between November 30, 1998, and December 3, 1998, to file suit. The Court of Appeals affirmed the order denying defendants' motion for summary disposition, finding that plaintiff's last day of work was November 30, 1998.[5]

Defendants then filed an application for leave to appeal in this Court. We ordered oral argument on the application, instructing the parties to address the following questions:

> The parties shall submit supplemental briefs . . . addressing: (1) what actions, if any, were taken by the two defendants after October 8, 1998, that contributed to a

[4] Plaintiff's complaint also named James Arango as a defendant. Arango was an outside contractor who did work for the city of Taylor's Department of Public Works. Arango was apparently never served with the complaint and has not filed an appearance or responsive pleadings in this matter. The claim against Arango is not before the Court.

[5] Unpublished opinion per curiam of the Court of Appeals, issued August 31, 2004 (Docket No. 247590).

discriminatory hostile work environment, so as to support a December 1, 1998, date of injury; (2) whether a December 1, 1998, accrual date for injury to plaintiff is sustainable for defendant Frank Bacha, where he left his employment with the city of Taylor on October 8, 1998; and (3) the impact, if any, of this Court's decision in *Magee v DaimlerChrysler Corp,* 472 Mich 108 (2005).[6]

STANDARD OF REVIEW

This Court reviews de novo rulings on summary disposition motions, viewing the evidence in the light most favorable to the nonmoving party.[7] In the absence of disputed facts, whether a cause of action is barred by the applicable statute of limitations is a question of law, which this Court reviews de novo.[8]

ANALYSIS

All of plaintiff's claims against the defendants are subject to the three-year period of limitations in MCL 600.5805(9).[9] The questions presented are on what

[6] 472 Mich 908 (2005).

[7] *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004), and *DiFranco v Pickard*, 427 Mich 32, 38; 398 NW2d 896 (1986).

[8] *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993).

[9] Plaintiff does not have a contract with either of the defendants; her contract was with the city of Taylor, which is not a party in the suit. These alleged contract claims are discrimination claims recast as contract claims. At the February 21, 2003, hearing on the motion for summary disposition, plaintiff conceded that all her claims, including her claim for breach of contract and misrepresentation, were governed by the three-year statute of limitations in MCL 600.5805(9). *Stringer v Sparrow Hosp Bd of Trustees*, 62 Mich App 696, 702; 233 NW2d 698 (1975), and *Glowacki v Motor Wheel Corp*, 67 Mich App 448, 460; 241 NW2d 240 (1976). Given plaintiff's concession, for purposes of our analysis of when plaintiff's claims accrued under the applicable statute of limitations, how such contract claims are characterized is irrelevant.

dates did plaintiff's claims accrue, and when did the period of limitations begin to run.

The statute of limitations at issue, MCL 600.5805, provides that plaintiff's claims must be brought within three years of the date the claims accrued:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (9) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Furthermore, accrual under the three-year statute of limitations is measured by "the time the wrong upon which the claim is based *was done* regardless of the time when damage results."[10]

Thus, plaintiff's claims are barred by the statute of limitations unless they were brought within three years of the date the claims accrued, which is the date of the alleged wrongdoing.

The trial court and the Court of Appeals both relied on *Jacobson, supra*, and *Collins v Comerica Bank,* 468 Mich 628; 664 NW2d 713 (2003), to hold that the period of limitations began to run on plaintiff's last day of work. Both courts found that plaintiff's last day of work was not before November 30, 1998, and thus plaintiff's suit was timely filed within the three-year period of limitations.

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[10] MCL 600.5827 (emphasis added).

The lower courts' reliance on *Collins* was erroneous. First, as we noted in *Magee*, *supra, Collins* involved a claim of *discriminatory* discharge motivated by race and gender animus, not a constructive discharge based on earlier discriminatory acts, as is the claim here.[11] In *Collins,* after the plaintiff's employment was terminated by her employer, the plaintiff brought a claim of discriminatory discharge under the Civil Rights Act, MCL 37.2101 *et seq*. There, this Court recognized that "a claim for discriminatory discharge cannot arise *until* a claimant has been discharged."[12]

But here plaintiff does not assert a claim of discriminatory discharge. Rather, plaintiff's Civil Rights Act claims and her breach of contract and misrepresentation claim are based on alleged discriminatory conduct that occurred before she resigned her position. Thus, unlike the situation in *Collins,* the adverse employment action alleged in this case did not coincide with the date of the termination of plaintiff's employment. *Collins* is inapposite.

This Court recently recognized in *Magee, supra,* the distinction between a constructive and a discriminatory discharge. When the plaintiff does not make a claim of discriminatory termination, the court must examine whether the discriminatory *conduct* occurred within the three years that preceded the filing of the complaint. In *Magee*, the plaintiff went on medical leave on September 12, 1998, and resigned on February 2, 1999. She never returned to work from her medical leave. On February 1, 2002, the plaintiff filed a civil rights claim against the defendant, alleging an assortment of age, sex, and hostile work environment claims. The trial court granted the defendant's motion for summary

[11] *Magee*, *supra* at 112.

[12] *Collins*, *supra* at 633 (emphasis added).

disposition on the ground that the statute of limitations barred the plaintiff's claims, because the plaintiff alleged no discriminatory activity after September 12, 1998. The Court of Appeals reversed the trial court by relying on *Collins*. It held that the plaintiff's suit was timely because she filed suit within three years of her resignation.

This Court reversed the Court of Appeals and distinguished *Collins* on the basis that the plaintiff in *Magee* did not allege a discriminatory discharge. Since she was not discriminatorily discharged by the defendant, and she could not allege any acts of discrimination within three years of her lawsuit, the plaintiff's claims were barred by the statute of limitations. We find the holding of *Magee* particularly instructive in this case, since both cases center on claims of constructive discharge where the alleged discriminatory acts preceded the date of resignation.

In addition to its misplaced reliance on *Collins*, the Court of Appeals in this case also relied on *Jacobson, supra*, to hold that plaintiff's claims accrued on her last day of work. In *Jacobson,* this Court considered whether the 90-day statute of limitations contained in the Whistleblowers' Protection Act (WPA)[13] barred the plaintiff's wrongful discharge claim.[14] The plaintiff, an executive vice president and chief operating officer of

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[13] MCL 15.363(1) ("A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.").

[14] MCL 15.362 ("An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law . . . .").

the defendant Parda Federal Credit Union, argued that she had been constructively discharged, in violation of the WPA, after she notified the FBI that her employer may have filed a fraudulent bond claim with its insurer.[15] The plaintiff alleged that her relationship with the Parda board of directors thereafter deteriorated, that the board passed her over for a promotion to be chief executive officer, and that her job duties were significantly reduced. In response to what the plaintiff perceived to be an intolerable work environment, the plaintiff composed and mailed a resignation letter on Saturday, October 21, 1989, and cleaned out her desk on the following Monday. She later filed suit on January 19, 1990, exactly 90 days after writing and mailing the letter.

After the plaintiff received a favorable jury verdict, the trial court granted the defendant a directed verdict because the plaintiff failed to allege a violation of the WPA that occurred within the period of limitations. The Court of Appeals reversed, and this Court affirmed.

The majority held that the constructive discharge, although not itself a cause of action,[16] was a violation of the WPA as a retaliatory act of discharge, since "a discharge occurs when a reasonable person in the employee's place would feel compelled to resign."[17] Although the plaintiff's voluntarily resignation was compelled by discriminatory acts that had occurred more than 90 days *before* filing her lawsuit, the majority found that her WPA claim was timely filed.

Justice TAYLOR, joined by Justices WEAVER and BRICKLEY, dissented. The dissent distinguished be-

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[15] *Jacobson*, *supra* at 321-322.

[16] *Id*. at 321 n 9, citing *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481; 516 NW2d 102 (1994).

[17] *Jacobson*, *supra* at 328.

tween a violation of the WPA and its lingering effects. According to the dissent, it is the adverse employment action that motivates an employee ultimately to resign that triggers the statute of limitations, not the date of the resignation.[18] As the WPA limitations period runs on the " 'occurrence of the alleged *violation* of this act,' "[19] the dissent noted that the plaintiff's resignation was a *response* to an alleged WPA violation, not an alleged violation itself. The dissent criticized the majority for focusing intently on the date of resignation, particularly when the events in *Jacobson* that "cause[d] the employee to feel compelled to resign"[20] would have been time barred by the 90-day statute of limitations.

We note that, absent *Magee*, which the Court of Appeals in this case did not have the opportunity to consider, *Jacobson* would compel this Court to affirm the Court of Appeals, because plaintiff filed suit within three years of the date of her resignation. However, our decision in *Jacobson* is inconsistent with the statute of limitations accrual analysis we ultimately applied in *Magee*. Because *Jacobson's* analysis is contrary to the one adopted in *Magee*, we are obligated to resolve this conflict and decide which decision best reflects the Legislative intent expressed in the words of the statute of limitations.

Magee is more faithful in construing the plain language of the statute of limitations under the CRA than *Jacobson* was in construing the WPA statute of limitations. *Magee* recognized that the basic question to answer when analyzing the accrual date of a claim under the CRA is when did the "injury" or "wrong" take place. This is the most straightforward reading of

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[18] *Id*. at 337 (TAYLOR, J., dissenting).

[19] *Id*.

[20] *Id*.

the statute of limitations, which speaks only in terms of the "injury" and "the time [of] the wrong." Here, pursuant to the text of MCL 600.5827, plaintiff's claims accrued at the time the wrongs on which her claims are based were committed, not when she suffered damage. Thus, the relevant date for the period of limitations is not plaintiff's last day of work, but the date of the last discriminatory incident or misrepresentation.

We agree with the *Jacobson* majority that a constructive discharge is not a cause of action, but simply the culmination of alleged wrongful actions that would cause a reasonable person to quit employment. Constructive discharge is a *defense* that a plaintiff interposes to preclude the defendant from claiming that the plaintiff voluntarily left employment. *Jacobson*, *supra* at 321 n 9. The resignation itself does not constitute a separate cause of action. *Id.*

However, notwithstanding the conclusion that a constructive discharge is not a cause of action, *Jacobson* erroneously treated an *employee's* resignation as a violation of the WPA. Where the resignation is not itself an unlawful act perpetrated by the employer, it simply is not a "violation" of the WPA under the plain language of MCL 15.362, which prohibits discharge, threats, or other discrimination by the *employer*. We agree with the *Jacobson* dissent that in the context of a constructive discharge it is the *employer's* wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the *employee's* response. Accordingly, we overrule the accrual analysis of *Jacobson* because it is inconsistent with our opinion in *Magee* and with the plain language of the statute of limitations under the WPA and the CRA.[21]

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[21] The dissent labels our overruling of Jacobson "gratuitous" and "unnecessary" because *Jacobson* involved claims brought under the

Having distinguished *Collins*, reaffirmed *Magee,* and overruled *Jacobson*, we next examine the discriminatory conduct and misrepresentations alleged against each individual defendant to see whether the alleged conduct occurred on or after November 30, 1998, within the three years preceding the filing of plaintiff's complaint.

A. AGE AND SEXUAL DISCRIMINATION

1. DEFENDANT FRANK BACHA

Plaintiff recorded incidents by Bacha that she believed were discriminatory in her daily planner. The incidents that plaintiff recorded occurred between August 1997 and September 1998. Plaintiff testified in her deposition that she never saw Bacha after he ceased working for the city in September 1998:

> *Q*. . . . Was there any type of harassment by Mr. Bacha that you're aware of after he went on leave in September of 1998?
>
> *A*. No, I never saw him again.[22]

Even viewing the evidence in the light most favorable to plaintiff, on the basis of plaintiff's deposition testi-

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WPA, not the CRA. *Post* at 46. However, the dissent's basis for distinguishing *Jacobson* evades the plain fact that the Court of Appeals relied on *Jacobson* to reach its decision in this case. Therefore, the soundness of *Jacobson's* accrual analysis, which conflicts with our recent decision in *Magee*, must be confronted and resolved by this Court. Given the choice, the dissent would prefer to overrule *Magee* and reaffirm *Jacobson*, but it posits no analytical reason why it would resolve the conflict in favor of the latter and why, under the plain language of the CRA's statute of limitations, the plaintiff's claim could accrue when the plaintiff felt compelled to resign rather than the date when the defendant employer actually injured the plaintiff through an adverse employment action. We believe that such a result is inconsistent with the language of the applicable statute of limitations.

[22] Deposition of Virginia Joliet, August 21, 2002, p 61.

mony it is clear that Bacha engaged in no discriminatory conduct within the limitations period.

The trial court and Court of Appeals erred in denying the motion for summary disposition with regard to Bacha.

2. DEFENDANT GREGORY PITONIAK

Although in her deposition plaintiff testified that there was no specific incident of discrimination by Pitoniak between November 24, 1998, and November 30, 1998,[23] plaintiff claims on appeal that two discriminatory acts by Pitoniak occurred within the three years that preceded the filing of the complaint.

First, plaintiff claims that she received disparate pay until she resigned. Specifically, plaintiff alleges that her income was decreased by approximately $15,000 because she no longer received overtime pay after the city hired Wittner as the new director of information systems. Wittner was hired on August 31, 1998.

[23] In her September 3, 2002, deposition, plaintiff testified as follows:

Q. Was there any incident of discrimination that occurred between November 24th and the date you resigned on November 30th?

A. I had no contact with City officials, but I maintained that their actions were cumulative.

Q. Okay. I—

A. But no specific—No.

Q. There was no specific incident of discrimination from November 24th till November 30th; is that correct?

A. Let me just make sure I didn't get—don't have a record of a phone call.

There was no specific act of discrimination during that time period.

The hiring of the younger man was the alleged discriminatory act; the resulting loss of overtime pay was an ongoing damage that resulted from that discriminatory act, not a discriminatory act in itself. If an act is not in and of itself discriminatory, i.e., it has a discriminatory effect only because of a prior discriminatory act, it cannot sustain a cause of action. *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505, 530; 398 NW2d 368 (1986) (citing *United Air Lines, Inc v Evans,* 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 [1977]), overruled on other grounds by *Garg v Macomb Co Community Mental Health Services,* 472 Mich 263; 696 NW2d 646 (2005).

Plaintiff's claim based on the hiring of Wittner accrued when the alleged discriminatory act took place, when Wittner was hired on August 31, 1998, even though the damages from that discriminatory act continued during the limitations period. MCL 600.5827.

Second, plaintiff made a request for severance pay in her resignation letter of November 30, 1998. Plaintiff alleges that this final request for severance pay, and Pitoniak's failure to respond to her request, was a discriminatory act that fell within the three-year period. But the failure to grant plaintiff's request for severance pay was not a discriminatory act. Plaintiff was not entitled to severance pay upon her resignation, though she would have been entitled to it had she been terminated by the city without cause.

Because plaintiff alleged no discriminatory acts by Pitoniak that occurred on or after November 30, 1998, her complaint against him was not timely filed.

B. BREACH OF CONTRACT AND MISREPRESENTATION

In count IV of her complaint, plaintiff alleged that defendants made various misrepresentations to her:

that her working conditions "would not be affected by her acceptance of any sexual harassment or discrimination on the basis of her age or sex," that her job was not being advertised or open for a replacement, and that she was to perform her duties in the best interests of the city of Taylor. All these allegations of misrepresentation stem from incidents that occurred before November 30, 1998. Because the claims did not accrue within the three years preceding the filing of the complaint, plaintiff's complaint was not timely filed.

CONCLUSION

Plaintiff's claims accrued on the dates that the alleged discriminatory acts or misrepresentations occurred. All the discriminatory acts or misrepresentations alleged in plaintiff's complaint took place before November 30, 1998. Thus, her November 30, 2001, complaint was not timely filed. The trial court and Court of Appeals erred in denying defendants' motion for summary disposition based on the three-year period of limitations, MCL 600.5805(9), by relying on *Collins, supra*.

We reverse the Court of Appeals judgment affirming the trial court's denial of defendants' motion for summary disposition, and remand to the Wayne Circuit Court for entry of an order granting defendants' motion for summary disposition.

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

KELLY, J. (*dissenting*). I respectfully disagree with the majority in this case. While the Court of Appeals and the trial court did err in relying on *Collins v Comerica*

Bank,[1] their reliance on *Jacobson v Parda Fed Credit Union*[2] was not misplaced. And, because I continue to believe that *Magee v DaimlerChrysler Corp*[3] was wrongly decided, I disagree with the majority's decision to overrule *Jacobson*.

The *Collins* decision is inapposite to this case. The Court there held that a cause of action for discriminatory termination cannot arise until the employee is actually discharged. Virginia Joliet does not assert a claim of discriminatory discharge. Neither did the plaintiff in *Magee*.

Magee presented unique circumstances. There, the plaintiff's three medical leaves were directly related to the continual sexual harassment she experienced at work. The plaintiff did not return to the harassing work environment after her last medical leave because the defendant had taken no steps during her leave to stop the harassment. *Magee* should be limited to its unique facts.

Jacobson did involve allegations of constructive discharge. It raised claims under the Whistleblowers' Protection Act (WPA),[4] not the Civil Rights Act (CRA).[5] The majority's decision to overrule *Jacobson* in favor of *Magee* is gratuitous and unnecessary in the context of this case. Here, plaintiff's claims are brought under the CRA, not the WPA.

The WPA's limitations provision was at issue in *Jacobson*. The provision requires that a civil action be brought "within 90 days after the occurrence of the

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[1] 468 Mich 628; 664 NW2d 713 (2003).

[2] 457 Mich 318; 577 NW2d 881 (1998).

[3] 472 Mich 108; 693 NW2d 166 (2005).

[4] MCL 15.361 *et seq*.

[5] MCL 37.2101 *et seq*.

alleged violation of this act." MCL 15.363(1). The *Jacobson* Court held that the limitations period began to run on the date of the plaintiff's constructive discharge. The dissent in *Jacobson*, now in the majority in this case, argued that the plaintiff did not file her complaint within 90 days of her employer's retaliatory acts.

Insofar as *Jacobson* is inconsistent with the majority's statute of limitations analysis in *Magee*, it is *Magee* that is wrongly decided. I would resolve the conflict in favor of *Jacobson*. *Jacobson* addressed the question of when a constructive discharge occurs in the context of the WPA, and cited as instructive *Champion v Nation Wide Security, Inc,* 450 Mich 702; 545 NW2d 596 (1996). In *Champion*, this Court addressed the question of constructive discharge in the context of a CRA claim, noting that constructive discharge occurs when employer conduct " 'is so severe that a reasonable person in the employee's place would feel compelled to resign.' " *Jacobson, supra* at 326, quoting *Champion, supra* at 710. The date that constructive discharge occurs is not dependent on the timing of the employer's actions. It is the point at which a reasonable employee would have felt compelled to resign.

I agree with the majority that plaintiff's claims against defendant Frank Bacha fail. Bacha engaged in no discriminatory conduct within the three-year limitations period, having left in September 1998. However, I disagree with the majority's conclusion that defendant Gregory E. Pitoniak did not engage in specific acts of discriminatory conduct during the three years that preceded the filing of plaintiff's complaint.

According to plaintiff, "the Mayor [Pitoniak] kept promising and promising and promising to meet with

me, and he would not meet with me." Plaintiff's September 3, 2002, deposition transcript, p 93.

> I was even under a desk one day fixing Gail's computer. Gail was one of the Mayor's two executive secretaries at the time. The Mayor walked in, told Gail that he didn't have much to do and he was going to relax this afternoon. I finished fixing the computer and stood up, and he's, oh, he says, I didn't know you were there. I've got a meeting to go to. Bye. And out he went.
>
> * * *
>
> *Q.* Okay. So your complaint is that after Mr. Bacha left the employment of the City that thereafter the way you contend the Mayor discriminated against you was by failing to meet with you?
>
> *A.* [Yes.] And by not addressing the situation. [*Id.*, pp 93-94.]

Even if I agreed with the majority that the date of the adverse discriminatory act begins the running of the limitations period, I would still find plaintiff's complaint timely filed. I believe that defendant Pitoniak's act of shunning plaintiff constituted a specific incident of discriminatory conduct that occurred on every day leading up to and including plaintiff's last day of work, November 30, 1998. Thus, plaintiff's November 30, 2001, complaint was timely filed.

I would deny leave to appeal and affirm *Jacobson*.

CAVANAGH, J., would deny leave to appeal.

PEOPLE v YAMAT

Docket No. 128724. Decided May 31, 2006. On application by the prosecution for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. Following oral argument, the Supreme Court entered an opinion per curiam reversing the judgment of the Court of Appeals and remanding the matter for trial.

Macario G. Yamat, Jr., was charged in the 61st District Court with felonious driving, MCL 257.626c, because, while a passenger in a motor vehicle, he grabbed and turned the steering wheel without the driver's permission, resulting in the vehicle's leaving the road and striking a jogger. The court, Janine LaVille, J., dismissed the charge on the basis that the defendant's conduct did not violate the statute. The Kent Circuit Court, Dennis B. Leiber, J., affirmed on the basis that the defendant did not have complete control of the movement of the vehicle. The Court of Appeals, MURRAY, P.J., and MARKEY and O'CONNELL, JJ., affirmed in an opinion per curiam on the basis that the defendant was merely interfering with the driver's operation of the vehicle and was not operating the vehicle himself. 265 Mich App 555 (2005). The Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action. 474 Mich 859 (2005).

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

The statute requires only "actual physical control," not exclusive control, of the vehicle. The prosecution showed probable cause to believe that the defendant was in actual physical control at the time of the accident. The judgment of the Court of Appeals must be reversed and the matter must be remanded for trial.

1. The Michigan Vehicle Code's definition of "operate" requires the exercise of "actual physical control" over a vehicle. MCL 257.35a. The common definitions of "actual," "physical," and "control" do not comport with the Court of Appeals determination that the statute requires exclusive control.

2. The defendant's act of grabbing the steering wheel and thereby causing the car to veer clearly constituted actual physical control of a motor vehicle.

Justice WEAVER, concurring, agreed with the result and reasoning of the majority opinion, except that she disagreed with the majority's criticisms of the Court of Appeals decision in *Farm Bureau Gen Ins Co v Riddering*, 172 Mich App 696 (1988). Contrary to the majority's contention, the *Riddering* panel did conclude that the contract terms at issue were susceptible to different interpretations; thus, the panel properly construed the contract against the drafter under the principle of *contra proferentem*.

Reversed and remanded for trial.

Justice CAVANAGH, dissenting, would grant leave to appeal and decide this case after full briefing and oral argument by the parties rather than peremptorily reversing the judgment of the Court of Appeals.

Justice KELLY, dissenting, would affirm. The Court of Appeals determined that defendant did not operate the vehicle when he grabbed the steering wheel. Instead, he interfered with the driver's control of the automobile. The majority uses the term "control" interchangeably with "influence," and thus fails to apply the language chosen by the Legislature. The majority's interpretation of the statute creates an ambiguity concerning what level of influence over a vehicle is sufficient to meet the definition of "operate" where none existed before. The majority holds the defendant criminally responsible for conduct that he could not reasonably have understood to be proscribed, thus violating the constitutional right of fair notice. Contrary to the majority's contention, exclusive control is not required for a person to operate a vehicle. For instance, two or more persons may cooperate with each other to operate a vehicle. There was no such cooperation here, however, and the defendant's action came as a surprise to the driver. Therefore, his actions constituted interference with control of the vehicle rather than operation of the vehicle.

CRIMINAL LAW — FELONIOUS DRIVING — OPERATING A VEHICLE.

Operating a vehicle, for purposes of the statute governing felonious driving, requires only actual physical control of the vehicle, not exclusive control of the vehicle (MCL 257.35a, 257.36, 257.626c).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *William A. Forsyth*, Prosecuting At-

torney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *T. Lynn Hopkins*, Assistant Prosecuting Attorney, for the people.

Jolene J. Weiner-Vatter for the defendant.

PER CURIAM. This case concerns the appropriate interpretation of the definition of "operate" in the Michigan Vehicle Code.[1] The Court of Appeals panel below interpreted the statute to essentially require *exclusive* control of a motor vehicle, and upheld the circuit court's affirmance of the district court's decision to quash the felonious driving charge against defendant. We hold that the plain language of the statute requires only "actual physical control," not exclusive control of a vehicle. Because the prosecutor has shown probable cause that defendant was in actual physical control of the vehicle at the time of the incident, we reverse the judgment of the Court of Appeals and remand for trial.

FACTS AND PROCEDURAL HISTORY

For purposes of the preliminary examination, the parties stipulated to the following facts: Defendant was a passenger in the vehicle his girlfriend was driving. As she drove, the couple argued. During the argument, defendant grabbed the steering wheel and turned it. When the defendant wrenched the steering wheel, the vehicle veered off the road, struck a jogger and caused the jogger severe injuries.

The prosecutor charged defendant with one count of felonious driving.[2] However, the district court refused to bind defendant over for trial after the preliminary examination because it concluded that the prosecution

[1] MCL 257.1 *et seq*.

[2] MCL 257.626c.

had not established that the statute proscribed defendant's conduct. The circuit court affirmed the district court's decision because defendant did not have *complete control* of the vehicle's movement. The Court of Appeals affirmed in a published opinion per curiam,[3] holding that defendant was merely interfering with his girlfriend's operation of the vehicle, but was not operating the vehicle himself. The prosecutor sought leave to appeal, and this Court scheduled and heard oral arguments on whether to grant the application.[4] In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand for trial.[5]

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation *de novo*.[6] In order to bind a defendant over for trial, the prosecutor must establish probable cause, which requires a quantum of evidence " 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' " of the accused's guilt on each element of the crime charged.[7] A district court's decision declining to bind a defendant over is reviewed for an abuse of discretion.[8]

ANALYSIS

The felonious driving provision of the Michigan Vehicle Code provides:

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[3] *People v Yamat*, 265 Mich App 555; 697 NW2d 157 (2005).

[4] 474 Mich 859 (2005).

[5] MCR 7.302(G)(1).

[6] *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002).

[7] *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

[8] *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998).

> A person who operates a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property resulting in a serious impairment of a body function of a person, but does not cause death, is guilty of felonious driving punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.[9]

The issue in this case is whether defendant was "operating" the vehicle within the meaning of the statute. To ascertain the meaning of a statutory term, this Court construes the term reasonably, according to its plain and ordinary meaning.[10] The Michigan Vehicle Code specifically defines "operate" as "being in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur."[11] Similarly, the code defines "operator" as "every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway."[12] The Court of Appeals accurately quoted the relevant statutory definitions and utilized a dictionary definition in order to ascertain the common meaning of "control." The panel held that "control" "means 'power or authority to guide or manage.' "[13] We agree that this is an appropriate definition of the statutory term "control." However, the panel did not correctly apply the common

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[9] MCL 257.626c.

[10] *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002); MCL 8.3a.

[11] MCL 257.35a.

[12] MCL 257.36. See also MCL 257.13, which provides, " 'Driver' means every person who drives or is in actual physical control of a vehicle."

[13] *Yamat* at 557, quoting *Webster's New Collegiate Dictionary* (1980).

meaning of the statutory terms to the facts in this case. Instead, the panel concluded that "[a]lthough defendant's act caused the vehicle to veer off the road, defendant did not have the actual physical control of the vehicle, i.e., the power or authority to guide or manage the vehicle."[14] On the contrary, we hold that causing the vehicle to change direction and "veer off the road" squarely meets the statutory requirement of actual physical control, which is understood to mean the "power . . . to guide" the vehicle.[15]

Compounding its erroneous application of the common understanding of the statutory terms at issue, the Court of Appeals panel looked beyond the appropriate defined meaning of "operate" to examine how that term had been interpreted in a case involving an insurance contract. The Court of Appeals panel cited *Farm Bureau Gen Ins Co v Riddering*[16] to buttress its conclusion that "actual physical control" of a vehicle requires control over "all functions necessary to make the vehicle operate."[17] In *Riddering*, a woman grabbed the steering wheel of the car in which she was riding, causing the car to collide with a tree. The other passengers in the car sustained severe injuries and filed an action against her. The woman's homeowner's insurance provider refused to defend the lawsuit because the policy specifically excluded coverage for liability arising

[14] *Yamat* at 557.

[15] While "control" is the critical component of the statutory definition, the definition also includes the words "actual," which means "existing in act, fact, or reality; real," *Random House Webster's College Dictionary* (1997), p 14, and "physical," which means "of or pertaining to that which is material," *Id*. at 983. These definitions lend further support to the conclusion that defendant's act of grabbing the steering wheel and wrenching it conform to the statutory definition of "operate."

[16] 172 Mich App 696; 432 NW2d 404 (1988).

[17] *Yamat* at 558.

out of the "operation" of a vehicle. The *Riddering* panel held that the insurer must provide coverage, reasoning that "[o]peration includes *control over all the parts* that allow the vehicle to move, not just the steering function."[18] Therefore, the panel concluded that the woman was not "operating" the vehicle for purposes of the insurance policy.

The Court of Appeals panel below found *Riddering* "analogous" and held that a "passenger who grabbed and turned the steering wheel without permission was *interfering* with the operation of the vehicle, not operating it."[19] The Court of Appeals panel erred in relying on *Riddering* because *Riddering* is entirely inapposite for a number of reasons.[20] First, basic principles of statutory construction require that courts construe statutory terms according to their plain or common meanings.[21] As noted, the Michigan Vehicle Code defines "operate" as "actual physical control." Because the insurance policy did not use that definition, the *Riddering* panel never discussed the plain or common meaning of "actual physical control." As such, the *Riddering* panel's interpretation of the undefined word "operate" in the insurance contract is not pertinent to an interpretation of the *statutorily defined* term "operate."

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[18] *Riddering* at 703 (emphasis added).

[19] *Yamat* at 558, citing *Riddering* at 703.

[20] Unlike the dissent, we are hard-pressed to hold "that the law laid down in *Riddering* would affect this defendant's understanding of what constitutes a crime under the circumstances of this case." *Post* at 67. Surely, it is one of the stranger ideas the dissent has offered to suggest that, in the heat of an argument with his girlfriend, defendant wrenched the steering wheel of a moving vehicle in "reliance" on a Court of Appeals decision construing an insurance contract that he was not "operating" the vehicle within the meaning of the Michigan Vehicle Code.

[21] MCL 8.3a; *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Second, the *Riddering* panel arrived at its conclusion that the contract term "operate" meant "complete control" of the vehicle because, misapplying the *contra proferentem* principle for contract interpretation,[22] they construed the term "narrowly" and against the insurance company. The *Riddering* panel erred in resorting to this principle without first concluding that the term "operate" in the contract was ambiguous.[23] Regardless of the proper application of specific rules of construction applicable to contracts, when construing statutes, our obligation is to construe the statutory term reasonably, according to its plain and ordinary meaning.[24]

Where, as here, the statutory terms are not ambiguous and are susceptible to a plain reading, in construing the statutory term "operate," there is no principled basis for resorting to an inapposite insurance case as an aid to construction as suggested by the panel below and the dissent. The definition of "operate" contained in the Michigan Vehicle Code requires the exercise of "actual physical control" over a motor vehicle.[25] Unlike the Court of Appeals, we cannot conclude that the statute effectively requires exclusive control "of all the functions necessary to make the vehicle operate," because

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[22] The *contra proferentem* principle is "[u]sed in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language." Black's Law Dictionary (5th ed), p 296.

[23] *Id*.

[24] *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004).

[25] Remarkably, the dissent accuses the majority of ignoring the statutory definition of "operate," yet the dissent approves of the Court of Appeals reliance on extraneous case law that construes the term "operate" in an insurance contract without reference to the statutory definition of "operate."

such a construction does not comport with the plain language of the statutory definition.[26]

As applied to the facts of this case, defendant's act of grabbing the steering wheel and thereby causing the car to veer off the road clearly constitutes "actual physical control of a motor vehicle."[27] Utilizing the proper statu-

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[26] The dissent claims that we misconstrue the Court of Appeals decision by suggesting that it required "exclusive control" as a predicate for "operating" the vehicle. While the panel did not use the word "exclusive," that is surely the import of its reliance on *Riddering's* test that required "control over all the parts that allow the vehicle to move, not just the steering function." *Riddering* at 703. This is amplified by the panel's own holding that "[d]efendant could not have stopped or started the vehicle, nor could he have caused it to increase or decrease in speed. Defendant could not use any of the vehicle's other instruments; therefore he was not in actual physical control of the vehicle." *Yamat* at 557.

The dissent would also require "exclusive control" because Justice KELLY finds persuasive the fact that the defendant had no "control" over even ancillary devices such as the turn signal and windshield wipers to demonstrate why his actions did not satisfy the Michigan Vehicle Code. Justice KELLY asserts that she does not advocate "exclusive control" because "[i]f two or more individuals agree to work the components of a vehicle together, then each is an operator." *Post* at 70. While the dissent's "cooperative operation" theory does not meet a strict definition of "exclusive," it still requires a concerted effort to control all of the vehicle's instruments. In fact, applying the dissent's construction, because neither the driver nor the defendant had complete control over all of the car's devices, nor agreed to work together, no one was operating this vehicle at the time it struck the jogger. Justice KELLY claims that the majority has incorrectly applied her analysis because defendant's girlfriend remained in "control" despite defendant's "interference." It is difficult to square the dissent's claim that the girlfriend was in control, despite not having control over the steering wheel, with the dissent's argument that defendant did not have control because he could not control the vehicle's ancillary devices. Clearly, defendant exercised the "power to guide" the vehicle, which is the plain meaning of control that the Court of Appeals cited and we adopt. It is the dissent that refuses to give "control" its natural meaning by requiring exclusive or complete control.

[27] Under the dissent's construction of this phrase, when defendant grabbed the steering wheel and turned it, causing the vehicle to veer off

tory definition of "operate," the prosecutor has clearly established sufficient probable cause that defendant violated MCL 257.626c. Because the district court applied an erroneous definition of the term "operate," it abused its discretion by refusing to bind defendant over for trial at the preliminary examination. We therefore reverse the judgment of the Court of Appeals and remand this case for trial.

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

WEAVER, J. (*concurring*). I concur in the result and reasoning of the majority opinion with one exception. I disagree with one of the majority's criticisms in dicta of a Court of Appeals decision, *Farm Bureau Gen Ins Co v Riddering*.[1]

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the road and strike a jogger on the side of the road, he was merely "hindering" his girlfriend's control over the vehicle because "he could not have activated the headlights or turn signals." *Post* at 63. Contrary to the dissent's arguments, the person who controls the steering wheel does " 'exercise restraint or direction over; dominate, regulate, or command' " a vehicle. *Post* at 60 (citation omitted). Specifically, the person who controls the steering wheel, like defendant, can command the vehicle to go in any direction he or she chooses. Arguing and causing a distraction to the driver is "hindering;" seizing the steering wheel when a car is in motion and causing the vehicle to change direction is an exercise of actual physical control.

It simply strains credulity for the dissent to suggest that because the defendant did not have control of every ancillary device, such as the windshield wipers, defendant's act of physically wrenching the steering wheel of the car was not an act of actual physical control. The dissent's analysis is not advanced by suggesting that one who turns the steering wheel of a parked vehicle cannot exercise control. *Post* at 65. Here, defendant grabbed the wheel of a *moving* vehicle and, in so doing, caused it to change direction. Defendant's action was one of "control" in every sense of the word unless, as does the dissent, one requires that there be *complete* or *exclusive* control.

[1] 172 Mich App 696; 432 NW2d 404 (1988).

I disagree with the majority's statement that *Riddering* "erred in resorting to [the principle of *contra proferentem*] without first concluding that the term 'operate' in the [insurance] contract was ambiguous." *Ante* at 56. A review of *Riddering* reveals that that Court of Appeals panel in that case did conclude that the contract terms at issue were susceptible to different interpretations; thus, it properly construed the contract against the drafter. See *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 481-487; 663 NW2d 447 (2003) (WEAVER, J., dissenting), and *Raska v Farm Bureau Mut Ins Co of Michigan,* 412 Mich 355, 362; 314 NW2d 440 (1982).

CAVANAGH, J. (*dissenting*). This Court scheduled and heard oral arguments on the prosecutor's application. 474 Mich 859 (2005). After this process, I believe that the parties' advocacy and the significance of this issue weigh in favor of granting leave to appeal. Therefore, I must respectfully dissent from today's decision. Rather than peremptorily reversing the judgment of the Court of Appeals, I would grant leave to appeal and decide this case after full briefing and oral argument.

KELLY, J. (*dissenting*). In this case, the majority claims that the Court of Appeals failed to apply the "plain meaning" of the words used in MCL 257.626c. This is despite the fact that the Court of Appeals referred to a dictionary and applied dictionary definitions in interpreting the words in question.

I believe that the Court of Appeals read the words as intended by the Legislature. Therefore, I would affirm its decision, along with the district court's dismissal of the charge of felonious driving and the circuit court's affirmance of the district court's decision.

THE MEANING OF "OPERATE"

Felonious driving is codified at MCL 257.626c, which provides:

> *A person who operates a vehicle* upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property resulting in a serious impairment of a body function of a person, but does not cause death, is guilty of felonious driving punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both. [Emphasis added.]

The focus of our discussion is the meaning of the word "operates." Although the Legislature does not define "operates" in this statute, it does offer definitions elsewhere in the Michigan Vehicle Code. MCL 257.35a provides:

> "Operate" or "operating" means being in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur.

The code also defines "operator." " 'Operator' means every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway." MCL 257.36.

In both definitions, the central focus is on "control." Therefore, our interpretation of MCL 257.626c depends on the meaning of "control." *Random House Webster's College Dictionary* (2001) defines "control" as "to exercise restraint or direction over; dominate, regulate, or command." "Dominate" and "command" are strong

words. They demonstrate more than mere influence.[1] These terms connote a sense of power over the object. While they have some relation to influence, "dominate" and "command" carry more force. Both terms present the idea of overriding influence, which is more than *a mere* or *any* influence.

The majority's use of "control" in this case is interchangeable with "influence." This is simply inconsistent with the definition of "control." Therefore, the majority is holding the prosecution to a lesser standard than the Legislature intended and indicated by use of the term "control" in both MCL 257.35a and MCL 257.36. Had the Legislature intended to substitute the term "influence," it could have done so. Appellate courts should not easily assume that the Legislature made a mistake in drafting and inadvertently used one word when intending another. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000); *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). Although the majority does not expressly say so, its analysis implies it.

Here, in the simple act of grabbing the steering wheel, defendant did not dominate or command the

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[1] It is unlikely that the use of the strong terms "dominate" and "command" in this definition is an accident. The *Merriam-Webster Online Dictionary* defines "control" as "to exercise restraining or directing influence over: REGULATE[.]" See <http://www.m-w.com/dictionary/control> (accessed May 5, 2006). *Dictionary.com* defines the word as: "To exercise authoritative or dominating influence over; direct." See <http://dictionary.reference.com> (accessed May 5, 2006). *The Cambridge Dictionaries Online* offers the following definition: "to order, limit, instruct or rule something, or someone's actions or behaviour[.]" See<http://www.dictionary.cambridge.org> (accessed May 5, 2006). Just as in the *Random House Webster's College Dictionary* definition, the common theme among these definitions is dominating influence or directing influence. Each definition shows more than simple influence.

vehicle. The undisputed facts show that the driver remained in command of all the other elements of the vehicle. For instance, the driver still dominated the gas pedal, brake pedal, ignition, emergency brake, turn signals, and windshield wipers. Defendant did not have any command over these important elements of driving. Given that defendant was not dominating the vehicle, he was not in control of the vehicle,[2] and the district court properly dismissed the charge of felonious driving.

THE DISTINCTION BETWEEN CONTROL AND INTERFERENCE

The lower courts were careful to note the distinction between control of a vehicle and interference with that control. In the majority's decision, that distinction is ignored because the majority uses "control" interchangeably with "influence." I believe that the distinction between exercising control and interfering with that control is relevant here. By ignoring it, the majority has failed to effectuate the Legislature's intent in choosing to use the term "control." The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

Random House Webster's College Dictionary (2001) defines "interfere" as "to come into opposition or collision so as to hamper, hinder, or obstruct someone or something[.]" This is a concept distinct from control. In

[2] *One Look Dictionary Search* offers another definition of "control" that is helpful in the analysis of this case: "verb: handle and cause to function (Example: '*Control the lever*')[.]" See <http://www.onelook.com> (accessed May 5, 2006). Defendant's actions were not what caused the car to function. The driver caused the car to function. As will be discussed later in the opinion, defendant was merely interfering with this process.

fact, it can be seen as the opposite. The person exercising control is dominating and commanding the object. A person interfering is hampering, hindering, or obstructing that domination or command.

This case demonstrates the salient point. The driver of the car was in command of the vehicle. She was exercising direction over it by regulating the gas pedal, brake pedal, emergency brake, and steering wheel. This command caused the car to function. Defendant, on the other hand, hampered that command by grabbing the steering wheel. This action did not place the vehicle under his command. Rather, it hindered and obstructed the driver's command and ability to direct the vehicle.

By seizing the wheel, defendant could not cause the car to stop. He could not increase or decrease its speed. And he could not have activated the headlights or turn signals. All he could do was hamper the driver in steering the vehicle in the direction she chose. Because this ability fits the definition of "interference" rather than "control," the Court of Appeals properly affirmed the lower courts' decisions to dismiss the felonious-driving charge. Ignoring this distinction, the majority offers no justification for its failure to effectuate the intent of the Legislature.

THE DISCUSSION OF CIVIL CASES

Much of the majority's opinion centers on criticizing the Court of Appeals for relying on a civil case. The Court of Appeals supported its decision with a reference to a civil case dealing with the same factual scenario as in this case, but in the context of an insurance contract, *Farm Bureau Gen Ins Co of Michigan v Riddering*, 172 Mich App 696; 432 NW2d 404 (1988). Given that *Riddering* was factually close to this case and construed essentially the same term, operation, as does this case,

it was wholly appropriate for the Court of Appeals to reference it.[3]

Riddering noted the distinction between interference and operation:

> Operation includes more than simple control as Pioneer State seems to argue on appeal. While Ms. Riddering did exercise some control over the vehicle by grabbing the steering wheel, steering is only part of operating a vehicle. Operation necessarily includes the additional functions of controlling the gas and brake pedals and all other components necessary to make a vehicle run. Operation includes control over all the parts that allow the vehicle to move, not just the steering function. Obviously, one cannot operate a vehicle only with the steering—there must be acceleration to get anywhere and there must be braking to stop the vehicle, along with control over other key components, such as the engine.
>
> We can reach no other logical conclusion on the facts of this case than that Ms. Riddering interfered with the operation of the vehicle while it was being operated by Ms. Jaarsma. Ms. Jaarsma unequivocally testified at her deposition that Ms. Riddering's actions were a surprise and without consent or permission and the trial court so found. It logically follows that Ms. Riddering's actions, in order to constitute operation or use, had to be with Ms. Jaarsma's consent or permission, because Ms. Jaarsma was operating the vehicle at the time while occupying the driver's seat. Without this needed consent, Ms. Riddering's actions did not constitute operation of the vehicle, but, rather, interference with its operation. [*Id*. at 703.]

The majority first contends that *Riddering* used some other definition of "operate" than the one appropriate for

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[3] As Justice Felix Frankfurter once stated, "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded." Frankfurter, S*ome reflections on the reading of statutes,* 47 Colum L R 527, 541 (1947), quoted in Shapiro, *The Oxford Dictionary of American Legal Quotations* (New York: Oxford University Press, 1993), p 390.

this case. Again, the majority claims that it is applying "the plain language." See *ante* at 51. This claim is at odds with the fact that the majority fails to state what makes its definition of "operate" different from the Court of Appeals definition in either this case or in *Riddering*.

Next, the majority claims that *Riddering* improperly stated that "[o]peration includes more than simple control . . . ." *Riddering*, *supra* at 703. The paragraph that followed demonstrated that the Court of Appeals was noting the difference between mere influence and the dominating or directing influence required to meet the definitions of "control" discussed before. *Riddering* noted that, while Ms. Riddering did have some influence over the vehicle, it did not rise to the level of the dominating influence necessary to reach the meaning of "operate." This is because Ms. Riddering could not command the gas and brake pedals or any of the other components necessary to make the vehicle run. Therefore, she did not have sufficient control of the vehicle to be considered an operator. *Id*.

Although the majority passes over this point, the *Riddering* conclusion is eminently consistent with common sense. Everyone who has been in an automobile knows that you cannot operate it simply by moving the steering wheel. If you sit in a parked car and move the steering wheel clockwise and counterclockwise, you will not move the vehicle. This is because it takes more than influence or "simple control" over the steering wheel to make a car function. Simply put, no one would believe that interference with a steering wheel is sufficient to operate a car. Given that the Court of Appeals reading of the statute is consistent with common sense, it should not be casually overturned.

The majority also complains that reliance on *Riddering* is inappropriate because that decision narrowly

construed an exclusion in the language of an insurance contract. The majority feels that such narrow construction is inappropriate in a criminal case.[4] I disagree.

The rule of lenity should be used when construing a criminal statute. It requires that criminal statutes be construed strictly and in favor of the defendant. *United States v Wiltberger*, 18 US (5 Wheat) 76, 95; 5 L Ed 37 (1820). The rule demands sensitivity to the rights of individual defendants. *Id*. Lenity is required because, often, it provides the only means of giving fair warning to people about what behavior is criminal. Constitutionally, fair warning is given only if an ambiguity in a criminal statute is construed to apply to conduct that the statute clearly designates as criminal. *United States v Lanier*, 520 US 259, 266; 117 S Ct 1219; 137 L Ed 2d 432 (1997).

In this case, if there is any question about the level of control necessary to meet the meaning of the word "operate," it must be resolved in favor of the accused. The majority's reading creates ambiguity in this statute because it is no longer clear what level of influence over a vehicle is sufficient to meet the definition of "operate."

The rule of lenity is especially important here, given that *Riddering* held that a person's action in grabbing

[4] The majority also indicates that strict construction was inappropriate in *Riddering*. I disagree and add that the question is not before us and any mention of it by the majority is mere dictum. Given the nature of insurance contracts, I continue to believe that they should be strictly construed against the drafting insurance company and in favor of the insured. *Hillburn v Citizens' Mut Auto Ins Co*, 339 Mich 494, 498; 64 NW2d 702 (1954); *Kennedy v Dashner*, 319 Mich 491, 494; 30 NW2d 46 (1947). For more detail on the nature of insurance contracts, please see the "adhesion contracts" section of my dissenting opinion in *Rory v Continental Ins Co*, 473 Mich 457, 505-511; 703 NW2d 23 (2005) (KELLY, J., dissenting).

the steering wheel does *not* constitute operating a motor vehicle. It must be expected that the law laid down in *Riddering* would affect this defendant's understanding of what constitutes a crime under the circumstances of this case.

Fair warning mandates that it is made clear to people what the law intends to do if they cross a certain line. *Id*. at 265. " 'The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " *Bouie v Columbia*, 378 US 347, 351; 84 S Ct 1697; 12 L Ed 2d 894 (1964), quoting *United States v Harriss*, 347 US 612, 617; 74 S Ct 808; 98 L Ed 989 (1954). No one should be left to speculate about what constitutes a crime or about the meaning of a penal statute. *Bouie*, 387 US 351, quoting *Lanzetta v New Jersey*, 306 US 451, 453; 59 S Ct 618; 83 L Ed 888 (1939).

In this case, defendant and all others in the state could reasonably believe that interference with someone operating a motor vehicle would not be equated to operation of the vehicle. In changing the *Riddering* analysis, the majority holds defendant criminally responsible for conduct that he could not reasonably have understood to be proscribed. *Bouie*, 378 US 351. This violates the constitutional right of fair notice. *Id*.

THERE IS NO REQUIREMENT OF EXCLUSIVE CONTROL

The majority's most inexplicable criticism of the Court of Appeals decision is its claim that the Court's interpretation of the statute required the accused to have acquired "*exclusive* control" of the vehicle. *Ante* at 51 (emphasis in original). The word "exclusive" is not used once by the Court of Appeals. The Court of Appeals

found no requirement of exclusive control. Instead, it recognized the difference between interference and control. It is this distinction that the majority fails to acknowledge and that apparently leads to its misinterpretation of the Court of Appeals opinion.

As discussed earlier, there is an undeniable distinction between control and interfering with control. MCL 257.626c requires the former. Defendant's conduct constituted the latter. By recognizing the distinction, the Court of Appeals did not require that all control be exclusive.

Another Court of Appeals opinion in a civil case offers a good example of this point. In *Flager v Associated Truck Lines, Inc*,[5] two girls rode together on a motor scooter. One operated the throttle and steered. The other operated the brake. This ended up being a poor choice because the ride terminated in their collision with a truck. *Flager v Associated Truck Lines, Inc*, 52 Mich App 280, 281-282; 216 NW2d 922 (1974). To decide the case, the Court of Appeals needed to interpret the meaning of "operator." It turned to the definition offered in the Michigan Vehicle Code, MCL 257.36. *Flager*, *supra* at 282 n 1.

The Court concluded that each girl constituted an "operator" because of their agreement to cooperate in handling the motor scooter:

> In the extremely unique facts of this case, the evidence is undisputed that both girls agreed to and had some measure of physical control over the operation of the motor scooter. Patty, the girl who was to control the throttle and the steering, was unable to apply the brake due to the construction of the motor scooter. The scooter could be controlled only by the two girls acting together; without the actions of one of them, an essential control function

[5] 52 Mich App 280; 216 NW2d 922 (1974).

> could not be performed. The statute defines an "operator" as "every person * * * who is in actual physical control of a motor vehicle"; therefore, Vickie comes within the definition because she was one of the persons who was in control of the motor scooter. The trial court did not err either in his ruling or instruction to the jury that Vickie was an operator of the motor scooter as a matter of law. [*Id*. at 283, quoting MCL 257.36.]

Because of the girls' cooperation, all of the essential functions of the vehicle were controlled. *Flager* differed from *Riddering* in that in *Riddering* there was no cooperation. *Riddering*, 172 Mich App 703. And it is the lack of that cooperation that marks the distinction between control and interference. Contrary to the majority's contention, the Court of Appeals did not require exclusive control. Instead, it required that, if two people are involved, they must work in cooperation with one another to operate a vehicle. Otherwise, the surprise actions of one constitute interference with the other's control of the vehicle. *People v Yamat*, 265 Mich App 555, 557; 697 NW2d 157 (2005); *Riddering*, 172 Mich App 703; *Flager*, 52 Mich App 282-283.

In this case, there was no agreement to work in cooperation in order to move the vehicle. Instead, as in *Riddering*, defendant's action of grabbing the wheel came as a surprise to the person driving. Therefore, defendant interfered with the vehicle's control rather than controlled it, and the district court properly refused to bind him over for trial.

With no small amount of acerbity, the majority accuses my analysis of secretly requiring exclusive control. A simple reading of this section of my opinion disproves the accusation. I believe, as have the past courts of this state when called on to address this factual scenario, that control of a vehicle requires more than grabbing a steering wheel. But this does not mean

that only one person may control a vehicle at one time. If two or more individuals agree to work the components of a vehicle together, then each is an operator. This is what was recognized in *Flager*. I believe that the Court of Appeals set forth the proper means of addressing the factual scenario presented in this case in *Flager*, *Riddering*, and *Yamat*. I see no reason to abandon this well-reasoned line of cases.

The majority finds it simpler to put words in my mouth and to attack those words than to address my true argument. A straw man is always easier to knock down. In truth, no exclusive-control requirement can be read into my opinion. What is in this opinion is the recognition of a distinction between interference and control. The majority pays no attention to this difference. In fact, it elevates interference to the same level as control. I find this inappropriate, logically and legally. Logically, turning a steering wheel is not enough to operate a vehicle.[6] Legally, the Legislature decided to use the term "control" in MCL 257.35a and MCL 257.36. Therefore, it is inappropriate for the majority to substitute "interference" for "control."

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[6] In yet another stretch of logic, the majority claims that my interpretation means that neither defendant nor the driver was an operator at the time defendant grabbed the steering wheel. This is simply not the case. The driver continued to have control over the vehicle. Although her domination of the vehicle was *interfered* with, this does not mean her control ended. Under the majority's argument, a driver who purposefully removes his hands from the steering wheel and his feet from the pedals would no longer be operating the vehicle. Therefore, such a person would not be guilty of felonious driving even if he intentionally did this to slam the vehicle into a crowd of people. I find this illogical. When a person is in the position to have dominating command over a vehicle, the person is an operator. When someone *interferes* with that dominating command, as occurred in this case, he is not an operator. Courts in Michigan have consistently noted this distinction until now. I believe that it is the majority's analysis that "strains credulity."

CONCLUSION

The majority misinterprets the Court of Appeals decision. In doing so, it accuses the Court of Appeals of failing to adhere to the "plain language" of the statute. *Ante* at 51. It makes the accusation despite the fact that the Court of Appeals consulted a dictionary and properly applied its definitions to the facts of the case. This is but another example of when "plain language" in the ears of the majority has quite a different sound in the ears of others, illustrating the fragility of the concept of plain language legal analysis in the real world.

Defendant did not operate a motor vehicle. Instead, he interfered with the control of a motor vehicle. Therefore, the district court properly refused to bind him over on a charge of felonious driving. MCL 257.626c. By reversing this decision, the majority has violated the fair notice protections of the Constitution.

I would affirm the decision of the Court of Appeals.

GRIMES v DEPARTMENT OF TRANSPORTATION

Docket No. 127901. Argued January 10, 2006 (Calendar No. 1). Decided May 31, 2006.

Michael and Tamara Grimes brought an action in the Court of Claims against the Michigan Department of Transportation, seeking damages for Tamara Grimes's loss of consortium and for injuries sustained by Michael Grimes when his vehicle was struck by another vehicle after the driver of that vehicle lost control when the vehicle went onto the asphalt and gravel shoulder of an interstate highway. The Court of Claims, Geoffrey L. Neithercut, J., denied the defendant's motion for summary disposition on the basis that the highway exception to governmental immunity from tort liability, MCL 691.1402(1), applied under the holding in *Gregg v State Hwy Dep't*, 435 Mich 307 (1990), which held that a shoulder is "designed for vehicular travel." The defendant appealed from the order denying its motion, and the Court of Appeals, MARKEY, P.J., and FITZGERALD and OWENS, JJ., affirmed in an unpublished opinion per curiam, issued December 16, 2004 (Docket No. 249558). The Supreme Court granted the defendant's application for leave to appeal. 474 Mich 877 (2005).

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

The shoulder is not part of the "improved portion of the highway designed for vehicular travel" for purposes of the highway exception to governmental immunity, MCL 691.1402(1), because the shoulder is not "designed for vehicular travel." *Gregg* and its progeny must be overruled to the extent that they can be read to suggest that a shoulder is "designed for vehicular travel." The order of the Court of Claims must be reversed, the judgment of the Court of Appeals must be reversed, and the matter must be remanded to the Court of Claims for further proceedings.

The duty of the state or a county road commission to repair and maintain a highway attaches only to the improved portion of the highway that is also designed for vehicular travel. A shoulder may be capable of supporting some form of vehicular traffic, but it is not a travel lane and it is not designed for vehicular travel. Only

the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1).

Reversed and remanded.

Justice KELLY, dissenting, would affirm the Court of Appeals in this case, reaffirm *Gregg,* and hold that, under the plain, ordinary meaning of the statute, the shoulder of a highway is "designed for vehicular travel" for purposes of the highway exception to governmental immunity. Emergency vehicles travel on the shoulder, and vehicular traffic is typically diverted onto shoulders during highway construction. Moreover, the Legislature has not altered the statute since appellate cases began interpreting shoulders as being within the exception, and such legislative acquiescence should be considered when construing statutes.

Justice CAVANAGH concurred only in the result proposed by Justice KELLY.

GOVERNMENTAL IMMUNITY — HIGHWAYS — HIGHWAY SHOULDERS.

The duty of the state or a county road commission to repair and maintain a highway under its jurisdiction attaches only to the improved portion of the highway that is designed for vehicular travel; the shoulder of a highway is not a travel lane and is not part of the improved portion of the highway designed for vehicular travel for purposes of the highway exception to governmental immunity (MCL 691.1402[1]).

G. W. Caravas & Associates, P.C. (by *Gary W. Caravas*), for the plaintiffs.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Vincent J. Leone*, Assistant Attorney General, for the defendant.

YOUNG, J. We granted leave to appeal to consider whether the shoulder is part of the "improved portion of the highway designed for vehicular travel" for the purpose of the highway exception to governmental immunity. We conclude that a shoulder is not within the exception because it is not "designed for vehicular travel."

In reaching this conclusion, we overrule the holding in our earlier decision in *Gregg v State Hwy Dep't* that a

shoulder is "designed for vehicular travel."[1] *Gregg* subsequently has been relied on by lower courts for the proposition that every shoulder is "designed for vehicular travel." As we will discuss, we find no support within *Gregg*, considering its internal inconsistencies, to give it this broad reading. Moreover, judging from the plain meaning of the statutory language and the context thereof enacted by the Legislature, we conclude that a shoulder, unlike a travel lane, is not the improved portion of a highway designed for vehicular travel. Accordingly, the order of the Court of Claims denying summary disposition on the basis of *Gregg* is reversed, the judgment of the Court of Appeals affirming that order is reversed, and this case is remanded to the Court of Claims for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On the morning of March 24, 2000, Alan Thisse traveled north on I-75 in the far left lane of the three-lane highway. Thisse testified in his deposition that as he passed an entrance ramp he ran over a mound of dirt that forced his vehicle onto the left shoulder of the highway. The left shoulder consisted of a three-foot-wide strip of asphalt with an adjoining two-foot-wide gravel strip. The asphalt portion of the shoulder shared the same grade as the travel lanes. The gravel portion, however, was lower.[2] Thisse's two left tires dropped onto the gravel surface. As Thisse left the highway travel lane, plaintiff Michael Grimes had just entered onto northbound I-75. It is alleged that when Thisse recovered and reentered the highway, the grade differential between the gravel and the asphalt surfaces caused Thisse to lose control of his

[1] 435 Mich 307; 458 NW2d 619 (1990).

[2] The parties dispute the severity of the grade differential.

vehicle, veer into the far right lane, and crash into Grimes's vehicle. As a result of the accident, plaintiff Michael Grimes suffered permanent quadriplegia.

Plaintiffs Michael Grimes and his wife Tamara filed actions against Alan and Douglas Thisse and defendant Michigan Department of Transportation (MDOT).[3] Plaintiffs brought negligence and nuisance claims against MDOT, claiming that MDOT negligently maintained the gravel portion of the shoulder where Thisse left the roadway. They argued that MDOT designed the shoulder intending that the gravel portion would gradually slope away from the asphalt portion. However, plaintiffs allege that MDOT failed to maintain that gradual slope, resulting in the drop-off that proximately caused plaintiffs' injuries.

MDOT moved for summary disposition pursuant to MCR 2.116(C)(7), asserting governmental immunity as a defense. It argued that the shoulder fell outside the scope of the highway exception because it was not an improved portion of the highway designed for vehicular travel. Relying on *Gregg,* the Court of Claims denied MDOT's motion for summary disposition.[4]

The Court of Appeals affirmed the judgment of the Court of Claims.[5] In a short unpublished per curiam decision, the panel relied on *Gregg* as well as subsequent Court of Appeals cases following *Gregg* in holding that a shoulder is part of the improved portion of the

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[3] Plaintiff Tamara Grimes sued derivatively for loss of consortium. Plaintiffs' claims against Alan Thisse, the driver, and Douglas Thisse, the owner of the vehicle, are not part of this appeal.

[4] The parties stipulated in the order of denial to dismiss all other allegations and agreed that plaintiffs could "only proceed on their claim regarding an alleged defective shoulder as it relates to the failure of MDOT to repair and maintain the shoulder."

[5] Unpublished opinion per curiam, issued December 16, 2004 (Docket No. 249558).

highway designed for vehicular travel.[6] The panel also held that this Court's subsequent decision in *Nawrocki v Macomb Co Rd Comm*[7] had not affected the jurisprudential validity of *Gregg*.

MDOT filed an application for leave to appeal, which this Court granted.[8]

II. STANDARD OF REVIEW

This Court reviews motions for summary disposition under MCR 2.116(C)(7) de novo.[9] Questions of statutory interpretation are also reviewed de novo.[10] When this Court interprets statutory language, our primary goal is to discern the intent of the Legislature as expressed in the text of the statute.[11] Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written.[12]

III. ANALYSIS

a. GOVERNMENTAL IMMUNITY AND THE HIGHWAY EXCEPTION

The governmental tort liability act (GTLA)[13] broadly shields a governmental agency[14] from tort liability "if

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[6] *Meek v Dep't of Transportation*, 240 Mich App 105, 114; 610 NW2d 250 (2000); *Soule v Macomb Co Bd of Rd Comm'rs*, 196 Mich App 235, 237; 492 NW2d 783 (1992).

[7] 463 Mich 143; 615 NW2d 702 (2000).

[8] 474 Mich 877 (2005).

[9] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[10] *Mitan v Campbell*, 474 Mich 21, 23; 706 NW2d 420 (2005).

[11] *Dibenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

[12] *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001).

[13] MCL 691.1401 *et seq*.

[14] A governmental agency is "the state or a political subdivision." MCL 691.1401(d). The state, in turn, includes "the state of Michigan and its

the governmental agency is engaged in the exercise or discharge of a governmental function."[15] The act enumerates several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency.[16] This case concerns what is known colloquially as the "highway exception." That provision states, in pertinent part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency . . . . *The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel* and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [17]

The GTLA provides its own definition of "highway," which is "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trail-

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agencies, departments [and] commissions . . . ." MCL 691.1401(c). Defendant, as a department of the state, is protected by the provisions of this act.

[15] MCL 691.1407(1).

[16] The Legislature codified the following exceptions: the highway exception, MCL 691.1402; the motor vehicle exception, MCL 691.1405; the public building exception, MCL 691.1406; the proprietary function exception, MCL 691.1413; the governmental hospital exception, MCL 691.1407(4); and the sewage disposal system exception, MCL 691.1417.

[17] MCL 691.1402(1) (emphasis added).

ways, crosswalks, and culverts on the highway."[18] This definition of a highway excludes "alleys, trees, and utility poles."[19] Beyond defining the term "highway," the GTLA does not define these additional terms. It also does not define "shoulder" or include shoulder among the list of features such as bridges and sidewalks that are deemed to be part of a highway.

The scope of the highway exception is narrowly drawn. Under its plain language, every governmental agency with jurisdiction over a highway owes a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." However, when the governmental agency is the state or a county road commission, as is the case here, the Legislature constricted the scope of the highway exception by limiting the portion of the highway covered by that exception. For these agencies, the highway exception does not extend to an installation "outside" the improved portion of the highway such as a sidewalk, trailway, or crosswalk, although these features are included in the general definition of a "highway." The duty of these agencies to repair and maintain does not extend to every "improved portion of highway." It attaches only "to the improved portion of the highway" that is also "designed for vehicular travel." As we discuss later in this opinion, such narrowing of the duty supplies important textual clues regarding the Legislature's intent concerning whether a shoulder falls within or without the protection afforded by the GTLA.

Although the specific issues considered in *Nawrocki v Macomb Co Rd Comm*,[20] are not before us today, that

[18] MCL 691.1401(e).

[19] *Id*.

[20] 463 Mich 143; 615 NW2d 702 (2000).

case is particularly instructive in this case.[21] In *Nawrocki*, this Court reconciled several of our previous inconsistent highway exception cases, and clarified the scope of the governmental agency's duty under the highway exception. We held in *Nawrocki* that "if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable . . . ."[22] Put differently, the highway exception creates a duty to maintain *only* the " 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' "[23] Our focus, then, consistent with *Nawrocki*, is determining whether a shoulder is actually designed for public vehicular travel.

b. *GREGG v STATE HWY DEP'T*

Plaintiffs urge this Court to affirm the judgments of the lower courts on the basis of our decision in *Gregg v State Hwy Dep't*,[24] which we decided before *Nawrocki*. In *Gregg*, this Court considered whether the highway exception was available to a bicyclist injured by a defect in "a designated bicycle path on the inner portion of the paved shoulder of a state highway."[25] The plaintiff

[21] In *Nawrocki*, this Court decided two issues. First, the highway exception protects pedestrians who are injured by the defendant state or county road commission's failure to repair and maintain the improved portion of the highway designed for vehicular travel. *Id*. at 184. Second, the highway exception does not permit "signage" claims. That is, the state and country road commissions owed no duty to install, maintain, repair, and improve traffic control devices. *Id*.

[22] *Id*. at 162.

[23] *Id*. at 180 (citation omitted).

[24] 435 Mich 307; 458 NW2d 619 (1990).

[25] *Id*. at 309. The defendant in *Gregg* raised a second argument that bicyclists could not bring suit under the highway exception. We rejected that claim by resorting to the plain language of the highway exception,

suffered extensive injuries when he struck a pothole on the bicycle path and overturned his bicycle. For purposes of deciding whether the trial court had properly granted the defendant's motion for summary disposition, this Court relied on a photograph of the accident scene, which pictured a bicycle path situated between the "traveled portion of the highway and its paved shoulder."[26] The majority in *Gregg* reversed the judgment granting summary disposition that had been entered in favor of the defendant, concluding that the shoulder was designed for vehicular travel.

Gregg's first task was to distinguish the bicycle path in that case from the bicycle path at issue in *Roy v Dep't of Transportation*.[27] *Roy* also involved an injury sustained on a bicycle path, and we concluded there that the plaintiff's claim was barred by governmental immunity. In distinguishing the two cases, the *Gregg* majority placed a great deal of reliance on where the bicycle path in that case was located in relationship to the roadbed.[28]

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which permits "a person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel" to recover damages for injuries suffered in the improved portion of the roadway designed for vehicular travel. MCL 691.1402(1). This separate holding in *Gregg* is consistent with our decision in *Nawrocki* that a pedestrian may sue for an injury occurring in the improved portion of the highway designed for vehicular travel. See *Nawrocki, supra* at 184.

[26] *Gregg, supra* at 310.

[27] 428 Mich 330; 408 NW2d 783 (1987).

[28] The *Gregg* majority also made a superficial attempt to square its holding with an earlier decision from this Court, *Goodrich v Kalamazoo Co*, 304 Mich 442; 8 NW2d 130 (1943). *Goodrich* had held that a shoulder next to the roadway that was a three-foot-wide dirt and gravel shoulder with a tree planted "approximately 30 inches" from the pavement was not part of the traveled portion of the road. The *Gregg* majority recognized but made little effort to differentiate *Goodrich*, acknowledging that it "would probably conclude" that such a shoulder was not an

Whereas the bicycle path in *Gregg* "comprised part of the inner portion of the shoulder," the bicycle path in *Roy* ran "parallel to" and was "detached from" the highway. As a result, *Gregg* expressly rested its holding "on the assumption that the bicycle path at issue comprised part of the inner portion of the shoulder closest to the roadway,"[29] later conceding that it would have been a closer question "if the bike path had been on the outer fringes of the shoulder . . . ."[30]

After distinguishing *Roy*, the *Gregg* majority offered several reasons to support its conclusion that the shoulder encompassing the bicycle path fell within the highway exception. It noted the uninterrupted line of cases from the Court of Appeals beginning in 1971 holding that a shoulder was designed for vehicular travel.[31] Because the Legislature did not overrule that line of cases when it amended the GTLA over the years, this served as proof to the *Gregg* majority that the Legislature approved of this line of cases construing the highway exception.

The *Gregg* majority also held that it "flies in the face of common experience" to say that a shoulder is not designed for vehicular travel. It opined:

> Any motorist who has ever experienced a highway emergency understands that shoulders are essential to a

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"improved portion" of a highway if the factual situation in *Goodrich* had been before the *Gregg* Court. *Gregg, supra* at 313.

[29] *Id*. at 310.

[30] *Id*. at 317 n 5.

[31] See, e.g., *Johnson v Michigan*, 32 Mich App 37, 39; 188 NW2d 33 (1971); *Van Liere v State Hwy Dep't*, 59 Mich App 133, 136; 229 NW2d 369 (1975); *Hall v Dep't of State Hwys,* 109 Mich App 592, 602 n 4; 311 NW2d 813 (1981); *McKee v Dep't of Transportation*, 132 Mich App 714, 721; 349 NW2d 798 (1984); *Roux v Dep't of Transportation*, 169 Mich App 582, 586; 426 NW2d 714 (1988).

> safe modern highway. To get on or off a shoulder to stop, park, or leave standing a vehicle, motorists must travel on the shoulder.
>
> At the high speeds of modern vehicles, such an endeavor often results in significant travel, "in the ordinary sense," on the shoulder of a highway. Indeed, it seems quite extraordinary, if not fictional, to assume that vehicles do not travel on shoulders or that shoulders are not designed for vehicular travel, albeit of a temporary sort.[32]

In further support of its holding, the *Gregg* majority cited what it believed to be apposite definitions from the Michigan Vehicle Code (MVC).[33] It noted that the MVC defines "highway" more broadly than "roadway." Whereas in the MVC a highway encompasses "the entire width between the boundary lines,"[34] a roadway is only that portion of the highway "improved, designed, or ordinarily used for vehicular travel."[35] According to the *Gregg* majority, the Legislature's use of the broader term "highway" in the highway exception of the GTLA evinced its intent to sweep the shoulder into that exception. Otherwise, it reasoned, the Legislature would have used the more narrowly defined term "roadway" to cabin the scope of the highway exception.

Justice GRIFFIN dissented from the *Gregg* majority opinion, arguing, among other things, that the plain language of the highway exception excluded the shoulder.[36] He emphasized that the highway exception ex-

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[32] *Gregg*, *supra* at 315.

[33] MCL 257.1 *et seq*.

[34] MCL 257.20.

[35] MCL 257.55.

[36] Chief Justice RILEY wrote a separate dissent concurring in Justice GRIFFIN's analysis.

tends only to a *portion* of the highway, that is, the portion "designed for vehicular travel."[37]

c. *GREGG* WAS WRONGLY DECIDED AND POORLY REASONED

Although the Court of Claims and the Court of Appeals relied on *Gregg* to deny defendant summary disposition, we overrule *Gregg's* conclusion that a shoulder is "designed for vehicular travel." That conclusion rested heavily on the fact that the *inner* portion of the shoulder included a designated bicycle path. The *Gregg* majority expressed doubt that it would have reached the same conclusion had the designated bicycle path been located further from the edge of the travel lane of the highway.[38] This unusual factual premise—an integrated, dedicated bicycle path—from the standpoint of statutory construction is irrelevant. We believe *Gregg* is consequently so internally inconsistent that it does not yield a meaningful rule applicable to all shoulders on Michigan's highways. Frankly, upon close inspection, *Gregg* is an enigma. Its core assumption is that the location of the integrated bicycle path determined the outcome of that case. We cannot ascertain why the location of the integrated bicycle path—whether it was

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[37] Justice GRIFFIN also discussed at length the importance of the MVC definitions and their applicability to the GTLA. While we agree with much of Justice GRIFFIN's dissent, we do not rely on the MVC to reach our decision. See the discussion later in this opinion.

[38] See n 28 of this opinion and the accompanying text. In this case, the shoulder was immediately adjacent to I-75, a well-traveled interstate highway, and contained no designated bicycle path.

We see no principled basis for the distinction *Gregg* drew between a bicycle path located near to or farther from the travel lanes of a highway. A bicycle path included anywhere within the shoulder of a road would not otherwise be an "installation outside the improved portion of the highway" if, as *Gregg* arguably concluded, a shoulder itself constitutes an improved portion of the highway designed for vehicular travel.

located on the inner portion or the outer fringe of the shoulder—bore so heavily or at all on the question whether the shoulder was designed for vehicular travel.[39] Furthermore, the *Gregg* majority's analysis, as we will show, is not based on the text of the GTLA and is seriously flawed. Therefore, we overrule *Gregg* and its progeny to the extent that they can be read to suggest that a shoulder is "designed for vehicular travel."

d. *GREGG'S* REASONING IS ERRONEOUS

In our view, there are several fatal flaws in the analysis offered by *Gregg*. It failed to pay serious attention to the plain meaning of the text of the highway exception and it made other unpersuasive arguments.

First, the *Gregg* majority inappropriately relied on the doctrine of legislative acquiescence for the proposition that prior Court of Appeals decisions that had broadly construed the highway exception to encompass all shoulders were consistent with the Legislature's intent. This doctrine of legislative acquiescence is founded on the notion that decisions that have not been legislatively overturned are tacitly approved by the Legislature. The doctrine is "highly disfavored" in this Court's jurisprudence, which prescribes that courts are to discern the Legislature's intent " 'from its words, not from its silence.' "[40] That the Legislature did not amend the existing language of the highway exception in response to earlier Court of Appeals cases does not suggest that the Legislature believed those cases were rightly decided.

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[39] See n 38 of this opinion.

[40] *Nawrocki, supra* at 177 n 33, quoting *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999) (emphasis omitted).

Moreover, unlike the *Gregg* majority, we decline to rely on the Court's conception of motorists' "common experience" with road shoulders as a proper canon of statutory construction. Were this Court competent to make such a normative judgment about motorists' common experience, it would be particularly inappropriate to apply that judgment here where it departs from the plain statutory language used by the Legislature. This subtle appeal to common experience arguably substituted the *Gregg* majority's policy preference for the policy preference of the Legislature. In analyzing the highway exception, we must be governed by the statutory language.[41]

Unlike the *Gregg* Court, we also decline to consult the definitions contained in the MVC to inform our construction regarding the scope of the highway exception. Closer inspection of the MVC reveals why *Gregg's* reliance on an unrelated statute to construe another is a perilous endeavor to be avoided by our courts. The GTLA expressly incorporates only one definition from the MVC. Section 5, also known as the motor vehicle exception, refers the reader to the definition of "owner" in the MVC.[42] The absence of any other reference to the MVC in the GTLA, coupled with the explicit incorporation of "owner" in the motor vehicle exception, indicates that the Legislature intended to limit the applicability of the MVC in the GTLA.[43]

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[41] We expect jurors to apply their "common experience" in assessing facts. Judges should apply law in interpreting statutes.

[42] MCL 691.1405; see also *Stanton v Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002).

[43] See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."); *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931) ("Courts

Even more troubling than the *Gregg* majority's frank violation of the rules of statutory construction was the fact that it used provisions of the MVC in a highly selective manner. One of the "crucial" questions before the *Gregg* Court was "whether the paved shoulder is 'designed for vehicular travel.' "[44] *Gregg* preferentially selected and relied on only *some* of the MVC defined terms to answer that question. The *Gregg* majority cited the MVC definitions of "roadway" and "highway" to support its conclusion that a shoulder was part of the improved portion of the highway designed for vehicular travel, but curiously failed to rely on the most relevant term defined in the MVC— "shoulder." One can only speculate why the *Gregg* majority brushed aside this term, which the MVC actually defines as "that portion of the highway contiguous to the roadway generally extending the contour of the roadway, *not designed for vehicular travel but maintained for the temporary accommodation of disabled or stopped vehicles otherwise permitted on the roadway*."[45]

Justice GRIFFIN's dissent reminded the majority of this fact, to which the majority unconvincingly responded that what it termed "another section" of the MVC stated, " ' "Shoulder" means that portion of a highway or street on either side of the roadway which is normally snowplowed for the safety and convenience of *vehicular traffic*.' "[46] It is not clear why the *Gregg*

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cannot attach provisions not found therein to an act of the legislature because they have been incorporated in other similar acts."), citing *Michigan v Sparrow*, 89 Mich 263, 269; 50 NW 1088 (1891).

[44] *Gregg, supra* at 313.

[45] MCL 257.59a (emphasis added).

[46] *Gregg, supra* at 315, quoting former MCL 257.1501(k) (emphasis in *Gregg*). In actuality, the quoted section was part of the former Michigan Snowmobile Act, not the MVC. The former provision is now found at MCL 324.82101(p).

majority believed this provision negated the MVC's specific definition of "shoulder," particularly because this provision does not support the conclusion that a shoulder is *designed for vehicular travel,* whereas the MVC's definition of a shoulder specifically states that a shoulder is *not* so designed. Had the *Gregg* majority relied on the *most* relevant definition, the one found in the MVC, it could not have reached the result it did.[47] Once the *Gregg* majority inappropriately committed itself to using the language of the MVC rather than construing the actual words of the highway exception, the MVC should have pressed the Court to reach the opposite conclusion.

More important, the GTLA provides its own definition of "highway."[48] There is no apparent ambiguity in the GTLA's definition of "highway" that would warrant resort to another statute's definition of the same term. Hence, the *Gregg* majority's use of the MVC definition was inconsistent with our canons of statutory construction.

In sum, the *Gregg* majority's conclusion that a shoulder is designed for vehicular travel and the reasons supporting that conclusion are entirely unpersuasive and must be abandoned.[49]

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[47] If the *Gregg* majority had examined faithfully the entire MVC, it would have found additional support to conclude that a shoulder is *not* designed for vehicular travel. The MVC requires a person to drive within the *travel lanes* or risk a civil infraction. For example, the driver of a vehicle may not "overtake and pass another vehicle upon the right by driving off the pavement or main-traveled portion of the roadway." MCL 257.637(2). Thus the organic traffic laws of this state, as provided in the MVC, limit vehicular travel to the *travel lanes.*

[48] MCL 691.1401(e).

[49] Although this Court respects and gives considerable weight to the doctrine of stare decisis, we are "not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). For the reasons

e. A SHOULDER IS NOT "DESIGNED FOR VEHICULAR TRAVEL "

Turning from *Gregg* to the text of the highway exception itself, we hold that the shoulder is not "designed for vehicular travel." Plaintiffs' theory, boiled down to its core, is that a shoulder is meant to be a travel lane. Guided by the statutory language chosen by the Legislature, we reject plaintiffs' contention. A shoulder may be capable of supporting some form of vehicular traffic, but it is not a travel lane and it is not "designed for vehicular travel."

The GTLA does not expressly define "shoulder" or the phrase "designed for vehicular travel." Nor does the highway exception explicitly indicate whether a shoulder is "designed for vehicular travel." Consequently, to aid our inquiry, we must consider the plain and ordinary meaning of the phrase "the improved portion of the highway designed for vehicular travel" and the context in which the Legislature employed this phrase.[50]

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stated earlier in this opinion, we believe *Gregg* was a badly reasoned decision. However, we must move beyond those considerations under a stare decisis analysis and examine the effects of overruling *Gregg*. *Id.* at 466.

One of the most significant considerations is "the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Id*. We find no reliance interests at work that support the continuation of *Gregg's* erroneous interpretation of the highway exception. Motorists traverse shoulders because of the exigencies of highway travel. They do not traverse shoulders because our case law might permit them to recover against the governmental agency in the event of an accident. Indeed, to do so would be a violation of the MVC. MCL 257.637. *Gregg* is not the sort of case that fosters a reliance interest or shapes future individual conduct. Therefore, we do not believe we work an undue hardship in overruling *Gregg*. Further, by correcting *Gregg's* erroneous construction of the highway exception, we restore "legitimate citizen expectations" that the Court will not arrogate to itself the legislative power to make public policy. *Robinson, supra* at 467.

[50] MCL 8.3a; *Horace v City of Pontiac*, 456 Mich 744, 755-756; 575 NW2d 762 (1998).

MDOT does not contest that road shoulders are "designed" with the intention that they be *used* by vehicles. It contests that shoulders are designed as *travel* lanes. This is a distinction that turns on the meaning of "travel." Taken in its broadest and most literal sense, "travel" in the highway exception could include the shortest incremental movement by a vehicle on an improved surface.[51] Therefore, in an emergency, when a motorist momentarily swerves onto the shoulder, the motorist can be said to have traveled on the shoulder. Were this broadly inclusive definition of "travel" appropriate, we might be persuaded by plaintiffs' argument that a shoulder is designed for vehicular travel. However, we reject this broad definition proposed by plaintiffs.

Adopting a broad definition of "travel" would read any meaning out of the phrase "designed for vehicular travel." When interpreting statutes, we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."[52] The Legislature modified the phrase "the improved portion of the highway" with the phrase "designed for vehicular travel." It did not intend to extend the highway exception indiscriminately to every "improved portion of the highway." Otherwise, it would not have qualified the phrase. Rather, it limited the exception to the segment of the "improved portion of highway" that is "designed for vehicular travel." Because the Legislature created this distinction, it believed there are improved portions of highway that are not designed for vehicular travel.

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[51] See *Random House Webster's College Dictionary* (1995), defining "travel" as "to go from one place to another . . . ."

[52] *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Hence, this Court ought to respect this distinction as we parse the statutory language.

Plaintiffs in effect urge this Court to adopt the expansive definition of "travel." If "travel" is broadly construed to include traversing even the smallest distance, then it must follow that every area surrounding the highway that has been improved for highway purposes is "designed for vehicular travel" since such improved portions could support even momentary vehicular "travel."[53] Under plaintiffs' interpretation, then, every "improved portion of the highway" is also "designed for vehicular travel." This interpretation renders these phrases redundant and contravenes a settled rule of statutory interpretation. It also conflates two disparate concepts: design and contemplated use. That vehicular traffic might *use* an improved portion of the highway does not mean that that portion was "designed for vehicular travel." Therefore, in an effort to give meaning to every word of the highway exception and to honor the Legislature's expressed intent, we reject plaintiffs' construction of the highway exception.

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[53] The only conceivable limitation of the highway exception under this expansive view is that the duty does not extend to an "installation *outside* of the improved portion of the highway designed for vehicular travel." MCL 691.1402(1) (emphasis added). However, it is not clear, if every improved portion of highway is designed for vehicular travel, where the improved portion of the highway designed for vehicular travel ceases.

For example, on the motion for summary disposition, the parties submitted photos that depict the area of I-75 around the accident scene. Clearly, much of this area is an "improved portion of the highway." That is, most of the area surrounding the actual roadbed bears the mark of human improvement for highway purposes. For example, separating the northbound and southbound lanes of I-75 is an intentionally sloped grassy median shaped in that fashion for any number of highway-related purposes. Plaintiffs' theory would require that we conclude that this entire swath of land, which looks dramatically different from the wood and shrubbery lines on either side of I-75, was an improved portion of highway *designed for vehicular travel*.

We believe that, taken as a whole, the language of the highway exception supports the view that a shoulder, unlike a travel lane, is not designed for vehicular travel. Consequently, we adopt a view of "travel" that excludes the shoulder from the scope of the highway exception. Thus, we hold that only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1).[54]

Also, our decision is consistent with *Nawrocki*. We had no opportunity in *Nawrocki* to consider the validity of *Gregg* as it relates to the question presented in this case. However, our determination that the shoulder is not designed for vehicular travel reinforces *Nawrocki's* reading of the highway exception that it encompassed only the " 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' "[55]

IV. RESPONSE TO THE DISSENT

Although the dissent would reaffirm *Gregg*, it fails to rebut the peculiarities and flaws in *Gregg's* reasoning highlighted above and rests heavily on the doctrine of legislative acquiescence, which this Court has clearly discredited and rejected.[56] Furthermore, the dissent

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[54] In construing the GTLA, this Court has often relied on the principle set forth in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984), that exceptions to governmental immunity are construed narrowly and the grant of immunity is construed broadly. It is unnecessary to rely on this *Ross* principle to decide this case. We reject plaintiffs' argument that the shoulder is designed for vehicular travel, and we overrule *Gregg* in order to construe the statutory language reasonably and give effect to every word and phrase in the highway exception.

[55] *Nawrocki, supra* at 180 (citation omitted).

[56] *See Donajkowski v Alpena Power Co*, 460 Mich 243, 258-262; 596 NW2d 574 (1999).

offers no serious rebuttal to our construction of the highway exception. We do not harbor, as the dissent accuses, a "subjective fear" that *Gregg* exposes the governmental agency to "unlimited liability."[57] Rather, this Court simply seeks to give effect to each word and phrase employed by the Legislature. A shoulder may be capable of supporting vehicular traffic, but this fact does not answer the legal question whether the Legislature intended to designate shoulders as an "improved portion of the highway designed for vehicular travel" and thereby expose a governmental agency to tort liability for defects in a shoulder. If plaintiffs' definition of "travel" were to prevail, then a key phrase in the highway exception is rendered surplusage. This is inconsistent with our settled rules of statutory construction.

V. CONCLUSION

We overrule *Gregg* because it was internally inconsistent and it appealed to inappropriate methods of statutory construction. Consistent with the language of the highway exception, we conclude that the shoulder is not designed for vehicular travel. As this Court previously held in *Nawrocki*, the focus of the highway exception is the actual physical roadbed. Moreover, by concluding that the shoulder is not "designed for vehicular travel," we fulfill our obligation to give effect to every word of the highway exception.

Accordingly, we reverse the order of the Court of Claims and the judgment of the Court of Appeals and remand this case to the Court of Claims for further proceedings consistent with this opinion.

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[57] *Post* at 99.

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

KELLY, J. (*dissenting*). The issue presented is whether the shoulder of the road is part of the "improved portion of the highway designed for vehicular travel" for purposes of the highway exception to governmental immunity. MCL 691.1402(1). Unlike the majority, I would reaffirm this Court's holding in *Gregg v State Hwy Dep't,*[1] and hold that a shoulder is "designed for vehicular travel." Therefore, I would affirm the decision of the Court of Appeals.

STANDARD OF REVIEW

The trial court denied defendant's motion for summary disposition. We review such rulings de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In making our de novo review, we are called on to determine an issue involving statutory construction. Such matters are questions of law that also are reviewed de novo. *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 62; 642 NW2d 663 (2002). Our primary goal in construing the meaning of statutes is to determine the intent of the Legislature. Everyone on the Court is in accord that, if a statute's language is clear and unambiguous, it must be enforced as written. *People v Laney,* 470 Mich 267, 271; 680 NW2d 888 (2004). Also, it is generally agreed that the Legislature is presumed to have intended the meaning expressed in the words it wrote. *Roberts, supra* at 63. All words and phrases are "construed and understood according to the common and approved usage of the language . . . ." MCL 8.3a.

[1] 435 Mich 307; 458 NW2d 619 (1990).

ANALYSIS

The immunity of government from suit is made possible by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. It sets forth the basic tenets of governmental immunity: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are a few exceptions. One is contained in MCL 691.1402(1), which is commonly referred to as the "highway exception." It provides, in relevant part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . *The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel* and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [Emphasis added.]

"Highway" is defined by the GTLA as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e). "Shoulder" is not defined in the GTLA.

I believe that this Court's decision in *Gregg* correctly interpreted these statutory provisions. It recognized that, for purposes of the highway exception to govern-

mental immunity, a shoulder is part of the highway "designed for vehicular travel." *Gregg, supra* at 317. The *Gregg* Court reached its decision for three reasons.

First, the Court noted that, beginning in 1971, the Court of Appeals has consistently held that the shoulder of a highway is designed for vehicular travel. *Id*. at 314.[2] In making this ruling, the Court applied the concept of legislative acquiescence. Since the Legislature chose not to amend the GTLA in the face of numerous holdings of the Court of Appeals, it acquiesced in the Court of Appeals interpretation of the law. *Id.*

Second, the Court held that it would fly in the face of "common experience" to hold that a highway shoulder is not designed for vehicular travel. *Id*. at 315. The Court reasoned that all motorists understand that, because a shoulder is an essential safety feature of a highway, it is part of the highway. Specifically, the Court stated that

> [t]o get on or off a shoulder to stop, park, or leave standing a vehicle, motorists must travel on the shoulder.
>
> At the high speeds of modern vehicles, such an endeavor often results in significant travel, "in the ordinary sense," on the shoulder of a highway. Indeed, it seems quite extraordinary, if not fictional, to assume that vehicles do not travel on shoulders or that shoulders are not designed for vehicular travel, albeit of a temporary sort. [*Id.*]

Third, the Court considered relevant definitions found in the Michigan Vehicle Code (MVC). MCL 257.1 *et seq*. *Id.* Specifically, it considered the MVC definitions

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[2] See, e.g., *Johnson v Michigan*, 32 Mich App 37, 39; 188 NW2d 33 (1971); *Van Liere v State Hwy Dep't*, 59 Mich App 133, 136; 229 NW2d 369 (1975); *Hall v Dep't of State Hwys*, 109 Mich App 592, 602 n 4; 311 NW2d 813 (1981); *McKee v Dep't of Transportation*, 132 Mich App 714, 721; 349 NW2d 798 (1984); *Roux v Dep't of Transportation*, 169 Mich App 582, 586; 426 NW2d 714 (1988).

of "highway" and "roadway." It noted that the MVC definition of "highway"[3] is broader than the definition of "roadway."[4] It then concluded that the Legislature's use of the word "highway" rather than "roadway" in the highway exception statute showed that it intended that shoulders be considered as designed for vehicular travel. *Id*. at 315-316.

The majority concludes that the rationale presented in *Gregg* is unpersuasive. It states that *Gregg* should be overruled because, under the majority's "strict construction" approach, a shoulder is not "designed for vehicular travel."

MCL 8.3a and numerous recent decisions from this Court emphasize that we should give words their ordinary meanings in construing statutes.[5] In fact, this Court often refers to dictionary definitions to interpret the meanings of words. A dictionary is a codification of the "common experience" meanings of words. I believe that the *Gregg* Court properly emphasized the mandate of MCL 8.3a when it held that "it seems quite extraordinary, if not fictional, to assume that vehicles do not travel on shoulders or that shoulders are not designed for vehicular travel, albeit of a temporary sort." *Gregg, supra* at 315.

Moreover, *Gregg's* holding is consistent with dictionary definitions for "design" and "travel." *Random*

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[3] MCL 257.20 defines "highway" to include "the entire width between the boundary lines."

[4] MCL 257.55 defines "roadway" to include only the portion of a highway "improved, designed, or ordinarily used for vehicular travel."

[5] See, e.g., *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006); *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005); *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763; 685 NW2d 391 (2004); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

House Webster's College Dictionary (1995) defines "design" as "to intend for a definite purpose[.]" It defines "travel" as "to move or pass from one place or point to another."

Defense counsel's admission at oral argument comported with the *Gregg* Court's "common experience" reasoning. Counsel conceded that shoulders are designed for vehicular travel "of a sort." Emergency vehicles travel on the shoulder, and the Michigan Department of Transportation (MDOT) typically diverts vehicular traffic onto shoulders during construction. Given these facts, defense counsel admitted that shoulders are designed for travel "of a sort."[6]

Certainly, MDOT would not permit motorists to drive their vehicles from one place to another on a portion of the highway that is not designed for vehicular travel. These facts, together with traditional notions of statutory construction, strongly support *Gregg's* reasoning. The majority's conclusion that the "common experience" approach is inconsistent with the statutory language is flawed in light of this Court's current practices and MCL 8.3a.

The majority also takes issue with *Gregg's* use of legislative acquiescence. This issue has arisen numerous times in the last several years. I continue to believe that we should consider legislative acquiescence when construing statutes. See *Donajkowski v Alpena Power Co*, 460 Mich 243, 270-273; 596 NW2d 574 (1999) (KELLY, J., dissenting). Since 1971, when appellate cases began defining "designed for vehicular travel," the Legislature has amended the highway exception three times. But it did not see fit to alter the judicial inter-

[6] The majority does not even attempt to contradict this admission.

pretation of those words.[7] The Legislature's acceptance of *Gregg* is highly persuasive.[8]

In summary, I believe that *Gregg* was correctly decided. I would affirm it on the basis of (1) basic accepted principles of statutory interpretation, (2) defense counsel's unrebutted admission that a shoulder is designed for vehicular travel "of a sort," (3) MDOT's use of shoulders for diversion of vehicular traffic during construction, and (4) the fact that the law in question has remained unaltered since 1971.

In holding that shoulders are not "designed for vehicular travel," the majority admits that several interpretations are available but chooses the narrowest one possible.[9] Essentially, it argues that giving the words "designed for vehicular travel" their plain ordinary meaning swallows the exception, because a vehicle could travel on every improved part of a highway. This argument has three flaws:

First, the majority fails to remember that, although drivers rarely travel on medians or embankments, they do routinely travel short distances on shoulders. Moreover, MDOT specifically requires vehicles to travel on shoulders for long distances. The same cannot be said for other highway improvements.

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[7] The Legislature amended the statute in 1990, 1996, and 1999.

[8] The majority asserts that the Court's ruling in *Gregg* was based on the assumption that the Legislature had acquiesced in the Court's earlier decisions. This ignores the fact that the *Gregg* Court went further. It based its holding primarily on an interpretation of the language of MCL 691.1402(1) that gave an ordinary meaning to the word "travel."

[9] The majority suggests that it does not need to apply *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567; 363 NW2d 641 (1984), to this case. In actuality, the majority does apply *Ross* and reads the statute narrowly.

Second, as explained in *Wexford Med Group v City of Cadillac,*[10] a court should not make an interpretation not intended by the Legislature because it fears what will develop if it interprets the language as written. *Id.* at 220 n 10. The majority suggests that giving the statute's language a meaning other than the narrowest possible meaning would create the risk of unlimited liability, which is something it must avoid. Its conclusion contradicts *Wexford,* apparently out of a subjective fear.

Third, the only issue before the Court is whether a shoulder is designed for vehicular travel. Whether other improved portions of the highway are designed for vehicular travel is a question best left to cases that raise and explore that possibility.

Ultimately, the majority's reasoning fails because of the language of the statute and because of the fact that vehicles do indeed travel on shoulders that were designed for travel. By contrast, the reasoning in *Gregg* is soundly supported by the meaning of the words in the statute and by common practice. Moreover, *Gregg* is properly in line with the majority's rules of statutory interpretation.

CONCLUSION

I would reaffirm this Court's decision in *Gregg* and hold that the shoulder of a highway is "designed for vehicular travel" within the meaning of the highway exception to governmental immunity. I base this position on (1) time-honored principles of statutory interpretation, (2) defense counsel's unrebutted admission that a shoulder is designed for vehicular travel, (3) MDOT's actions of actually diverting traffic onto the

[10] 474 Mich 192; 713 NW2d 734 (2006).

shoulders of highways, and (4) the fact that Michigan courts have followed this interpretation since 1971. Therefore, I would affirm the decision of the Court of Appeals.

CAVANAGH, J., concurred only in the result proposed by KELLY, J.

PEOPLE v JOEZELL WILLIAMS

Docket Nos. 128294, 128533. Decided May 31, 2006. On applications by the defendant and the prosecution for leave to appeal, the Supreme Court ordered oral argument on whether to grant the applications or take other peremptory action. Following oral argument, the Supreme Court issued a memorandum opinion affirming the judgment of the Court of Appeals and denied the defendant's application in all other respects.

Joezell Williams II was convicted by a jury in the Wayne Circuit Court, Brian R. Sullivan, J., of first-degree premeditated murder, first-degree felony murder, larceny from the person of another, and other felonies for the slaying of one person and other acts. The court imposed one sentence of life imprisonment on the alternative theories of first-degree premeditated murder and first-degree felony murder, and other sentences of imprisonment for the larceny and other convictions. The defendant appealed, alleging a double-jeopardy violation. The Court of Appeals, SAWYER, J., and SCHUETTE, P.J. (O'CONNELL, J., dissenting), affirmed in part and vacated in part, noting that, although double-jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim, a single conviction of murder based on two alternative theories will be upheld. The Court of Appeals affirmed the one conviction and one sentence based on the two theories of premeditated murder and felony murder. However, the Court of Appeals noted that, because the defendant was convicted and sentenced for the murder on the alternative bases of premeditation and felony murder, the conviction for larceny, the felony underlying the felony-murder theory, must be vacated. 265 Mich App 68 (2005). The defendant and the prosecution sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the applications. 474 Mich 882 (2005).

In a memorandum opinion signed by Chief Justice TAYLOR and Justices CAVANAGH, KELLY, YOUNG, and MARKMAN, the Supreme Court *held*:

If the defendant's murder conviction is reversed on grounds only affecting the murder element, entry of a judgment of conviction of larceny may be directed by the appellate court. The defendant's conviction must be affirmed.

Affirmed.

Justice WEAVER, dissenting, stated that the defendant's conviction of larceny from the person of another should be affirmed for the reasons stated in her dissenting statement in *People v Curvan*, 473 Mich 896 (2005).

Justice CORRIGAN, dissenting, would hold this case in abeyance for the decision in *People v Smith* (Docket No. 130353), lv gtd 475 Mich 864 (2006), concerning whether *People v Robideau,* 419 Mich 458 (1984), or *Blockburger v United States,* 284 US 299 (1932), sets forth the proper test to determine whether multiple punishments are barred on double-jeopardy grounds under Const 1963, art 1, § 15. Otherwise, under the currently controlling test of *People v Robideau*, 419 Mich 458 (1984), she would decide this case on the basis that larceny from the person and first-degree murder based on alternative theories of premeditation and felony murder are not the "same offense" for the purposes of the protection against double jeopardy.

CRIMINAL LAW — DOUBLE JEOPARDY.

A defendant who receives one conviction of first-degree murder supported by two theories, first-degree premeditated murder and first-degree felony murder, and is also convicted of the felony underlying the felony-murder charge and whose conviction of the underlying felony is thereafter vacated on double-jeopardy grounds may have a judgment of conviction of the underlying felony entered against the defendant where the defendant's murder conviction is reversed on grounds that only affect the murder element.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

Neil J. Leithauser for the defendant.

Amicus Curiae:

Ronald J. Frantz, Kym L. Worthy, and *Timothy A. Baughman*, for Prosecuting Attorneys Association of Michigan.

MEMORANDUM. In this case, we examine the double-jeopardy concerns[1] that are involved when a defendant who has committed a felony and a concurrent, single homicide is charged with and convicted of first-degree premeditated murder, first-degree felony-murder, and the felony underlying the felony-murder charge. Under the current case law, to avoid double-jeopardy implications, the defendant receives one conviction of first-degree murder, supported by two theories, and the conviction of the predicate felony underlying the felony murder is vacated. See *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981); *People v Bigelow* 229 Mich App 218; 581 NW2d 744 (1998). The defendant thus receives one conviction and one sentence for having committed one crime.

In this case, the trial court followed that procedure in part, and the Court of Appeals affirmed in part and vacated in part, but invited us to consider modifying *Bigelow*. 265 Mich App 68; 692 NW2d 722 (2005). We decline to do so, affirming the judgment of the Court of Appeals, and we provide a brief analysis of our reasoning.

The prosecutor in this case is concerned that if the judgment vacates defendant's larceny conviction, in the unlikely situation that defendant's conviction of murder is overturned for some reason unrelated to his conviction of larceny, defendant could "go free" even though there is no question that he was found guilty of larceny. Although such a situation is unprecedented in Michigan case law, we find reassurance in the federal law that these concerns are groundless. Although the United States Supreme Court has not considered this specific context, it came close in *Rutledge v United States*, 517 US 292; 116 S Ct 1241; 134 L Ed 2d 419

[1] Const 1963, art 1, § 15.

(1996). We believe *Rutledge* presents the correct method of handling this case.

In *Rutledge*, the defendant was convicted of both conducting a continuing criminal enterprise (CCE) and conspiracy to distribute a controlled substance and was sentenced to two concurrent life sentences. The Court held that under the common-elements test of *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), the conspiracy was a lesser included offense of CCE. The Court then found that the defendant could not receive two sentences and that the second conviction, even without a second sentence, was presumptively impermissible under *Ball v United States*, 470 US 856; 105 S Ct 1668; 84 L Ed 2d 740 (1985).[2]

Next, the Court addressed the government's concern that without a "backup" conviction, the defendant might escape punishment altogether if he successfully challenged the CCE conviction in a manner that did not affect his conspiracy conviction. *Rutledge* at 305. The Court found "no reason why this pair of greater and lesser offenses should present any novel problem," and noted that "federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." *Id*. at 306. Justice Stevens continued, "This Court has noted the use of such a practice with approval." *Id*.

Under this approach, if defendant's murder conviction is reversed on grounds only affecting the murder

[2] The Court did not ultimately decide whether the second conviction was impermissible under *Ball* alone because the fact that each conviction carried its own $50 "special assessment" established a second punishment, even without a second prison term. *Rutledge* at 301.

element, entry of a judgment of conviction of larceny may be directed by the appellate court. Such was the practice of this Court in, for example, *People v Randolph*, 466 Mich 532, 553; 648 NW2d 164 (2002), and *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001). We continue to support this approach and thus affirm defendant's conviction.[3]

Affirmed.

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

WEAVER, J. (*dissenting*). I dissent from the majority's decision to affirm the Court of Appeals judgment that vacated defendant's conviction of larceny from the person of another and would affirm defendant's convictions because I continue to adhere to the position expressed in my dissent in *People v Curvan,* 473 Mich 896 (2005).

CORRIGAN, J. (*dissenting*). I respectfully dissent from the majority's declination to tackle the central question presented in this case, i.e., whether double-jeopardy principles prohibit the imposition of multiple punishments for the underlying offense of larceny from the person of another, MCL 750.357, and first-degree murder based on alternative theories of premeditated murder and felony murder, MCL 750.316(1). I would hold this case in abeyance for the decision in *People v Smith* (Docket No. 130353), lv gtd 475 Mich 864 (2006), in which we have granted leave to appeal to consider the appropriate test for resolving a "multiple punishments" double-jeopardy claim that arose from a conviction of

[3] In all other respects, the application for leave to appeal in Docket No. 128533 is denied.

armed robbery, MCL 750.529, and felony murder based on a predicate felony of larceny.

An abeyance for *Smith* is appropriate for the following reasons:

First, this case and *Smith* are in similar postures. In both cases, the defendant received dual convictions for felony murder and a predicate felony or an offense related to the predicate felony. In *Smith*, the defendant was convicted of armed robbery and felony murder based on larceny. In this case, the defendant was convicted of larceny from the person of another and first-degree murder based on alternative theories of premeditated murder and felony murder.

Second, both cases potentially present the question whether *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984), or *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), sets forth the proper test to determine whether multiple punishments are barred on double-jeopardy grounds under Const 1963, art 1, § 15. Our grant order in *Smith* directed the parties to consider "this Court's prior precedent in 'multiple punishment' claims and the common understanding of 'same offense' as it relates to the 'multiple punishments' prong of double jeopardy. Cf. *People v Nutt*, 469 Mich 565 (2004)." *Smith*, *supra* at 864.

Thus, our resolution of the appropriate test in *Smith* may offer guidance in addressing the "multiple punishments" claim in this case. If this Court decides in *Smith* that the *Blockburger* test governs the resolution of multiple punishments claims, then we should consider the proper application of that test in this case. Therefore, because an abeyance for *Smith* is warranted, I must respectfully dissent.

Next, I will articulate what I believe to be the correct disposition of this case under the currently controlling

Robideau test. For the following reasons, I believe that double jeopardy does not preclude the imposition of multiple punishments for larceny from the person of another and first-degree murder based on alternative theories of premeditation and felony murder.

In *People v Curvan*, 473 Mich 896 (2005) (CORRIGAN, J., dissenting), I agreed with Justice RILEY's dissenting view in *People v Harding*, 443 Mich 693; 506 NW2d 482 (1993), that felony murder and the predicate offense of armed robbery are not the "same offense" for the purposes of the protection against double jeopardy. Plainly, the two offenses protect against distinct societal harms. Felony murder punishes homicide committed with malice in the course of a felony, while armed robbery protects against the violent deprivation of property. *Id*. Moreover, the structure of the first-degree murder statute reflects that felony murder is one of three classifications of the crime of first-degree murder. The predicate felonies are used to differentiate felony murder "from the other two types of first-degree murder, and from second-degree murder, MCL 750.317, rather than merely to enhance the penalty for the enumerated predicate felonies." *Curvan*, *supra* at 904 (CORRIGAN, J., dissenting).

As in *Curvan*, the majority here again declines to answer a fairly straightforward question: Are first-degree murder supported by alternative theories and larceny from the person the "same offense"? Under our current test set forth in *Robideau*, legislative intent is the fundamental criterion in discerning whether multiple punishments are authorized. Although this Court held in *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981), and *Harding*, *supra*, that separate convictions and sentences for felony murder and the underlying felony are not permitted, this Court has never ad-

dressed whether multiple punishments for an underlying felony and first-degree murder are permitted where, as here, the murder conviction is based on alternative theories of premeditated murder and felony murder.[1]

I would decide this case on the basis of the views I expressed in *Curvan*. First-degree murder and the underlying felony of larceny from the person simply are not the "same offense." I can discern no indication that our Legislature ever prohibited multiple punishments for these distinct offenses. The two offenses protect against distinct social harms. That is particularly true where, as here, the murder conviction is supported by an alternative theory of premeditation. It cannot reasonably be disputed that protecting against a premeditated homicide is a social interest that is distinct from the aim of preventing the taking of property from the person of another.

In lieu of answering any of these questions or holding this case in abeyance, the majority has imported a doctrine from federal case law allowing a conviction that has been vacated to be revived in certain circumstances. Because I question the majority's avoidance of the double-jeopardy issues that are so clearly before us, and because an abeyance for *Smith* is warranted, I respectfully dissent from the majority's decision.

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[1] The Court of Appeals special panel in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), of which I was a member, vacated the conviction for a felony underlying a murder conviction based on alternative theories of premeditated murder and felony murder. In his dissent in this case, Judge O'CONNELL, who was a member of the *Bigelow* special panel, opined that he and the other members of the *Bigelow* special panel had erred in holding that the underlying felony conviction must be vacated in this situation. I share Judge O'CONNELL's view that the special panel members in *Bigelow*, myself included, erred in this regard.

CITY OF TAYLOR v DETROIT EDISON COMPANY

Docket No. 127580. Argued March 7, 2006 (Calendar No. 1). Decided May 31, 2006.

The city of Taylor brought an action in the Wayne Circuit Court against the Detroit Edison Company, seeking reimbursement of the costs incurred in the removal of the defendant's overhead power lines and their relocation underground during a major reconstruction project along Telegraph Road. The plaintiff passed an ordinance requiring utilities to remove aboveground facilities and to relocate them underground at the owner's expense. The defendant refused to pay in accord with the ordinance, and the plaintiff advanced the costs to the defendant to complete the project. The court, John A. Murphy, J., granted summary disposition for the plaintiff, ordering reimbursement. The defendant appealed, contending, in part, that the circuit court had no jurisdiction because the Michigan Public Service Commission (MPSC) has primary jurisdiction. The Court of Appeals, MURPHY, P.J., and GRIFFIN and WHITE, JJ., affirmed in part and remanded the matter to the circuit court for proceedings consistent with its opinion per curiam. 263 Mich App 551 (2004). The Court held that the MPSC did not have primary jurisdiction because the question was one of law and the courts could craft an answer that would promote uniformity without interfering with the MPSC's ability to perform its regulatory duties. In reliance on the governmental function/proprietary function test first articulated in *City of Pontiac v Consumers Power Co*, 101 Mich App 450 (1980), the Court of Appeals determined that the plaintiff exercised a governmental function and properly required the defendant to bear the entire cost of relocation. The Court also determined that state law did not preempt the plaintiff's ordinance. The Supreme Court granted the defendant's application for leave to appeal. 474 Mich 877 (2005).

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

1. Under Const 1963, art 7, §§ 22 and 29, a local unit of government may exercise reasonable control over its highways, streets, alleys, and public places as long as that regulation does not conflict with state law. The governmental function/proprietary function test applied by the Court of Appeals is not supported by statute or the Constitution. The Court of Appeals cases that apply the governmental function/proprietary function test in this area of the law must be overruled.

2. The decisions in *City of Monroe v Postal Telegraph Co*, 195 Mich 467 (1917), *Detroit Edison Co v Detroit*, 332 Mich 348 (1952), and *Detroit v Michigan Bell Tel Co*, 374 Mich 543 (1965), must be abrogated to the extent that they conflict with the MPSC's interpretation of its rules.

3. The MPSC's rules regarding the placement of utility wires underground appear to cover the same subject matter as the plaintiff's ordinance and may conflict with the ordinance. The provisions of the ordinance may contravene the authority of the MPSC in this area. If the portion of the ordinance requiring the defendant to bear the entire cost of relocation conflicts with the MPSC's rules, that portion of the ordinance is invalid.

4. Application of the factors considered in determining whether the MPSC has primary jurisdiction over the issue of how to allocate the costs of relocating the lines underground leads to a conclusion that the MPSC has primary jurisdiction over the issue of cost allocation.

5. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the circuit court for the entry of a judgment and order granting summary disposition to the defendant.

Justice CAVANAGH concurred in the result only.

Justice KELLY, dissenting, would affirm the judgment of the Court of Appeals because it properly applied the long line of cases holding that a municipality's constitutional and common-law right of reasonable control over its rights-of-way includes the right to order a utility to relocate its facilities at the utility's expense. The existing common-law rule provides uniformity and should not be abrogated. The plaintiff's ordinance represents reasonable control over the plaintiff's right-of-way. The MPSC's rules regarding placement of utility lines do not preempt the plaintiff's right to control its rights-of-way; in fact, the rules anticipate municipal ordinances such as the plaintiff's. Nor is the MPSC's primary jurisdiction implicated in this case.

Reversed and remanded.

1. MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW.

A local unit of government may exercise reasonable control over its highways, streets, alleys, and public places as long as such regulation does not conflict with state law (Const 1963, art 7, §§ 22, 29).

2. ADMINISTRATIVE LAW — PRIMARY JURISDICTION.

Factors that may be considered in determining whether an administrative agency has primary jurisdiction over a dispute include whether the matter falls within the agency's specialized knowledge, whether the court would interfere with the uniform resolution of similar issues, and whether the court would upset the regulatory scheme of the agency.

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Bruce R. Maters, George H. Hathaway, and *Foster, Swift, Collins & Smith, P.C.* (by *William K. Fahey* and *Stephen J. Rhodes*), for the defendant.

Amici Curiae:

Law, Weathers & Richardson, P.C. (by *David W. Centner* and *Ann E. Liefer*), for Michigan Municipal League and Michigan Townships Association.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David A. Voges, Steven D. Hughey, Michael A. Nickerson,* and *Kristin M. Smith*, Assistant Attorneys General, for the Michigan Public Service Commission.

Dykema Gossett PLLC (by *Daniel J. Martin*) for International Transmission Company.

Foster, Swift, Collins & Smith, P.C. (by *Stephen O. Schultz*), for Michigan Electric Transmission Co., LLC.

Dickinson Wright PLLC (by *Michael A. Holmes, Jeffery V. Stuckey,* and *Susan G. Schwochau*) for the Telecommunications Association of Michigan.

Jon R. Robinson and *Vincent P. Provenzano* for Consumers Energy Company.

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James A. Ault for the Michigan Electric & Gas Association.

YOUNG, J. We granted leave to appeal in this case to reconcile plaintiff's constitutional authority to exercise "reasonable control" over its streets with the Michigan Public Service Commission's (MPSC) broad regulatory control over public utilities. Consistent with our long-standing precedent, we hold that a municipality's exercise of "reasonable control" over its streets cannot impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law. In this case, the MPSC has promulgated uniform rules governing the relocation of utility wires underground. To the degree plaintiff's ordinance on this subject conflicts with the MPSC's rules, the ordinance exceeds plaintiff's power to exercise "reasonable control" over its streets and is invalid. Furthermore, because the question of allocation of costs for the relocation of utility wires underground falls under the primary jurisdiction of the MPSC, that entity should be the first to consider this dispute. We reverse the judgment of the Court of Appeals and remand to the Wayne Circuit Court to enter an order granting summary disposition to defendant. The dismissal is without prejudice to plaintiff's right to seek a remedy before the MPSC.

FACTS AND PROCEDURAL HISTORY

In the fall of 1999, the City of Taylor (plaintiff) and the Michigan Department of Transportation planned for a major reconstruction project of a four-mile portion of Telegraph Road that intersects the city. The project called for major infrastructure improvements, including the underground relocation of all utility wires along Telegraph Road. Under the proposal, the Detroit Edison Company's (defendant) utility poles along Telegraph Road would be removed and their wires relocated underground. In early 2000, officials from plaintiff and defendant met several times to discuss the project and its implementation.

Defendant agreed to relocate the lines underground, but would not agree to bear the costs of that effort. When the parties' negotiations failed, plaintiff enacted Taylor Ordinance 00-344, the "Telegraph Road Improvement and Underground Relocation of Overhead Lines Ordinance." Section 3 of that ordinance requires all public utilities with lines or poles adjacent to Telegraph Road "to relocate underground all of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the City."[1] After plaintiff enacted the ordinance, the parties continued to discuss the dispute, but could not come to an amicable resolution. Ultimately, plaintiff agreed to advance the cost of relocating the wires underground, but reserved its rights to enforce the ordinance against defendant and seek reimbursement.

In June 2002, plaintiff filed a complaint for a declaratory judgment in circuit court, seeking a determination that defendant was obligated to pay the entire cost of

[1] Taylor Ordinance 00-344.

relocating the wires under Taylor Ordinance 00-344. Defendant moved for summary disposition under MCR 2.116(C)(4), arguing that the MPSC rules required plaintiff to pay for the relocation, and that the MPSC had primary jurisdiction over this dispute. Plaintiff filed a cross-motion for summary disposition under MCR 2.116(C)(10), arguing that the ordinance controlled. The circuit court granted summary disposition to plaintiff, holding that it was unnecessary to consider the issue of primary jurisdiction because the city's ordinance was enforceable regardless of the MPSC's interpretation of its rules.

On appeal, the Court of Appeals affirmed in part the judgment of the circuit court in a published opinion per curiam.[2] The Court held that the MPSC did not have primary jurisdiction because the question was one of law, and the courts could craft an answer that would promote uniformity without interfering with the MPSC's ability to perform its regulatory duties. Then, relying on its governmental function/proprietary function test, first articulated in *City of Pontiac v Consumers Power Co*,[3] the Court determined that plaintiff exercised a governmental function and properly required defendant to bear the entire cost of relocation. The Court also determined that state law did not preempt the city's ordinance.

This Court granted leave to appeal, specifically directing the parties to address the scope of a city's power over utilities under its constitutional authority to exercise reasonable control over its streets; whether that constitutional authority permits a city to impose relocation costs on utilities under Const 1963, art 7, § 29, and how the city's constitutionally authorized power to

[2] 263 Mich App 551; 689 NW2d 482 (2004).

[3] 101 Mich App 450; 300 NW2d 594 (1980).

control its streets could be reconciled with the MPSC's broad regulatory authority over utilities.[4]

STANDARD OF REVIEW

This Court reviews the decision to grant or deny a motion for summary disposition de novo.[5] Issues of constitutional and statutory construction are questions of law that are also reviewed de novo.[6]

ANALYSIS

THE CITY'S CONSTITUTIONAL AUTHORITY

Article 7 of the Constitution of 1963 enumerates the general authority and limits on the authority of local governments, such as counties, townships, cities, and villages.[7] Subject to authority specifically granted in the Constitution, local governments derive their authority from the Legislature.[8] We have held that

> "[local governments] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."[9]

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[4] 474 Mich 877 (2005).

[5] *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

[6] *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004).

[7] Const 1963, art 7.

[8] Const 1963, art 7, §§ 1, 17, and 21.

[9] *City of Kalamazoo v Titus*, 208 Mich 252, 262; 175 NW 480 (1919), quoting 1 Cooley, Constitutional Limitations (7th ed), pp 163, 264 *et seq*.

Notwithstanding that local governments obtain their authority from the Legislature, the Constitution reserves to local governments certain authorities. In this case, plaintiff relies on the authority to exercise reasonable control over its streets, which is specifically reserved in art 7, § 29, which states:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. *Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government*.[10]

Thus, the authority reserved to local units of government to exercise reasonable control over the enumerated subject areas is explicitly made subject to the other provisions of the Constitution. One such provision is art 7, § 22, which empowers cities and villages "to adopt resolutions and ordinances *relating to its municipal concerns*, property and government, *subject to the constitution and law*."[11]

In *People v McGraw*,[12] this Court interpreted the similarly worded "reasonable control" predecessor of art 7, § 29 found in the 1908 Constitution,[13] along with the predecessor of art 7, § 22, the provision regarding

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[10] Const 1963, art 7, § 29 (emphasis added).

[11] Const 1963, art 7, § 22 (emphasis added).

[12] 184 Mich 233; 150 NW 836 (1915), interpreting Const 1908, art 8, §§ 21 and 28.

[13] Const 1908, art 8, § 28 provided:

municipal powers.[14] *McGraw* involved traffic ordinances enacted by the City of Detroit that conflicted with the general state traffic laws. This Court held that "[t]aking the [constitutional] sections together, they should be so construed as to give the power to municipalities to pass such ordinances and regulations with reference to their highways and bridges as are not inconsistent with the general State law."[15] Thus, *McGraw* permits a city to exercise "reasonable control"

> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks, or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

The differences between this section and Const 1963, art 7, § 29 are relatively minor. In addition to stylistic changes, counties are added to the list of municipalities; the list of items that public places can be used for now includes the general "other utility facilities"; and the reservation of power to municipalities is explicitly subject to other provisions of the Constitution.

[14] Const 1908, art 8, § 21 provided:

> Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.

The differences between this section and Const 1963, art 7, § 22 are also relatively minor. Besides the stylistic changes, the section merely reaffirms that a city's or a village's powers are subject to the general laws of the state.

[15] *McGraw, supra* at 238.

to regulate matters of local concern, but only in a manner and to the degree that the regulation does not conflict with state law.

In 1939, the Legislature created the MPSC, giving it broad regulatory authority over public utilities. Under its enabling statute,

> [t]he public service commission is vested with *complete power and jurisdiction* to regulate all public utilities in the state except . . . as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and *all other matters* pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon *all matter pertaining to, necessary, or incident to the regulation of public utilities* . . . .[16]

In 1970, the MPSC promulgated rules governing the underground placement of new and existing utility wires.[17] Specifically, the MPSC promulgated Rule 460.516, governing the "[r]eplacement of existing overhead lines," and Rule 460.517, concerning "[u]nderground facilities for convenience of utilities or where required by ordinances."[18] These rules appear to cover the same subject matter as Taylor Ordinance 00-344, and in a manner that possibly creates a conflict between the MPSC's rules and the plaintiff's ordinance. Because the MPSC has not construed how its rules governing the allocation of costs for the underground relocation of utility wires apply in this circumstance, and because provisions of the ordinance appear to fall within the MPSC's regulatory purview, the MPSC, rather than a

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[16] MCL 460.6 (emphasis added).

[17] 1999 AC, R 460.511 *et seq*.

[18] See titles of 1999 AC, R 460.516 and 460.517

court, should assess whether there is an actual conflict. As discussed later in this opinion, the doctrine of primary jurisdiction requires us to defer to the judgment of the MPSC on this question. If the ordinance conflicts with MPSC rules, then under art 7, §§ 22 and 29, and *McGraw*, Taylor Ordinance 00-344 must yield.

The cases from this Court relied on by the Court of Appeals and plaintiff are readily distinguishable from the present case. As an initial matter, *all* the cases from this Court holding that a municipality has the power to force a utility to relocate its facilities at its own expense were decided before the MPSC's promulgation of rules regarding the underground relocation of wires.[19] Thus, there was no state law for the municipal action to conflict with. To the extent these cases conflict with the MPSC's interpretation of its rules, however, they are abrogated. Moreover, no case cited is factually analogous. For example, the Court of Appeals cited this Court's opinion in *Detroit Edison Co v Detroit*[20] for the proposition that this Court "ruled that the city of Detroit could order the utility to move its poles at its own expense under the municipality's constitutional right to control public places."[21] In *Detroit Edison*, the utility erected poles on an easement granted to the city for public utilities. The utility claimed exclusive control over the easement because the grantor dedicated it for utilities rather than public use. This Court held that the utility easement fell under the "public places" language of article 8, § 28 of the 1908 Constitution. However, the Court did not rely on that constitutional provision in

[19] See *City of Monroe v Postal Tel Co*, 195 Mich 467; 162 NW 76 (1917), *Detroit Edison Co v Detroit*, 332 Mich 348; 51 NW2d 245 (1952), and *Detroit v Michigan Bell Tel Co*, 374 Mich 543; 132 NW2d 660 (1965).

[20] 332 Mich 348; 51 NW2d 245 (1952).

[21] 263 Mich App at 558, citing *Detroit Edison*.

holding that the city could require the utility to pay to move the poles. Rather, the Court relied on the utility's *concession* that it would be liable if the easement was determined to be a "public place."[22] Therefore, *Detroit Edison* does not support plaintiff's argument or the holding of the Court of Appeals.[23]

As noted, the precedent that governs the resolution of this case is *McGraw*. Because Taylor Ordinance 00-344 may conflict with MPSC rules, it may not be a valid exercise of plaintiff's reasonable control over its streets. Therefore, if the portion of the ordinance that requires the utility to bear the entire cost of relocation conflicts with the MPSC rules on the subject, that portion of the ordinance is invalid. We reverse the Court of Appeals judgment that held to the contrary.

THE COURT OF APPEALS TEST

In reaching its holding, the Court of Appeals did not focus on the question of "reasonable control." Instead, the Court of Appeals relied on a "general rule that relocation costs may be imposed on the utility if necessitated by the municipality's discharge of a governmental function, while the expenses must be borne by the

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[22] *Detroit Edison, supra* at 354-355. The dissent has created a doctrine of "perpetual concession" and would bind Edison to a concession it made 50 years ago in unrelated litigation. Merely stating the dissent's position shows why it has never had any basis in our jurisprudence.

[23] The case relied on by the dissent, *City of Monroe v Postal Tel Co*, *supra,* also does not support the Court of Appeals conclusion. *Monroe* involved a federal statute, the Post Road Act of 1886, which gave telegraph companies the right to construct telegraph lines along any United States post road. The issue before the Court was whether the federal statute limited the state's ability to exercise control over the lines. This Court determined, consistently with other jurisdictions, that the federal statute was permissive and subject to the states' police power. Not surprisingly, *Monroe* did not mention or utilize Const 1908, art 8, § 28 or *McGraw* in its resolution of the case.

municipality if necessitated by its discharge of a proprietary function."[24] This "general rule" appears to emanate from *City of Pontiac v Consumers Power Co*,[25] and is derived from McQuillin, Municipal Corporations, § 34.74(a), p 184. While many Michigan Court of Appeals cases have applied the "general rule," [26] there is no support for it in either our statutes or Constitution. The proper "general rule," which has been inexplicably ignored by the Court of Appeals, was articulated by this Court in *McGraw* nearly 100 years ago. Today, we reaffirm the holding and standard articulated in *McGraw* as being consistent with the modern constitutional provisions of the analogues of these provisions it construed: A municipality may regulate "highways, streets, alleys, and public places" to the degree such regulations are consistent with state law. We overrule the Court of Appeals cases that apply the proprietary function/governmental function test in this area of the law.[27]

PRIMARY JURISDICTION

Having decided that plaintiff's effort to compel defendant's compliance by decree may contravene the authority of the MPSC, we next address whether the MPSC has primary jurisdiction over the dispute about the allocation of the costs of relocating the wires under-

[24] 263 Mich App at 557-558.

[25] 101 Mich App 450; 300 NW2d 594 (1980).

[26] *Pontiac, supra* at 453-454, was cited in *Detroit Edison Co v Detroit*, 180 Mich App 145; 446 NW2d 615 (1989) (expansion of Cobo Hall), and *Detroit Edison Co v Southeastern Michigan Transportation Auth,* 161 Mich App 28; 410 NW2d 295 (1987) (public transit system); see also *Michigan Bell Tel Co v Detroit*, 106 Mich App 690; 308 NW2d 608 (1981) (sewer treatment facility).

[27] See n 26, *supra*.

ground.[28] There is no fixed formula, but there are several factors to consider in determining whether an administrative agency has primary jurisdiction over a dispute: (1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency.[29] The Court of Appeals analyzed these three factors and determined that the MPSC did not have primary jurisdiction over the dispute. We disagree.

The fundamental error in the Court of Appeals analysis is that the court applied the *Travelers* factors to the question of the city's constitutional authority to exercise reasonable control over its streets. We agree that the MPSC has absolutely no jurisdiction to consider the scope of plaintiff's constitutional authority under art 7, § 29.[30] As discussed earlier in this opinion, *McGraw* articulates the proper standard for resolution of the constitutional issue. Once the constitutional issue has been resolved, the *Travelers* factors are applied to determine whether the MPSC has primary jurisdiction over the issue of how to allocate the costs of relocating the lines underground.

Applying the first factor, the appropriate method for allocating the cost of moving the facilities of utilities is

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[28] The dissent discusses preemption at length. We cannot discern why. Our opinion does not mention preemption, much less rely on the doctrine, and it plays no role in our disposition of this case.

[29] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 198-200; 631 NW2d 733 (2001); see also *Rinaldo's Constr Co v Michigan Bell Tel Co*, 454 Mich 65, 71-72; 559 NW2d 647 (1997).

[30] As stated in *Wikman v City of Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982), "Generally speaking, an agency exercising quasi-judicial power does not undertake the determination of constitutional questions or possess the power to hold statutes unconstitutional."

clearly within the expertise of the MPSC. Additionally, the MPSC is in the best position to interpret and apply its own rules on this subject. Regarding the second factor, the MPSC arguably has devised a uniform system for removing overhead lines and allocating the associated costs. Because the expense incurred in complying with plaintiff's demands may potentially affect a wide range of ratepayers, most of whom do not reside in the City of Taylor, this is an area of law where uniformity is critical. Finally, under the third factor, the decision of the City of Taylor appears directly to implicate the rate-making authority of the MPSC and defendant's tariffs created under that authority. Given the MPSC's broad authority to regulate public utilities, and its promulgation of rules pertaining to the relocation of overhead lines underground, the circuit court's resolution of this case could adversely affect the MPSC's ability to carry out its regulatory responsibilities. Because application of the *Travelers* factors overwhelmingly favors the MPSC, that agency has primary jurisdiction to determine the proper allocation of costs associated with relocating the wires underground. Accordingly, the circuit court should have granted defendant's motion to dismiss and required plaintiff to seek a remedy from the MPSC.

CONCLUSION

Today, we reaffirm this Court's decision in *McGraw*. Under Const 1963, art 7, §§ 22 and 29, a local unit of government may exercise reasonable control over its "highways, streets, alleys, and public places" as long as that regulation does not conflict with state law. Here, because plaintiff's ordinance may be incongruent with the MPSC's regulations governing underground relocation of wires, and the regulation of defendant utility, the

ordinance may be invalid. MCL 460.6 vests the MPSC with broad authority to regulate public utilities, and the MPSC has promulgated rules on this subject. Accordingly, we conclude that the MPSC has primary jurisdiction over the issue of cost allocation.

We reverse the judgment of the Court of Appeals and remand to the Wayne Circuit Court to grant summary disposition to defendant. Plaintiff may seek a remedy concerning the costs of relocating defendant's wires underground from the MPSC.

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

CAVANAGH, J., concurred in the result only.

KELLY, J. (*dissenting*). Today, the majority of this Court has made a drastic change in the law. I believe the legal conclusions underlying the change are erroneous.

The Michigan Constitution provides local units of government the authority to reasonably control their rights-of-way. Const 1963, art 7, § 29. Michigan courts have long held that the right of reasonable control includes the right to order a utility to move its facilities to another location at the utility's expense. The state has not occupied the field in this area of the law. And the primary jurisdiction of the Michigan Public Service Commission (PSC) is not implicated in it. Therefore, the Court of Appeals was correct in remanding the case to the circuit court, and I would affirm its decision.

ESSENTIAL FACTS AND PROCEDURAL HISTORY

This case involves a large reconstruction project on Telegraph Road, also known as M-24, in the city of Taylor. Telegraph is a major thoroughfare in the city.

About 70,000 vehicles travel on its four-mile stretch each day. Plaintiff city of Taylor indicates that Telegraph is the most heavily congested business district in the city. Hundreds of traffic accidents occur there each year, and some involve collisions with utility poles. Defendant Detroit Edison's utility poles run along Telegraph within Taylor's right-of-way. Edison's facilities were placed in the right-of-way pursuant to a franchise agreement that made clear that Taylor did not surrender its control over any streets, highways, or public places.

In 1999, Taylor began work in cooperation with the Michigan Department of Transportation on the Telegraph reconstruction project. It involved a massive overhaul of the right-of-way, calling for new pavement, new sidewalks, new water mains, new street lights, and new conduit for median irrigation and utilities. A significant part of the plan involved the relocation of Edison's facilities below ground.

The parties disagreed about who was responsible to pay for the relocation, and after negotiations failed, the Taylor City Council passed Taylor Ordinance 00-344. It directed all persons owning, leasing, operating, or maintaining overhead lines, wires, poles, or facilities to relocate them underground and to remove all aboveground facilities. The work was specified to be done at the expense of the persons owning, leasing, operating, or maintaining the overhead facilities.

The ordinance listed several reasons why relocation was required. It enhanced public safety by preventing falling and downed poles and wires, by eliminating vehicle collisions with the facilities, and by enhancing drivers' visibility and sightlines. The ordinance stated that underground lines would operate more reliably than overhead lines. Finally, it pointed out that the

removal of poles and overhead lines would improve aesthetics and facilitate the future development of the city.

Edison objected to the ordinance and refused to relocate its facilities at its own expense. Taylor advanced a portion of the cost of relocation so that the project could progress, but reserved the right to litigate to recover its expenditures. When, in time, it sued Edison to enforce the ordinance, both parties sought summary disposition. The trial court granted Taylor's motion, denied Edison's motion, and ordered Edison to reimburse Taylor.

Edison appealed in the Court of Appeals, which affirmed the ruling. It remanded the case on a subissue regarding the sufficiency of some of the conduit that Taylor had installed. *City of Taylor v Detroit Edison Co*, 263 Mich App 551; 689 NW2d 482 (2004). This Court subsequently granted leave to appeal and heard oral argument. 474 Mich 877 (2005).

REASONABLE CONTROL OF THE RIGHT-OF-WAY

The Michigan Constitution provides at article 7, section 29:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Conducting private business on public streets is not a right. " 'The use of public streets for private enterprise may be for the public good, but, even so, it is a privilege that may be granted, regulated, or withheld.' " *Red Star Motor Drivers' Ass'n v Detroit*, 234 Mich 398, 409; 208 NW 602 (1926), quoting *Schultz v City of Duluth*, 163 Minn 65, 68; 203 NW 449 (1925). In fact, this Court has stated that such use of the right-of-way is special and extraordinary because it differs radically from the ordinary use of streets, which is for travel. *Fostini v Grand Rapids*, 348 Mich 36, 40-41; 81 NW2d 393 (1957), quoting 64 CJS, Municipal Corporations, § 1774, pp 224-225. The right to deny or limit the use of streets reposes in the local unit of government. If the municipality decides to grant permission to use the streets, it may do so under such terms and conditions as it sees fit. *Fostini, supra* at 41. The only limitation on the municipality is that its control be reasonable. Const 1963, art 7, § 29.

Through the last century, Michigan courts uniformly applied this rule to utilities. Our appellate courts consistently held that a municipality may require a utility to relocate its poles and facilities at the utility's own expense. In fact, Edison has repeatedly been the subject of these cases. Its struggle against the constitutionally protected right of reasonable control has been unsuccessful until now.

By way of illustration, nearly 90 years ago, this Court dealt with a remarkably similar case, *City of Monroe v Postal Tel Co*, 195 Mich 467; 162 NW 76 (1917). There, the city of Monroe issued an ordinance requiring various utilities to relocate their lines and facilities underground at their own expense. This Court stated that a utility's use of the right-of-way cannot " 'incommode the public in its use.' " *Id*. at 472 (citation omitted). The

Court further stated that the cost of relocation cannot be a deciding factor in whether the control of the right-of-way is reasonable. We wrote:

> "The mere fact that the route designated by the municipality is less convenient or involves on the part of the telephone company a larger expenditure is of no consequence so long as the company is not thereby prevented from reaching all those it desires to serve or who desire service from it. The record before us fails to disclose this condition. Where a municipality, in the exercise of its inherent police power, adopts an ordinance reasonably regulating the manner, character, or place of construction of a contemplated line, the telephone company must comply with such regulations and exercise its right of entry under the general powers conferred by the State subject to them." [*Id*. at 473-474, quoting *Village of Jonesville v Southern Michigan Tel Co*, 155 Mich 86, 90; 118 NW 736 (1908).]

In 1952, this Court followed in the footsteps of the *Monroe* case. The city of Detroit sought to install and expand its public sewer system in an area where Edison had installed its facilities. *Detroit Edison Co v Detroit*, 332 Mich 348, 349-350; 51 NW2d 245 (1952). We held that the designated area was equivalent to those dedicated to the city for streets or alleys. *Id*. at 354. That being the case, we concluded, Edison must bear the cost of removing and replacing its facilities located there pursuant to Const 1908, art 8, § 28.[1] Edison conceded as much. Both it and the majority have failed to explain why Edison should not be bound in this case by its earlier concession. In fact, the majority uses this concession as a reason to distinguish *Detroit Edison Co* from this case. Given that Edison made this concession in a case involving similar facts, I see no reason why it should not be bound by its clearly stated former position.

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[1] This was the predecessor to Const 1963, art 7, § 29.

In 1965, this Court again addressed an issue involving the relocation of utility facilities. The city of Detroit vacated previously dedicated streets and alleys as part of an urban redevelopment plan for a blighted area. *Detroit v Michigan Bell Tel Co*, 374 Mich 543, 548; 132 NW2d 660 (1965). Both the Michigan Bell Telephone Company and Edison sought reimbursement from the city for the relocation of their lines and facilities. *Id*. at 549-550. Detroit's plan called for the utilities to relocate facilities both aboveground and underground. *Id*. at 557. Again, this Court stated that the city had a legal right to require the utilities to relocate their facilities at their own expense. As in the *Monroe* case, we made no distinction between relocation aboveground and relocation underground.

The Court of Appeals picked up the baton after being asked repeatedly to address the question of relocating utility lines. It has consistently found that the utility must bear the cost of relocation as long as the relocation is required in the course of the discharge of a governmental function. See *City of Pontiac v Consumers Power Co*, 101 Mich App 450; 300 NW2d 594 (1980), *Detroit Edison Co v Southeastern Michigan Transportation Auth*, 161 Mich App 28; 410 NW2d 295 (1987), *Detroit Edison Co v Detroit*, 180 Mich App 145; 446 NW2d 615 (1989), *Detroit Edison Co v Detroit*, 208 Mich App 26; 527 NW2d 9 (1994), and *City of Taylor,* 263 Mich App 551.[2]

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[2] The majority contends that this line of cases from the Court of Appeals applying the governmental function test is inconsistent with the "reasonable control" standard. I disagree. I believe that the cases articulate a further test created by the Court of Appeals to assure that governmental units act reasonably. Therefore, the holdings are supported by both our case law and the Michigan Constitution. The majority errs in overruling this helpful line of cases. Contrary to the majority's statements, the Court of Appeals did not ignore the "proper 'general rule' "

This long line of cases discussing reasonable control under Const 1963, art 7, § 29 is supported by the common law. And the control exercised by Taylor here is also in accord with the common law.

> Under the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities. 12 E. McQuillin, Law of Municipal Corporations § 34.74a (3d ed. 1970); 4A J. Sackman, Nichols' Law of Eminent Domain § 15.22 (rev. 3d ed. 1981). This rule was recognized and approved by this Court as long ago as *New Orleans Gas Light Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 462 (1905) (holding that the injury sustained by the utility is *damnum absque injuria*[3]). [*Norfolk Redevelopment & Housing Auth v Chesapeake & Potomac Tel Co*, 464 US 30, 35; 104 S Ct 304; 78 L Ed 2d 29 (1983).]

Far from abandoning the common law, this state's constitution specifically retains it. Const 1963, art 3, § 7; *Stout v Keyes*, 2 Doug 184, 188-189 (Mich, 1845). Nothing in article 7, § 29 of the Michigan Constitution is inconsistent with the common law in this area. Instead, as shown earlier in this opinion, this Court has underlined the consistency in repeatedly requiring utilities to bear the cost of relocation. Therefore, the common law remains in this state.[4] Under its general rule, the Taylor ordinance represents a reasonable control of

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expressed in *People v McGraw*, 184 Mich 233; 150 NW 836 (1915). *Ante* at 121. Instead, it dutifully followed the common law, which has not been repudiated in this state.

[3] Loss or harm for which there is no legal remedy. Black's Law Dictionary (7th ed).

[4] The Legislature has the authority to abrogate the common law. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981). But, when it does so, it must speak in clear terms. *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 652 n 17; 513 NW2d 799 (1994), quoting *Bandfield v Bandfield*, 117 Mich

the city's right-of-way.[5] Given that the control is reasonable, it is constitutionally protected by Const 1963, art 7, § 29, and the Court of Appeals decision should be affirmed.

The majority relies on *People v McGraw*, 184 Mich 233; 150 NW 836 (1915). In *McGraw*, the Court stated, "Taking the sections [of the Constitution] together, they should be so construed as to give the power to municipalities to pass such ordinances and regulations with reference to their highways and bridges as are not inconsistent with the general State law." *Id*. at 238. The majority treats this general statement of the law as if it overrides all other precedent in the area, even precedent directly on point.[6] This is inaccurate. Moreover, it is inconsistent with *McGraw*.

As noted earlier, the common law remains viable law in this state. *Stout*, 2 Doug 188-189. Under the common law, "utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." *Norfolk Redevelopment & Housing Auth*, 464 US 35. In creating the PSC, the Legislature did not explicitly overrule the common law. To the contrary, the PSC's jurisdiction is limited "as otherwise restricted by law." MCL 460.6(1).

80, 82; 75 NW 287 (1898). I find no action by the Legislature speaking in clear terms that abrogate the common law on this subject.

[5] The ordinance is reasonable also because it is directed at remediating an interference with the primary use of the right-of-way, travel. If, at any time, the presence of a utility becomes a burden on the public's right to travel, the utility's franchise must give way. *Postal Tel Co*, 195 Mich 472. In this case, the ordinance was directed at the fact that Edison's poles and facilities blocked sightlines and led to vehicular collisions. This interference with the primary use of the rights-of-way allowed Taylor to require relocation at Edison's expense as a reasonable exercise of its police powers and control of its right-of-way. *Id*.

[6] *McGraw* dealt with local traffic ordinances, not the relocation of utility facilities. *McGraw*, 184 Mich 234-235.

The common law of the state is part of that restricting law. Therefore, unless the common law is expressly overruled, it controls, even with respect to the jurisdiction of the PSC.

Applying this to the case at hand, *McGraw* did not change the common-law rule that a municipality may require a utility to bear the cost of relocating its facilities. The Supreme Court and the Court of Appeals have consistently followed this rule. In continuing in this case its adherence to the common law, the Court of Appeals did not err, and its decision should be affirmed.

THE ORDINANCE IS NOT PREEMPTED

Instead of properly respecting Taylor's constitutional right to reasonably control its rights-of-way, the majority focuses its attention on the jurisdiction of the PSC. Given my analysis of the law, I conclude that this focus is misplaced. But I will address it in order to fully demonstrate that the majority has reached an incorrect legal conclusion.[7]

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. [*People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977).]

In determining whether the state preempted the field, this Court weighs certain considerations: (1) whether state law stipulates that it is exclusive, (2) whether legislative history implies that it is preempted,

[7] The majority states that it cannot discern why I address preemption. I do so because it was raised by the appellant and addressed by the Court of Appeals. Therefore it is an important part of the discussion of this case.

(3) whether the pervasiveness of the statutory scheme supports preemption,[8] and (4) whether the nature of the subject matter demands exclusive state regulation to achieve uniformity. *Id*. at 322-324. Regarding the fourth factor, this Court provided:

> As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld. [*Id*. at 324-325.]

Under the first factor, the PSC's jurisdiction is not exclusive. Instead, its jurisdiction is limited "as otherwise restricted by law." MCL 460.6(1). Edison directs our attention to nothing in the legislative history implying preemption. Therefore, the second *Llewellyn* factor also fails to support preemption.

Nor does the third factor favor preemption. The PSC's regulations are not so pervasive that they cover the entire area or field of relocating power lines. This Court has specifically stated that the PSC has no interest in the development and control of a city's right-of-way. Rather, it must be left to the individual municipality:

> The commission is not interested—nor should it be—in the effect which the construction will have on the development of the communities through which it passes. If its determination were to be binding upon local units of government, the absence of public hearings and notification to affected municipalities would suggest due process shortcomings. [*Detroit Edison Co v City of Wixom*, 382 Mich 673, 682; 172 NW2d 382 (1969) (opinion by BRENNAN, C.J.), citing *Gust v Canton Twp*, 342 Mich 436; 70 NW2d 772 (1955).]

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[8] This factor alone will not be sufficient to find preemption.

This Court has also ruled that the cost-conscious nature of the PSC is incompatible with the PSC preempting a municipality's right to control its rights-of-way:

> But a city does have an interest in the location and route of a high tension electric power line. It is a specific land use which is not compatible with other land uses. It is a land use which characterizes the neighborhood and influences the development of adjacent real estate.
>
> The public service commission statute does not vest the commission with authority to determine the routes of high tension lines except as those routes bear upon "rates, fares, fees, charges, services, rules, conditions of service" or the "formation, operation or direction of such public utilities." CLS 1961, § 460.1 *et seq*. (Stat Ann 1965 Cum Supp § 22.13[1] *et seq*.). The first sentence of CLS 1961, § 460.6 (Stat Ann 1965 Cum Supp § 22.13[6]), vests the commission "with complete power and jurisdiction to regulate all public utilities in the state * * * except as otherwise restricted by law."
>
> The commission is not empowered to assume the role of arbiter between the utility and the city. The company's cost-conscious approach to route selection and the commission's rate-and-service-conscious evaluation of the selected route are too closely aligned. [*Detroit Edison Co*, 382 Mich 682-683 (opinion by BRENNAN, C.J.).]

Aside from the Court's reasoning in these cases, the PSC's own rules contemplate no preemption in this area of the law. Instead, they anticipate that municipalities will pass ordinances intended to control their rights-of-way. 1999 AC, R 460.517 provides: "The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience or *where underground construction is required by ordinance* in heavily congested business districts." (Emphasis added.)

This rule specifically contemplates that municipalities will pass ordinances on the subject. And it specifi-

cally states that these ordinances control. Edison cannot plausibly argue that the Taylor ordinance is preempted by a state regulatory scheme when the scheme specifically allows for such an ordinance. Because the state regulatory scheme contemplates and allows regulation by municipalities, it does not preempt the field.

Finally, the nature of the subject matter does not require exclusive state regulation for the purpose of achieving uniformity throughout Michigan. A city has an interest in the location and route of power lines because their location involves a use of land that is not compatible with other land uses. Conversely, the PSC is not interested in the effect that the construction will have on cities' rights-of-way. *Detroit Edison Co,* 382 Mich 682-683 (opinion by BRENNAN, C.J.).

The courts can and have provided uniformity in this area of the law. The common law states that utilities must pay for relocating their facilities. Michigan courts have consistently upheld this rule. Only this Court in this case has failed to follow it. It is this decision that now creates confusion. Municipalities will be less sure when they may exercise their constitutional right to control their rights-of-way. And it is now unclear whether the common law in this area is abrogated in all situations or just in some situations.

This confusion is without legal justification. None of the *Llewellyn* factors favors preemption by the PSC. Past incarnations of this Court and the Court of Appeals have understood this point. As a result, a consistent rule of law has been created regarding the relocation of utility lines. Unlike the majority of this Court, I would leave this rule of law unmolested.

THE PRIMARY JURISDICTION OF THE PSC IS NOT IMPLICATED

Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are

> deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency. "A question of 'primary jurisdiction' arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required." [*Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733 (2001) (citation omitted).]

No fixed formula exists for determining when primary jurisdiction applies. But three major considerations have been identified: (1) whether the agency's specialized expertise makes it a preferable forum, (2) whether there is a need for uniformity in the resolution of the issue, and (3) whether a judicial determination of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 71; 559 NW2d 647 (1997), quoting 2 Davis & Pierce, Administrative Law (3d ed), § 14.1, p 272. Application of these considerations does not support a finding that primary jurisdiction in this case rests with the PSC.

The issue here is whether Taylor is exercising reasonable control over its streets and rights-of-way.[9] The PSC is not equipped to deal with that issue. *Detroit Edison Co*, 382 Mich 682-683 (opinion by BRENNAN, C.J.). It does not involve rate structures. Instead, it is a legal question regarding interpretation and application of a constitutional provision. It is a question of law best left to the expertise of the courts, not an administrative agency.

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[9] The majority implies that this is just a preliminary matter controlled by *McGraw*. In reality, this is the entire focus of the case. And it goes beyond the mere application of *McGraw*. In ruling on it, the lower courts were bound to follow the common law and the precedent of this Court that is directly on point.

Defendant argues, and the majority seems to agree, that the issue in this case should be resolved by the PSC because Edison's rates may be adversely affected. Essentially, Edison's fear is that many communities may require that lines be placed underground at the utility's expense once Taylor has done so. It asserts that this might cost Edison hundreds of millions of dollars. If so, it argues, this will require it to raise its rates. Because the PSC is the body that deals with raising rates, Edison reasons that this case should go to the PSC.

I question this logic. The PSC cannot be asked to control all that may ultimately affect utility rates. Otherwise, it would have original jurisdiction over everything from environmental regulations to the wages paid to utility employees.

By extension, Edison's reasoning would be as follows: employees' wages cost Edison a significant sum of money. This cost is passed on to consumers. When wages rise, utility rates rise. Therefore, the PSC should handle all cases involving utility employees' wages because it is the only body that can deal with setting rates. It follows that the PSC could set the maximum wage that Edison pays its employees at $1 an hour in order to lower costs to the customers. I find it disheartening that the majority has allowed itself to be distracted by this argument from the real issue presented.

Next, the need for uniformity does not support primary jurisdiction in the PSC. In fact, before today, a single rule of law applied in all cases involving the relocation of utility facilities. Both the common law and the precedent from this Court held that a municipality could require a utility to move its facilities at the utility's own expense. For nearly the last century, this rule of law had been uniformly applied. The PSC was

neither threatened nor destroyed. Given that uniformity can and has been achieved, there is no need now to defer to the PSC.[10]

Finally, a judicial determination will not have an adverse effect on the PSC's performance of its regulatory responsibilities. The ordinance in this case does not conflict with the PSC's regulatory scheme. The PSC's own rules contemplate that a municipality will enact an ordinance when it decides that a utility's facilities must be relocated. The municipality is empowered to require the utility to pay for the relocation. Given that the PSC's rules allow for this, no negative effect on the regulatory responsibilities should be assumed.

The majority apparently draws a distinction between this case and other precedents because the lines are to be moved underground. The common law makes no such distinction. Nor did this Court previously draw such a distinction. Instead, at least from 1917 forward, this Court treated underground replacement the same as any other replacement. *Postal Tel Co*, 195 Mich 472. To create this distinction requires a change in existing law.

The rule governing moving a utility's poles and structures that are situated within a right-of-way should be retained. Under a consistent application of this rule, the PSC's regulatory responsibilities are as unaffected now as they were when all the other cases that I have discussed were decided.

Everything considered, this case presents a question that the PSC is ill-equipped to handle. The PSC has no

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[10] Under this factor, the majority points to the "uniform system for removing overhead lines . . . ." *Ante* at 123. As noted above, the PSC's own rules contemplate municipal ordinances on this subject. Moreover, the ordinances are controlling. 1999 AC, R 460.517. Therefore, this "uniformity" does not weigh in favor of disallowing these ordinances under the guise of primary jurisdiction.

expertise in dealing with or applying constitutional provisions. Therefore, deferring to its primary jurisdiction is both unwise and unnecessary.

CONCLUSION

The Michigan Constitution, Const 1963, art 7, § 29, provides local units of government the right to reasonable control over their rights-of-way. Michigan courts have long held that this includes the right to order a utility to relocate its facilities to another location at the utility's expense. Therefore, Taylor was justified in passing an ordinance requiring Edison to relocate its facilities underground and pay for the relocation itself.

This is a well-developed area of law. The state has not occupied the field, and the primary jurisdiction of the PSC is not implicated. Quite simply, there is no need for the sea change that the majority of this Court makes in the law today. The judgment of the Court of Appeals should be affirmed.

PEOPLE v DROHAN

Docket No. 127489. Argued November 8, 2005 (Calendar No. 1). Decided June 13, 2006.

Joseph E. Drohan was convicted by a jury in the Oakland Circuit Court, Deborah G. Tyner, J., of one count of third-degree criminal sexual conduct and one count of fourth-degree criminal sexual conduct. He pleaded guilty to a charge of being a third-offense habitual offender. He was sentenced to one to four years of imprisonment for the conviction of fourth-degree criminal sexual conduct and 127 to 360 months of imprisonment for the conviction of third-degree criminal sexual conduct. The latter sentence was calculated by the trial court's assignment of points to the defendant's offense variable and prior record variable scores under a preponderance of the evidence standard. The defendant appealed, alleging that his sentence was imposed contrary to the decision in *Blakely v Washington*, 542 US 296 (2004), because it was based on facts that were not proven to the jury beyond a reasonable doubt. The Court of Appeals, CAVANAGH, P.J., and FITZGERALD and METER, JJ., affirmed, relying on the statement in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that the sentencing scheme in Michigan is unaffected by the holding in *Blakely.* 264 Mich App 77 (2004). The Supreme Court granted the defendant's application for leave to appeal, limited to the issue whether *Blakely* and *United States v Booker*, 543 US 220 (2005), apply to Michigan's sentencing scheme. 472 Mich 881 (2005).

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

Michigan's indeterminate sentencing scheme, which allows a trial court to use judicially ascertained facts under a preponderance of the evidence standard to set a defendant's minimum sentence, does not violate the Sixth Amendment.

1. Under the Sixth Amendment, a trial court may not impose a sentence greater than the statutory maximum unless it does so on the basis of a prior conviction or where a fact at issue is admitted by the defendant or proven to a jury beyond a reasonable doubt.

2. For Sixth Amendment purposes, the "statutory maximum"

is the maximum sentence that may be imposed solely on the basis of the defendant's prior convictions and those facts proven beyond a reasonable doubt.

3. Michigan's indeterminate sentencing scheme provides that the maximum sentence that a court may impose on the basis of the jury's verdict is the statutory maximum sentence; as long as the defendant receives a sentence that does not exceed the statutory maximum sentence, a trial court may consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range. The sentence appealed from in this matter did not violate these principles. Accordingly, the judgment of the Court of Appeals must be affirmed.

Justice WEAVER, concurring, agreed with the result of the majority's opinion because *Blakely* does not affect Michigan's sentencing guidelines scoring system, which establishes only the recommended minimum sentence.

Justice CAVANAGH concurred in the result only.

Justice KELLY, concurring in part and dissenting in part, agreed that the defendant's sentence does not offend the Sixth Amendment. The defendant's sentence could not fall within an intermediate sanction cell under the sentencing guidelines. Therefore, no issue arises under *Blakely* because the judicial fact-finding that changed his recommended minimum sentence was not used to change his maximum sentence. She disagreed, however, with the majority's implication that the statutory maximum sentence under the sentencing guidelines will always be the maximum sentence allowed by statute. If a defendant's prior record variable level places him or her in an intermediate sanction cell, the intermediate sanction is the statutory maximum for *Blakely* purposes. Judicial fact-finding used to score the offense variables or depart from the intermediate sanction unconstitutionally changes that defendant's statutory maximum in violation of *Blakely*. The sentencing guidelines are thus no longer constitutionally sound, and severance is not possible, although the problem might be resolved with bifurcated hearings and jury determination of the facts necessary to score the offense variables. Justice KELLY also disagreed with the majority's implication that the dicta discussion of *Blakely* in *Claypool* has precedential value.

Affirmed.

1. SENTENCES — STATUTORY MAXIMUMS — SIXTH AMENDMENT.

Under the Sixth Amendment, a trial court may not impose a sentence greater than the statutory maximum unless it does so on

the basis of a prior conviction or where a fact at issue is admitted by the defendant or proven to a jury beyond a reasonable doubt (US Const, Am VI).

2. SENTENCES — STATUTORY MAXIMUMS — SIXTH AMENDMENT.

For Sixth Amendment purposes, the "statutory maximum" is the maximum sentence that may be imposed solely on the basis of the defendant's prior convictions and those facts proven beyond a reasonable doubt (US Const, Am VI).

3. SENTENCES — INDETERMINATE SENTENCES.

Michigan's indeterminate sentencing scheme provides that the maximum sentence that a court may impose on the basis of the jury's verdict is the statutory maximum sentence; as long as the defendant receives a sentence that does not exceed the statutory maximum sentence, a trial court may consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Chief, Appellate Division, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the people.

Michael J. McCarthy, P.C. (by *Michael J. McCarthy*), for the defendant.

Amici Curiae:

Miller, Canfield, Paddock and Stone, P.L.C. (by *Hideaki Sano*), and *Kimberly Thomas*, for Criminal Defense Attorneys of Michigan.

Stuart J. Dunnings, III, Kym L. Worthy, and *Timothy A. Baughman*, for Prosecuting Attorneys Association of Michigan.

MARKMAN, J. We granted leave to appeal to consider whether Michigan's indeterminate sentencing scheme, which allows a trial court to set a defendant's minimum sentence on the basis of factors determined by a pre-

ponderance of the evidence, violates the Sixth Amendment of the United States Constitution. Following a jury trial, defendant was convicted of one count of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). Defendant also pleaded guilty to a charge of being a third-offense habitual offender, MCL 769.11. The trial court sentenced defendant to a term of 127 to 360 months of incarceration on the third-degree criminal sexual conduct conviction. This range was calculated by the trial court's assignment of points to defendant's "offense variable" and "prior record variable" scores under a "preponderance of the evidence" standard. Defendant appealed his sentence, asserting that it was imposed contrary to the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the sentence was based on facts that were not determined by the jury beyond a reasonable doubt. The Court of Appeals affirmed the conviction, relying on this Court's decision in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Because we conclude that Michigan's sentencing scheme does not offend the Sixth Amendment,[1] we affirm defendant's sentence.

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[1] The amicus curiae brief of the Criminal Defense Attorneys of Michigan at page 11 points out that the guidelines' "intermediate sanctions" establish fixed and determinate sentences. MCL 769.34(4)(a) states:

> 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 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.

I. BACKGROUND

The victim in this case and defendant were coworkers. She testified that defendant sexually assaulted her on four separate occasions between July 17, 2002, and October 25, 2002. The first incident took place on July 17, when defendant asked the victim to assist him with his computer at his cubicle. While there, defendant grabbed her hand and placed it on his clothed penis. In addition, defendant rubbed her clothed breast. The second incident occurred on July 19 at about 2:00 p.m. At that time, defendant entered the victim's cubicle, again grabbed her hand and placed it over his penis, and made a sexual comment. The third incident occurred at around 4:00 p.m. on that same day. The victim testified that defendant accosted her in the parking garage and forced her into his car. Defendant demanded oral sex, and, when she refused, he grabbed the back of her head and forced her to perform oral sex until he ejaculated. The final incident took place on October 25 while the company was moving its office to a new location. As the victim moved things out of her cubicle, defendant entered, grabbed her hand and placed it over his penis, and made a sexual comment. The victim did not report any of these incidents until after defendant left the company. Defendant was prosecuted for one count of third-degree criminal sexual conduct and two counts of fourth-degree criminal sexual conduct. The jury convicted defendant of third-degree criminal sexual conduct and one count of fourth-degree criminal sexual conduct. Following the verdict, defendant pleaded guilty of being a third-offense habitual offender, MCL 769.11.

Because defendant here was not subject to an intermediate sanction, we decline to address whether and to what extent *Blakely* affects the intermediate sentencing scheme.

At sentencing, the trial court scored ten points for offense variable 4 (psychological injury to a victim) and 15 points for offense variable 10 (exploitation of a vulnerable victim).[2] Defendant's total score placed him in the C-V cell,[3] and the trial court sentenced him at the high end of the guidelines to a minimum term of 127 months and a maximum term of 360 months on the third-degree criminal sexual conduct conviction.[4] Defendant was also sentenced to a concurrent term of 12 to 48 months on the fourth-degree criminal sexual conduct conviction.

Defendant appealed, asserting that his minimum sentence violated the United States Supreme Court's decision in *Blakely* because it was based on judicially ascertained facts that had not been determined by the jury beyond a reasonable doubt. Pursuant to *Claypool,* the Court of Appeals affirmed defendant's convictions and sentence, observing that *Blakely* does not apply to Michigan's sentencing scheme. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).[5] This Court granted defendant's application for leave to appeal,

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[2] Defendant successfully challenged the scoring of 15 points for offense variable 8 (victim asportation or captivity). The trial court scored offense variable 8 at zero points. The reduction of 15 points did not alter the guidelines range.

[3] The minimum sentence range in the C-V cell is 51 months to 127 months.

[4] As a third-offense habitual offender, defendant was subject to "imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense . . . ." MCL 769.11(1)(a). The maximum term for a first conviction of third-degree criminal sexual conduct is 15 years. MCL 750.520d(2). Therefore, the maximum term for a third-offense habitual offender is 30 years.

[5] The Court of Appeals rejected defendant's argument that *Claypool* was not binding. However, the Court went on to note that "given the large number of recent criminal appeals in which this issue has been

limited to the issue whether *Blakely* applies to Michigan's sentencing scheme. 472 Mich 881 (2005).

II. STANDARD OF REVIEW

The issue in this case concerns whether Michigan's sentencing scheme violates the Sixth Amendment of the United States Constitution because it permits a defendant's minimum sentence to be determined on the basis of facts not proven to the jury beyond a reasonable doubt. A Sixth Amendment challenge presents a question of constitutional law that we review de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

III. ANALYSIS

A. UNITED STATES SUPREME COURT

The Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

The United States Supreme Court first addressed the Sixth Amendment implications of the enhancement of a defendant's sentence based on judicially ascertained facts in *McMillan v Pennsylvania,* 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986). In *McMillan*, a Pennsylvania statute imposed a five-year mandatory minimum sentence if the trial court concluded, by a preponder-

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raised, we request that the Supreme Court issue its opinion concerning whether footnote fourteen in *Claypool* constitutes binding precedent." *Id*. (emphasis omitted).

ance of the evidence, that a defendant " 'visibly possessed a firearm' " during the commission of an enumerated felony. *Id.* at 81. However, the sentencing statute did not permit a sentence in excess of the maximum established for the enumerated felonies.[6] The defendants, relying on *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970),[7] argued that the visible possession of a firearm constitutes an element of the offense, and, therefore, must be proven beyond a reasonable doubt. The Court, while noting that the Pennsylvania statute provided that the possession of a firearm was "not an element of the [enumerated] crimes," *McMillan, supra* at 85-86, opined that this provision did not "relieve the prosecution of its burden of proving guilt . . . ." *Id.* at 87. Nonetheless, the Court found it significant that the statute

> neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [*Id.* at 87-88.]

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[6] At the time, Pennsylvania law provided that a mandatory minimum sentence " 'shall not exceed one-half of the maximum sentence imposed.' " *Id.* at 88 n 4, quoting 42 Pa Cons Stat 9756(b).

[7] In *In re Winship*, the United States Supreme Court addressed the issue whether the "proof beyond a reasonable doubt" standard applies to determinations of delinquency where a minor is charged with an act that would constitute a crime if committed by an adult. The Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The Court reasoned that adjudications of delinquency, like criminal convictions, deprive a minor of his or her liberty for some period and, therefore, that such adjudications are " 'comparable in seriousness to a felony prosecution.' " *Id.* at 366 (citation omitted). Accordingly, every fact necessary to adjudicate a minor as delinquent must be proven by the state beyond a reasonable doubt. *Id.* at 368.

The Court went on to note that the defendants' claims "would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment . . . ." *Id.* at 88. However, the Pennsylvania statute merely raised the minimum sentence that could be imposed by the trial court. Because the minimum sentence did not alter the maximum penalty authorized by the jury's verdict, the statute did not violate the Constitution.

While *McMillan* sanctioned the use of judicially ascertained facts to establish a minimum sentence, the United States Supreme Court, in *Jones v United States*, 526 US 227, 239; 119 S Ct 1215; 143 L Ed 2d 311 (1999), stated that the use of such facts to *increase* the maximum sentence posed " 'grave and doubtful constitutional questions . . . .' " (Citation omitted.) In *Jones*, the defendant was convicted of violating the federal carjacking statute. The statute called for a 15-year maximum, but also provided for a 25-year maximum where the victim suffered serious bodily injury, and a potential life term where the victim was killed. 18 USC 2119. The trial court imposed a 25-year sentence, determining by a preponderance of the evidence that the victim had suffered "serious bodily injury." The defendant argued that the statute created three distinct offenses, while the prosecutor argued that the statute created a single crime with the choice of three maximum penalties. In analyzing which interpretation of the statute should prevail, the Court observed that,

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Gov-

> ernment's reading of the [carjacking] statute rises only to the level of doubt, not certainty. [*Jones, supra* at 243 n 6.]

As a result of these concerns, the Court held that the statute established three separate offenses and, therefore, reversed the defendant's conviction.

The following year, in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court acted on the concerns it had expressed in *Jones*. In *Apprendi*, the defendant was sentenced to an additional two years above the statutory maximum, on the basis of the trial court's determination by a preponderance of the evidence that the defendant had acted with an intent to intimidate an individual based on that individual's race. The Court undertook its analysis by noting that the Fourteenth Amendment "due process" clause and the Sixth Amendment "right to jury trial," considered together, "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id.* at 477, quoting *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995). At the time of the American Revolution, a trial court had very little discretion in sentencing. *Apprendi, supra* at 479. Rather, there was generally a specific sanction for each criminal offense—a sanction determined by a jury's verdict. *Id.* The Court explained that, during this period, where a statute created a higher degree of punishment than the common law, the prosecutor

> "must expressly charge it to have been committed under those circumstances [established in the statute], and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170]." Archbold, Pleading and Evidence in Criminal Cases, at 51. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have

> been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only." *Id.* at 188. [*Apprendi, supra* at 480-481.]

The 19th century shift away from fixed sentences gave trial courts increasingly broad discretion in sentencing. However, such discretion was limited by " 'fixed statutory or constitutional limits.' " *Id.* at 482, quoting *Williams v New York*, 337 US 241, 247; 69 S Ct 1079; 93 L Ed 1337 (1949). Thus, just as in revolutionary times, a defendant's maximum sentence was fixed by the maximum sentence permitted at the time of the jury's verdict. In contrast, the New Jersey statute permitted a trial court to sentence a defendant beyond the maximum fixed by the statute that served as the basis for the jury's conviction. The Court stated:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached. [*Apprendi, supra* at 484.]

Accordingly, the Court held that under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Thus, any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict[,]" *id.* at 494, is an element of the crime that must be proven beyond a reasonable doubt. Conversely, a fact "that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular

offense[,]" *id.* at 494 n 19 (emphasis in the original), is a sentencing factor that does not implicate the Sixth Amendment.

The United States Supreme Court reinforced this decision two years later, in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002). In *Harris*, the defendant pleaded guilty of distribution of marijuana. At sentencing, the trial court determined by a preponderance of the evidence that the defendant had brandished a firearm during the drug transaction and, as a result, imposed a seven-year minimum, as required under 18 USC 924 (c)(1)(A)(ii).[8] The trial court did not alter the defendant's maximum sentence. The defendant argued that the imposition of a minimum sentence violated *Apprendi* and that, as a result, *McMillan* was no longer sound authority. Justice Kennedy, writing for a four-justice plurality, noted that the Sixth Amendment requires that " 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Harris, supra* at 563, quoting *Apprendi, supra* at 490. However, once the defendant has

[8] The statute, which has not been amended in any relevant manner since *Harris*, states in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

been convicted of an offense, "the Government has been authorized to impose any sentence below the maximum." *Harris, supra* at 565. The defendant also argued that mandatory minimum sentences violated "the concerns underlying *Apprendi*," *id.,* because they require a trial court to impose a sentence even if it would have otherwise chosen a lower sentence. However, Justice Kennedy noted that "[t]he Fifth and Sixth Amendments ensure that the defendant 'will never get more punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." *Id.* at 566, quoting *Apprendi, supra* at 498 (Scalia, J., concurring) (emphasis omitted). Justice Kennedy concluded:

> Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. [*Harris, supra* at 567.][9]

The United States Supreme Court clarified the importance of the term "statutory maximum" within the

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[9] Justice Breyer, one of the dissenting justices in *Apprendi*, concurred in the judgment in *Harris*, stating:

> I continue to believe that the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here). And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule. I therefore join the Court's judgment, and I join its opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums. [*Id.* at 569-570 (Breyer, J., concurring in part and concurring in the judgment).]

meaning of sentencing guidelines in *Blakely*. In that case, the defendant pleaded guilty to a charge of second-degree kidnapping. While the statute called for a ten-year maximum sentence, under Washington's sentencing guidelines scheme, the defendant was subject to a fixed sentence within a "standard range" of between 49 to 53 months. The guidelines statute permitted a trial court to depart above the guidelines maximum, up to the statutory maximum of ten years, if it found "substantial and compelling" reasons to do so. The trial court determined that the defendant acted with "deliberate cruelty" and, therefore, sentenced him to 90 months—37 months beyond the standard maximum. The prosecutor argued that the sentence was consistent with *Apprendi* because it fell below the ten-year statutory maximum. However, the Court noted:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. [*Blakely, supra* at 303-304 (emphasis in the original).]

The defendant's prior convictions and the facts elicited from his guilty plea, by themselves, could not have supported the imposition of the 90-month sentence. *Id.* at 304. Therefore, "the State's sentencing procedure did not comply with the Sixth Amendment, [and the defendant's] sentence is invalid." *Id.* at 305. However, the Sixth Amendment does not prohibit all judicial fact-finding. In addressing indeterminate sentencing schemes,[10] the Court stated:

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[10] An indeterminate sentence is one "of an unspecified duration, such as one for a term of 10 to 20 years." Black's Law Dictionary (8th ed). In

> [T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [*Id.* at 308-309 (emphasis in the original).]

Last year, the United States Supreme Court applied the Sixth Amendment to the federal sentencing guidelines in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). In *Booker*, the defendant was convicted of possession with intent to distribute at

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other words, while a defendant may serve a sentence of up to 20 years, the defendant may be released from prison at the discretion of the parole board at any time after the defendant serves the ten-year minimum. In contrast, a determinate sentence is "[a] sentence for a fixed length of time rather than for an unspecified duration." *Id.* Such a sentence can either be for a fixed term from which a trial court may not deviate, see, e.g., MCL 750.227b(1) ("A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . shall be imprisoned for 2 years."), or can be imposed by the trial court within a certain range, e.g., *Blakely, supra* at 300 (stating that, under Washington's sentencing act, the defendant was entitled to a sentence within a range of 49 to 53 months.)

least 50 grams of crack cocaine. The evidence elicited at trial established that he had possessed 92 grams of cocaine. The statute called for a minimum sentence of ten years in prison and a maximum sentence of life in prison. 21 USC 841(b)(1)(A)(iii). On the basis of the defendant's criminal history and the quantity of drugs that the jury found that he possessed, the sentencing guidelines dictated a sentence of 210 to 262 months in prison. At sentencing, the trial court found two additional facts by a preponderance of evidence: (1) that the defendant had possessed an additional 566 grams of crack cocaine, and (2) that the defendant had also committed obstruction of justice. Those findings mandated that the trial court select a sentence between 360 months and life imprisonment, and the court imposed a sentence of 360 months in prison. Just as in *Blakely*, the Court focused on the mandatory nature of the sentencing guidelines. *Booker*, *supra* at 749-750. Solely on the basis of the defendant's criminal history and the facts supported by the jury's verdict, the trial court could not have imposed the 360-month sentence. *Id.* at 751. The Court concluded that,

> just as in *Blakely*, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases. [*Id.,* quoting *Blakely, supra* at 305 (citation omitted).]

Therefore, the Court "reaffirm[ed] [its] holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Booker, supra at 756. However, just as in *Blakely*, the Court did not hold that *all* judicial fact-finding violates the Sixth Amendment. Indeed, the Court clarified that,

> [i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. [*Id.* at 750.][11]

The constitutional rule of *Apprendi, Blakely,* and *Booker* can be summarized as follows: (1) a trial court may not impose a sentence greater than the statutory maximum unless it does so on the basis of a prior conviction or the fact at issue is "admitted by the defendant or proved to a jury beyond a reasonable doubt[,]" *Booker, supra* at 756; (2) where a defendant's maximum sentence is calculated through the use of mandatory sentencing guidelines, the statutory maximum is the maximum sentence that may be imposed under those guidelines, based solely on the defendant's prior convictions and those facts proven beyond a reasonable doubt, *Blakely, supra* at 303-304; and (3) a trial court *may* consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range, *McMillan*, *supra*; *Harris*, *supra*; *Booker*, *supra*.

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[11] In a separate majority opinion, authored by Justice Breyer, the Court limited application of its opinion to the portion of the sentencing guidelines that made them mandatory. As a result, the federal guidelines are now advisory. *Id.* at 756-757.

B. AFTERMATH

State courts, consistently with *Apprendi, Blakely,* and *Booker*, have held that the Sixth Amendment bars the use of judicially ascertained facts to increase a defendant's sentence only when that sentence is increased beyond the "statutory maximum." For example, the New Jersey Supreme Court recognized in *State v Abdullah*, 184 NJ 497; 878 A2d 746 (2005), that the applicability of *Blakely* hinges on the question whether the trial court uses judicially ascertained facts to impose a sentence above the statutory maximum. In *Abdullah*, the defendant was convicted of murder and two counts of second-degree burglary. The defendant was sentenced to life imprisonment with a 30-year parole disqualifier on the murder conviction and to a consecutive ten-year prison term with a five-year parole disqualifier on the burglary convictions. Under New Jersey law, a defendant convicted of burglary is entitled to a presumptive sentence of seven years. *Id.* at 503. Because the defendant was entitled to no more than the seven-year sentence for burglary on the basis of the jury's verdict alone, imposition of the ten-year sentence on the basis of judicially ascertained facts was " 'incompatible with the holdings in [*Apprendi, Blakely*, and *Booker*]. ' " *Id.* at 505 (citation omitted). On the other hand, the court noted that there is no presumptive term for murder. *Id.* at 504. " '[B]ecause the crime of murder has no presumptive term, defendant, like every murderer, knows he is risking life in prison.' " *Id.* at 508 (citation omitted). Thus, the upper sentencing limit based on the jury's verdict alone was life imprisonment. Accordingly, the murder sentence was not in derogation of the Sixth Amendment. See also *State v Stover*, 140 Idaho 927, 931; 104 P3d 969 (2005) (stating that "[t]he *Blakely* Court recognized that an indeterminate sen-

tencing system does not violate the Sixth Amendment"); *State v Rivera*, 106 Hawaii 146, 157; 102 P3d 1044 (2004) (noting that "the *Blakely* majority's declaration that indeterminate sentencing does not abrogate the jury's traditional factfinding function effectively excises indeterminate sentencing schemes such as Hawaii's from the decision's sixth amendment analysis"); *Commonwealth v Junta*, 62 Mass App Ct 120, 129 n 11; 815 NE2d 254 (2004) (finding that "[t]he recent United States Supreme Court decision in [*Blakely*] has no application here, as the Massachusetts sentencing scheme provides for indeterminate sentences").

The courts in Pennsylvania, a state with a sentencing scheme bearing a strong resemblance to Michigan's, have also held that the use of judicially ascertained facts to increase a defendant's minimum sentence is permitted by the Sixth Amendment. The Pennsylvania Superior Court addressed the implications of *Blakely* on its sentencing scheme in *Commonwealth v Smith*, 863 A2d 1172 (Pa Super, 2004). In *Smith*, the defendant claimed that Pennsylvania's sentencing scheme violated *Blakely*, because it allowed a trial court to use judicially ascertained facts to increase the defendant's minimum sentence. The court rejected this claim, noting that

> Pennsylvania utilizes an indeterminate sentencing scheme with presumptive sentencing guidelines which limit the judge's discretion only concerning the minimum sentence. 42 Pa. C.S.A. § 9721; 204 Pa. Code § 303.9(h). The United States Supreme Court has previously determined that this system does not violate the Sixth Amendment so long as the enhanced minimum sentence is not beyond that authorized by the jury verdict. [*Harris*, *supra*]. Because of the link with the maximum sentence, enhanced minimum sentences, when enhanced by factors in the guidelines, are not beyond sentences authorized by the jury verdict. [*McMillan, supra*]. *Blakely* is only implicated in Pennsylvania to the extent that an enhanced minimum term leads to a

> longer period of incarceration by extending the date at which the defendant is eligible to be released. Yet, because there is no limit, other than the statutory maximum, on the maximum term a judge may set, and due to the discretion vested in the parole board, the Pennsylvania sentencing scheme and guidelines evade even these *Blakely* concerns. The *Blakely* Court, itself, noted that indeterminate guidelines do not increase judicial discretion "at the expense of the jury's function of finding the facts essential to a lawful imposition of penalty," and judicial (or parole board) fact-finding does not infringe on a defendant's "legal right to a lesser sentence." *Blakely* [*supra* at 309].
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> Here, the trial court did not employ an enhancement provision based on a judicially determined fact, but instead, imposed its sentence pursuant to the discretion provided it under the sentencing code and the sentencing guidelines. The sentence was proper under the code and the guidelines, and the guidelines, themselves, are constitutional under *Blakely*. [*Smith, supra* at 1178-1179.]

C. MICHIGAN'S SENTENCING SCHEME

This Court likewise has noted that the Sixth Amendment bars the use of judicially ascertained facts to increase a defendant's maximum sentence beyond that authorized by the jury's verdict. *Claypool, supra* at 730 n 14. However, a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range. *Blakely, supra* at 308-309. In *Claypool*, *supra* at 730 n 14, this Court noted that *Blakely* does not affect Michigan's sentencing scheme. We explained:

> *Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial

> judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury. *Blakely*, *supra* at [305].
>
> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges as discussed in the present case and in [*People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003)]. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment. [*Id.*]

Having concluded that *Blakely* applies only to bar the use of judicially ascertained facts to impose a sentence beyond that permitted by the jury's verdict, we must next determine what constitutes the "statutory maximum" under Michigan's sentencing scheme. MCL 769.8(1) states:

> When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.

In other words, in all but a few cases,[12] a sentence imposed in Michigan is an indeterminate sentence. The maximum sentence is not determined by the trial court, but rather is set by law.[13] Michigan's sentencing guidelines, unlike the Washington guidelines at issue in *Blakely,* create a range within which the trial court must set the minimum sentence. However, a Michigan trial court may not impose a sentence greater than the statutory maximum. While a trial court may depart from the minimum guideline range on the basis of "substantial and compelling reason[s]," MCL 769.34(3); *Babcock*, *supra* at 256-258, such departures, with one exception, are limited by statute to a minimum sentence that does not exceed " 2/3 of the statutory maxi-

[12] Crimes requiring a determinate sentence include carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b (imposing a flat two-year sentence); and first-degree murder, MCL 750.316 (imposing a mandatory life sentence without the possibility of parole).

[13] We note that the statutory maximum sentence is subject to enhancement based on Michigan's habitual offender act, MCL 769.12. Under the habitual offender statute, a trial court may impose a maximum sentence beyond the statutory maximum upon a determination that the defendant "has been convicted of any combination of 3 or more felonies or attempts to commit felonies . . . ." MCL 769.12(1). Thus, the statutory maximum sentence of a defendant who is convicted of being an habitual offender is as provided in the habitual offender statute, rather than the statute he or she was convicted of offending. *Apprendi* and *Blakely* specifically allow for an increase in a defendant's maximum sentence on the basis of "the fact of a prior conviction . . . ." *Apprendi, supra* at 490.

Further, we note that our holding in this case does not affect the ability of the trial court to impose a jail sentence and/or probation in lieu of a prison sentence where permitted by law. See, e.g., MCL 769.34(4)(c). Generally, the maximum term of probation is two years for a defendant convicted of a misdemeanor and five years for a defendant convicted of a felony. MCL 771.2(1). For certain enumerated felonies, the maximum term of probation is "any term of years, but not less than 5 years." MCL 771.2a(2).

mum sentence."[14] MCL 769.34(2)(b). Thus, the trial court's power to impose a sentence is always derived from the jury's verdict, because the "maximum-minimum" sentence will always fall within the range authorized by the jury's verdict.[15]

Defendant asserts that the "maximum-minimum" under the guidelines constitutes the "statutory maximum" for *Blakely* purposes because a trial court is required to depart on the basis of a finding of aggravating factors that, as a practical matter, will subject the defendant to an increase in the actual time the defendant will be required to serve in prison. However, defendant's interpretation is inconsistent with the nature of the protection afforded by the Sixth Amendment. At common law, a jury's verdict entitled a defendant to a determinate sentence. *Apprendi, supra*. During the 19th century, American courts began moving away from such sentencing by according trial courts the discretion to determine a defendant's sentence. However, this new discretion was limited by fixed statutory or constitutional limits. *Id*. In other words, while a trial court could impose a sentence *less than* the maximum authorized by the jury's verdict, the court

[14] We recently held that MCL 769.34 does not apply when a defendant is convicted of a crime punishable with imprisonment for "life or any term of years" because the minimum will never exceed 2/3 of the statutory maximum sentence of life. *People v Powe*, 469 Mich 1032 (2004). Because a jury's verdict in such cases authorizes a life sentence, the imposition of *any* sentence is within the range authorized by that verdict. Accordingly, a trial court may utilize judicially ascertained facts to sentence a defendant to a term up to life imprisonment when life is the maximum sentence. *Harris*, *supra*; *McNally*, *supra*.

[15] In *Claypool*, *supra* at 739, then Chief Justice CORRIGAN, concurring in part and dissenting in part, noted that "[g]iven the response to Blakely, it appears likely that the issue of mandatory minimum sentences will need to be settled." We settle this issue today by holding that departures from the minimum guidelines are not implicated by *Blakely*.

could not impose a sentence greater than that allowed by the statute that the defendant had been convicted of violating. In short, the Sixth Amendment ensures that a defendant will not be incarcerated for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt. However, the Sixth Amendment does not entitle a defendant to a sentence *below* that statutory maximum. *Apprendi, supra* at 498 (Scalia, J., concurring). Rather, under the Sixth Amendment, the jury effectively sets the outer limits of a sentence and the trial court is then permitted "to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." *Id.* at 481 (emphasis omitted); *McMillan*, *supra*; *Harris*, *supra*.

When defendant, a third-offense habitual offender, committed third-degree criminal sexual conduct, he did so knowing that he was risking 30 years in prison. When defendant was, in fact, sentenced to a maximum of 30 years in prison, he received all the protections he was entitled to under the Sixth Amendment. Therefore, the trial court's exercise of discretion in imposing a sentence greater than the "maximum-minimum," but within the range authorized by the verdict, fully complies with the Sixth Amendment.

Finally, but not insignificantly, there is no guarantee that an incarcerated person will be released from prison after the person has completed his or her minimum sentence. Ultimately, the parole board retains the discretion to keep a person incarcerated up to the maximum sentence authorized by the jury's verdict. Accordingly, because a Michigan defendant is always subject to serving the maximum sentence provided for in the statute that he or she was found to have violated, that maximum sentence constitutes the "statutory maxi-

mum" as set forth in *Blakely*. Therefore, we reaffirm our statement from *Claypool*, *supra* at 730 n 14, that "the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment."

IV. CONCLUSION

We conclude that, under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi, supra* at 490. The statutory maximum constitutes "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant." *Blakely, supra* at 303 (emphasis omitted). Under Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. MCL 769.8(1). In other words, every defendant, as here, who commits third-degree criminal sexual conduct knows that he or she is risking 15 years in prison, assuming that he or she is not an habitual offender. MCL 750.520d(2). As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. Accordingly, we reaffirm our statement in *Claypool*, and affirm defendant's sentence.

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

WEAVER, J. (*concurring*). I concur in the result of the majority opinion. As this Court recognized in *People v*

Claypool, 470 Mich 715; 684 NW2d 278 (2004), the United States Supreme Court's decision in *Blakely v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), which considered whether facts that increase the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to the jury, does not affect Michigan's scoring system, which establishes the recommended *minimum* sentence.

CAVANAGH, J., concurred in the result only.

KELLY, J. (*concurring in part and dissenting in part*). My opinion in this case parallels my dissenting opinion in *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006). Because *McCuller* offers a better opportunity to explore the ramifications of *Blakely v Washington*[1] and associated United States Supreme Court cases, my opinion in that case more fully explores the pertinent issues.

I concur in the majority's decision that Joseph Drohan's sentence does not offend the Sixth Amendment. US Const, Am VI. I agree that, in cases like his, the "statutory maximum" for *Blakely* purposes is the maximum sentence allowed by law and provided by statute. I dissent, however, from the majority's reliance on *People v Claypool*[2] as having precedential value here. I dissent also from the majority's implication that the "statutory maximum" sentence under Michigan's sentencing guidelines will always be the maximum sentence allowed by statute. As I explained in *McCuller*, when intermediate sanction cells are involved, the intermediate sanction is the "statutory maximum" for *Blakely* purposes. Because of the gravity and pervasive-

[1] 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[2] 470 Mich 715; 684 NW2d 278 (2004).

ness of the intermediate sanction cell problem, I would find the sentencing guidelines no longer valid.

DEFENDANT'S SENTENCING

A jury convicted defendant of third-degree criminal sexual conduct[3] (CSC III) and fourth-degree criminal sexual conduct[4] (CSC IV). Defendant pleaded guilty of being a third-offense habitual offender. MCL 769.11. The focus of his appeal is his sentence for the CSC III offense. CSC III is categorized as a crime against a person and is listed as a class B offense. MCL 777.16y.

When it sentenced defendant, the court calculated his prior record variable (PRV) level at 20 points. With respect to the offense variables (OVs), it scored ten points for OV 4,[5] 15 points for OV 10,[6] five points for OV 12,[7] and 25 points for OV 13.[8] Defendant objected at sentencing to the scores attributed to OVs 4 and 10, but the court rejected his arguments. His OV level was set at 55 points. In the class B sentencing grid, a PRV level of 20 points and an OV level of 55 points placed defendant in cell C-V. MCL 777.63. That cell provides a minimum sentence range of 51 to 85 months. Because defendant was a third-offense habitual offender, the top number was increased by 50 percent to 127 months. MCL 777.21(3)(b). Accordingly, the trial court sentenced defendant to 127 months to 30 years of impris-

[3] MCL 750.520d(1)(b).

[4] MCL 750.520e(1)(b).

[5] MCL 777.34, psychological injury to a victim.

[6] MCL 777.40, exploitation of a vulnerable victim.

[7] MCL 777.42, contemporaneous felonious criminal acts.

[8] MCL 777.43, continuing pattern of criminal behavior. Defendant never objected to the scoring of OV 13. This constitutes an admission that it was properly scored.

onment. It also sentenced him to one to four years of concurrent imprisonment for the CSC IV conviction.

Defendant's sentences were rendered before the United States Supreme Court issued its decision in *Blakely*. But after that date, defendant raised the *Blakely* issue in a supplemental brief on appeal. The Court of Appeals did not directly analyze the issue, stating merely that it disagreed with defendant's contentions. It relied on dicta contained in our *Claypool* opinion, treating it as binding precedent. But the Court of Appeals did request this Court to indicate whether it should be bound by the *Claypool* dicta. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). We granted oral argument on the matter, limited to what effect, if any, the *Blakely* opinion has on Michigan's statutory sentencing guidelines. 472 Mich 881 (2005).

DEFENDANT'S SENTENCE DOES NOT INVOLVE AN INTERMEDIATE SANCTION CELL

In his appeal in this Court, defendant claims that the trial court incorrectly scored OVs 4, 10, and 12. But it is apparent that, however these OVs were scored, defendant's sentence would not have fallen within an intermediate sanction cell. With his PRV level of 20 points and an OV level of 25 points,[9] defendant would have fallen into cell C-III, which, for a third-offense habitual offender, provides a range of 36 to 90 months. MCL 777.21(3)(b) and 777.63. A sentencing guidelines cell is an intermediate sanction cell only when the upper limit of the sentencing range is under 18 months. MCL 769.34(4)(a).[10]

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[9] Even if OVs 4, 10, and 12 had been scored at zero, defendant would have had an OV level of 25 because he conceded the scoring of OV 13.

[10] MCL 769.34(4)(a) provides:

Even if defendant's PRV level were zero, his sentence would not fall within an intermediate sanction cell. Instead, it would fall into cell C-I. For a third-offense habitual offender, cell C-I sets a minimum sentence range of 24 to 60 months. Again, this exceeds the 18-month limit for an intermediate sanction cell. MCL 769.34(4)(a).

The significance of the fact that defendant's sentence could not fall within an intermediate sanction cell is that the problem that arose in *McCuller* cannot occur here. The reason is that the guidelines dictate defendant's minimum sentence only. The judicial findings of fact used to score the challenged OVs did not change defendant's maximum sentence. As a consequence, no *Blakely* issue arises.

THE UNITED STATES SUPREME COURT'S PRECEDENT REGARDING THE "STATUTORY MAXIMUM"[11]

In *McMillan v Pennsylvania*,[12] the Supreme Court addressed the constitutionality of Pennsylvania's mandatory minimum sentencing act, 42 Pa Cons Stat 9712 (1982). It found that the act did not change the prosecution's burden of proving guilt beyond a reasonable doubt. *McMillan v Pennsylvania*, 477 US 79, 86-88; 106

> 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 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.

[11] For a more complete discussion of the case history, please see my dissent in *McCuller*, 475 Mich 176.

[12] 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

S Ct 2411; 91 L Ed 2d 67 (1986). It was careful to point out, however, that there are constitutional limits on how far a state may go in defining away the facts necessary to prove a criminal offense. Specifically, the Court relied on the fact that the Pennsylvania act did not increase the maximum penalty faced by a defendant. *Id*. at 87-88.

The Supreme Court expanded on this point in five subsequent cases: *Jones v United States*,[13] *Apprendi v New Jersey*,[14] *Ring v Arizona*,[15] *Blakely*, and *United States v Booker*.[16] I refer to these cases as "the *Blakely* cases." The *Blakely* cases focused primarily on the "statutory maximum." *Blakely* and *Booker* made clear that this phrase did not refer to the absolute maximum sentence provided by statute. Instead, the Supreme Court defined the "statutory maximum" as the maximum sentence that can be imposed without any judicial fact-finding:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. [*Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004) (emphasis in original; citations omitted).]

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[13] 526 US 227; 119 S Ct 1215; 143 L Ed 2d 311 (1999).

[14] 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

[15] 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002).

[16] 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

The *Blakely* cases reiterated a central holding:

> Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. [*United States v Booker*, 543 US 220, 244; 125 S Ct 738; 160 L Ed 2d 621 (2005).]

THE DIFFERENCE BETWEEN INTERMEDIATE SANCTION CELLS AND NONINTERMEDIATE SANCTION CELLS

When a defendant is entitled to a sentence falling within an intermediate sanction cell, Michigan's sentencing guidelines establish the maximum sentence that the defendant may face. MCL 769.34(4)(a). That maximum is either the upper limit of the recommended minimum sentence range or 12 months in jail, whichever period is shorter. Under the guidelines, a trial court is required to impose this maximum sentence unless it articulates substantial and compelling reasons to depart upward. At that point, the sentencing process is no longer focused on the individual's minimum sentence. The court's attention centers on the "statutory maximum" discussed in the *Blakely* cases. This is because the intermediate sanction is the maximum sentence supported by the jury verdict and defendant's criminal history alone. *Blakely* holds that any judicial fact-finding that moves a defendant above this "statutory maximum" violates the Sixth Amendment. *Booker*, 543 US 244; *Blakely*, 542 US 303-304.

In cases involving nonintermediate sanction cells, such as Joseph Drohan's case, the sentencing guidelines set the minimum sentence. If the judge engages in judicial fact-finding to increase the minimum sentence, the defendant's maximum sentence will not be increased. Instead, the "statutory maximum" for *Blakely* purposes is the maximum sentence set by the criminal

statute. The defendant's criminal history, admissions, and the jury's verdict alone allow the court to sentence a defendant to the maximum sentence allowed by law, regardless of any subsequent judicial fact-finding. And the defendant's Sixth Amendment rights are not implicated because all facts needed to support the maximum sentence were admitted by the defendant or proven to a jury beyond a reasonable doubt.

In cases like Drohan's, judicial fact-finding moves the minimum sentence within the preexisting range rather than increasing the potential maximum sentence. As the Supreme Court noted, this does not violate constitutional rights because "it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding[s.]" *McMillan*, 477 US 88.

Drohan's case serves to demonstrate this point of law. Drohan's criminal history, scored through the PRVs, did not place his sentence in an intermediate sanction cell. Hence, his "statutory maximum" was never an intermediate sanction. Instead, his maximum sentence was the maximum penalty allowed by law, 30 years. The judicial fact-finding necessary to score OVs 4, 10, and 12 did not and could not change his maximum sentence. Therefore, defendant always knew his potential maximum sentence; it was the maximum penalty prescribed by law. Just as in *McMillan*, adjustments to the minimum sentence create no constitutional problems. *Id*. at 86-88.

Because Drohan's sentence does not raise a Sixth Amendment issue, it is constitutionally unobjectionable. Therefore, I concur in the decision to affirm it.

THE INTERMEDIATE SANCTION CELL PROBLEM AND SOLUTION

As shown above, and as I discussed in *McCuller*, the existence of intermediate sanction cells in Michigan's

sentencing guidelines creates a *Blakely* problem. The reason is that judicial fact-finding used to score the OVs or to depart from the intermediate sanction cells changes a defendant's "statutory maximum" sentence. The change in the "statutory maximum" makes the sentence constitutionally infirm. Then, the question must be addressed whether the offending portions of the sentencing guidelines can be severed from the nonoffending portions. Such severance might be possible if the Legislature had intended the sentencing guidelines to function without intermediate sanction cells. But that was not its intention.

I must reiterate my belief, as set forth in *McCuller,* that the offending sections cannot be severed. Nearly every class of felony involves intermediate sanction cells. In fact, only class A and M2 felonies do not. See MCL 777.61 to 777.69. Nearly every single felony could present a *Blakely* problem if the defendant has the correct number of PRV points. The comprehensiveness of the problem creates extreme entanglement.

At the start of any jury trial, the participants will be uncertain which sentencing method will be appropriate if the defendant is convicted. They will not know whether judicial fact-finding will be required or permitted. And the prosecution will be uncertain of the entirety of the facts it must prove to the jury.

Moreover, the offending sections of the sentencing guidelines will be difficult to spot. For one defendant convicted of a crime, it would be appropriate to score the OVs. For another convicted of the same crime, it would be impermissible to score the OVs because that defendant's PRV level places him or her in an intermediate sanction cell. Such entanglement shows that severance is simply not feasible. *Blank v Dep't of Corrections*, 462 Mich 103, 123; 611 NW2d 530 (2000) (opinion by KELLY, J.).

Also, it is unlikely that the Legislature would have enacted a noncomprehensive version of the guidelines. The Legislature intended the guidelines to be comprehensive. *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003). Its specific goals were to eliminate sentencing disparity and ensure that certain crimes not warranting prison time result in jail sentences. *Id*. at 435. Severing the intermediate sanction cells from the sentencing guidelines would work counter to both goals. This demonstrates that severance is not appropriate. *People v McMurchy*, 249 Mich 147, 157-159; 228 NW 723 (1930). Given that the offending sections cannot be severed, the guidelines as a whole must be found no longer valid.

However, alternative solutions should be explored. For example, we could replace all judicial fact-finding with jury determinations. The prosecution could include in its charges the specific facts needed to score relevant OVs. Then, in a bifurcated hearing, the prosecution could present evidence regarding each of them. The jury could deliberate and make specific findings. It could indicate which facts the prosecution had proved beyond a reasonable doubt. Because it would be the jury making the determinations, there would be no constitutional impediment to an OV score moving a defendant's sentence out of an intermediate sanction cell. See *McCuller*, 475 Mich 176.

This solution would ensure that the Legislature's intent in enacting the guidelines would be fulfilled. At the same time, it would allow defendants full Sixth Amendment protection by putting the prosecution to its proofs. Such a system would be compatible with the *Blakely* cases.

CLAYPOOL HAS NO PRECEDENTIAL VALUE

The Court of Appeals specifically asked us to address whether *Claypool's* discussion of *Blakely* carries any

precedential weight. In its decision, the majority implies that it does. I strongly disagree. The discussion of *Blakely* in *Claypool* was mere dicta.

Black's Law Dictionary (7th ed) defines "obiter dictum" as: "A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ." The reference to *Blakely* in *Claypool* was completely unnecessary to that decision. *Blakely* had nothing to do with the issue presented in *Claypool,* which the Court framed as

> whether it is permissible for Michigan trial judges, sentencing under the legislative sentencing guidelines pursuant to MCL 769.34, to consider, for the purpose of a downward departure from the guidelines range, police conduct that is described as sentencing manipulation, sentencing entrapment, or sentencing escalation. [*People v Claypool*, 470 Mich 715, 718; 684 NW2d 278 (2004).]

In fact, the majority opinion in *Claypool* notes the irrelevance of *Blakely* to the discussion: "The Chief Justice argues that the United States Supreme Court's recent decision in *Blakely v Washington*, 542 US [296]; 124 S Ct 2531; 159 L Ed 2d 403 (2004), affects this case. We disagree." *Id*. at 730 n 14.

As I noted at the time, *Blakely* was neither raised nor addressed by the parties. It was not germane to the discussion. *Id*. at 748 (KELLY, J. concurring in part and dissenting in part). Given this irrelevance, the discussion clearly falls under the dictionary definition of "dicta." Such dicta lack the force of an adjudication and are not binding under the principles of stare decisis. *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999). It is erroneous for the majority to indicate that the *Blakely* discussion in *Claypool* has any precedential weight.

CONCLUSION

I concur in the majority's decision that defendant's sentence does not offend the Sixth Amendment. But I believe that the Michigan sentencing guidelines do contain a constitutional flaw, which emerges whenever OV scores determined by judicial fact-finding remove a defendant from an intermediate sanction cell. Hence, for the reasons stated in my dissenting opinion in *McCuller*,[17] I would find Michigan's sentencing guidelines no longer constitutionally sound. Also, the majority's attempt to treat *Claypool's* discussion of *Blakely* as precedentially binding is incorrect. *Claypool's* analysis of *Blakely* was simply dicta.

I would affirm defendant's sentence.

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[17] 475 Mich 176.

PEOPLE v MCCULLER

Docket No. 128161. Decided June 13, 2006. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. 474 Mich 925 (2005). Following oral argument, the Supreme Court entered a memorandum opinion affirming the judgment of the Court of Appeals with regard to the sentence imposed on the defendant and denying leave to appeal in all other respects.

Raymond A. McCuller was convicted by a jury in the Oakland Circuit Court, Richard D. Kuhn, J., of assault with intent to do great bodily harm less than murder and was sentenced as a second-offense habitual offender within the guidelines range to two to 15 years in prison. The defendant appealed, alleging that he was entitled to an intermediate sanction because his prior record variable score alone placed him in a recommended minimum guidelines range of zero to 11 months. The defendant contended that the trial court violated *Blakely v Washington*, 542 US 296 (2004), by engaging in judicial fact-finding to score the offense variables, thereby allegedly increasing his maximum sentence from an intermediate sanction to a prison term. The Court of Appeals, TALBOT, P.J., and GRIFFIN and WILDER, JJ., affirmed in an unpublished opinion per curiam, issued January 11, 2005 (Docket No. 250000). The Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the defendant's application for leave to appeal. 474 Mich 925 (2005).

In a memorandum opinion signed by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

A sentencing court in an indeterminate sentencing scheme does not violate *Blakely* by engaging in fact-finding to determine the minimum term of a defendant's indeterminate sentence unless the fact-finding increases the statutory maximum sentence to which the defendant had a legal right. Under MCL 769.34(4)(a) a defendant is not legally entitled to an intermediate sanction until after the offense variables have been scored and those offense variables, in conjunction with the prior record variables and the offense class, indicate that the upper limit of the defendant's

guidelines range is 18 months or less. A sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the offense variables to calculate the minimum recommended sentencing guidelines range, even when the defendant's prior record variable score alone would have placed the defendant in an intermediate sanction cell. In this case, the defendant's sentence must be affirmed because the properly scored sentencing guidelines range did not entitle the defendant to an intermediate sanction. In all other respects, the application for leave to appeal must be denied.

Sentence affirmed; leave to appeal denied in all other respects.

Justice KELLY, dissenting, would hold that the sentencing guidelines are unconstitutional as applied in this case and would remand the case to the trial court for resentencing. A defendant is entitled to a sentence based solely on the defendant's prior convictions and any facts admitted by the defendant or specifically found by the jury. If a defendant would be entitled to a sentence within an indeterminate sanction cell using only these factors, MCL 769.34(4)(a) sets the maximum sentence as the indeterminate sanction. The sentencing court must impose this maximum sentence. Subsequent judicial fact-finding by a preponderance of the evidence that raises the defendant's sentence above the maximum, such as the fact-finding necessary to score the offense variables or to state substantial and compelling reasons to depart from the guidelines range, violates the Sixth Amendment and *Blakely*. Because severance of the offending portions of the guidelines is not possible, a bifurcated hearing system should be implemented that allows the jury to determine beyond a reasonable doubt the additional facts necessary to score the offense variables.

Justice CAVANAGH, dissenting, agreed with the rationale and proposed result of Justice KELLY's dissent concluding that the sentencing guidelines are unconstitutional as applied in this case, but disagreed with her proposed cure for the constitutional violation. A less burdensome approach that would protect defendants' constitutional rights would be for the prosecution to charge the aggravating factors in the information and request a special jury verdict if the prosecution wants offense variable points assessed.

1. CRIMINAL LAW — SENTENCES.

Any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to a jury and proved beyond a reasonable doubt; the statutory maximum is the maximum sen-

tence a court may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant; a sentencing court under an indeterminate sentencing scheme may engage in judicial fact-finding in order to impose a minimum term within the statutory range.

2. CRIMINAL LAW — SENTENCES.

MCL 777.21 requires a sentencing court to consider the offense variables, the prior record variables, and the offense class to determine a defendant's recommended minimum guidelines range.

3. CRIMINAL LAW — SENTENCES.

A defendant is not entitled to an intermediate sanction under MCL 769.34(4)(a) until after the offense variables have been scored and those offense variables, in conjunction with the prior record variables and the offense class, indicate that the upper limit of the defendant's guidelines range is 18 months or less.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Chief, Appellate Division, and *Robert C. Williams*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for the defendant.

Amici Curiae:

Kimberly Thomas for Criminal Defense Attorneys of Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Ron Franz*, President, Prosecuting Attorneys Association of Michigan, and *William E. Molner*, Assistant Attorney General, for the Prosecuting Attorneys Association of Michigan.

MEMORANDUM. Defendant was convicted of assault with intent to do great bodily harm less than

murder, MCL 750.84, following a jury trial. The properly scored recommended minimum sentence guidelines range for defendant's offense provided for a term of five to 28 months' imprisonment, thus placing defendant in a so-called "straddle cell."[1] The trial court sentenced defendant within the guidelines range to two to 15 years of imprisonment. On appeal, defendant argues that because his prior record variable (PRV) score alone placed him in a recommended minimum guidelines range of zero to 11 months, he is entitled to an intermediate sanction.[2] Defendant contends that the trial court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by engaging in judicial fact-finding to score the offense variables (OVs), thereby allegedly increasing his maximum sentence from an intermediate sanction to a prison term. We reject defendant's and the dissent's contention and affirm defendant's sentence.

In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States

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[1] When a defendant is placed in a "straddle cell," the sentencing court has the option of imposing an intermediate sanction or a prison term. MCL 769.34(4)(c) provides:

> If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
>
> (*i*) To imprisonment with a minimum term within that range.
>
> (*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

[2] When the upper limit of the guidelines range is 18 months or less, the sentencing court must impose an intermediate sanction. MCL 769.34(4)(a). An "intermediate sanction" can mean a number of things, but excludes a prison sentence. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002); MCL 769.31(b).

Supreme Court held that under the Sixth and Fourteenth amendments of the United States Constitution, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely, supra* at 303, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis deleted.) In regard to indeterminate sentencing schemes such as Michigan's, the *Blakely* Court reaffirmed that a sentencing court may engage in judicial fact-finding in order to impose a minimum term within the statutory range. See *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). The *Blakely* Court explained:

> Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence —and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [*Blakely, supra* at 309 (emphasis in original).]

Thus, a sentencing court in an indeterminate sentencing scheme does not violate *Blakely* by engaging in fact-finding to determine the minimum term of a defendant's indeterminate sentence unless the fact-finding increases the statutory maximum sentence to which the defendant had a legal right.

In Michigan, when the high end of the recommended minimum guidelines range is 18 months or less, MCL 769.34(4)(a) requires a sentencing court, absent articulation of substantial and compelling reasons, to impose

an intermediate sanction, which may include a jail term of no more than 12 months:

> 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 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.]

MCL 777.21 explicitly requires the court to consider the OVs, the PRVs, and the offense class to determine a defendant's recommended minimum guidelines range.[3] Under our statutory scheme, a defendant has no legal right to have the minimum sentence calculated using

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[3] MCL 777.21(1) provides:

> For an offense enumerated in part 2 of this chapter, determine the recommended minimum sentence range as follows:
>
> (a) Find the offense category for the offense from part 2 of this chapter. From section 22 of this chapter, determine the offense variables to be scored for that offense category and score only those offense variables for the offender as provided in part 4 of this chapter. Total those points to determine the offender's offense variable level.
>
> (b) Score all prior record variables for the offender as provided in part 5 of this chapter. Total those points to determine the offender's prior record variable level.
>
> (c) Find the offense class for the offense from part 2 of this chapter. Using the sentencing grid for that offense class in part 6 of this chapter, determine the recommended minimum sentence range from the intersection of the offender's offense variable level and prior record variable level. The recommended minimum sentence within a sentencing grid is shown as a range of months or life.

only a *fraction* of the statutorily enumerated factors. Thus, under MCL 769.34(4)(a), a defendant is not legally *entitled* to an intermediate sanction until *after* the OVs have been scored and those OVs, in conjunction with the PRVs and the offense class, indicate that the upper limit of the defendant's guidelines range is 18 months or less. In other words, a defendant's legal right to an intermediate sanction arises from properly scored guidelines, including the scoring of the OVs. A sentencing court does not violate *Blakely* and its progeny by engaging in judicial fact-finding to score the OVs to calculate the minimum recommended sentencing guidelines range, even when the defendant's PRV score alone would have placed the defendant in an intermediate sanction cell.[4]

In this case, properly scored guidelines placed defendant in a recommended minimum sentence range of five to 28 months in prison. This placed defendant in a "straddle cell," in which the trial court was permitted to choose between imposing an intermediate sanction or a prison term. MCL 769.34(4)(c). Thus, defendant faced a statutory maximum sentence of 15 years in prison for his conviction of assault with intent to do great bodily harm less than murder as a second-offense habitual offender, MCL 750.84; MCL 769.10. Because the properly scored guidelines range did not entitle defendant to

[4] Contrary to the dissent's contention, our holding is consistent with *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). In *Ring* the Court held that Arizona's sentencing scheme violated the defendant's Sixth Amendment rights where the sentencing court increased the defendant's statutory maximum sentence of life imprisonment to a death sentence on the basis of a judicial finding of aggravating factors. This case does not involve an increase of defendant's statutory maximum sentence on the basis of judicial findings. Instead, the trial court merely scored defendant's OVs before imposing a sentence within the statutory range.

an intermediate sanction, the trial court did not violate *Blakely* by scoring the OVs before imposing a prison sentence within the guidelines. Accordingly, we affirm defendant's sentence.

In all other respects, defendant's application for leave to appeal is denied, because we are not persuaded that this Court should review the remaining questions presented.

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

KELLY, J. (*dissenting*). This case provides the Court an opportunity to fully and carefully explore the effects on Michigan's sentencing guidelines[1] of the United States Supreme Court decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). It presents an important *Blakely* problem: whether judicial fact-finding that increases a person's sentence by moving it from an intermediate sanction cell to a straddle cell violates the person's Sixth Amendment[2] right to trial by jury. I have concluded that it does. Hence, I would rule that Michigan's sentencing guidelines are unconstitutional as applied. Because a *Blakely* violation occurred here, I would remand the case to the trial court so that defendant could be resentenced.

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[1] MCL 777.1 *et seq.*

[2] The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [US Const, Am VI.]

PROCEDURAL FACTS

A jury found defendant Raymond McCuller guilty of assault with intent to do great bodily harm less than murder. MCL 750.84. In arriving at its sentence, the trial court followed these steps: Because defendant had previously been convicted of a misdemeanor, the judge scored two points for the prior record variables (PRVs). He also scored 36 points for the offense variables (OVs). He did this by making certain findings of fact. He found that the victim had been touched by a weapon, other than a gun or knife, and scored OV 1 at ten points. MCL 777.31. He found that defendant had possessed a potentially lethal weapon and scored OV 2 at one point. MCL 777.32. He found that the victim had suffered a life threatening or permanent incapacitating injury, and scored OV 3 at 25 points. MCL 777.33.

The sentencing guidelines statutes make assault with intent to do great bodily harm less than murder a class D offense. MCL 777.16d. In the guidelines class D sentencing grid, a PRV level of two points and an OV level of 36 points placed defendant in the B-IV cell. This cell provides a minimum sentence range of five to 23 months. MCL 777.65.[3] Because defendant had a prior conviction, the judge increased the top number by 25

[3] This cell is what is often referred to as a "straddle cell." See *People v Stauffer*, 465 Mich 633, 636 n 8; 640 NW2d 869 (2002). Straddle cells are addressed at MCL 769.34(4)(c), which provides:

> If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
>
> (*i*) To imprisonment with a minimum term within that range.
>
> (*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

percent to 28 months. MCL 777.21(3)(a).[4] The range for his minimum sentence became five to 28 months. Accordingly, the judge sentenced defendant within this range to a minimum of two years' imprisonment.

After the sentencing and before defendant filed his claim of appeal, the United States Supreme Court released its decision in *Blakely*. Defendant could not have raised a *Blakely* issue at his sentencing. But he did raise the issue in his appeal to the Court of Appeals. Unfortunately, that Court did not directly address the issue. Instead, it relied on our dicta discussion of the subject contained in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). As a result, it found that defendant was not entitled to resentencing. *People v McCuller*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 250000).

Originally, this Court held the case in abeyance for the matter of *People v Drohan*, 472 Mich 881 (2005). Later, we scheduled oral argument for the purpose of determining whether to grant the application or take other peremptory action pursuant to MCR 7.302(G)(1). We specifically ordered the parties to address the effect of *Blakely* on defendant's sentence. Unfortunately, in its opinion, the majority fails to recognize the effects of *Blakely* on defendant's sentence.

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[4] MCL 777.21(3) provides, in relevant part:

> If the offender is being sentenced under section 10, 11, or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:
>
> (a) If the offender is being sentenced for a second felony, 25%.

MICHIGAN'S SENTENCING SCHEME

MCL 769.8 lays out the basics of Michigan's statutory sentencing scheme:

> (1) When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.
>
> (2) Before or at the time of imposing sentence, the judge shall ascertain by examining the defendant under oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the defendant's criminal character or conduct, which facts and other facts that appear to be pertinent in the case the judge shall cause to be entered upon the minutes of the court.

Therefore, generally, a court's initial attention when sentencing must be on determining the minimum sentence. That sentence must be within the range set by the sentencing guidelines unless substantial and compelling reasons to depart from the range are shown. MCL 769.34(2) and (3). Typically in Michigan, the maximum sentence is established by statute. For instance, MCL 750.84 provides that the maximum sentence for assault with intent to do great bodily harm less than murder is ten years or a fine of $5,000. Unless a defendant has habitual-offender status, the sentencing court cannot exceed the maximum sentence provided by statute.[5]

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[5] With respect to habitual offenders, MCL 769.10, MCL 769.11, and MCL 769.12 allow the maximum sentence to be increased. The new maximum set forth in these statutes is the absolute maximum to which

There are exceptions to the general rule that the court's focus in sentencing is only on the minimum sentence. With respect to certain offenses, the Legislature has specified a determinate sentence.[6] They require a specific sentence, not a sentence that falls within a range. For instance, the offense of carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm) has a mandatory determinate sentence of two years. A second conviction for felony-firearm requires a determinate five-year sentence. MCL 750.227b(1). But, for purposes of this case, the most important exception to the general rule that trial judges calculate a defendant's minimum sentence involves intermediate sanction cells.

INTERMEDIATE SANCTION CELLS

If the trial court had not entered a score for OVs 1, 2, and 3, defendant's OV level would have dropped to zero. This would have moved him to the B-I cell. The B-I cell provides a sentencing range of zero to 11 months' imprisonment for a second-offense habitual offender. MCL 777.21(3)(a) and 777.65. Because its upper limit is under 18 months, the B-I cell is referred to as an "intermediate sanction cell."

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

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the sentencing judge can sentence a defendant. In this case, because defendant was a second-offense habitual offender, the maximum possible sentence was 15 years. MCL 769.10(1)(a). Defendant received this maximum sentence.

[6] A "determinate sentence" is "[a] sentence for a fixed length of time rather than for an unspecified duration." Black's Law Dictionary (7th ed), p 1367.

> 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 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.

MCL 769.31(b) further defines "intermediate sanction":

> "Intermediate sanction" means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:
>
> (*i*) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082 .
>
> (*ii*) Probation with any probation conditions required or authorized by law.
>
> (*iii*) Residential probation.
>
> (*iv*) Probation with jail.
>
> (*v*) Probation with special alternative incarceration.
>
> (*vi*) Mental health treatment.
>
> (*vii*) Mental health or substance abuse counseling.
>
> (*viii*) Jail.
>
> (*ix*) Jail with work or school release.
>
> (*x*) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258.
>
> (*xi*) Participation in a community corrections program.
>
> (*xii*) Community service.
>
> (*xiii*) Payment of a fine.
>
> (*xiv*) House arrest.
>
> (*xv*) Electronic monitoring.

When one reads these statutes together, it becomes apparent that intermediate sanction cells have a highly unusual role in Michigan's sentencing guidelines scheme. Once a defendant's minimum sentencing range falls within those cells, the guidelines no longer are concerned with the person's minimum sentence. Instead, under MCL 769.34(4)(a), the guidelines set the maximum sentence to which the defendant may be sentenced. That maximum is either the upper limit of the range of the recommended minimum sentence or 12 months in jail, whichever is shorter. The guidelines statutes do not permit a court to sentence to prison a defendant fitting within the intermediate sanction cells. The court is required to impose a maximum term of 12 months or less, unless it can state substantial and compelling reasons for a longer sentence. MCL 769.34(4)(a).

In this case, the defendant's maximum sentence would have been 11 months in jail if the trial judge had not affixed a score to OVs 1, 2, and 3. By scoring the OVs after making judicial findings of fact, the judge moved defendant out of the intermediate sanction cell into a straddle cell. By that process, the judge sentenced defendant to a higher maximum sentence than he would have been able to on the basis of the jury verdict and defendant's criminal history alone. And the judge scored the OVs after making his own findings of fact, findings not made by the jury. It is under this setting that I address the applicability of the United States Supreme Court's decision in *Blakely*.[7]

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[7] This Court considered the application of *Blakely* to standard sentencing guideline cases in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). My statement here should be read in tandem with my concurring/dissenting opinion in *Drohan* for a fuller discussion of the applicability of *Blakely* to Michigan's sentencing guidelines statutes.

THE HIGH COURT'S PRECEDENT REGARDING THE "STATUTORY MAXIMUM"

The United States Supreme Court grappled over a long period with the judicial modification of sentences using facts found by a judge after a jury's verdict. These facts are known as "sentencing factors." In *McMillan v Pennsylvania*,[8] the Court addressed the constitutionality of Pennsylvania's mandatory minimum sentencing act, 42 Pa Cons Stat 9712 (1982). That act provided for a mandatory minimum sentence for certain felonies if the sentencing judge found, by a preponderance of the evidence, that the defendant " 'visibly possessed a firearm' during the commission of the offense." *McMillan v Pennsylvania*, 477 US 79, 81; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

The Court found that the visible-possession requirement was a mere sentencing factor that did not change the prosecution's burden of proving guilt beyond a reasonable doubt. *Id*. at 86-88. And it made another important point: there are constitutional limitations on the degree to which a state may whittle away the factual support needed to prove a criminal offense beyond a reasonable doubt. It also paid special attention to the fact that 42 Pa Cons Stat 9712 did not increase the maximum penalty faced by the defendant:

> Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [*McMillan, supra* at 87-88.]

The Supreme Court returned to the discussion of sentencing factors in *Jones v United States*, 526 US 227;

[8] 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

119 S Ct 1215; 143 L Ed 2d 311 (1999). In that case, the Court addressed whether the federal carjacking statute[9] constituted three separate crimes or one crime with sentencing factors that increased the maximum penalty. *Id*. at 229. The Court concluded that a fair reading of the statute required it to find three separate offenses. But it went on to discuss alternative reasons under constitutional law for requiring that all the "elements" be proven to a jury beyond a reasonable doubt. The Court's focus quickly centered on *McMillan's* discussion of an increase in the maximum penalty:

> The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary

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[9] 18 USC 2119. At the time, the statute provided:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

> for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. [*Id*. at 243-244.]

The Supreme Court found the diminution of the jury's role of great concern. It indicated that removal from the jury of control over the facts necessary for determining a statutory sentencing range would raise a genuine Sixth Amendment issue. *Id*. at 248. The Court stated that any doubt on this issue of statutory construction must be resolved in favor of avoiding such Sixth Amendment questions. *Id*. at 251.

The next step in the Supreme Court's discussion of sentencing factors came in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). *Apprendi* centered on a New Jersey hate-crime law. The statute allowed for an increase in the defendant's maximum sentence from ten to 20 years if the trial court found that the defendant " 'acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " *Id*. at 468-469, quoting NJ Stat Ann 2C:44-3(e). The sentencing judge could make the finding based on a preponderance of the evidence. *Apprendi*, 530 US 468. In its analysis, the Supreme Court specifically built on its holding in *Jones*. It concluded that the Fourteenth Amendment of the United States Constitution commanded the same answer for state statutes. *Id*. at 476.

The *Apprendi* Court found that a legislature could not change the elements of a crime simply by labeling some of them "sentencing factors." It found that such attempts run afoul of due process and violate a defendant's Sixth Amendment protections. Instead, the Court stated, a sentencing court could exercise its judicial discretion on sentencing factors only as long as

the sentence imposed fell within the appropriate statutory limits. *Id*. at 481-482. The Court expressed concern that a defendant not be deprived of his or her liberty or otherwise stigmatized by a conviction and sentence. To that end, procedural practices must adhere to the basic principles undergirding the requirement that the prosecution prove beyond a reasonable doubt all facts necessary to constitute the statutory offense. *Id*. at 483-484. The Court reasoned that increasing punishment beyond the statutory maximum violated those principles:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached. [*Id*. at 484.]

The Supreme Court went on to make a concise reiteration of its holding. In doing so, it used the phrase "statutory maximum":

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." [*Id*. at 490, quoting *Jones*, 526 US 252-253 (Stevens, J., concurring).]

The Supreme Court continued its discussion of the "statutory maximum" in *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). That case dealt with the Sixth Amendment implications of Arizona's first-degree murder statute. The statute stated that first-degree murder was punishable by death or life in prison. It then referred to another statute that directed the trial judge to conduct a separate sentencing hearing. The purpose of the hearing was to determine the existence of specific circumstances (sentencing factors) in order to decide whether a death sentence was appropriate. *Id*. at 592-593. The Supreme Court, relying on its previous decisions in *Jones* and *Apprendi*, found that Arizona's system violated the defendant's Sixth Amendment rights.

The Court reiterated:

> The dispositive question, we said, "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [*Id*. at 602, quoting *Apprendi*, 530 US 482-483, 494 (citations omitted; emphasis in *Apprendi*).]

Notwithstanding that the statute allowed for either life in prison or death, the Supreme Court found that the "statutory maximum" was life imprisonment. This is because the death sentence could be imposed only after additional factual findings by a judge. The Supreme Court found nothing to distinguish this case from *Apprendi*. *Ring,* 536 US 604-606. It reached this conclusion because Arizona's enumerated aggravating factors were the functional equivalent of an element of a

greater offense. Therefore, the Sixth Amendment required that a jury find these factors beyond a reasonable doubt. *Id*. at 609.

It was in *Blakely* that the Supreme Court fully explained the meaning of the phrase "statutory maximum." In that case, the defendant had pleaded guilty in the state of Washington of second-degree kidnapping involving domestic violence and the use of a firearm. The standard sentencing range for the offense was 49 to 53 months in prison. *Blakely*, 542 US 298-299. But, under Washington's sentencing guidelines, a court could impose a sentence above the standard range if it found substantial and compelling reasons to justify an "exceptional sentence." *Id*. at 299.

Aside from the elements of the crime, the defendant in *Blakely* admitted to no other relevant facts. *Id*. However, after hearing the complainant's version of the kidnapping, the judge imposed an exceptional sentence of 90 months.[10] He based this departure on his finding that there had been deliberate cruelty, a statutorily enumerated ground for departure in domestic violence cases. *Id*. at 300. Washington argued that its system did not present a Sixth Amendment problem because the highest possible sentence was a maximum of ten years' imprisonment. Therefore, in no instance could an exceptional sentence exceed ten years. *Id*. at 303. The Supreme Court rejected this argument.

Instead, it defined the "statutory maximum" as the maximum sentence that can be imposed without judicial fact-finding:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sen-

[10] Washington's sentencing scheme provided for determinate sentences. *Blakely*, 542 US 308.

> tence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. [*Id*. at 303-304 (emphasis in original; citations omitted).]

Therefore, for Sixth Amendment purposes, the maximum sentence was not ten years. Instead, it was 53 months, the maximum sentence that could have been imposed solely on the basis of facts defendant admitted when pleading guilty. *Id*. at 304. The Supreme Court concluded that this determination alone properly effectuated the people's control of the judiciary that the Founding Fathers intended:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. [*Id*. at 313 (emphasis in original).]

The final phase in the Supreme Court's discussion of judicial modification of statutory maximum sentences through "sentencing factors" came in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). In that case, the Court addressed the applica-

bility of *Blakely* to the federal sentencing guidelines. Booker[11] was charged with possession with intent to distribute at least 50 grams of cocaine base. The statute for this crime provided a maximum possible sentence of life in prison. But on the basis of Booker's criminal history and the quantity of cocaine base that the jury found was involved, the guidelines required a maximum sentence of 262 months' imprisonment. Instead of imposing that sentence on Booker, the trial court held a hearing during which it made additional findings of fact. It found that Booker had possessed an additional 566 grams of cocaine base and that he had obstructed justice. Accordingly, using a preponderance of the evidence test, the court increased the maximum sentence to 30 years in prison. *Id*. at 227.

After a discussion of *Jones*, *Apprendi*, *Ring*, and *Blakely*, the Supreme Court found the federal guidelines statutes indistinguishable from the Washington guidelines statutes at issue in *Blakely*.

> Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed

[11] *Booker* involved consolidated cases that included another defendant, Fanfan. For the sake of avoiding repetition, I will discuss defendant Booker only.

> pursuant to the Federal Sentencing Guidelines in these cases. [*Id*. at 235, quoting *Blakely*, 542 US 305 (citation omitted).]

It again found irrelevant the fact that there existed an absolute maximum sentence set by statute. The maximum sentence could not be applied in every case. Instead, in cases like Booker's, the jury's verdict supports nothing other than a lower maximum sentence. *Booker*, 543 US 234-235. In conclusion, the Supreme Court reiterated its holding from *Apprendi*:

> Accordingly, we reaffirm our holding in *Apprendi:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. [*Id*. at 244.]

On this basis, the Supreme Court invalidated the statutory provisions that make the federal sentencing guidelines mandatory. *Id*. at 226-227.

BLAKELY AND MICHIGAN'S GENERAL SENTENCING SCHEME

As noted before, Michigan's sentencing guidelines generally establish the minimum sentence. Usually, judicial fact-finding does not alter a defendant's maximum sentence. Instead, in the typical case, the maximum sentence for *Blakely* purposes is the sentence set by the statute. The defendant's criminal history, admitted facts, and the jury's verdict alone allow the sentencing court to sentence the defendant to the maximum sentence allowed by law, without recourse to judicial fact-finding. And the defendant's Sixth Amendment rights are not implicated because all the facts necessary to support the maximum sentence have been proven to a jury beyond a reasonable doubt.

Such situations do not threaten the basic principles undergirding our jury-driven legal system. This is because the defendant knows what maximum sentence he or she is facing regardless of judicial fact-finding. *Apprendi* noted that judicial fact-finding is acceptable when it does not increase the maximum penalty for a crime or create a separate offense calling for a separate penalty. " '[Judicial fact-finding] operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding[s] . . . . ' " *Apprendi*, 530 US 486, quoting *McMillan*, 447 US 88.

The typical application of the Michigan sentencing guidelines more readily relates to *McMillan*. Scoring the OVs merely shifts a defendant's sentence within the maximum range. It does not move the defendant from one maximum sentence to a higher one. A defendant whose criminal history and jury verdict do not place him or her in an intermediate sanction cell always knows what the potential maximum sentence will be: it is the maximum penalty prescribed by law. Because there is no notice problem in the application of the sentencing guidelines in cases not involving intermediate sanction cells, there is no Sixth Amendment issue either. All of this changes, however, when an intermediate sanction cell is involved.

BLAKELY AND MICHIGAN'S INTERMEDIATE SANCTION CELLS

When a defendant is entitled to a sentence within an intermediate sanction cell, MCL 769.34(4)(a) sets the maximum sentence. That sentence is either the upper limit of the recommended minimum sentence range or 12 months in jail, whichever is shorter. Under the guidelines, the court *must* impose this maximum sentence, unless it can state substantial and compelling

reasons to depart upward. Therefore, the process is no longer concerned with the defendant's minimum sentence. This alteration in focus changes the "statutory maximum" discussed in *Apprendi* and *Blakely*.

The new maximum sentence set under MCL 769.34(4)(a) is the "statutory maximum." This is true because it is the highest sentence to which the court can sentence a defendant solely on the basis of the defendant's criminal record, admissions, and the jury's verdict. *Booker*, 543 US 244; *Blakely*, 542 US 301; *Apprendi*, 530 US 490; *Jones*, 526 US 251-252. And, if the court makes findings of fact moving the sentence to a higher statutory maximum, the defendant faces either (1) a different criminal charge or (2) the increased stigma of an extended sentence.

This is specifically what the Supreme Court sought to avoid. *Apprendi*, 530 US 484. Any judicial fact-finding that shifts the defendant's sentence above the statutory maximum is unconstitutional and violates *Jones* and its progeny. By scoring the OVs or stating substantial and compelling reasons to depart from the sentencing guidelines range, a court engages in such judicial fact-finding.

The question then becomes: Who is entitled to an intermediate sanction cell? Again, the central holding of the pertinent cases is that

> [a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. [*Booker*, 543 US 244.]

In other words, a defendant is entitled to a sentence based solely on (1) the defendant's prior convictions and (2) any facts he or she admitted or any facts that were specifically found by the jury. *Id*.

To determine an appropriate sentence in Michigan, the sentencing court should score only the PRVs. This is true because these factors are based on the defendant's prior convictions and relations to the criminal justice system. To determine whether a defendant's sentence falls within an intermediate sanction cell, the sentencing court should not score the OVs. This is because they are based on factual determinations that are made by the trial court by a preponderance of the evidence. Such judicial fact-finding was explicitly rejected in the *Blakely* line of cases. *Id*. at 234-235. The only time the sentencing court should score an OV is when the underlying fact was admitted by the defendant or found by the jury beyond a reasonable doubt. But this occurs only in rare cases.

Therefore, it is safe to conclude that a Michigan defendant is entitled to an intermediate sanction cell sentence when his or her PRV level alone supports such a sentence. On the other hand, a defendant whose PRV level is too high to place him or her in an intermediate sanction cell is not entitled to a sentence within an intermediate sanction cell. The latter defendant falls under the general sentencing scheme and is subject to the maximum sentence set by law. In that case, the trial court is free to make the judicial findings of fact necessary to score the OVs.

The instant case is demonstrative of the distinction. Defendant did not admit any fact necessary to score OVs 1, 2, and 3. And the jury made no specific findings of fact regarding these OVs. Thus, defendant's sentence should be based solely on his PRV level. Defendant's PRV level was two points, which placed him in the B-I cell. The B-I cell provides a sentence range of zero to 11 months for a second-offense habitual offender. MCL 777.65; MCL 777.21(3)(a). This is an intermediate sanc-

tion cell. MCL 769.34(4)(a). Therefore, defendant was entitled to an intermediate sanction sentence. As discussed above, this means a maximum sentence of 11 months in jail.

But the trial court made judicial findings of fact using a preponderance of the evidence to score OVs 1, 2, and 3. These judicial findings increased defendant's maximum sentence because they moved defendant into a straddle cell. At that point, he was no longer entitled to an intermediate sanction sentence. Because the judge's findings of fact increased defendant's maximum sentence, they violated defendant's Sixth Amendment rights. Defendant suffered a greater stigma through an increased sentence than the stigma he would have been subjected to had his sentence been based solely on his PRV level. This increased stigma undermines the basic concepts of the right to trial by jury and defeats the intent of the Founding Fathers to ensure a publicly controlled judiciary. *Apprendi*, 530 US 483-484.

Just as in the *Ring* case, scoring the OVs here was the functional equivalent of convicting defendant of a different criminal offense. Although he had been convicted only of assault with intent to do great bodily harm less than murder, he was sentenced for an assault with intent to do great bodily harm less than murder (1) in which the victim was touched by a weapon,[12] (2) in which defendant possessed a potentially lethal weapon,[13] and (3) in which the victim suffered life threatening or permanent incapacitating injury.[14] Just as in *Ring*, the Sixth Amendment requires that the jury find beyond a reasonable doubt the facts that enhanced defendant's guilt. *Ring*, 536 US 609.

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[12] This was the finding under OV 1. MCL 777.31(1)(d).

[13] This was the finding under OV 2. MCL 777.32(1)(e).

[14] This was the finding under OV 3. MCL 777.33(1)(c).

Some may argue that the statutory maximum was the maximum sentence allowed by law and not the intermediate sanction sentence of 11 months. The argument is that all defendants in Michigan should assume that they will receive the statutory maximum because they do not know how the judge will score the OVs at sentencing. This reasoning is inaccurate and is directly contradicted by the *Blakely* line of cases.

In fact, both *Blakely* and *Booker* make clear that it is not relevant that the possibility exists for the judge to depart from the statutory maximum sentence in some circumstances. It is not relevant that the maximum sentence could increase with additional fact-finding by the judge. *Booker*, 543 US 234-235; *Blakely*, 542 US 304. Under *Blakely*, the statutory maximum in this case remains the 11-month intermediate sanction sentence even though the judge was empowered to increase it after additional fact-finding. *Blakely* succinctly explained the Supreme Court's reasoning on this point:

> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," [*State* v] *Gore*, [143 Wash 2d 288, 315-316; 21 P3d 262 (2001)], which in this case included the elements of second-degree kidnapping and the use of a firearm, see [Wash Rev Code] 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See [Wash Rev Code] 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in

> *Ring* (because that is what the judge could have imposed upon finding an aggravator). [*Id*.]

In the instant case, had the judge sentenced defendant to a maximum of 15 years without scoring the OVs or making additional fact-finding, he would have committed error requiring reversal. The same rule of law applies as in *Ring*, *Blakely*, and *Booker*. Despite the fact that the statute permits a different maximum in some situations, sentencing a defendant to that maximum on the basis of judicial fact-finding constitutes a violation of the Sixth Amendment.

Some also argue that the *Blakely* line of cases does not affect Michigan's sentencing guidelines because Michigan has an indeterminate sentencing scheme. I would agree with this assessment in cases in which the defendant's PRV level places the defendant somewhere other than in an intermediate sanction cell. But I disagree with respect to cases in which the indeterminate sentencing scheme sets two possible maximums,[15] which is exactly what occurs in cases involving intermediate sanction cells. In these cases, the indeterminate sentencing scheme resembles the determinate sentencing schemes discussed in the *Blakely* line of cases. *Blakely* itself contains a discussion of the difference between indeterminate and determinate schemes:

> Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial

[15] Here, the two possible maximums were 15 years (set by MCL 750.84 and MCL 769.10) and 11 months (set by the guidelines).

> power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [*Id*. at 308-309 (emphasis in original; citations omitted).]

Once this reasoning is applied to the instant case, the problem posed by Michigan's sentencing scheme becomes apparent. It would be one thing if every second-offense habitual offender convicted of assault with intent to do great bodily harm less than murder faced the same 15-year maximum. Then, there would be no problem with judicial fact-finding that results in a sentence in the range of zero to 15 years. But that is not the case. Some second-offense habitual offenders convicted of assault with intent to do great bodily harm less than murder face a maximum sentence of 11 months. They are offenders whose criminal records do not support the scoring of the OVs.[16] These offenders are entitled to a sentence falling within an intermediate sanction cell. *Id*.

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[16] These would be the equivalent of *Blakely's* "burglar who enters a home unarmed." *Blakely*, 542 US 309.

Given that there are two possible maximum sentences for the offense in question, a defendant is entitled to whichever is supported by the conviction and his or her admissions and criminal record alone. "[A]nd by reason of the Sixth Amendment the [additional] facts bearing upon that entitlement must be found by a jury." *Id*. at 309. Therefore, if certain other facts are necessary to move the defendant to the higher maximum sentence, they must be proven to the jury beyond a reasonable doubt.[17]

In this case, the judge moved defendant from the 11-month maximum to the 15-year maximum. He did this using facts that he determined to be true by a mere preponderance of the evidence. The prosecution was not put to its proofs regarding these facts, and defendant faced an increased sentence without the full opportunity to challenge the facts the prosecution claims support it. This is exactly the problem recognized by *Blakely*. And it constitutes a Sixth Amendment violation.

The argument has also been made that no defendant is entitled to a sentence in Michigan until after the OVs have been scored. See MCL 777.21. It is this argument on which the majority bases its decision. This argument does not survive even casual inspection, and the *Blakely* line of cases clearly contradicts it. Essentially, it boils down to a claim that judicial fact-finding should occur to determine if judicial fact-finding should occur. It is a claim that the court should be able to make some

[17] The majority ignores this unusual nature of intermediate sanction cells as compared to a traditional indeterminate scheme. And it states that Michigan's sentencing scheme is indeterminate, period. But, because intermediate sanction cells set maximum sentences, Michigan's sentencing scheme in these cases is distinct from the traditional indeterminate scheme and, for Sixth Amendment purposes, is properly viewed as determinate.

judicial fact-finding. If, as a consequence, the guidelines place a defendant in an intermediate sanction cell, no more judicial fact-finding would be appropriate. But, the claim continues, if initially the court's fact-finding moves the sentence beyond an intermediate sanction cell, more judicial fact-finding would be acceptable.

I find this argument intellectually disingenuous and circular. Nowhere in *Blakely* or in any of the other related cases does the Supreme Court indicate that any initial judicial fact-finding is appropriate. In fact, all the cases specifically *contradict* this contention:

> Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. [*Booker*, 543 US 244.]

Any fact means any fact. Certain facts are not excepted, and no exception is made for an initial round of fact-finding. The holding of the *Blakely* line of cases is simple: Any facts, aside from past convictions, that increase a defendant's maximum sentence must be either admitted by the defendant or proven to a jury beyond a reasonable doubt.

The majority ignores this central tenet of the *Blakely* line of cases. It is irrelevant that a defendant would or could receive a higher sentence under the traditional application of the sentencing scheme. A defendant is *entitled* to the maximum sentence authorized by the defendant's past convictions and the facts admitted or established during a guilty plea or by a jury verdict. *Id*. A defendant's sentence must not be based on facts later found by a judge using a preponderance of the evidence standard.

MCL 777.21 does not change this central tenet. The statute is similar to the statute in *Ring*. In *Ring*, the

statute directed the judge to conduct a separate sentencing hearing to determine the existence of specified circumstances in order to decide whether to impose death or life imprisonment. *Ring*, 536 US 592.

The fact that it is possible to impose a higher sentence under the sentencing scheme is not relevant. A defendant is *entitled* to a sentence based solely on the jury verdict and the defendant's admissions and criminal history. The Supreme Court explained:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." [*Id*. at 603-604.]

Defendant in this case was exposed to a greater punishment than was authorized by the jury's verdict. This was a violation of the Sixth Amendment. *Id*. at 609.

THE CURE FOR THE CONSTITUTIONAL VIOLATION

The fact that intermediate sanction cells exist does not necessarily render Michigan's sentencing guidelines statutes unconstitutional. There are legally valid applications of this portion of the guidelines. Also, legally valid applications can be made of the nonintermediate sanction cells. For instance, a defendant's PRV level

alone could place the defendant in a straddle cell or a cell requiring a prison sentence without further judicial fact-finding.

A problem of constitutional magnitude arises, however, when someone is moved out of an intermediate sanction cell into a straddle cell or beyond by judicial fact-finding. In such situations, the application of the guidelines violates the defendant's Sixth Amendment right to have all the facts that increase the sentence proven to a jury beyond a reasonable doubt. The only exceptions are the defendant's criminal record and facts admitted by the defendant.

The question becomes: How can this constitutional problem be eliminated? The Court could declare the offending portions of the guidelines unconstitutional and simply sever them from the statutes. I believe this is not feasible. A significant portion of the guidelines involves intermediate sanction cells. The sentences for all class G and H felonies fall in an intermediate sanction cell without consideration of the OVs. MCL 777.68 and MCL 777.69. All class F felonies fall in an intermediate sanction cell if the defendant has fewer than 50 PRV points. MCL 777.67. All class E felonies fall in an intermediate sanction cell if the defendant has fewer than 25 PRV points. MCL 777.66. All class D felonies fall in an intermediate sanction cell if the defendant has fewer than 50 PRV points. MCL 777.65. All class C felonies fall in an intermediate sanction cell if the defendant has fewer than ten PRV points. MCL 777.64. The sentences of class B felons having zero PRV points fall in an intermediate sanction cell. MCL 777.63. And the sentence of no class M2 or A felon could fall in an intermediate sanction cell. MCL 777.61 and 777.62.

Given these facts, the magnitude of the problem becomes apparent. Nearly every felony could present a *Blakely* problem if the defendant has a certain number of PRV points. The comprehensive nature of the problem raises a serious question whether severance is possible. The Legislature encourages saving statutes and acts through severance:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable. [MCL 8.5.]

To determine whether severance is appropriate, this Court must consider whether the portion of the act remaining after the unconstitutional portion has been severed is capable of functioning alone. *Blank v Dep't of Corrections*, 462 Mich 103, 123; 611 NW2d 530 (2000), quoting *Maki v East Tawas*, 385 Mich 151, 159; 188 NW2d 593 (1971). The Court must also focus on the intent of the Legislature; if the Legislature would not have enacted the act without the severed provisions, the Court cannot sever them. *People v McMurchy*, 249 Mich 147, 157-159; 228 NW 723 (1930), quoting 1 Cooley, Constitutional Limitations (8th ed), pp 359-363.

I believe that the portions of the guidelines that are unconstitutional are so entangled with the others that they cannot be removed without adversely affecting the guidelines as a whole. The judicial fact-finding required by the sentencing guidelines would be inappropriate

with respect to most crimes. An attempt to save the rest of the guidelines would engender confusion in the courts. Defendants, lawyers, and judges would be left guessing at the start of trial which sentencing method will be appropriate and whether judicial fact-finding will later be required or permitted. The prosecution will not be certain about all the facts it will have to prove to the jury. These inconsistencies and uncertainties mitigate against severance. Instead, the act as a whole would have to be found invalid. *Blank*, 462 Mich 123.

In addition, the judge would find it difficult to identify the offending sections of the sentencing guidelines statutes. For one defendant convicted of a crime, it would be appropriate to score the OVs. For another convicted of the same crime, it would not be permissible to score the OVs because the defendant's PRV level would place that defendant's sentence in an intermediate sanction cell. The same statutory scheme could apply differently depending on the situation. This is a classic example of entanglement, and it signals that severance is simply not possible. *Id*.

It is also unlikely that the Legislature would have passed only part of the sentencing guidelines. It intended the guidelines to be comprehensive. *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003). Some of its specific goals were to eliminate sentencing disparity and to ensure that certain crimes that do not warrant prison time result in appropriate sentences. *Id*. at 435. Severing the portions pertaining to intermediate sanction cells would work against both of these goals. Most importantly, it would directly thwart the Legislature's intent to enact a comprehensive system of sentencing. Everything considered, severance is not appropriate. *McMurchy*, 249 Mich 157-159.

Given that conclusion, this Court must find that Michigan's sentencing guidelines statutes are no longer valid as applied. The question then becomes how sentencing should occur in the future. There have been three options presented to this Court. First, the Court could find the guidelines merely advisory. This is the solution reached by the United States Supreme Court in *Booker*. *Booker*, 543 US 227. But I believe it is inappropriate in this case.

From 1983 to 1998, Michigan's sentencing guidelines were not furnished by the Legislature but by the Court, through administrative orders. They were not mandatory. Judges rendering sentences were obliged to use the guidelines to calculate a sentencing range in each case. But they were not required to sentence convicted parties within those guidelines ranges. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). The Legislature's guidelines replaced the merely advisory judicial guidelines and mandated that judges sentence within the statutory guidelines with few exceptions. To render the statutory guidelines advisory would be directly contrary to the Legislature's intent.

The second possible solution is to strike down the guidelines as unconstitutional. This would allow the judges wide discretion in sentencing defendants. The only limitation would be the absolute maximum sentence provided by law. Although this is a better option than the first, it too has serious flaws. Primarily, allowing such discretion would defeat the intent of the Legislature to eliminate sentence disparity. *Garza*, 469 Mich 435. More than likely, this solution would ensure sentence disparity.

I believe a third option is the most appropriate and the most consistent with the Legislature's intent regarding sentencing. The third option is to find the

sentencing guidelines statutes unconstitutional as applied, but specify how they could operate so as to pass constitutional scrutiny. This would require replacing judicial fact-finding with jury determinations. After a guilty verdict, the prosecution would be required to list the specific OVs that it wished the jury to score. Then, in a bifurcated hearing, the prosecutor would present to the jury evidence regarding each variable. The defense could respond, as in a trial. The jury would then deliberate and make specific findings regarding the OVs. It would indicate which the prosecution proved beyond a reasonable doubt. Because the jury would make the determinations, there would be no constitutional impediment to increasing a defendant's sentence from an intermediate sanction cell to a straddle cell sentence.

This solution would ensure that the Legislature's intent in enacting the guidelines would be fulfilled. Sentence disparity would be diminished. At the same time, defendants would be afforded full Sixth Amendment protection because the prosecution would be put to its proofs. Given the benefits of this solution, I find it to be the best option available. Therefore, I would require all future sentencing to employ the bifurcated jury procedure where appropriate.

CONCLUSION

Today, unfortunately, the majority fails to recognize the effects on Michigan's sentencing guidelines statutes of the United States Supreme Court rulings in the *Blakely* line of cases. This case illustrates that a grave constitutional problem arises in this state when *Blakely* is correctly applied. Specifically, the judicial fact-finding that moved defendant McCuller's sentence from an intermediate sanction cell to a straddle cell violated McCuller's Sixth Amendment right to trial by jury.

Given that a large portion of Michigan's sentencing guidelines involves intermediate sanction cells that intertwine with the rest of the guidelines, the unconstitutional sections cannot be severed. Hence, the entire guidelines must be found unconstitutional when applied as they were in this case.

In future cases, Michigan trial judges should implement a bifurcated hearing system. And the prosecution should be required, after a guilty verdict, to submit the facts not admitted and necessary for scoring the OVs to a jury for resolution beyond a reasonable doubt. These changes would effectuate the Legislature's intent in passing the sentencing guidelines statutes and would best protect defendants' constitutional rights in this state.

The case should be remanded to the trial court for resentencing.

CAVANAGH, J. (*dissenting*). I agree with the rationale and proposed result of Justice KELLY's dissent concluding that in this intermediate sanction cell case, Michigan's sentencing guidelines are unconstitutional as applied. But I disagree with Justice KELLY with respect to the proposed cure for the constitutional violation. In my view, a bifurcated system in these types of cases would be overly taxing on the judiciary and the jury. Instead, I believe the sounder approach would be for the prosecution to charge the aggravating factors in the information and request a special verdict from the jury if the prosecution wants offense variable points assessed in these types of cases. And, if the prosecution fails to abide by this process, the trial court *must* give the intermediate sanction. Accordingly, this cure would be less burdensome on the criminal justice system, as well as ensure that a defendant's constitutional rights are protected.

ZSIGO v HURLEY MEDICAL CENTER

Docket No. 126984. Argued November 8, 2005 (Calendar No. 3). Decided June 14, 2006.

Marian T. Zsigo brought an action in the Genesee Circuit Court against Hurley Medical Center, seeking damages arising from a sexual assault by a nursing assistant while the plaintiff was a patient in the defendant's emergency room. The court, Richard B. Yuille, J., denied summary disposition of claims of assault, battery, and intentional infliction of emotional distress, and denied the defendant's motion for a directed verdict at the close of the plaintiff's proofs. A jury rendered a verdict in favor of the plaintiff and the court entered a judgment thereon. The Court of Appeals, BANDSTRA, P.J., and WHITE and DONOFRIO, JJ., reversed the trial court's judgment and remanded the matter for the entry of a judgment of dismissal on the basis that the plaintiff failed to present a material question of fact regarding the defendant's liability under the doctrine of respondeat superior. Unpublished opinion per curiam of the Court of Appeals, issued May 4, 2004 (Docket No. 240155). The Supreme Court granted the plaintiff's application for leave to appeal. 472 Mich 899 (2005).

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

The general rule regarding employer liability under the doctrine of respondeat superior is that an employer is not liable for the torts intentionally or recklessly committed by an employee when those torts are beyond the scope of the employer's business. An exception to this rule of employer nonliability that applies where the plaintiff can show that he or she relied on the apparent authority of the employee or that the employee was aided in harming the plaintiff by the existence of the agency relationship between the employee and the employer has not been adopted by the Michigan Supreme Court. The Court of Appeals erred in finding that the Supreme Court has affirmatively adopted the exception. That part of the judgment of the Court of Appeals must

be reversed. The Supreme Court declined to adopt the exception, noting that the exception essentially has no parameters and can be applied too broadly, and its adoption would expose employers to the threat of vicarious liability that knows no borders for acts committed by employees that are clearly outside the scope of employment. The Court of Appeals, however, correctly reversed the judgment of the trial court on the basis that the plaintiff failed to establish that the defendant was liable under the theory of respondeat superior. That part of the judgment must be affirmed and the matter must be remanded to the trial court for entry of a judgment of dismissal with prejudice.

Justice YOUNG, concurring, joined the majority opinion, and he wrote separately to question the validity of the application of agency principles in *Champion v Nation Wide Security, Inc*, 450 Mich 702, 713-714 (1996). The *Champion* Court held that an employer is "strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim." However, the supervisor in *Champion* was in no way "aided" by his managerial status in raping his subordinate inasmuch as the sexual assault was accomplished through brute force after the supervisor's attempts to use his supervisory powers had failed. As such, *Champion* is an isolated, inexplicable exception in the Michigan Supreme Court's agency jurisprudence.

Affirmed in part, reversed in part, and remanded to the trial court.

Justice KELLY, joined by Justice CAVANAGH, dissenting, would affirm in part and reverse in part the judgment of the Court of Appeals, and remand this case to the trial court for further proceedings. She stated that the Supreme Court implicitly adopted 1 Restatement Agency, 2d, § 219(2)(d) in *Champion v Nation Wide Security, Inc*. Section 219(2)(d) provides an exception to the general rule of employer nonliability for torts committed by employees outside the scope of employment where an employee was aided in accomplishing the tort by the existence of the agency relation. Even if the Supreme Court has not implicitly adopted § 219(2)(d), it should be adopted now because § 219(2)(d) correctly places the burden on the employer to adequately supervise an employee's use of the authority granted by the employer. Section 219(2)(d) recognizes that it is unworkable to place, as the majority does, the burden of preventing an abuse of authority on people, like the plaintiff, who are powerless to prevent it. The majority's argument that boundless employer liability will result if the Supreme Court adopts § 219(2)(d) arises from a misunderstanding

of the scope of § 219(2)(d), and avoids acknowledging that this Court can adopt a narrow interpretation of § 219(2)(d) that balances (1) the opportunity created by the relationship, (2) the powerlessness of the victim to resist the perpetrator and prevent the unwanted contact, and (3) the opportunity to prevent and guard against the conduct in determining whether the employer can be held vicariously liable.

TORTS — MASTER AND SERVANT — RESPONDEAT SUPERIOR.

Michigan follows the general rule regarding employer liability under the doctrine of respondeat superior that an employer is not liable for the torts intentionally or recklessly committed by an employee when those torts are beyond the scope of the employer's business; Michigan has not adopted an exception to this general rule that would apply where the plaintiff can show that he or she relied on the apparent authority of the employee or that the employee was aided in harming the plaintiff by the existence of the agency relationship between the employee and the employer.

Law Office of Glen N. Lenhoff (by *Glen N. Lenhoff* and *Robert Kent-Bryant*), for the plaintiff.

Portnoy & Roth, P.C. (by *Robert P. Roth* and *Marc S. Berlin*), for the defendant.

WEAVER, J. The general rule of respondeat superior is that an employer is not liable for the torts of its employees who act outside the scope of their employment.[1] This case raises the question whether this Court has adopted an exception to the respondeat superior rule of employer nonliability found in 1 Restatement Agency, 2d, § 219(2)(d). Under this exception, an employer would be liable for the torts of an employee acting outside the scope of his or her employment when the employee is "aided in accomplishing" the tort "by

[1] *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951), citing *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942).

the existence of the agency relation."[2] We hold that this Court has not previously adopted this exception, and we decline to adopt it.

We affirm in part the decision of the Court of Appeals, but for different reasons, reverse in part, and remand to the trial court for entry of a judgment of dismissal with prejudice.

FACTS

We adopt the facts as related by the Court of Appeals:

> This case arises from plaintiff's allegation that defendant's employee, a nursing assistant, sexually assaulted her in the emergency room at Hurley Medical Center on July 9, 1998. On that date, plaintiff was suffering a manic depressive episode when she was brought to defendant's emergency department by police and placed in a treatment room. Because plaintiff was belligerent, yelling, swearing, and kicking, she was placed in restraints and administered treatment. Eventually she was left alone in the room with a nursing assistant assigned to clean the room. Plaintiff begged him to release her from the restraints.
>
> While the aide was alone in the room with plaintiff, she continued to make sexually explicit remarks, enticing him to engage in sexual activity with her. According to plaintiff, she made these remarks "[a]t first to get him out of the room like the other nurses," but when he went to her, she "suddenly thought he was a very powerful person in the hospital" and "would release [her.]" The aide engaged, without resistance, in digital and oral sex with plaintiff, but he did not release her and left. One of the nurses came back into the room right after the aide left. Plaintiff did not say anything because she was scared.

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[2] 1 Restatement Agency, 2d, § 219(2)(d).

> Plaintiff reported the incident three days later to a social worker, police were notified, and an investigation commenced. Plaintiff believed the employee might have been a janitor because he was cleaning and she provided a general description of the employee. Through the hospital's efforts, the nursing assistant was identified approximately three months later.[3]

Plaintiff brought a complaint against defendant Hurley Medical Center, alleging assault, battery, and intentional infliction of emotional distress.[4] The trial court denied summary disposition on these counts, finding that there was a question of fact with regard to whether Powell's agency relationship with defendant aided Powell in committing the tortious acts against plaintiff.

At the close of plaintiff's case, defendant moved for a directed verdict, asserting that defendant could not be liable for the torts of an employee acting outside the scope of his employment. Plaintiff, relying on this Court's opinion in *Champion v Nation Wide Security, Inc*,[5] argued that defendant was liable under the "aided by the agency" relationship exception to respondeat superior liability. The trial court denied defendant's motion. The jury rendered a verdict for plaintiff in the amount of $750,000 in past damages and $500,000 in future damages. After reducing the verdict to its

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[3] *Zsigo v Hurley Medical Ctr,* unpublished opinion per curiam of the Court of Appeals, issued May 4, 2004 (Docket No. 240155), slip op at 1-2. Lorenzo Powell pleaded no contest to a charge of attempted assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to five years' probation.

[4] Plaintiff had also alleged that defendant was negligent in hiring Powell, and that defendant had breached its duty of providing safe treatment and monitoring of a vulnerable patient. Defendant filed a motion for summary disposition and plaintiff stipulated that the negligence counts be dismissed.

[5] 450 Mich 702, 712 n 6; 545 NW2d 596 (1996).

present value, the trial court entered a judgment in favor of plaintiff in the amount of $1,147,247.42.

Defendant appealed, and the Court of Appeals, in an unpublished decision, reversed and remanded the case for entry of a judgment of dismissal, holding that the trial court erred in denying defendant's motions for summary disposition and a directed verdict because plaintiff failed to present a material question of fact regarding defendant's liability under the doctrine of respondeat superior.[6] The Court of Appeals denied plaintiff's motion for reconsideration. Plaintiff sought leave to appeal, and we granted the application.[7]

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[8] Summary disposition may be granted pursuant to MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law.[9] When reviewing a motion for summary disposition, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence . . . in the light most favorable to the party opposing the motion."[10]

When reviewing a trial court's decision on a motion for a directed verdict, the standard of review is de novo and the reviewing court must consider the evidence in

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[6] *Zsigo v Hurley Medical Ctr,* unpublished opinion per curiam of the Court of Appeals, issued May, 4, 2004 (Docket No. 240155).

[7] 472 Mich 899 (2005).

[8] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[9] MCR 2.116(C)(10).

[10] *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

the light most favorable to the nonmoving party.[11]

ANALYSIS

Under the doctrine of respondeat superior, the general rule is that an employer is not liable for the torts intentionally or recklessly committed by an employee when those torts are beyond the scope of the employer's business.[12] 1 Restatement Agency, 2d, § 219(2) sets forth the general rule of respondeat superior and also lists certain exceptions to employer nonliability:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[13]

The question in this case is whether Michigan recognizes the fourth exception, § 219(2)(d), to the doctrine of respondeat superior nonliability. Plaintiff argues that Michigan has adopted, or should now adopt, the fourth exception to the respondeat superior nonliability rule. Section 219(2)(d) provides an exception to employer nonliability when a plaintiff can show that he or she

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[11] *Elezovic v Ford Motor Co,* 472 Mich 408, 442; 697 NW2d 851 (2005) (WEAVER, J., concurring in part and dissenting in part).

[12] *Bradley, supra* at 562.

[13] 1 Restatement Agency, 2d, § 219(2).

relied on the apparent authority of the employee, or that the employee was aided in harming the plaintiff by the existence of the agency relationship between the employee and the employer. Section 219(2)(d) and the commentary on that section establish that this exception to employer nonliability applies primarily to cases involving misrepresentation and deceit, for example when a store manager is able to cheat store customers because of his or her position as store manager for the owner.[14]

Section 219(2)(d) was first mentioned by this Court in *McCann v Michigan*,[15] a case in which this Court issued four separate opinions, none of which received enough concurrences to constitute a majority opinion. A majority of this Court, however, declined to adopt the exception. Consequently, this Court did not adopt § 219(2)(d) in *McCann*.

Nevertheless, several appellate court decisions have cited the *McCann* plurality's reference to § 219(2)(d) in subsequent tort actions.[16] After noting such multiple references, the Court of Appeals panel below concluded

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[14] *Id.*, § 219 (2)(d), comment on subsection 2.

[15] 398 Mich 65; 247 NW2d 521 (1976).

[16] See *Zsigo v Hurley, supra*, slip op at 3 ("Our Supreme Court in *McCann v Michigan,* 398 Mich 65, 71; 247 NW2d 521 [1976] recited the general principle and introduced The Restatement of Agency § 219 [2][d]). . . ."); *Salinas v Genesys Health Sys,* 263 Mich App 315, 318; 688 NW2d 112 (2004) ("In some jurisdictions, courts have recognized an exception to that general principle where the employee 'was aided in accomplishing the tort by the existence of the agency relation.' See 1 Restatement Agency, 2d, § 219[2][d] . . . ."); *Elezovic v Ford Motor Co,* 259 Mich App 187, 212; 673 NW2d 776 (2003) (KELLY, J., concurring), rev'd in part on other grounds *Elezovic v Ford Motor Co,* 472 Mich 408 (2005) (" The employer is also liable for the torts of his employee if ' "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation," ' " *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 [1976] . . . .) (citation omitted).

that the Michigan Supreme Court had adopted § 219(2)(d) in *Champion, supra*.

In *Champion, supra,* the plaintiff was raped by her supervisor and sought to impose liability on their employer for quid pro quo sexual harassment under the Michigan Civil Rights Act, MCL 37.2103(i). The employer attempted to avoid liability under the Civil Rights Act on the theory that the employer did not authorize the supervisor to rape his subordinate. Calling the employer's "construction of agency principles . . . far too narrow," the Court in *Champion, supra* at 712, cited Restatement Agency, 2d, § 219(2)(d) in a footnote.[17] *Champion* did not elaborate on this citation in reaching this conclusion.

The reference to "Restatement Agency, 2d, § 219(2)(d)" in footnote six of *Champion* may have contributed to appellate court confusion about whether this Court adopted the aided by the agency exception to employer nonliability under the doctrine of respondeat superior.[18] We now clarify that the reference to § 219(2)(d) in *Champion, supra,* was made only in

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[17] *Champion,* 450 Mich at 712 n 6.

[18] While the *Zsigo* panel of the Court of Appeals held that this Court had adopted § 219(2)(d) by the reference in footnote 6 of *Champion,* the Court of Appeals in *Salinas v Genesys Health Sys,* 263 Mich App 315, 320; 688 NW2d 112 (2004), held otherwise:

> Further, we question whether *Champion* generally "adopted" the Restatement exception to the usual rule that an employer cannot be held liable for torts intentionally committed by an employee. The only mention of the Restatement exception was made in passing in a footnote. In the course of rejecting the defendant's "construction of agency principles [as] far too narrow," the Court made a "see" reference to the Restatement exception. [*Champion, supra*] at 712 n 6. We are unconvinced that this constituted an adoption of the Restatement exception, especially for cases like the present one involving tort actions not at issue in *Champion*.

passing and on the basis of the very distinct facts of that civil rights matter.[19] We did not, by that reference, adopt § 219(2)(d). The Court of Appeals erred in finding that this Court affirmatively adopted the "aided by the agency relationship" exception to liability under the respondeat superior doctrine set forth in Restatement Agency, 2d, § 219(2). However, this case again presents us with the opportunity to adopt the exception.

In support of adopting § 219(2)(d), plaintiff cites a First Circuit Court of Appeals decision, *Costos v Coconut Island Corp.*[20] In *Costos,* the plaintiff was a guest at an inn and had retired for the night to her room. The inn manager obtained a key to the plaintiff's room, entered without the plaintiff's knowledge, and raped her. In finding the employer of the manager vicariously liable under § 219(2)(d), the court focused on the fact that, as an agent of the inn, the manager was entrusted

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[19] The dissent contends that the *Champion* Court implicitly adopted § 219(2)(d) and did not limit its application. We note, to the contrary, that the *Champion* holding was carefully crafted to apply only in the context of quid pro quo sexual harassment under MCL 37.2103(i). Specifically, the Court stated:

> In this case, we must decide whether an employer is liable for quid pro quo sexual harassment under *MCL 37.2103(i)*; MSA 3.548(103)(i) where one of its employed supervisors rapes a subordinate and thereby causes her constructive discharge. We hold that an employer is liable for such rapes where they are accomplished through the use of the supervisor's managerial powers. We believe that this result best effectuates the remedial purpose of the Civil Rights Act, *MCL 37.2101* et seq.; MSA 3.548(101) *et seq.* [*Champion, supra* at 704-705 (emphasis added).]

Thus, even in the context of quid pro quo sexual harassment, the sexual assault must be "accomplished through the use of the supervisor's managerial powers." *Id.* This limited exception clearly does not apply to the facts in this case.

[20] 137 F3d 46 (CA 1, 1998).

with the key to the plaintiff's room and knowledge of where to find her. Specifically, the key was the "instrumentality" that provided the manager with the opportunity to accomplish the rape.

Costos has been sharply criticized, and appears to have been adopted by only two other federal courts.[21] Indeed, *Costos* was later distinguished by the Supreme Judicial Court of Maine in *Mahar v StoneWood Transport*.[22] Maine's highest court not only clarified that it had not expressly adopted § 219(2)(d), but also questioned the application of the exception by the *Costos* court:

> At least one critic notes that the First Circuit's "instrumentality" analysis does not delineate the scope of "instrumentality." [Casenote: Costos v Coconut Island Corp: *Creating a vicarious liability catchall under the aided-by-agency-relation theory,* 73 U Colo L R 1099, 1112] ("By ignoring the properly narrow scope of aided-by-agency-relation liability, the *Costos* court eroded traditional principles of agency law."); *see Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 760, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) ("In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the employment relation: Proximity and regular contact afford a captive pool of potential victims.").[23]

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[21] *LaRoche v Denny's Inc,* 62 F Supp 2d 1366, 1373 (SD Fla, 1999)(the defendant restaurant was vicariously liable under § 219[2][d] for racial slur directed at customers by restaurant manager because manager used his position of authority as basis for denial of services to customers); *Del Amora v Metro Ford Sales & Service, Inc,* 206 F Supp 2d 947, 952 (ND Ill, 2002) (the defendant auto dealer was liable under § 219[2][d] where the defendant's employee was able to obtain the plaintiff's credit report under false pretenses because of the employee's position at the dealership). Cf. *Primeaux v United States,* 181 F3d 876, 879 (CA 8, 1999) (declining to adopt Restatement exception and noting, "[t]o our knowledge, the Supreme Court of South Dakota has not had occasion to apply or even cite § 219[2][d] of the Restatement").

[22] 823 A2d 540 (2003).

[23] *Id.* at 546 n 6.

Thus, the dissent's suggestion that the *Costos* instrumentality ruling has been generally accepted, *post* at 238, is incorrect.

Courts have criticized § 219(2)(d) primarily because the exception swallows the rule and amounts to an imposition of strict liability upon employers.[24] Indeed, it is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always "aided in accomplishing" the tort.[25] Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of respondeat superior employer nonliability.

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[24] See *Gary v Long,* 313 US App DC 403, 409; 59 F3d 1391 (1995); *Smith v Metropolitan School Dist Perry Twp,* 128 F3d 1014, 1029 (CA 7, 1997).

[25] For this reason, the Court of Appeals, in *Cawood v Rainbow Rehab Ctr,* 269 Mich App 116; 711 NW2d 754 (2005), wisely rejected the application of the exception in a case involving sexual assault by a nurse of a patient in a rehabilitation center. The panel succinctly reasoned:

> "This Court has held that an employee is not 'aided in accomplishing the tort by the existence of the agency relation,' under the Restatement exception, just because of the 'mere fact that an employee's employment situation may offer an opportunity for tortious activity . . . .' " [*Salinas v Genesys Health Sys*, 263 Mich App 315, 321; 688 NW2d 112 (2004)] quoting *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 355; 288 NW2d 424 (1979). Rather, the Restatement exception will only apply where "the agency itself empowers the employee to commit the tortious conduct." *Salinas, supra* at 323. In this case, defendant's employee was not empowered to engage in the sexual conduct by the existence of the agency relationship. He did not use his authority or any instrumentality entrusted to him in order to facilitate the inappropriate encounter. Instead, the existence of the employment relationship merely provided the employee with the opportunity to engage in the inappropriate conduct. Consequently, the Restatement exception would not apply. [*Cawood, supra* at 120-121.]

Because we recognize that were we to adopt the exception we would potentially be subjecting employers to strict liability, we decline to do so. We further note that, employers will continue to be subject to liability for their negligence in hiring, training, and supervising their employees.[26] The dissent contends that these other causes of action available to plaintiffs will not provide protection to a plaintiff who is injured when an "employer does not have knowledge that an employee may misuse granted authority."[27] Yet, the dissent fails to recognize that were this Court to impose liability on an employer under these very circumstances, we would in fact be subjecting the employer to strict liability. If the dissent believes that an employer's prior knowledge of an employee's propensity for bad acts is required to impose liability, then the only basis for employer liability based on an employee's unknown propensities would be strict liability.

Given the danger of applying such a broad exception to respondeat superior employer nonliability because employers may be subject to strict liability, courts that have applied the exception have done so primarily in sexual harassment/discrimination cases on the basis that an employer is vicariously liable when a supervisory employee uses his agency position to sexually harass an employee.[28]

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[26] Plaintiff's complaint in fact included a count of negligent hiring, a count that she ultimately stipulated to dismiss after summary disposition motions were argued before the trial court.

[27] *Post* at 237 n 6.

[28] *Veco, Inc v Rosebrock*, 970 P2d 906 (Alas, 1999) (Alaska Supreme Court held vicarious liability may be imposed when an employee is aided in accomplishing a tort by the employee's position with the employer, but an employer's vicarious liability for punitive damages is limited to acts by managerial employees while acting within the scope of their employment); *Entrot v BASF Corp*, 359 NJ Super 162; 819 A2d 447 (2003) (New

One court that chose to apply the exception outside the sexual harassment employment realm was the Vermont Supreme Court when, in *Doe v Forrest,*[29] it applied § 219(2)(d) in a case where a police officer sexually assaulted a female cashier at a convenience store. The Court held that the sheriff was vicariously liable because his deputy used his agency position to commit a sexual assault while on duty.

The dissent asserts, *post* at 242, that this Court has the option of applying the exception in the same tailored manner as demonstrated by the Vermont Supreme Court in *Doe v Forrest*. Specifically, that court

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Jersey Superior Court held an employer vicariously liable for a supervisor's conduct outside the scope of employment when the supervisor was aided in the commission of the harassment by the agency relationship); *State v Schallock*, 189 Ariz 250, 262; 941 P2d 1275 (1997) (Arizona Supreme Court held "[u]nder the common law of agency, a supervisor's use of the actual or apparent authority of his position—power conferred by the employer—'gives rise to [the employer's] liability under a theory of respondeat superior.' *Nichols* [*v Frank*, 42 F3d 503, 514 (CA 9, 1994)], citing RESTATEMENT § 219(2)(d). . . ."). See, also, *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), and *Faragher v Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998).

[29] 176 Vt 476; 853 A2d 48 (2004). See also *Mary M v City of Los Angeles*, 54 Cal 3d 202; 814 P2d 1341 (1991) (California Supreme Court held that when a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable); *Nazareth v Herndon Ambulance Service, Inc*, 467 So 2d 1076 (Fla App, 1985) (Florida Court of Appeals acknowledged state's adoption of Restatement 2d, § 219 [2][d] in fraud case); *Industrial Ins Co of New Jersey v First Nat Bank of Miami*, 57 So 2d 23 (1952). But, see, *Bowman v State*, 10 AD3d 315, 317; 781 NYS2d 103 (2004) (New York Supreme Court declined to adopt § 219[2][d] noting that " 'liability premised on apparent authority [is] usually raised in a business or contractual dispute context. . . .' ") (citation omitted); *Olson v Connerly*, 156 Wis 2d 488; 457 NW2d 479 (1990) (Wisconsin Supreme Court declined to apply § 219[2][d] in scope of employment case where it did not appear that employee was actuated, at least in part, by a purpose to serve the employer).

cited *Faragher v Boca Raton*[30] as the basis for extending § 219(2)(d) beyond the realm of sexual harassment in the employment setting. According to the dissent, there are three balancing factors from *Faragher* that courts can consider when applying § 219(2)(d).[31] However, the dissent ignores the very specific context in which those factors were applied, namely to a *supervisor-employee relationship*. The actual language from *Faragher* is not broadly worded, but is in fact precisely tailored to the unique circumstances of a sexual harassment suit in an employment context.

As the dissenting justices in *Doe v Forrest* noted, the *Faragher* Court applied the exception in order to promote the policies of Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*. Given the *Faragher* Court's limited application of the exception, the dissenting justices were critical of the majority's extension of § 219(2)(d) to factually distinct scenarios:

> [T]he majority's analysis and conclusion are fundamentally flawed. First, as noted, the high court never intended for its decisions in *Faragher* and *Ellerth*[32]to have any influence on the development of common-law agency principles or the application of § 219 (2)(d) outside the specific context of Title VII.[33]

In concluding that the application of the exception to the facts of that particular case was too broad, the dissenting justices noted:

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[30] 524 US 742; 118 S Ct 2257; 141 L Ed 2d 662 (1998).

[31] The dissent lists them as:

> (1) the opportunity created by the relationship, (2) the powerlessness of the victim to resist the perpetrator and prevent the unwanted contact, and (3) the opportunity to prevent and guard against the conduct. [*Post* at 240, citing *Doe v Forrest*, *supra* at 491.]

[32] *Burlington Industries, Inc v Ellerth, supra*.

[33] *Doe v Forrest*, *supra* at 509 (Skoglund, J., dissenting, joined by Amestoy, C.J.).

> [T]he majority has created a threat of vicarious liability that knows no borders. While the majority limits its holding to sexual assaults committed by "on-duty law enforcement officers," ante, at 48, the standard that it articulates applies to a broad range of employees whose duties grant them unique access to and authority over others, such as teachers, physicians, nurses, therapists, probation officers, and correctional officers, to name but a few. As the trial court here aptly observed, the Court's interpretation could virtually "eviscerate[] the general scope of employment rule." [*Id.* at 505 (Skoglund, J., dissenting, joined by Amestoy, C.J.).]

The Vermont dissenting justices then aptly noted:

> Like the finding of a duty of care in negligence law, the imposition of vicarious liability under agency principles flows not from the rote application of rules, but from a considered policy judgment that it is fair and reasonable to hold an employer liable for the harmful actions of its employee. As Justice Souter, writing for the United States Supreme Court in *Faragher v. City of Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998), cogently observed: "In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law. . . . The 'highly indefinite phrase' [vicarious liability] is 'devoid of meaning in itself' and is 'obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.' " *Id.* at 796 (quoting W. Keaton [sic] et al., Prosser and Keaton [sic] on Law of Torts § 502 (5th ed. 1984))[.][34]

We decline to follow the approach suggested by the Vermont Supreme Court majority in *Doe v Forrest*. As noted by the dissenting justices in that case, to do so

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[34] *Id*. at 506 (Skoglund, J., dissenting, joined by Amestoy, C.J.).

would expose employers to the "threat of vicarious liability that knows no borders" for acts committed by employees that are clearly outside the scope of employment.[35] We recognize the danger of adopting an exception that essentially has no parameters and can be applied too broadly. Because we decline to adopt the exception, plaintiff has failed to establish that defendant Hurley Medical Center is vicariously liable for the sexual misconduct of its nursing assistant who was clearly not acting within the scope of his employment when he engaged in acts of sexual misconduct with plaintiff.

CONCLUSION

The Court of Appeals below correctly reversed the judgment of the trial court because plaintiff failed to establish that defendant is liable under the theory of respondeat superior. We therefore affirm that portion of the May 4, 2005, opinion of the Court of Appeals and remand the matter to the trial court for entry of a judgment of dismissal with prejudice.

However, the Court of Appeals erred in concluding that this Court adopted Restatement Agency, 2d, § 219(2)(d) when we held in *Champion*, *supra*, that an employer was liable for quid pro quo sexual harassment under MCL 37.2103(i). That part of the judgment of the Court of Appeals is reversed. We decline to adopt the exception, which would create employer liability for the torts of an employee acting outside the scope of his or her employment when the employee is aided in accomplishing the tort by the existence of the agency relationship. Therefore, plaintiff's assertion that there is a question of fact regarding whether defendant's employee was aided by his agency relationship is moot.

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[35] *Id*. at 504.

Affirmed in part, reversed in part, and remanded.

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

YOUNG, J. (*concurring*). I fully concur and join in the majority opinion. I write separately to question the validity of this Court's application of agency principles in *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996). In *Champion*, the supervisor engaged in quid pro quo sexual harassment by offering to "take care of" the plaintiff if she submitted to his sexual requests. However, when the plaintiff rebuffed his offer, the supervisor raped the plaintiff. This Court held that an employer is "strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim." *Id*. at 713-714. I fail to see how the supervisor's "supervisory power" aided him in sexually assaulting the plaintiff, where he accomplished the sexual assault through brute force *after* his attempt to use his supervisory powers had failed. A rape is a physical assault, and the supervisor in *Champion* was in no way "aided" by his managerial status in raping his subordinate.

I find it hard to square *Champion* with any conventional notion of agency, and it stands as an isolated, inexplicable exception in our Michigan Supreme Court jurisprudence.

KELLY, J. (*dissenting*). We granted leave in this case to address two important questions: (1) whether this Court has adopted 1 Restatement Agency, 2d, § 219(2)(d) and, if not, (2) whether we should adopt it now.

Regarding the first question, this Court has not explicitly adopted § 219(2)(d). However, ten years ago in

Champion v Nation Wide Security Inc,[1] we did implicitly adopt it. And regarding the second question, we should now explicitly adopt § 219(2)(d) and apply it to the facts of this case.

Accordingly, I would affirm the Court of Appeals use and recognition of § 219(2)(d) and reverse the trial court's grant of summary disposition. Summary disposition was improper because a factual question exists concerning whether the person who assaulted plaintiff was aided in committing the tort by his agency relationship with defendant.

I. THIS COURT HAS IMPLICITLY ADOPTED § 219(2)(d)

As a general rule, an employer is not responsible for an employee's intentional or reckless torts that exceed the scope of employment. *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951). But § 219(2)(d) of the Restatement of Agency provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. [1 Restatement Agency, 2d, § 219(2)(d).]

The exception essentially holds an employer liable for an employee's abuse of the authority that the employer granted.[2] Our concern in this case surrounds the excep-

[1] 450 Mich 702; 545 NW2d 596 (1996).

[2] The majority claims that § 219(2)(d) is primarily applicable in cases of deceit or misrepresentation. I agree but do not believe that § 219(2)(d) is

tion's phrase "aided in accomplishing the tort by the existence of the agency relation" and whether this Court has previously adopted § 219(2)(d). *Id.*

The majority holds that this Court did not adopt § 219(2)(d) in *Champion*. I agree that the magic words "we adopt the Restatement" do not appear. But I disagree that the Court's reference to § 219(2)(d) was merely in passing and that its application of the section was limited to the facts of that case.[3] Rather, a close reading of *Champion* suggests that the citation of § 219(2)(d) was part of the Court's rationale. Also, the citation of § 219(2)(d) was not expressly or implicitly limited to the facts presented in *Champion*, and its inclusion was designed to give guidance to the bench and bar.

Additionally, the citation of § 219(2)(d) was not just a cursory statement. This Court's citation of § 219(2)(d) in *Champion* was in response to one of the defendant's arguments in that case. The defendant-employer had asserted that it could not be responsible for its supervisor's rape of the plaintiff-employee because it never authorized the supervisor to rape the employee. *Champion, supra* at 712. In direct response, this Court stated, "This construction of agency principles is far too nar-

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limited to those cases. The comments on § 219(2)(d) state that liability may exist where the servant is able to cause harm because of his or her position as an agent. The comments also provide that the enumeration of situations where § 219(2)(d) applies is not exhaustive, and the section applies where an agent causes physical harm. Therefore, I would not read § 219(2)(d) so narrowly as the majority does.

[3] The majority also argues that the placement of the citation in a footnote should determine its precedential effect. This is a dubious argument, considering that footnotes do sometimes set the state of the law. Perhaps this is unfortunate, but it is true. See, e.g., *United States v Carolene Products Co*, 304 US 144, 153 n 4; 58 S Ct 778; 82 L Ed 1234 (1938), which laid the groundwork for heightened constitutional scrutiny of laws that discriminate on the basis of race and religion.

row." *Id.* The reader is then directed to § 219(2)(d) to determine how a court should determine the proper scope of agency principles.

This Court further stated that, when an employer gives a supervisor certain authority over other employees, the employer must take responsibility to remedy any harm caused by the supervisor's misuse of the authority granted. *Id.,* citing *Henson v City of Dundee,* 682 F2d 897, 909 (CA 11, 1982). *Champion*'s citation of the *Henson* decision is especially noteworthy because *Henson* includes a discussion of § 219(2)(d):

> The common law rules of respondeat superior will not always be appropriate to suit the broad remedial purposes of Title VII[4]. . . . In this case, however, the imposition of liability upon an employer for *quid pro quo* sexual harassment committed by supervisors appears to be in general agreement with common law principles. *See* Restatement (Second) of Agency § 219(2) (d) (master is liable for tort of his servant if the servant "was aided in accomplishing the tort by the existence of the agency relation"). [*Henson, supra* at 910 n 21.]

Given *Champion's* direction to readers to refer to the Restatement and *Champion's* citation of *Henson,* I do not believe that § 219(2)(d) was mentioned only in passing.[5]

Nonetheless, the majority seeks, by smoke and mirrors, to hide the fact that this Court appears to have implicitly adopted § 219(2)(d). Framing the issue as

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[4] Title VII is the section of the Civil Rights Act of 1964 that prohibits employment discrimination. 42 USC 2000e *et seq*.

[5] The majority argues that *Champion* was carefully crafted to apply only to quid pro quo sexual harassment cases. *Ante* at 223-224. I disagree. *Champion* was a sexual harassment case. But this Court's broad statement there that Michigan's agency principles are in line with § 219(2)(d) cannot fairly be read as an expression to limit § 219(2)(d) to sexual harassment cases.

being whether this Court adopted § 219(2)(d) allows the majority to overrule *Champion* without the need to show that it was wrongly decided. Moreover, *Champion*'s validity was not questioned below. But even if this Court has not already adopted § 219(2)(d), we should explicitly adopt it now.

II. THE COURT SHOULD NOW EXPLICITLY ADOPT § 219(2)(d)

Section 219(2)(d) correctly places responsibility on the employer to ensure that any grant of authority it makes to an employee is proper. The employer has the ultimate power to decide whom it will hire. The employer is responsible for determining what authority its employees are allowed. Therefore, it is the employer who should be responsible when its employees abuse the authority the employer gave them and the authority granted enables the employees to cause harm.

But in seeking to shield employers from liability, the majority instead places the burden of preventing an abuse of authority and the corresponding harm on people powerless to prevent it. This case presents a perfect example. Plaintiff was taken to the defendant hospital against her will. She was strapped to a bed. Defendant's employee then used his employer-given authority to enter plaintiff's room to sexually assault plaintiff. She had no power over who could enter her hospital room, and she could not prevent the assault. The entity with the power to protect plaintiff was the hospital. Yet, the majority leaves plaintiff to bear the full burden for the harm she was powerless to prevent.

However, § 219(2)(d) recognizes that the majority's approach of placing the burden on the victim is unworkable. It also recognizes that such an action would create a situation where an employer has much less reason to

monitor its employees' use of authority.[6] Therefore, this Court should explicitly adopt § 219(2)(d) and apply it to the facts of this case. Moreover, the majority's reasons for not adopting § 219(2)(d) are unpersuasive.

The majority's main reason for not embracing § 219(2)(d) is that the exception would swallow the rule. According to the majority, this would create " 'vicarious liability that knows no borders' for acts committed by employees that are clearly outside the scope of employment." *Ante* at 231 (citation omitted). But this generic rationale misunderstands the scope of § 219(2)(d). It also avoids acknowledging that this Court can adopt a narrow interpretation of § 219(2)(d).

Indeed, the majority seems to accept without explanation that § 219(2)(d) must be broadly construed. This is understandable in light of the majority's calculated fear that adoption of § 219(2)(d) will open a Pandora's box. But this rationale ignores the fact that the employer liability that § 219(2)(d) provides for is the tortious use of authority by an employee. Liability is not created by the employer-employee relationship alone. And § 219(2)(d) requires more than mere opportunity

[6] The majority believes that § 219(2)(d) is unnecessary in light of the existence of other tort remedies. However a review of case law involving negligent hiring, training, and supervising shows that the majority is incorrect. Negligence in hiring requires knowledge on the part of the employer that the employee has criminal tendencies. *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412; 189 NW2d 286 (1971). Negligent training is inapplicable here because there is no allegation that the nurse's aide was improperly trained. Negligent supervising, like negligent hiring and retention, requires knowledge on the part of the employer that special circumstances exist that could establish a duty to protect third persons. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 196-197; 413 NW2d 17 (1987). This review of the torts listed by the majority shows that none adequately covers a situation where the employer does not have knowledge that an employee may misuse granted authority. Therefore, § 219(2)(d) is needed to protect victims like plaintiff.

to commit the tort.[7] *Bozarth v Harper Creek Bd of Ed,* 94 Mich App 351, 355; 288 NW2d 424 (1979). Moreover, the majority's blanket assertion that adoption of § 219(2)(d) will create "virtual" strict liability ignores the fact that several other courts have interpreted the exception narrowly.

For example, courts have taken several approaches to interpreting the scope of § 219(2)(d). One is to adopt the instrumentality rule which is explained in *Costos v Coconut Island Corp,* 137 F3d 46 (CA 1, 1998). Another is to adopt a balancing approach as explained by the Supreme Court of Vermont in *Doe v Forrest,* 176 Vt 476; 853 A2d 48 (2004). Both seek to balance the scope of § 219(2)(d) so as not to impose strict liability based solely on the employer-employee relationship or on the mere opportunity to commit the tort.

With respect to the instrumentality approach, in *Costos, supra,* the United States Court of Appeals for the First Circuit interpreted the scope of § 219(2)(d). In that case, a hotel manager gained access to a guest's room and raped the guest. The court found that the owner and corporate manager of the hotel could be held liable for the rape. *Costos*, *supra* at 50. The court reasoned:

> By virtue of his agency relationship with the defendants, as manager of the inn, [the manager] was entrusted with the keys to the rooms, including [the victim's] room, at the Bernard House. Because he was the manager of the inn, [he] knew exactly where to find [the victim]. The jury could find that [the manager] had responsibilities to be at the inn or to have others there late at night. In short, because he was the defendants' agent, [the manger] knew that [the victim] was staying at the Bernard House, he was able to find [the victim's] room late at night, he had the key to the

[7] The majority's focus is misplaced. The focus is not on the employment relationship, but on the authority that the employer granted to the employee.

> room and used the key to unlock the door, slip into bed beside her as she slept, and rape her. [*Id*.]

Thus, the instrumentality approach requires that the tort be accomplished by an instrumentality or through conduct associated with the agency status. Accordingly, this interpretation in *Costos* reads § 219(2)(d) narrowly and balances interests so that employers do not become liable simply because an employer-employee relationship exists. In other words, the instrumentality approach to § 219(2)(d) does not result in strict liability for employers.

With respect to the second approach, the Supreme Court of Vermont in *Doe, supra,* explored the application of § 219(2)(d) to a sexual assault committed by a police officer while the officer was on duty. In response to the dissent's contention that unfathomable strict liability would result, the court explained that it was "sensitive to the concern expressed by the trial court that plaintiff's arguments could lead to a rule that makes a principal liable for all intentional torts of an agent in all circumstances." *Doe*, *supra* at 491.

In addressing this concern, the Vermont court, *id*. at 488, turned to the United States Supreme Court decisions in *Burlington Industries, Inc v Ellerth,*[8] and *Faragher v City of Boca Raton*,[9] two sexual harassment cases brought under Title VII. In those cases, the United States Supreme Court concerned itself with the last phrase of § 219(2)(d) and rejected a narrow reading of its language.[10] *Doe, supra* at 489-490. As such, while observing that it was not strictly bound by those

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[8] 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998).

[9] 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998).

[10] In *Faragher*, the Court specifically rejected the proffered reading that the aid-in-accomplishing theory merely refined the apparent authority theory.

decisions, the *Doe* court viewed *Ellerth* and *Faragher* as strong persuasive authority and helpful to the proper application of § 219(2)(d). *Doe, supra* at 490.

Accordingly, in following the lead of the United States Supreme Court, the Vermont court in *Doe* reasoned that it is "important not to adopt too narrow an interpretation of the last clause of § 219(2)(d), *but it is equally important not to adopt too broad an interpretation*." *Id.* at 491 (emphasis added). The court also reasoned that it should give appropriate deference to the policy reasons underlying the United States Supreme Court's decisions. It decided to apply those policy reasons in the context of an intentional sexual tort committed by a police officer while on duty.

As such, the Vermont court eventually determined that the three considerations noted in *Faragher* correctly balanced the scope of § 219(2)(d) and, thus, adopted them as its own. The considerations are (1) the opportunity created by the relationship, (2) the powerlessness of the victim to resist the perpetrator and prevent the unwanted contact, and (3) the opportunity to prevent and guard against the conduct. *Id.* at 491.[11]

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[11] The majority asserts that the Vermont Supreme Court in *Doe* incorrectly relied on these factors from *Faragher* because *Faragher* was limited to cases involving a supervisor-employee relationship. See *ante* at 229. In support of this assertion, the majority relies on the Doe dissent. But I find the *Doe* court's response to that dissent persuasive and fitting in this case. The *Doe* court observed:

> In following the United States Supreme Court decisions, we reject the dissent's claim that the Supreme Court "never intended for its decisions . . . to have any influence on the development of common-law agency principles or the application of § 219(2)(d) outside the specific context of Title VII." . . . The Supreme Court applied the Restatement of Agency because it found that "Congress wanted courts to look to agency principles for guidance" in deciding hostile environment sex discrimination cases under Title VII. . . . Thus, in [*Ellerth*, *supra* at 754], the Court noted that it

According to the Vermont court, when all three factors weigh in favor of the victim, liability may be imposed on the employer under the exception set forth in § 219(2)(d). Thus, it is clear that the Vermont court's approach does not result in strict liability and also serves to protect those who cannot protect themselves.

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was relying on "the general common law of agency." (Citation omitted). The Court noted that state court decisions could be "instructive," but they often relied upon federal decisions, id. at 755, and found the Restatement of Agency a useful starting point to find the general common law. Id. It went through the various sections of the Restatement (Second) of Agency and finally centered on § 219(2)(d) as the most useful. It then applied the "aided in the agency relation principle" of § 219(2)(d) to the situation before it. Id. at 760-65. . . . The analysis in [*Faragher*, *supra* at 801-802], is similar, and as noted in the text, the Court resolved a dispute over the meaning of the language of § 219(2)(d), holding that the "aided-by-agency-relation principle" was not merely a refinement of apparent authority.

It is, of course, the nature of the common law that every appellate decision represents the development of the common law, and nothing in the Supreme Court decisions suggests they are not an integral part of that process. Indeed, the resolution of the dispute over the meaning of § 219(2)(d) in Faragher is exactly the kind of decision that best defines and develops the common law. No common-law court engaged in this process, and certainly not the highest court of this country, would expect that a common-law decision on one set of facts would have no influence on future decisions applying the same legal principle to a different factual scenario. [*Doe*, *supra* at 490 n 3.]

In any event, the reasons underlying the *Faragher* Court's use of these factors applies with equal force here even though there is not a supervisor-employee relationship. Therefore, extension of those factors is logical and appropriate. For example, just like a supervisor (*Faragher*) and a police office (*Doe*), a hospital aide has unique access to a patient who is depending on the aide for care. The patient is often defenseless. Imposing liability on the hospital may prevent recurrence of an assault by creating an incentive for vigilance. Accordingly, I disagree with the majority's assertion that I am ignoring the specific context in which *Faragher* announced and applied the factors noted above. Rather, the context and underlying policy considerations are largely the same.

I agree with the Vermont court that § 219(2)(d) as interpreted by the United States Supreme Court in *Faragher*, *supra,* reflects the correct balance between reading § 219(2)(d) too narrowly and reading it too broadly. I would adopt its approach for Michigan law.[12] Again, strict liability does not result from this application of § 219(2)(d). Only in those cases where (1) the opportunity created by the relationship, (2) the powerlessness of the victim to resist the perpetrator and prevent the unwanted contact, *and* (3) the opportunity to prevent and guard against the conduct are properly balanced will a defendant be held vicariously liable. *Doe*, *supra* at 491.

Still, the majority prefers to ignore or discount the fact that this Court has the power to adopt an interpretation of § 219(2)(d) that does not cause strict liability. This Court could adopt an interpretation that encompasses its previous statement that

> when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority. [*Champion, supra* at 712.]

In my view, the most disturbing aspect of the majority's refusal to adopt or apply § 219(2)(d) is that its rationale is based solely on an unproven hypothesis. The majority reasons that adoption of the Restatement could lead to "virtual" strict liability for employers. But this is simply an unproven assertion designed to cause fear. More importantly, the majority does not acknowledge that it can interpret § 219(2)(d) to fairly balance the interests that § 219(2)(d) seeks to protect, just as other courts have done. Instead, it merely states that it refuses to do so because of its fear that strict liability

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[12] I do not reject out of hand the instrumentality approach adopted by the *Costos* court, but find the balancing approach in *Doe* more compelling.

would result. The majority is like a farmer holding a can of red paint saying, "I dare not paint my barn because the barnyard will become red."

Unlike the majority, I would carefully adopt and amend the common law to embrace the reasonable interpretation of § 219(2)(d) expressed in *Doe* and *Faragher*. The truth about § 219(2)(d) is that it functions as good public policy and as practical law when interpreted properly. In light of the discussion above, I am unpersuaded by the majority's rationale that boundless liability will result from a careful adoption of § 219(2)(d). The majority's rationale misunderstands the scope of § 219(2)(d) and fails to acknowledge this Court's ability to craft a rule that would properly balance the interests protected under § 219(2)(d). Therefore, had we not adopted it in the past, we should adopt § 219(2)(d) today, thereby placing the burden on the party most capable of preventing loss or injury. Moreover, I would apply that interpretation to this case.

Here, under the approach detailed above, a factual question exists whether his agency relationship assisted the nurse's aide in committing the tort. Powell's position in defendant's emergency room gave him the opportunity to sexually assault a restrained patient. It appears that plaintiff was powerless to prevent the unwanted contact because she was physically bound and was suffering from a manic episode. In general, patients are vulnerable and trust hospital staff and their care. Therefore, I would affirm the result of the decision of the Court of Appeals and remand this case to the trial court for further proceedings.

III. CONCLUSION

I would find that this Court implicitly adopted § 219(2)(d) in *Champion*. And even if we did not adopt

§ 219(2)(d) before, we should adopt it now. We should interpret the exception as did the Supreme Court of Vermont in *Doe, supra,* and apply it to the facts of this case. Consequently, I dissent from the majority opinion.

I would affirm in part and reverse in part the decision of the Court of Appeals, and remand this case to the trial court for further proceedings.

CAVANAGH, J., concurred with KELLY, J.

PEOPLE v CLEVELAND WILLIAMS

Docket No. 126956. Decided June 14, 2006. On application by the defendant for leave to appeal, the Supreme Court ordered the clerk to schedule oral argument on whether to grant the application or take other appropriate action. Following oral argument, the Supreme Court entered an opinion affirming the order of the Court of Appeals remanding the matter to the circuit court for trial on the charge of armed robbery.

Cleveland Williams, while on parole following a conviction of larceny from the person, was arrested and returned to the custody of the Department of Corrections on May 23, 2000. The Wayne County Prosecuting Attorney then issued a complaint charging the defendant with armed robbery and a magistrate signed an arrest warrant on June 2, 2000. The Detroit Police Department then took the defendant into their custody for arraignment on the warrant on June 18, 2001. The defendant was bound over for trial following a preliminary examination on June 28, 2001. On July 12, 2001, the Department of Corrections sent to the Wayne County Prosecuting Attorney written notice of the defendant's incarceration, requesting disposition of the pending warrant. On July 19, 2001, an information charged the defendant with armed robbery. On January 9, 2002, the Wayne Circuit Court, George W. Crockett, III, J., granted the defendant's motion to dismiss the charge on the basis of a violation of the 180-day rule, MCL 780.131. The Court of Appeals, WHITE, P.J., and KELLY and MURRAY, JJ., on appeal by the prosecution, peremptorily vacated the trial court's order of dismissal and remanded the matter to the trial court to address the application of *People v Chavies*, 234 Mich App 274 (1999), which relied on *People v Smith*, 438 Mich 715 (1991), to hold that the 180-day rule does not apply to a person who commits a crime while on parole because that person is subject to mandatory consecutive sentencing. Unpublished order of the Court of Appeals, entered June 9, 2003 (Docket No. 239662). On remand, the trial court followed *Chavies* and also ruled that under the speedy trial factors articulated in *Barker v Wingo*, 407 US 514 (1972), the charge against the defendant should not have been dismissed because the defendant did not insist on a speedy trial and was unable to show prejudice. The Court of Appeals, WHITE, P.J., and KELLY and

MURRAY, JJ., on its own motion following the trial court's finding on remand, dismissed the appeal and remanded the matter to the trial court for trial. Unpublished order of the Court of Appeals, entered July 9, 2004 (Docket No. 239662). The defendant sought leave to appeal in the Supreme Court, which ordered the clerk to schedule oral argument on the application. 472 Mich 872 (2005).

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

The 180-day-rule statute contains no exception for charges subject to consecutive sentencing. *Smith* and its progeny must be overruled to the extent that they are inconsistent with the plain language of the 180-day-rule statute. The decision in this matter must be given limited retroactive effect, applying to those cases pending on appeal in which this issue has been raised and preserved. The trial court's decision that the 180-day-rule statute was not violated must be affirmed because the defendant was tried within 180 days of the date that the prosecutor received actual notice that the defendant was in prison awaiting disposition of the pending armed robbery charge. The defendant's constitutional right to a speedy trial was not violated. The order of the Court of Appeals remanding the matter to the trial court for trial on the armed robbery charge must be affirmed.

1. A defendant facing consecutive sentencing is not precluded from asserting a violation of the 180-day rule.

2. The version of MCR 6.004(D) that was in effect before January 1, 2006, was invalid to the extent that it improperly deviated from the language of MCL 780.131. The decisions in *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963), on which the invalid interpretation of the 180-day rule in MCR 6.004(D) was based, must be overruled to the extent that they are inconsistent with MCL 780.131.

3. The trial court's holding that the defendant's right to a speedy trial under US Const, Am VI and Const 1963, art 1, § 20 was not infringed was not clearly erroneous and must be affirmed. Application of the *Barker* factors—length of delay, reason for delay, the defendant's assertion of the right, and prejudice to the defendant—indicates that the defendant was not denied his right to a speedy trial.

Justice CAVANAGH, joined by Justice KELLY, concurring in the result only, agreed with the overruling of *Smith* and its progeny because those cases are inconsistent with the plain language of MCL 780.131. While agreeing that this case involved no violation

of the 180-day rule or the defendant's constitutional right to a speedy trial, he urged the trial court to consider the delay in bringing the defendant to trial when imposing sentence, if the defendant is ultimately convicted, because the delay in prosecution will delay the start of the defendant's minimum sentence.

Affirmed.

CRIMINAL LAW — SPEEDY TRIAL — 180-DAY RULE.

The statute that provides that a prosecution against an inmate of a state correctional facility on an untried charge must be commenced within 180 days after the prosecutor receives notice of such incarceration and a request for disposition of the charge applies where the pending charge provides for mandatory consecutive sentencing (MCL 780.131).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jeffrey Caminsky*, Principal Attorney, Appeals, for the people.

State Appellate Defender (by *Leonard Zielinski* and *Jacqueline J. McCann*) for the defendant.

CORRIGAN, J. The 180-day rule, codified in MCL 780.131, provides that a prison inmate who has a pending criminal charge must be tried within 180 days after the Department of Corrections delivers to the prosecutor notice of the inmate's imprisonment and requests disposition of the pending charge. In *People v Smith*, 438 Mich 715, 717-718 (LEVIN, J.), 719 (BOYLE, J.); 475 NW2d 333 (1991), this Court held that the 180-day rule does not apply when the pending charge provides for mandatory consecutive sentencing. In the instant case, the trial court initially dismissed the charges against defendant on the basis of a violation of the 180-day rule, but the Court of Appeals vacated the order of dismissal and remanded so the trial court could address the application of the rule in *Smith, supra*. On

remand, the trial court, relying on the rule in *Smith, supra*, found no violation of the 180-day rule. The Court of Appeals thereafter dismissed the appeal and remanded for trial.

We overrule *Smith, supra*, and its progeny to the extent that they are inconsistent with the plain language of the 180-day-rule statute, which contains no exception for charges subject to consecutive sentencing. This decision is to be given limited retroactive effect, applying to those cases pending on appeal in which this issue has been raised and preserved. See *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). However, we affirm the lower courts' decision that the 180-day-rule statute was not violated because defendant was tried within 180 days of the date that the prosecutor received actual notice that defendant was in prison awaiting disposition of his pending armed robbery charge.

I. FACTS AND PROCEDURAL HISTORY

In 1998, after defendant's conviction of larceny from the person, MCL 750.357, he was sentenced to a one- to fifteen-year term of imprisonment. On May 7, 2000, while on parole for this conviction, defendant visited his son at the home of his son's mother, Adrian Harper. During this visit, defendant allegedly threatened Harper with a knife and stole money from her purse. He then stole Harper's car keys and drove away in her car.

On May 23, 2000, defendant was arrested and returned to the custody of the Michigan Department of Corrections. On the Wayne County Prosecutor's recommendation, the magistrate signed an arrest warrant and complaint for armed robbery, MCL 750.529, on June 2, 2000. On June 18, 2001, the Detroit Police Department took defendant into their custody for ar-

raignment on the warrant. After a June 28, 2001, preliminary examination, defendant was bound over for trial on the armed robbery charge. On July 12, 2001, the Department of Corrections sent a written notice of defendant's incarceration to the prosecutor, requesting disposition of the pending warrant. The prosecutor's office received this notice on July 16, 2001. On July 19, 2001, an information charged defendant with armed robbery.

When the parties appeared for trial on January 9, 2002, defendant first moved to dismiss the charge, asserting violations of the 180-day rule and his right to a speedy trial. The trial court granted defendant's motion to dismiss. On the prosecution's appeal, the Court of Appeals peremptorily vacated the trial court's order of dismissal and remanded the matter to the trial court to address the application of *People v Chavies*, 234 Mich App 274, 280-281; 593 NW2d 655 (1999). *People v Williams,* unpublished order of the Court of Appeals, entered June 9, 2003 (Docket No. 239662). *Chavies* relied on *Smith* in holding that the 180-day rule does not apply to persons who commit a crime while on parole because that person is subject to mandatory consecutive sentences. The Court of Appeals also ordered the trial court to make findings and discuss the application of the speedy trial factors articulated in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

On remand, the trial court followed *Chavies, supra*, concluding that defendant was subject to mandatory consecutive sentencing for the pending armed robbery charge. Regarding the speedy trial issue, the court ruled that the charge against defendant should not have been dismissed because defendant had not insisted on a speedy trial and was unable to show prejudice. Upon

receiving the trial court's findings, the Court of Appeals dismissed the appeal and remanded the case to the circuit court for trial. Unpublished order of the Court of Appeals, entered July 9, 2004 (Docket No. 239662). We ordered the clerk to schedule oral argument on whether to grant the defendant's application for leave to appeal or take other peremptory action. 472 Mich 872 (2005).

II. STANDARD OF REVIEW

This case involves the interpretation of MCL 780.131. We review issues of statutory interpretation de novo. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005). Our primary purpose in construing statutes is "to discern and give effect to the Legislature's intent." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id.*

Whether defendant was denied his right to a speedy trial is an issue of constitutional law, which we also review de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). We generally review a trial court's factual findings for clear error. MCR 2.613(C); *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005).

III. ANALYSIS

A. THE STATUTORY 180-DAY RULE

As a preliminary matter, before determining whether the 180-day rule was violated, we must first address whether defendant is entitled to assert the rights

granted under the 180-day-rule statute although he faces mandatory consecutive sentencing on the pending charge. Because *Smith, supra*, would preclude defendant from making a 180-day-rule claim, we must address the validity of *Smith, supra*, before determining whether defendant's claim is meritorious. We ultimately conclude that defendant's rights under the 180-day rule were not violated (and, in so holding, reach the same outcome as if defendant were not entitled to the protections of the 180-day rule). Nonetheless, our conclusion that a defendant facing consecutive sentencing may assert a claim based on the 180-day-rule statute ensures that our holding is not dicta.[1]

The 180-day rule is set forth in MCL 780.131:

> (1) Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

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[1] Obiter dictum is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ." Black's Law Dictionary (7th ed).

> (2) This section does not apply to a warrant, indictment, information, or complaint arising from either of the following:
>
> (a) A criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility.
>
> (b) A criminal offense committed by an inmate of a state correctional facility after the inmate has escaped from the correctional facility and before he or she has been returned to the custody of the department of corrections.

MCL 780.133 requires dismissal with prejudice if a prisoner is not brought to trial within the 180-day time limit set forth in the act:

> In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Michigan courts have inconsistently interpreted MCL 780.131 in determining whether the 180-day rule applies to defendants facing mandatory consecutive sentencing upon conviction of the pending charge. In *Loney, supra*, the Court of Appeals held that the 180-day rule applies only when the pending charge would allow concurrent sentencing:

> The purpose of the statute is clear. It was intended to give the inmate, who had pending offenses not yet tried, an opportunity to have the sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences. This purpose, however, does not apply in the instance of a *new* offense committed *after* imprisonment, nor where the statute, as in the case of an escape or attempted escape, sets up a mandatory consecutive sentence. The legislature was not concerning itself with the

> need for dispatch in the handling of a charge brought against an inmate for offenses committed *while* in prison.
>
> * * *
>
> For the foregoing reasons, it is the opinion of this Court that the 180-day statute does not and was not intended to apply to offenses committed while in prison and for which offenses mandatory consecutive sentences are provided. [*Loney, supra* at 292-293 (emphasis in original).]

After *Loney*, several panels of the Court of Appeals split on the issue.[2] This Court resolved the conflict in *People v Woodruff*, 414 Mich 130; 323 NW2d 923 (1982). In *Woodruff, supra* at 137, this Court held that the 180-day rule "applies to any untried charge which carries a punishment of imprisonment in a state penal institution against any inmate, even if the offense was committed while in prison or carries a mandatory consecutive sentence." The *Woodruff* Court determined that the statutory language unambiguously set forth the extent of the 180-day rule by expressly providing that it applied to " 'any' untried charge against 'any' prisoner, 'whenever' the department of corrections shall receive notice of that charge." *Id.* at 136. The *Woodruff* Court explained that the statute did not

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[2] Compare, e.g., *People v Charles Moore*, 111 Mich App 633; 314 NW2d 718 (1981), rev'd 417 Mich 878 (1983), *People v Grandberry*, 102 Mich App 769; 302 NW2d 573 (1980), and *People v Ewing*, 101 Mich App 51; 301 NW2d 8 (1980) (agreeing with *Loney* that the 180-day rule does not apply to criminal defendants who are facing charges that would involve mandatory consecutive sentencing), with *People v Hegwood*, 109 Mich App 438; 311 NW2d 383 (1981), *People v Marcellis*, 105 Mich App 662; 307 NW2d 402 (1981), *People v Pitsaroff*, 102 Mich App 226; 301 NW2d 858 (1980), *People v Anglin*, 102 Mich App 118; 301 NW2d 470 (1980), and *People v David Moore*, 96 Mich App 754; 293 NW2d 700 (1980) (holding that criminal defendants are entitled to the protections of the 180-day rule even if facing mandatory consecutive sentencing).

specify the type of sentence that determines the reach of the 180-day rule, but only generally referred to " 'a prison sentence.' " *Id.*

Five justices thereafter agreed to overrule *Woodruff* in *Smith, supra* at 717-718 (LEVIN, J.), 719 (BOYLE, J.). *Smith* resurrected the *Loney* panel's holding that the 180-day rule does not apply to offenses committed while in prison or to offenses that provide for mandatory consecutive sentences. In the lead opinion, Justice LEVIN explained that he agreed with the particular portion of *Loney, supra* at 292, that discussed the purpose of the 180-day-rule statute.[3]

Defendant argues that under the plain language of MCL 780.131, the 180-day rule applies to inmates facing mandatory consecutive sentencing. The prosecution acknowledges that the *Smith* and *Chavies* decisions extend the exceptions to the 180-day rule beyond the literal wording of the statute. We agree with defendant and hold that *Smith* and its progeny contravened the plain language of the 180-day-rule statute. *Smith* resorted to the purpose of the 180-day-rule statute in determining that the statute did not apply to defendants facing mandatory consecutive sentencing.

MCL 780.131 delineates only two exceptions to the 180-day rule for those offenses committed by incarcerated and escaped prisoners. MCL 780.131(2). If the Legislature had meant to exclude inmates facing mandatory consecutive sentencing on pending charges from

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[3] *Chavies, supra* at 280-281, followed *Smith, supra*. The *Chavies* panel held that "the statutory goal of allowing sentences to be served concurrently 'does not apply in a case where a mandatory consecutive sentence is required upon conviction.' " *Id.* at 280 (citation omitted).

People v Falk, 244 Mich App 718; 625 NW2d 476 (2001), reaffirmed *Chavies, supra*. The *Falk* panel held that the 180-day rule does not apply to a pending charge for which a possible sentence includes either imposition of a mandatory consecutive prison term or probation. *Falk, supra* at 721-722.

the ambit of MCL 780.131, it could have created such an exception. See *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004) ("If the Legislature had meant for OV [offense variable] 19 to apply only in cases dealing with the obstruction of justice, it could have easily used that phrase."). *Smith* overstepped its bounds by drafting an exception to the 180-day rule based on the purpose of the statute.

As we explained in *Woodruff, supra* at 136, the language of MCL 780.131 expressly applies the 180-day rule to "any" untried charge against "any" prisoner "[w]henever" the Department of Corrections receives notice of that charge. The statute does not specify that the type of sentence determines the applicability of the rule. In particular, the statute does not distinguish concurrent and consecutive sentencing on the pending charge. We overrule *Smith* and its progeny to the extent that they are inconsistent with our ruling. Our decision is to have limited retroactive effect, applying to those cases pending on appeal in which this issue has been raised and preserved. See *Cornell, supra* at 367.

B. APPLICATION OF THE 180-DAY-RULE STATUTE

Defendant argues that several communications satisfied the notice provision of the statute. For example, on January 26, 2001, the Department of Corrections sent written notice to the Detroit Police Department that defendant was incarcerated and sought disposition of his warrant for armed robbery. The Department of Corrections then sent another such notice to the investigator assigned to defendant's case, which the investigator received on February 5, 2001. An employee of the Department of Corrections subsequently communicated with the investigating officer several times regarding defendant's status. Although investigating

police officers may and do cooperate with the prosecutor, they are not part of the prosecutor's office. Defendant has cited no persuasive authority for his argument that the investigating police officer is an agent of the prosecutor, or that knowledge by the police of defendant's incarceration should be imputed to the prosecutor.

The 180-day-rule statute expressly provides that the Department of Corrections must deliver a written notice of incarceration and request for disposition "to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending . . . ." MCL 780.131(1). The first qualifying written notice from the Department of Corrections was received by the prosecutor on July 16, 2001. Cf. *People v Fex*, 439 Mich 117, 119-123; 479 NW2d 625 (1992), aff'd 503 US 43 (1993) (the 180-day period in Article III[a] of the Interstate Agreement on Detainers [IAD], MCL 780.601 *et seq.*, does not commence until the prisoner's request for final disposition of the charges against him or her has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him or her). There is no dispute that this written notice complied with the other requirements of the statute that it be delivered by certified mail and be accompanied by a statement setting forth defendant's term of commitment, his time served, his time remaining to be served, the amount of sentence credits earned, the time of his parole eligibility, and any decisions of the parole board. Defendant's trial commenced on January 9, 2002, which was less than 180 days after the prosecutor received notice.[4] Therefore,defendant was tried within the statutory 180-day limit.

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[4] Because MCL 780.131 does not specifically address how courts should compute the 180-day time period, we turn to MCR 1.108, which unambiguously governs the computation of a period prescribed by statute. MCR 1.108(1) provides:

C. MCR 6.004(D)

In addition to MCL 780.131, the Michigan Court Rules also codify the 180-day rule in MCR 6.004(D). Because the 180-day rule, as expressed in the pre-January 1, 2006, version of the court rule, may be violated even when there is no violation under the plain language of the statute, we must address whether defendant is entitled to relief under the court rule. We conclude that defendant is not entitled to relief under the court rule because the court rule must yield to the statute.

At all times relevant to this case, MCR 6.004(D) provided:

> (D) Untried Charges Against State Prisoner.
>
> (1) *The 180-Day Rule.* Except for crimes exempted by MCL 780.131(2), the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:
>
> (a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or

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> The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order.

Thus, the 180-day period begins to run the day after the prosecutor receives notice that a defendant is incarcerated and awaiting trial on pending charges. See *People v Sinclair*, 247 Mich App 685, 688-689; 638 NW2d 120 (2001) (holding that MCR 1.108[1] applies to computation of time for the 180-day rule set forth in the Interstate Agreement on Detainers [IAD], MCL 780.601 *et seq*.).

(b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.

For purposes of this subrule, a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person.

(2) *Remedy.* In cases covered by subrule (1)(a), the defendant is entitled to have the charge dismissed with prejudice if the prosecutor fails to make a good-faith effort to bring the charge to trial within the 180-day period. When, in cases covered by subrule (1)(b), the prosecutor's failure to bring the charge to trial is attributable to lack of notice from the Department of Corrections, the defendant is entitled to sentence credit for the period of delay. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.[5]

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[5] MCR 6.004(D) has been amended to conform to the 180-day rule as set forth in MCL 780.131, effective January 1, 2006. The court rule now provides:

(D) Untried Charges Against State Prisoner.

(1) *The 180-Day Rule*. Except for crimes exempted by MCL 780.131(2), the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

MCR 6.004(D) was adopted in 1989 to codify, with two exceptions, this Court's interpretation of the 180-day-rule statute in *People v Hill,* 402 Mich 272; 262 NW2d 641 (1978), *People v Hendershot*, 357 Mich 300; 98 NW2d 568 (1959), and dictum in *People v Castelli,* 370 Mich 147; 121 NW2d 438 (1963). We hold that this version of MCR 6.004(D) was invalid to the extent that it improperly deviated from the statutory language. This Court's holding in *Hill, supra*, and its dicta in *Castelli, supra*, along with the portion of the court rule implementing these holdings, improperly expanded the scope of the 180-day-rule statute by requiring the prosecutor to bring a defendant to trial within 180 days of the date that the Department of Corrections knew or had reason to know that a criminal charge was pending against the defendant. MCR 6.004(D)(1)(b). This language does not appear in the statute. The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant. We decline to read such nonexistent language into the statute. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003). We overrule *Hill, supra*, and *Castelli, supra*, to the extent that they are inconsistent with MCL 780.131. We also give this decision limited retroactive effect. See *Cornell, supra* at 367.

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

" 'If a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield.' " *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999) (citation omitted). The preamendment version of MCR 6.004(D) is not purely a matter of court administration. Instead, this court rule both codified and modified this Court's interpretations of the statutory 180-day rule. MCR 6.004(D) does not solely attempt to " 'regulate the day-to-day procedural operations of the courts.' " *McDougall, supra* at 32, quoting *People v McKenna*, 196 Colo 367, 372; 585 P2d 275 (1978). As such, the court rule must yield to MCL 780.131.

D. SPEEDY TRIAL

Finally, defendant contends that the trial court erred in holding that his right to a speedy trial under US Const, Am VI, and Const 1963, art 1, § 20, was not infringed. Although the delay was lengthy, we affirm the trial court's holding because the trial court's factual findings underlying its decision were not clearly erroneous.

1. WAIVER

The prosecution initially argues that defendant waived his right to a speedy trial by agreeing to the trial date. Waiver is the intentional relinquishment or abandonment of a known right or privilege. *People v Grimmett,* 388 Mich 590, 598; 202 NW2d 278 (1972), overruled on other grounds in *People v White*, 390 Mich 245 (1973) overruled on other grounds in *People v Nutt*, 469 Mich 565 (2004). Courts "should ' "indulge every reasonable presumption against waiver of fundamental constitutional rights." ' " *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004) (citations omitted).

Waiver consists of (1) specific knowledge of the constitutional right and (2) an intentional decision to abandon the protection of the constitutional right. *Grimmett, supra* at 598.

At the October 12, 2001, pretrial conference, the trial court offered January 9, 2002, as the earliest possible trial date. In response, defense counsel agreed, and defendant stated, "I can accept that." This brief colloquy did not qualify as a knowing and intentional waiver of defendant's right to a speedy trial. We see no evidence that defendant specifically considered and purposely waived his right to a speedy trial. Indeed, we will not presume waiver from a silent record. *Williams, supra* at 641. Nonetheless, defendant's agreement to the trial date is relevant in weighing the *Barker* factors to determine if he was denied the right to a speedy trial.

2. THE *BARKER* FACTORS

Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. We enforce this right both by statute and by court rule. MCL 768.1; MCR 6.004(A). The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest. *United States v Marion*, 404 US 307, 312; 92 S Ct 455; 30 L Ed 2d 468 (1971). In contrast to the 180-day rule, a defendant's right to a speedy trial is not violated after a fixed number of days. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). This Court adopted the *Barker* standards for a speedy trial in *Grimmett, supra* at 606. In determining whether a defendant has been denied the right to a speedy trial, we balance the following four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's

assertion of the right, and (4) the prejudice to the defendant. *Id.* Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972). Under the *Barker* test, a "presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *People v Wickham*, 200 Mich App 106, 109-110; 503 NW2d 701 (1993).

3. APPLICATION OF THE *BARKER* FACTORS

The first *Barker* factor is the length of the delay. Because the length of delay between defendant's arrest and the trial was over nineteen months, the delay was presumptively prejudicial. *Collins, supra* at 695. Thus, we must consider the other *Barker* factors to determine if defendant has been deprived of the right to a speedy trial.

Under the second *Barker* factor, the prosecution offered no compelling reason for the delay between defendant's arrest and the time the prosecutor's office received notice of defendant's incarceration on July 16, 2001. In fact, the prosecutor agreed that the delay had been "inexcusable." From the time the prosecutor's office learned of defendant's incarceration, it did attempt to move the proceedings along as quickly as possible. The trial court found that the delay between July 16, 2001, and the final pretrial conference on October 12, 2001, was attributable to defendant and his counsel. Defendant's first pretrial conference on the armed robbery charge was set for July 27, 2001, only eleven days after the prosecutor received written notice that defendant was incarcerated and had a pending

charge. This conference was adjourned when defendant's attorney failed to appear. The conference was rescheduled for August 10, 2001. At this conference, defense counsel indicated that he intended to file a motion to dismiss the armed robbery charge based on a violation of the 180-day rule. However, counsel never filed this motion. The trial court scheduled another pretrial conference for September 21, 2001, but defense counsel once again failed to appear. On September 28, 2001, defendant sought to terminate his appointed attorney's services. The court appointed a new attorney to represent defendant who had to familiarize himself with the case. Thus, we see no clear error in the trial court's finding that defendant was responsible for this delay.

The delay between the October 12, 2001, final pretrial conference and the January 9, 2002, trial date can be attributed to docket congestion. "Although delays inherent in the court system, e.g., docket congestion, 'are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial.' " *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997), quoting *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993).

The trial court weighed the third prong of the *Barker* test heavily against defendant. As of the final pretrial conference, defendant had not objected to any of the delays. Moreover, he accepted the January 9, 2002, trial date offered by the court. Further, defendant did not assert a speedy trial violation until the day before trial. Thus, the trial court did not clearly err in weighing this factor heavily against defendant. See *Collins, supra* at 692-694 (the prejudice prong weighed heavily against a defendant who did not assert his right to a speedy trial until the day before trial).

The fourth and final prong of *Barker* concerns the prejudice to defendant. "There are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to the defense." *Collins, supra* at 694. Defendant argues that he was personally prejudiced by the lengthy incarceration because (1) he received no credit for the time served before sentencing because he was on parole when he was arrested, and (2) the delay caused him to suffer mental anxiety. We agree that defendant suffered considerable personal deprivation by his 19-month incarceration before trial. Nonetheless, this Court has held that the prejudice prong of the *Barker* test may properly weigh against a defendant incarcerated for an even longer period if his defense is not prejudiced by the delay. See, e.g., *People v Chism*, 390 Mich 104, 115; 211 NW2d 193 (1973) ("on the matter of prejudice to defendant because of the length of time before his trial, the most important thing is that there is no evidence that a fair trial was jeopardized by delay, although obviously 27 months of incarceration is not an insignificant personal hardship"); see also *Grimmett, supra* at 606-607 (the prejudice prong weighed against the defendant where the delay was 19 months, but did not prejudice the defendant's defense).

Prejudice to the defense is the more serious concern, " 'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.' " *Chism, supra* at 114, quoting *Barker, supra* at 532. The trial court found that defendant's ability to defend was not prejudiced by the delay. Because the record contains no specific proof of such prejudice, the trial court's finding was not erroneous.

Although a 19-month delay is presumptively prejudicial, the trial court did not err in ruling that defendant was not denied his right to a speedy trial. The trial

court's factual findings underlying this decision were not clearly erroneous. Defendant did not object to any delays, agreed to the trial date, and did not assert his right to a speedy trial until the day before trial. He did not demonstrate that any delay prejudiced the defense of his case. Further, defendant and his counsel were partially responsible for the delay. Therefore, the trial court properly declined to dismiss the charge against defendant.

IV. CONCLUSION

Although the 180-day rule applied to defendant, the statute was not violated because the prosecution brought defendant to trial within 180 days of receiving notice that defendant was in prison, awaiting disposition of his pending charge. After weighing the four *Barker* factors, we conclude that defendant's constitutional right to a speedy trial was not violated. Accordingly, we affirm the Court of Appeals order to remand for trial on the armed robbery charge.

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

CAVANAGH, J. (*concurring in the result only*). I concur with the result reached by the majority to overrule *People v Smith*, 438 Mich 715; 475 NW2d 333 (1991), and its progeny because these cases are inconsistent with the plain language of MCL 780.131, the 180-day-rule statute. The statute contains no exception for charges subject to consecutive sentencing. Moreover, while I agree with the majority that, under the facts of this case, there was not a violation of the 180-day-rule statute or defendant's constitutional right to a speedy trial, if defendant is ultimately convicted, I urge the

trial court to consider the delay in bringing defendant to trial when imposing defendant's sentence. If convicted, the delay in prosecuting defendant will in fact delay the start of defendant's minimum sentence.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE v PIPES
PEOPLE v KEY

Docket Nos. 129152, 129154. Decided June 14, 2006. On application by the prosecution for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. Following oral argument, the Supreme Court reversed the judgment of the Court of Appeals and reinstated the defendants' convictions.

Cedric Pipes and Julian D. Key were convicted of first-degree premeditated murder following a joint trial before one jury in the Wayne Circuit Court. The court, Brian R. Sullivan, J., sentenced each defendant to life imprisonment without the possibility of parole. The Court of Appeals, BANDSTRA and BORRELLO, JJ. (METER, P.J., concurring in part and dissenting in part), reversed the defendants' convictions and remanded the matter to the trial court for new trials on the bases that the admission of each nontestifying codefendant's statements to the police against the other was a violation of *Bruton v United States*, 391 US 123 (1968), and that the error was not harmless. Unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket Nos. 247718, 247719). The Supreme Court, in lieu of granting the prosecution's application for leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. 474 Mich 918 (2005).

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

The Court of Appeals correctly held that the defendants' Sixth Amendment confrontation rights were violated. However, the Court of Appeals erred in holding that the error warranted reversal of the defendants' convictions. The judgment of the Court of Appeals must be reversed and the judgment of conviction against each defendant must be reinstated.

1. *Bruton* held that a defendant is deprived of the Sixth Amendment confrontation rights when a nontestifying codefendant's confession that inculpates the defendant is introduced at a joint trial.

2. A *Bruton* error does not require automatic reversal of a defendant's conviction and is subject to harmless error analysis. In a case involving a *Bruton* error, the defendant's own confession may be considered on appeal in assessing whether any Confrontation Clause violation was harmless.

3. The defendants, by failing to object or move for a mistrial on *Bruton* grounds, failed to properly preserve the *Bruton* error for appeal.

4. The Court of Appeals failed to determine whether the *Bruton* error was properly preserved, and thereby failed to apply the proper standard of review. The Court of Appeals should have reviewed this unpreserved constitutional claim for plain error that affected substantial rights. A defendant's failure to establish a plain error that affected a substantial right precludes a reviewing court from acting on such an error. Reversal is warranted where a defendant shows plain error that affected a substantial right and where the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

5. The Court of Appeals failed to give sufficient weight to the proper admission of each defendant's self-incriminating statements. There is little question of actual innocence given each defendant's self-incriminating statements. Neither defendant was prejudiced to the point that reversal is required by the admission of his codefendant's incriminating statements. Other properly admitted evidence corroborated each defendant's confession. In light of the overwhelming evidence of guilt, the prejudicial effect posed by the *Bruton* error was minimal and the error was harmless. The error did not seriously affect the fairness, integrity, or public reputation of the proceedings.

Reversed; convictions reinstated.

Justice CAVANAGH, joined by Justice KELLY, dissenting, agreed with the majority's determination that a *Bruton* violation occurred in this case, but disagreed with the majority's conclusion that the violation was not plain error that affected the defendants' substantial rights. The evidence against each defendant is not overwhelming if his codefendant's statements are not considered. Each defendant's statement minimized any role he may have played in the shooting and maximized the other defendant's role in the shooting. The jury's hearing of these unchallenged and inculpatory statements essentially rendered futile the defendants' questioning of police officers, as well as the contentions made in closing argument, that called into question the validity of the alleged statements. The jury was unlikely to question the validity of the

statements allegedly made when it heard that they were supported to some degree by statements made by each defendant's codefendant. The decision of the Court of Appeals should be affirmed, and each case should be remanded for its own new trial.

CRIMINAL LAW — CONSTITUTIONAL LAW — RIGHT TO CONFRONT WITNESSES.

A defendant is deprived of the Sixth Amendment right of confrontation when a nontestifying codefendant's statements implicating the defendant are introduced at their joint trial; the violation is of constitutional magnitude and is not ameliorated when the defendant's confession is also introduced; however, such a confrontation violation is subject to harmless error analysis, and the defendant's confession admitted into evidence may be considered on appeal in assessing whether any Confrontation Clause violation was harmless.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jeffrey Caminsky*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for Cedric Pipes.

Jonathan B. D. Simon for Julian D. Key.

YOUNG, J. Defendants were convicted of first-degree premeditated murder following a joint trial before one jury. The Court of Appeals reversed defendants' convictions on the bases that the admission of each codefendant's statements to the police against the other was a violation of *Bruton v United States*,[1] and that the error was not harmless. In *Bruton*, the United States Supreme Court held that a defendant is deprived of his Sixth Amendment confrontation rights when a nontestifying codefendant's confession that inculpates the defendant is introduced at a joint trial.[2]

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[1] 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

[2] *Id.* at 126.

We agree with the Court of Appeals that defendants' Sixth Amendment confrontation rights were violated. However, we disagree with the Court of Appeals that the error warranted reversal of defendants' convictions. Unpreserved, constitutional errors are reviewed for plain error affecting substantial rights. Because defendants have failed to show reversible prejudice, actual innocence, or that the confrontation error " ' "seriously affect[ed] the fairness, integrity or public reputation" ' "[3] of the trial, reversal of their convictions was improper. Accordingly, we reverse the Court of Appeals judgment and reinstate defendants' first-degree murder convictions.

FACTS AND PROCEDURAL HISTORY

On March 23, 2002, three-year-old Destiney Thomas sustained a fatal gunshot wound as the result of a drive-by shooting. The prosecution charged defendants Cedric Pipes and Julian Key with first-degree premeditated murder,[4] assault with intent to commit murder,[5] and possession of a firearm during the commission of a felony[6] in connection with the shooting.[7]

Pursuant to MCR 6.121(C),[8] defendants moved for separate trials or separate juries, arguing that their

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[3] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).

[4] MCL 750.316(1)(a).

[5] MCL 750.83.

[6] MCL 750.227b.

[7] Defendant Pipes was also charged with being a felon in possession of a firearm. MCL 750.224f(1).

[8] MCR 6.121(C) provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."

defenses were "mutually exclusive."[9] In support of the motion, defendant Key made an offer of proof that he would testify that he was not present and had no involvement in the shooting. Meanwhile, defendant Pipes made an offer of proof that he would testify that he was present when defendant Key shot at the house, but that Pipes had no involvement in the shooting. Neither defendant argued for severance based on the possibility of a *Bruton* error.[10]

The trial court denied defendants' motion, determining that defendants could not make the requisite showing of prejudice necessary to sustain the motion. The trial court concluded that although defendants' proposed defenses involved blame shifting, they were not "mutually exclusive." Furthermore, the trial court specifically noted that, given defendants' offer of proof, no *Bruton* problem was present in this case. If the codefendant testifies at trial, then his statements to the police are admissible because the maker of the statements is subject to cross-examination. The trial court relied on the offers of proof presented by both defendants where each unequivocally stated his intention to testify at trial. The trial court noted multiple times its determination that no *Bruton* problem was present because both defendants planned to testify.[11]

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[9] In *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994), this Court held that "[i]nconsistency of defenses is not enough to mandate severance [under MCR 6.121(C)]; rather, the defenses must be mutually exclusive or irreconcilable." (Internal citations and quotation marks omitted.) In other words, "[t]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id*. (Internal citations and quotation marks omitted.)

[10] Under *Hana*, a *Bruton* error may provide grounds for severance. *Id*. at 346 n 7; *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993).

[11] The first proceeding ended in a mistrial. Before the commencement of the second trial, which is the subject of the present appeal, counsel for

The prosecution's theory at trial was that the victim died in a drive-by shooting that resulted from a territorial dispute between defendants and rival drug dealers. According to the prosecution, rival drug dealers shot defendant Key's girlfriend's automobile, a green Jeep Cherokee, in response to an argument with defendants. Defendant Key frequently used the green Jeep and had it in his possession when it was shot. The drive-by shooting that killed the victim was an act of retaliation for the damage done to the automobile.

The trial court admitted into evidence multiple statements given by both defendants to the police.[12] Both defendants' admissions recounted the argument with the rival drug dealers and discussions regarding retaliation for the shooting of the Jeep. Initially, each defendant shifted all blame for the shooting to his codefendant. Subsequently, each codefendant made statements that inculpated himself as well as his codefendant. Defendant Key conceded that both he and defendant Pipes committed the drive-by shooting. Key admitted that he and Pipes obtained a car from a drug customer, which they used in the drive-by shooting, while others followed in the Jeep as backup. Likewise, Pipes admitted that he rented a car for Key to use in the shooting and admitted following behind Key in the Jeep in order to "watch his [codefendant's] back" during the shooting.

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defendant Key asked that the earlier motion for separate trials or juries be reconsidered. The trial court declined to reconsider the motion, noting that none of the circumstances had changed.

[12] The trial court instructed the jury that each statement was only to be considered against the defendant who made the statement. The jury was instructed on this point when the statements were admitted into evidence and when the trial court gave final jury instructions. However, as explained *infra*, such instructions do not cure a *Bruton* error.

After the prosecution presented its case-in-chief, the trial court inquired of defendants regarding how they planned to proceed. At that point, counsel for each defendant equivocated regarding whether his client would testify. The trial court acknowledged that defendants were free to not testify, but reiterated that its denial of their motion for separate trials and juries was specifically premised on the unequivocal offers of proof that defendants would testify at trial.

Ultimately, however, defendants exercised their Fifth Amendment right and did not testify at trial.[13] However, defendants never sought a mistrial when the *Bruton* error became apparent. The jury convicted both defendants of first-degree premeditated murder, but acquitted defendants on all other charges. Defendants were sentenced to life imprisonment without the possibility of parole.

The Court of Appeals reversed defendants' convictions and remanded for new trials.[14] The Court of Appeals majority concluded that the trial court denied defendants a fair trial by denying their motion for separate trials or separate juries, thus causing a *Bruton* error when defendants chose not to testify. Furthermore, the Court of Appeals majority concluded that the admission of these statements in violation of defendants' confrontation rights was not harmless. The Court of Appeals majority, however, failed to determine whether defendants properly preserved the *Bruton* error for appeal, as required by *People v Carines*.[15] Furthermore, the Court of Appeals majority did not cite or apply the proper standard of review delineated in *Car-*

[13] Defendants then rested. They presented no evidence or witnesses.

[14] Unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket Nos. 247718, 247719).

[15] 460 Mich 750; 597 NW2d 130 (1999).

ines for unpreserved, constitutional error. In applying a harmless error analysis, the majority gave little weight to the highly self-incriminating nature of defendants' statements.

The dissent, however, would have affirmed defendants' convictions on the basis that the offers of proof submitted by the defendants, unequivocally representing that they would testify, waived any claim of error with regard to separate trials or separate juries.

The prosecution sought leave to appeal in this Court. After directing the parties to address whether the offers of proof by defendants waived any right to claim a confrontation error, we heard oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1).[16]

STANDARD OF REVIEW

Constitutional questions, such as those concerning the right to confront witnesses at trial, are reviewed de novo.[17] The effect of an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights.[18] To avoid forfeiture under the plain error rule, a defendant must show actual prejudice.[19] Under the plain error rule, reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial.[20]

ANALYSIS

In *Bruton*, the United States Supreme Court held

[16] 474 Mich 918 (2005).

[17] *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

[18] *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

[19] *Id.*

[20] *Id*.

that a defendant is deprived of his Sixth Amendment right to confront witnesses against him when his nontestifying codefendant's statements implicating the defendant are introduced at their joint trial.[21] There is no error, however, if the codefendant testifies.[22] The Court held that giving limiting instructions to the jury that the statements can only be used against the declarant is not sufficiently curative because "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[23]

In *Cruz v New York*,[24] a codefendant's statements were admitted against the defendant along with the defendant's own confession. The *Cruz* Court revisited the plurality opinion in *Parker v Randolph*.[25] In *Parker*, which involved the same factual predicate as *Cruz*, four justices determined that *Bruton* was inapplicable and that there was no Sixth Amendment violation in cases where the defendant's own statement is admitted alongside the defendant's nontestifying codefendant's incriminating statement. Concurring in part and concurring in the judgment, Justice Blackmun stated that the admission of the codefendant's statement was a Sixth Amendment violation under *Bruton*, but any error was harmless beyond a reasonable doubt.[26] In *Cruz*, the Court adopted Justice Blackmun's approach, holding that a Confrontation Clause violation is not

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[21] *Bruton*, *supra* at 126.

[22] *Id*.

[23] *Id*. at 135.

[24] 481 US 186; 107 S Ct 1714; 95 L Ed 2d 162 (1987).

[25] 442 US 62; 99 S Ct 2132; 60 L Ed 2d 713 (1979).

[26] *Id*. at 77-81. Three justices dissented, and Justice Powell did not participate in the case.

ameliorated when the defendant's confession is introduced at trial alongside a nontestifying codefendant's statement that inculpates the defendant.[27] Thus, "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him."[28] However, the Court found that the defendant's own confession was relevant in a manner applicable to the instant case. The Court held that the defendant's confession "may be considered on appeal in assessing whether any Confrontation Clause violation was harmless . . . ."[29]

We agree with the Court of Appeals that a *Bruton* error occurred in this case.[30] However, a *Bruton* error does not require automatic reversal of a defendant's conviction.[31] The Supreme Court has recognized that a *Bruton* violation is nevertheless subject to harmless

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[27] *Cruz*, *supra* at 193.

[28] *Id*.

[29] *Id*. at 194.

[30] The Supreme Court's recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), buttresses the point that both defendants' confrontation rights were violated by the admission of the nontestifying codefendant's incriminating statements. The statements clearly fall within the class of "testimonial" statements that are only admissible at trial if the declarant is available for cross-examination, or if the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine. *Id*. at 59.

[31] There is a " ' "very limited class of cases" ' " involving "structural errors" where errors are so "intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *People v Duncan*, 462 Mich 47, 51, 52; 610 NW2d 551 (2000), quoting *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999), quoting *Johnson v United States*, 520 US 461, 468; 117 S Ct 1544; 137 L Ed 2d 718 (1997). This limited class of cases has never been recognized by either

error analysis,[32] and in such a case a defendant's own confession "may be considered on appeal in assessing whether any Confrontation Clause violation was harmless . . . ."[33]

To determine whether the *Bruton* error warrants reversal, we must first identify the proper standard of review to be applied in this case. In *People v Carines*,[34] this Court discussed the governing standards of review for claims of alleged error in criminal trial proceedings. The standard of review differs depending on whether the error is constitutional in magnitude and whether the defendant properly preserved the error at trial. As we have noted, a *Bruton* error is of constitutional magnitude.

The other inquiry of consequence is whether the issue was preserved at trial. In order to properly preserve an issue for appeal, a defendant must "raise objections at a time when the trial court has an opportunity to correct the error . . . ."[35] Preservation serves "the important need to encourage all trial participants to seek a fair and accurate trial the first time around . . . ."[36] In this case, defendants never objected to the admission of the statements on *Bruton* grounds.[37] Defendants also ex-

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the United States Supreme Court or this Court to encompass *Bruton* errors. Because a *Bruton* error is not structural, it is subject to harmless error review.

[32] "We reject the notion that a Bruton error can never be harmless." *Brown v United States*, 411 US 223, 231; 93 S Ct 1565; 36 L Ed 2d 208 (1973).

[33] *Cruz*, *supra* at 194.

[34] *Carines*, *supra*.

[35] *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994).

[36] *Id*. (Internal citations and quotation marks omitted); *Carines*, *supra* at 761.

[37] Defendant Pipes did object to the introduction of one of his own statements because he had refused to sign it. However, this objection did not raise or preserve the *Bruton* error. See MRE 103(a)(1).

pressly approved the limiting instructions given to the jury upon the introduction of each statement. Defendants were aware that the trial court predicated its decision to have a joint trial in front of one jury on defendants' representations that they were going to testify at trial.[38] When each defendant exercised his right to not testify, thereby causing the *Bruton* error with regard to the other defendant, neither defendant objected or moved for a mistrial on the basis of the *Bruton* error. Rather, each defendant allowed the trial to proceed to a verdict without ever affirmatively arguing that his confrontation rights had been violated. By failing to object or move for a mistrial on *Bruton* grounds, defendants failed to properly preserve the *Bruton* error for appeal.[39] The Court of Appeals erred in failing to determine whether the *Bruton* error was properly preserved, and thereby failed to apply the proper standard of review. The Court of Appeals should have reviewed this unpreserved, constitutional error for "plain error that affected substantial rights" under *Carines*.[40]

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[38] Absent an express waiver by defendants of their Fifth Amendment rights, we agree with the Court of Appeals majority that the trial court should not have relied on defendants' representations that they intended to testify at trial when deciding whether to grant separate trials or juries. We reject the Court of Appeals dissent's argument that defendants waived the *Bruton* error. See *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Defendants' silence in the face of a *Bruton* error amounts to forfeiture, not waiver, because waiver requires "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal citations and quotation marks omitted).

[39] Any other conclusion would be contrary to the rule that defendants cannot "harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). "The rule that issues for appeal must be preserved in the record by notation of objection is a sound one," *id*., and that rule is totally eviscerated in situations, such as this, where defendants never address appealable issues with the trial court.

[40] *Carines*, *supra* at 774.

Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.[41] Generally, the third factor requires a showing of prejudice—that the error affected the outcome of the trial proceedings.[42] Defendants bear the burden of persuasion. The failure to establish a plain error that affected a substantial right precludes a reviewing court from acting on such an error. However, even if defendants show plain error that affected a substantial right, reversal is only warranted "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ."[43]

In this case, the first two requirements are satisfied because the introduction of the defendants' statements that incriminated each other violated defendants' Sixth Amendment confrontation rights. Once defendants exercised their rights not to testify, admission of the statements was in direct contradiction of the rules laid down in *Bruton* and *Cruz*.

The next question then is whether the *Bruton* error affected defendants' substantial rights. Stated otherwise, the error must have been outcome determinative. Relying on *Bruton*, *Cruz,* and this Court's decision in *People v Banks*,[44] the Court of Appeals majority found

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[41] *Carines*, *supra* at 763.

[42] *Id*.

[43] *Id*. at 763 (internal citations and quotation marks omitted); *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[44] 438 Mich 408; 475 NW2d 769 (1991). In *Banks*, this Court held that a *Bruton* error does not require reversal where "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the

that the *Bruton* error created prejudice that required reversal. The Court of Appeals majority determined that the evidence properly admitted against defendants was not overwhelming and that the prejudicial effect of the codefendants' statements against each other was significant. Therefore, the Court of Appeals found that the *Bruton* error was not harmless.

We disagree. The Court of Appeals failed to give sufficient weight to the evidence that was properly admitted against each defendant, particularly the proper admission of each defendant's self-incriminating statements, and therefore erroneously reversed defendants' convictions. As held in *Cruz*, it was not error for each defendant's *own* confessions to be admitted against that defendant.[45] The only error was the introduction of the nontestifying codefendant's incriminating statement in a case where both defendants were tried before a single jury. While the Court of Appeals acknowledged that a defendant's confession "may be considered on appeal in assessing whether any Confrontation Clause violation was harmless,"[46] it accorded no weight to the strongly self-inculpating nature of each defendant's confession.

Given each defendant's statements, there is little question of actual innocence with regard to the first-

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codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Id*. at 427 (internal citations and quotation marks omitted). This "harmless beyond a reasonable doubt standard" would be the correct standard of review if the *Bruton* error was preserved. *Carines*, *supra* at 774. However, this case deals with an *unpreserved*, constitutional error, so the Court of Appeals should have reviewed for plain error affecting substantial rights. *Id*.

[45] See also MRE 801(d)(2)(A), which provides for admission at trial of party admissions.

[46] *Cruz*, *supra* at 194.

degree murder convictions. This Court has recognized that "[o]ften . . . when the defendant confesses, there can be little doubt concerning his guilt."[47] Indeed, " ' "the defendant's *own* confession is probably the most probative and damaging evidence that can be admitted against him." ' "[48] Because each defendant's own statements were self-incriminating, we cannot conclude that either defendant was prejudiced to the point that reversal is required by the erroneous admission of his codefendant's incriminating statements. Each defendant individually admitted the territorial dispute with rival drug dealers, and each defendant's statements exposed the motive behind the homicidal shooting—retaliation for shooting the green Jeep Cherokee. In his second statement to the police, defendant Key explicitly admitted being the triggerman in the drive-by shooting and using an AK-47 rifle. Although Pipes did not confess to being the gunman, he admitted procuring a vehicle to transport defendant Key to the drive-by shooting and admitted following Key in the Jeep in order to "watch [Key's] back." Taken in isolation, these statements provide more than enough "damaging evidence," if believed by a jury, for the jury to find each defendant guilty beyond a reasonable doubt as a principal or as an aider or abettor of first-degree premeditated murder.[49]

Furthermore, other probative and properly admitted evidence at trial corroborated defendants' confessions.

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[47] *People v Dunn*, 446 Mich 409, 424; 521 NW2d 255 (1994).

[48] *Id*. at 423, quoting *Arizona v Fulminante*, 499 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (White, J., with Marshall, Blackmun, and Stevens, JJ., concurring), quoting *Bruton*, *supra* at 139 (White, J., dissenting); *Cruz*, *supra* at 195 (White, J., dissenting). (Original emphasis omitted; emphasis added.)

[49] See MCL 767.39. The jury was instructed regarding the elements required to find guilt under an aiding or abetting theory.

One witness, who was on the front porch of the victim's residence at time of the shooting, testified that a green Jeep Cherokee pulled in front of the house and someone opened fire from the passenger side of the vehicle. The witness, who was a friend of defendant Key, testified that the vehicle was similar to the vehicle Key was known to drive. Another witness, who was walking toward the victim's house, testified that he was approximately one block away from the house when he heard gunfire. After the gunfire ceased, the witness observed a green Jeep Cherokee headed toward him at a "kind of fast" pace. From a distance of ten to 12 feet away, the witness positively identified both defendants in the green Jeep Cherokee, driving in the opposite direction from the scene of the crime. The witness was familiar with both defendants, and testified that Key was known to drive a green Jeep Cherokee. Another witness, who was on the side of the assaulted house at the time of the shooting, testified that he observed a small blue car and a green Jeep Cherokee drive to the residence. The witness ran toward the alley as soon as he observed a gun being pointed at the residence from the small blue car. The witness did not observe the gunshots being fired.

Key's girlfriend testified that she owned a green Jeep Cherokee and that she allowed defendant Key to drive her automobile "almost daily." At the time of the shooting, she was out of town and returned to find her vehicle missing.[50] When the witness retrieved her automobile from the police two weeks later, one window was "shot out" and the car had two or three bullet holes in it.

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[50] The witness testified that her automobile was parked at her residence when she left town, and that defendant Key did not have permission to drive her automobile on the weekend the shooting occurred. A second set of car keys was missing from the witness's residence.

An inconclusive amount of gunshot residue was found in the Jeep. However, shell casings and bullet fragments collected at the scene of the crime were consistent with an AK-47 rifle. Two Detroit Police officers testified that the information provided to 911 operators implicated a green Jeep Cherokee with a partial license plate number of 341. The officers testified that the "numbers were inverted," because the license plate sequence on the green Jeep Cherokee owned by defendant Key's girlfriend had a partial plate number of 431.

This evidence, coupled with each defendant's own highly self-inculpating confession that was properly admitted against the defendant who made the statements, provided strong evidence of guilt from which the jury could convict these defendants. In light of this overwhelming evidence of guilt, the prejudicial effect posed by the *Bruton* error was minimal, and therefore the *Bruton* error was harmless.

Under plain error review, reversal is only appropriate when the plain error that affected substantial rights "seriously affected the fairness, integrity, or public reputation of the proceedings" or when the defendant shows "actual innocence." In this case, for the same reasons that we find that defendants cannot show prejudice, defendants cannot show that the error "seriously affected the fairness, integrity, or public reputation of the proceedings" or that they are actually innocent. The properly admitted evidence of guilt, including each defendant's own highly self-inculpating confession as properly used against him, was sufficient to render the *Bruton* error harmless. Indeed, it would be the reversal of convictions for error that did not affect the judgment that would seriously affect " 'the

fairness, integrity or public reputation of the judicial proceedings.' "[51]

CONCLUSION

The Court of Appeals erred in reversing defendants' first-degree murder convictions. Defendants failed to object or move for a mistrial on *Bruton* grounds. Therefore, defendants failed to properly preserve the *Bruton* error for appeal. The Court of Appeals should have reviewed this unpreserved, constitutional error for plain error affecting defendants' substantial rights. Because defendants failed to show prejudice requiring reversal, actual innocence, or that the error seriously affected the fairness, integrity, or public reputation of the trial, reversal was not warranted in this case. Accordingly, we reverse the Court of Appeals judgment and reinstate defendants' first-degree murder convictions.

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

CAVANAGH, J. (*dissenting*). I believe that this case represents a textbook example of when separate trials or separate juries should be used. I agree with the majority that *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), was violated in this case. Defendants' Sixth Amendment Confrontation Clause rights were violated when the statements of each defendant's nontestifying codefendant were heard by the single jury at defendants' joint trial.

However, I disagree with the majority's conclusion that this violation was not plain error that affected

[51] *Carines*, *supra* at 773, quoting *Johnson*, *supra* at 470.

defendants' substantial rights. If the statements by each codefendant are not considered, the evidence is not overwhelming. No witness was able to identify who was actually responsible for the shooting. There were varying accounts of the vehicles involved in the shooting. And the jury's uncertainty about who was the shooter is evident in the jury's failure to convict *either* defendant of possession of a firearm during the commission of a felony.

Further, the effect on the jury of hearing each codefendant's unchallenged statements was great. See, e.g., *Bruton*, *supra* at 135-136. Each defendant's statements minimized any role he may have played and maximized the other defendant's role in the shooting. Moreover, hearing these unchallenged and inculpatory statements essentially rendered futile defendants' questioning of police officers, as well as contentions made during closing argument, that called into question the validity of the alleged statements made. The jury was unlikely to question the validity of the statements allegedly made when it heard that they were supported to some degree by statements made by each defendant's codefendant. Accordingly, I believe the *Bruton* violation was plain error that affected each defendant's substantial rights, and I would affirm the decision of the Court of Appeals and remand each case for its own new trial.

KELLY, J., concurred with CAVANAGH, J.

FEDERATED INSURANCE COMPANY v
OAKLAND COUNTY ROAD COMMISSION

Docket No. 126886. Argued October 19, 2005 (Calendar No. 5). Decided June 21, 2006.

Federated Insurance Company and its insured, Carl M. Schultz, Inc., brought an action in the Oakland Circuit Court against the Oakland County Road Commission, seeking remediation expenses for petroleum released on the defendant's property that migrated to the Schultz property. The court, Colleen A. O'Brien, J., granted summary disposition for the defendant on the basis that the action was not brought within the relevant period of limitations. The Court of Appeals, NEFF, P.J., and WILDER and KELLY, JJ., affirmed. 263 Mich App 62 (2004). The Attorney General, on behalf of the people of the state and the Department of Environmental Quality, filed an application in the Supreme Court for leave to appeal as an intervening appellant. The plaintiffs below then filed an application for leave to appeal after the deadline for filing an application for leave to appeal had expired. The Supreme Court granted the Attorney General's application, but denied the plaintiffs' application on the basis that it was untimely. 472 Mich 898 (2005).

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

Notwithstanding the Attorney General's broad statutory authority to intervene in cases, to do so there must be a justiciable controversy, which in this case requires an appeal by an aggrieved party. There is no justiciable controversy because the Attorney General does not represent an aggrieved party and because neither of the losing parties below chose to file a timely application for leave to appeal. Under such circumstances, the Supreme Court does not have the authority to hear the Attorney General's appeal. The appeal must be dismissed.

1. MCL 14.28 and MCL 14.101 provide the Attorney General with the authority to prosecute, defend, and intervene in certain actions. This case ceased to be an "action" when the losing plaintiffs below failed to file a timely application for leave to appeal

in the Supreme Court. The case ceased to be a justiciable controversy once the plaintiffs' deadline for filing a timely application for leave to appeal expired.

2. MCL 14.28 and 14.101 do not allow the Attorney General to prosecute an appeal from a lower court ruling unless an aggrieved party appeals.

Appeal dismissed.

Justice WEAVER, joined by Justices CAVANAGH and KELLY, dissenting, stated that the Attorney General, once he intervened, possessed the same right to appeal from the judgment of the Court of Appeals as any other party. Upon his proper intervention, the Attorney General had the authority to represent both the interests of the people and the interests of the Department of Environmental Quality in an appeal in the Supreme Court. The majority has incorrectly determined that the Attorney General may not intervene unless there is an "aggrieved party" pursuing an appeal. The majority's redefinition of "aggrieved party" to require a concrete and particularized injury imposes a higher threshold than prior Supreme Court definitions of "aggrieved party." To be an aggrieved party, a party merely must have some interest, pecuniary or otherwise. The majority effectively overrules without any explanation Michigan's longstanding precedent that recognized the Attorney General's broad authority to intervene and prosecute matters that involve a state interest. The Attorney General has authority to pursue this appeal on behalf of the people of Michigan and on behalf of the Department of Environmental Quality. Furthermore, this cost-recovery action is not barred by MCL 324.20140(1).

ACTIONS — ATTORNEY GENERAL — STANDING.

MCL 14.28 and 14.101, which provide the Attorney General authority to prosecute, defend, and intervene in certain actions, do not allow the Attorney General to prosecute an appeal from a lower court ruling unless an aggrieved party appeals.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Kathleen L. Cavanaugh* and *Robert P. Reichel*, Assistant Attorneys General, for the Attorney General.

Clark Hill PLC (by *Elizabeth Jolliffe* and *Paul C. Smith*) for the Oakland County Road Commission.

TAYLOR, C.J. At issue in this case is whether the Attorney General can appeal as an intervenor in this Court on behalf of the people and a state agency when the named losing parties did not themselves seek review in this Court. Notwithstanding the Attorney General's broad statutory authority to intervene in cases, we hold that to pursue such an appeal as an intervenor there must be a justiciable controversy, which in this case requires an appeal by an "aggrieved party." Because neither of the losing parties below filed a timely appeal, and because the Attorney General does not represent an aggrieved party for purposes of this case, there is no longer a justiciable controversy. Under such circumstances, the Attorney General may not independently appeal the Court of Appeals judgment. We therefore dismiss this appeal.

I. FACTS AND PROCEDURAL HISTORY

In 1988, Carl M. Schultz, Inc. (hereafter plaintiff), discovered that an underground storage tank and piping system located on its property had released petroleum into the soil. The Department of Natural Resources (DNR) directed plaintiff to take action to remedy this situation, and, in 1991, plaintiff began constructing an on-site treatment system. In 1992, the treatment system began operation, and, in 1993, the DNR approved plaintiff's site investigation work plan.

In 1991, defendant Oakland County Road Commission released petroleum on property adjacent to plaintiff's property. In 1992, plaintiff began to suspect that some of this petroleum had migrated onto its property. By 1995, the DNR concluded that at least some of the petroleum detected on plaintiff's property had originated from defendant's property. In 2000, plaintiff and

its insurer, Federated Insurance Company, filed a cost-recovery action against defendant pursuant to provisions of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.,* for the added costs associated with the cleanup of petroleum contaminants that had originated from defendant's property.

The trial court granted defendant's motion for summary disposition, concluding that the action was barred by the six-year limitations period found in the NREPA, and the Court of Appeals affirmed. 263 Mich App 62; 687 NW2d 329 (2004). On behalf of the people of the state and the Michigan Department of Environmental Quality (MDEQ) (the successor to the DNR), which had never been a party in the trial court proceedings or in the appeal in the Court of Appeals, the Attorney General then filed a timely application for leave to appeal in this Court as an intervening appellant. Plaintiffs, however, did not file a timely application for leave to appeal even though they "lost" under the Court of Appeals opinion. This Court granted the Attorney General's application for leave to appeal and denied plaintiffs' cross-application for leave to appeal. 472 Mich 898 (2005).[1]

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[1] Plaintiffs filed an application for leave to appeal in this Court after the deadline for filing an application for leave to appeal had expired. Plaintiffs sought to avoid MCR 7.302(C)(3) ("[l]ate applications will not be accepted") by designating the appeal as a cross-application for leave to appeal. Plaintiffs' "cross-application" fully supported the Attorney General-intervening appellant's application for leave to appeal. But, plaintiffs cannot be considered cross-appellants where their position is the same as that taken by the Attorney General-intervening appellant. Therefore, although plaintiffs referred to their application for leave to appeal as a cross-application, it was actually an untimely application for leave to appeal. This is why we denied plaintiffs' application.

II. STANDARD OF REVIEW

Defendant argues that the Attorney General lacks the authority to intervene to appeal the judgment of the Court of Appeals. Because this issue implicates the constitutional authority of the judiciary and the Attorney General, we review it de novo. *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005).

III. ANALYSIS

Following adjudication in the Court of Appeals that resulted in a published opinion, where the parties were plaintiffs Federated Insurance Company and Carl M. Schultz, Inc., and defendant Oakland County Road Commission, the Attorney General, representing the people of the state and the MDEQ, has now sought to appeal in this Court, even though neither of the losing parties in the Court of Appeals sought timely leave to appeal. The Attorney General argues that the Court of Appeals misconstrued MCL 324.20140(1)(a), a statute that the MDEQ frequently litigates. Resolution of whether this intervention and appeal are permissible implicates standing, the "aggrieved party" concept, and what constitutes a justiciable controversy.

As we indicated in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004), citing *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001), standing refers to the right of a party plaintiff *initially* to invoke the power of the court to adjudicate a claimed injury in fact. In such a situation it is usually the case that the defendant, by contrast, has no injury in fact but is compelled to become a party by the plaintiff's filing of a lawsuit. In appeals, however, a similar interest is vindi-

cated by the requirement that the party seeking appellate relief be an "aggrieved party" under MCR 7.203(A) and our case law.[2] This Court has previously stated, "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." *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948), citing *In re Estate of Matt Miller*, 274 Mich 190, 194; 264 NW 338 (1936).[3] An aggrieved party is not one who is merely disappointed over a certain result.[4] Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking

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[2] See, e.g., *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 225; 249 NW2d 29 (1976) (COLEMAN, J.), citing *In re Critchell's Estate*, 361 Mich 432; 105 NW2d 417 (1960). " 'A party who could not benefit from a change in the judgment has no appealable interest.' " " '[O]f course one may not appeal from a judgment, order or decree, in his favor by which he is not injuriously affected.' " *Id*. at 226, quoting 4 Am Jur 2d, Appeal and Error, §§ 182, 184. See also *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948) (" 'It is a cardinal principle, which applies alike to every person desiring to appeal, that he must have an interest in the subject-matter of the litigation. Otherwise, he can have no standing to appeal.' ") (citation omitted).

[3] The Attorney General does not fit within this definition of an "aggrieved party." Thus, contrary to the dissent's claim, our holding is not "unprecedented." The dissent further asserts that we are legislating from the bench a new restriction on the Attorney General's authority to intervene. Nothing could be further from the truth. Our holding is fully supported by constitutional principles and prior case law.

[4] The dissent contends that the Attorney General has standing because the MDEQ, the state agency that the Attorney General is representing, is "interested in the proper enforcement of the NREPA . . . ." *Post* at 307. However, if an interest in the proper enforcement of a statute were enough to confer standing, the Attorney General would always have standing because the people of Michigan and state agencies are always interested in the proper enforcement of statutes. Contrary to the dissent's contention, an interest in the proper enforcement of a statute has never before been thought sufficient to confer standing; instead, a concrete and particularized injury is required to confer standing.

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.[5]

With regard to the necessity of a justiciable controversy, it derives from the constitutional requirement that the judiciary is to exercise the "judicial power" and only the "judicial power."

In giving meaning to what the "judicial power" is in our Constitution, we explained in *Nat'l Wildlife Federation, supra* at 614-615:

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.
>
> Perhaps the most critical element of the "judicial power" has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a "particularized" or personal injury. [Citation omitted.][6]

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[5] *Tachiona v United States*, 386 F3d 205, 210-211 (CA 2, 2004). See also *Kootenai Tribe of Idaho v Veneman*, 313 F3d 1094, 1109 (CA 9, 2002).

[6] The dissent once again also accuses us of "further expand[ing] [our] judicial power . . . ." *Post* at 312 n 18. However, as this Court in *Nat'l Wildlife, supra* at 617-618, said:

The Attorney General's authority to intervene is found in two statutes.

MCL 14.101 states:

> The Attorney General of the State is hereby authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the State whenever such intervention is necessary in order to protect any right or interest of the State, or of the people of the State. Such right of intervention shall exist at any stage of the proceeding, and the Attorney General shall have the same right to prosecute an appeal, or to apply for a re-hearing or to take any other action or step whatsoever that is had or possessed by any of the parties to such litigation.

Similarly, MCL 14.28 states:

> The Attorney General shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in

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> [T]he exact opposite is true. By its adherence to *Lee*, the majority opinion rejects a constitutional regime in which the judicial branch can be invested with extra-constitutional powers at the expense of the other branches, in particular the executive. One need only be a casual student of government to recognize the extraordinary rarity of an institution of government, such as this Court, choosing, on the basis of constitutional objection, *not* to exercise a power conferred upon it by another branch of government. It is impenetrable reasoning to equate such an *abnegation* of power with an *enhancement* of power. [Emphasis in original.]

> any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

These statutes purport to provide the Attorney General with the authority to prosecute, defend, and intervene in certain "actions." But, this case ceased to be an "action" when the losing parties below (plaintiffs) failed to file a timely application for leave to appeal in this Court. Once plaintiffs' deadline for filing a timely application for leave to appeal expired, the case ceased to be a justiciable controversy.[7] To the extent one might read MCL 14.101 or MCL 14.28 as allowing the Attorney General to prosecute an appeal from a lower court ruling without the losing party below also appealing, and without the Attorney General himself being or representing an aggrieved party, the statutes would exceed the Legislature's authority because, except where expressly provided,[8] this Court is not constitutionally authorized to hear nonjusticiable controver-

[7] If plaintiffs had filed a timely application for leave to appeal, there would obviously have been a justiciable controversy in which the Attorney General could have intervened. Consistent with the principles of appellate standing, where the Attorney General intervenes solely to advocate a general position on the law, the intervention statutes on which the Attorney General relies confer on the Attorney General only a form of "statutory amicus," not true party, status. Thus, if the Attorney General had sought to intervene in a timely filed appeal by a party with appellate standing—not to represent a client that had suffered an adverse decision of a lower court but only to advance a perspective on the law—the Attorney General's role would have been limited to advocating the state's position on the law. Whatever role the Attorney General may properly play in an appeal in which he intervenes, the precondition for intervention is that there must be a timely appeal by a party that has appellate standing as outlined in this opinion.

[8] See, e.g., Const 1963, art 3, § 8, which permits the legislative and executive branches of government to request an opinion of this Court on the constitutionality of legislation not yet in effect.

sies.[9] *Nat'l Wildlife Federation, supra* at 614-615. To give these statutes such a reading would contravene an operative presumption of this Court that we presume constitutional intent on the part of the Legislature. See *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

IV. RESPONSE TO THE DISSENT

The dissent relies on two cases in arguing that the Attorney General should be allowed to appeal in this Court notwithstanding the fact that the losing parties below did not file a timely appeal: *Mundy v McDonald*, 216 Mich 444; 185 NW 877 (1921), and *Russell v Peoples Wayne Co Bank of Dearborn*, 275 Mich 415; 266 NW 401 (1936). These cases, however, are not inconsistent with our holding today; nor do they support the holding the dissent would adopt.

In *Mundy*, a circuit judge was sued in circuit court for libel. The Attorney General's office, on behalf of the circuit judge, sought dismissal of the lawsuit. On appeal, this Court rejected the argument that the Attorney General's office could not defend a circuit judge who had been sued. The Attorney General's office represented an actual defendant party in that lawsuit.

In *Russell*, a receiver of the Detroit Banker's Company filed a lawsuit seeking to have liquidating receivers appointed for other banks. The Attorney General's office intervened in the case and moved to dismiss the lawsuit. On appeal, the plaintiff argued that the Attor-

[9] Although the MDEQ might well have an interest in how MCL 324.20140(1)(a) is interpreted, it has not yet suffered a concrete injury on the basis of the alleged misconstruction of the statute. Moreover, no reason exists to prevent the Attorney General from filing a lawsuit on behalf of the MDEQ once the MDEQ has suffered such an injury, e.g., is denied reimbursement costs.

ney General should not have been permitted to move to dismiss the case because the public had no interest in the litigation. This Court rejected the plaintiff's claim because the banking commissioner became a "party" when the plaintiff sought to have receivers appointed. Again, the Attorney General's office represented an actual party in the litigation.

Each of these cases is inapposite because it presented a justiciable controversy wherein the Attorney General represented an actual party. In the case at bar, however, no justiciable controversy exists and the Attorney General does not represent a party to the dispute. Moreover, none of these cases cited by the dissent involved the Attorney General attempting to appeal a decision of a lower court without the losing party below also appealing.

Our opinion does not overrule any cases. Under our holding, the Attorney General remains free to prosecute actions on behalf of the state and may appear on behalf of state parties.[10] Moreover, it is not inconsistent with the Attorney General's authority to intervene in "actions." As previously explained, we merely hold that the Attorney General's authority to intervene does not include the ability to appeal a nonjusticiable case. Given the untethered language in the dissent, one has to wonder if there is any circumstance in which the dissent would conclude that the Attorney General would not have the authority to intervene and pursue an appeal no matter how unrelated the Attorney General's "interest" may be to traditional standing considerations.

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[10] Indeed, contrary to the dissent's contention, we are not holding that the Attorney General cannot appeal to this Court unless the named losing party also appeals; rather, we are holding that the Attorney General cannot appeal unless some aggrieved party appeals. There may be instances where the Attorney General himself or a party he is representing is aggrieved. This, however, is not such a case.

Contrary to the dissent's contention, the issue of the Attorney General's authority to independently intervene and appeal the Court of Appeals opinion was raised by the defendant in its brief on appeal; it was argued at oral argument, and it was briefed by the Attorney General and defendant in supplemental briefs. Finally, contrary to the dissent's contention, we are not expanding the standing theory; rather, our holding is consistent with our prior case law as cited in n 2 of this opinion.

V. CONCLUSION

We conclude that there is no justiciable controversy because the Attorney General does not represent an aggrieved party and because neither of the losing parties below chose to file a timely application for leave to appeal. Under such circumstances, this Court does not have the authority to hear the Attorney General's appeal. Therefore, we dismiss the appeal.

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

WEAVER, J. (*dissenting*). I dissent from the majority's holding that the Attorney General may not intervene in this case involving cost recovery for environmental contamination caused by defendant, Oakland County Road Commission. The majority's holding imposes unprecedented and unsupportable limitations on the Attorney General's ability to defend the interests of the people of the state of Michigan and to defend the interests of the Michigan Department of Environmental Quality (MDEQ) in the enforcement of Michigan law.

I also dissent from the majority's unprecedented narrowing of who is an "aggrieved party" for the purpose of invoking the appellate jurisdiction of this Court. The question of what constitutes an "aggrieved party" was not raised or briefed by the parties. Yet by reference to inapplicable federal law, the majority redefines who is an "aggrieved party," stating:

> [T]o 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. [*Ante* at 291-292.]

With this holding, the majority expands its novel standing theory adopted in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), by applying it to parties seeking to invoke this Court's appellate jurisdiction.

In this case on July 13, 2004, the Court of Appeals held that plaintiff's cost-recovery action against defendant was barred by MCL 324.20140(1), the statute of limitations of the Natural Resources and Environmental Protection Act (NREPA).[1] After the Court of Appeals rendered its decision, the Attorney General filed his motion to intervene on behalf of the people of Michigan and the MDEQ. Within the period specified for appeals,[2] the Attorney General appealed the decision of the Court of Appeals in this Court.

In response to the Attorney General's application, defendant Oakland County Road Commission challenges the Attorney General's standing to intervene in

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[1] *Federated Ins Co v Oakland Co Rd Comm,* 263 Mich App 62; 687 NW2d 329 (2004).

[2] MCR 7.302(C).

the case.[3] This Court granted the Attorney General's application, directing the parties to include among the issues to be briefed:

> (1) whether the work initiated in 1991 was an "interim response activity" that did not trigger the statute of limitations provision set out in MCL 324.20140(1)(a) rather than a "remedial action" that must first be "approved or selected" by the Department of Environmental Quality; and (2) whether the initiation of work for one release of hazardous substances begins the running of the period of limitations for any subsequent or unrelated release of hazardous substances. [472 Mich 898 (2005).]

No reference was made in this Court's grant order regarding whether the Attorney General represents an "aggrieved party."

I would hold that once the Attorney General intervened, he possessed the same right to appeal the decision of the Court of Appeals that was had or possessed by any party.[4] At the time the Attorney General appealed, plaintiff, Federated, still possessed the right to appeal from the decision of the Court of Appeals. Contrary to the conclusion of the majority, it is irrelevant to the authority of the Attorney General to maintain this appeal on behalf of the people and the MDEQ that Federated did not also perfect an appeal in a timely manner.

I would hold that upon his proper intervention and timely appeal, the Attorney General had the authority to represent the people of Michigan and the MDEQ because both parties are "aggrieved parties" within the traditional understanding of the term. With its decision today, however, the majority not only imposes unprec-

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[3] Federated Insurance Company filed an untimely cross-application for leave to appeal, which this Court denied. 472 Mich 898 (2005).

[4] MCL 14.101.

edented limits on the authority of the Attorney General to perform his statutory obligations, it also redefines and narrows who will be deemed an "aggrieved party" for the purposes of invoking appellate court jurisdiction.

For the reasons below, I would reverse the decision of the Court of Appeals because the Attorney General has the authority to represent the people of Michigan and the MDEQ in this appeal. Further, I would hold that the cost-recovery action was not barred by MCL 324.20140(1).

I

The law enacted by the Legislature is very clear regarding the power of the Attorney General to litigate on behalf of the interests of the people of Michigan. Pursuant to MCL 14.28, the Attorney General may,

> when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.[5]

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[5] MCL 14.28 states in full:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

MCL 14.101 provides that the Attorney General's power to intervene exists

> at any stage of the proceeding, and the Attorney General shall have the same right to prosecute an appeal, or to apply for a re-hearing or to take any other action or step whatsoever that is had or possessed by any of the parties to such litigation.[6]

This Court, including the members of this majority, has broadly construed the authority of the Attorney General to litigate on behalf of the people of the state. *In re Certified Question (Wayne Co v Phillip Morris, Inc)*, 465 Mich 537, 543-545; 638 NW2d 409 (2002); *Mundy v McDonald*, 216 Mich 444, 450-451; 185 NW 877 (1921). This Court, including this majority, has stated that "courts should accord substantial deference to the Attorney General's decision that a matter constitutes a state interest." *In re Certified Question, supra* at 547.

Until this majority's decision today, the only limitations on the Attorney General's power to intervene have been that the intervention must advance a state, rather than a merely local, interest,[7] and the Attorney General's intervention must not be "clearly inimical to the public interest . . . ."[8] But now this majority ignores

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[6] MCL 14.101 states in full:

> The Attorney General of the State is hereby authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the State whenever such intervention is necessary in order to protect any right or interest of the State, or of the people of the State. Such right of intervention shall exist at any stage of the proceeding, and the Attorney General shall have the same right to prosecute an appeal, or to apply for a rehearing or to take any other action or step whatsoever that is had or possessed by any of the parties to such litigation.

[7] *Attorney General ex rel Lockwood v Moliter*, 26 Mich 444, 447 (1873).

[8] *People v Johnston*, 326 Mich 213, 217; 40 NW2d 124 (1949).

its own precedent and the express statutory authority provided by MCL 14.101 that permits the Attorney General to intervene on behalf of a state interest at any time. The majority legislates from the bench a new restriction on the Attorney General's authority to intervene by premising it on a losing party's decision to pursue or not pursue an appeal.

The majority declares that without a losing party, there is no justiciable controversy. But as this Court stated in *Mundy, supra* at 451, "It is too narrow a view of the case to say that the people of this State are not interested in the defense in a case of this nature, which involves the purely legal question . . . ." *Mundy, supra,* involved an action for libel against a circuit judge. The Attorney General intervened and filed a motion to dismiss the case on the grounds that the judge was acting in his official capacity when the allegedly libelous statement was made. The party alleging libel against the judge challenged the Attorney General's authority to intervene to address a purely legal question. This Court in *Mundy, supra* at 451, affirmed the authority of the Attorney General to intervene and stated:

> Certainly if the people of the State can be said to be interested in a criminal proceeding, they are, we think, equally interested in this action growing out of it, depending as it does entirely upon whether the acts of the defendant complained of were judicial acts.

In this case, the legal issue involves the proper interpretation of a statute of limitations within the NREPA. The resolution of this question affects the proper allocation of costs for response activities for environmental contamination. The Legislature has very clearly provided that a person who causes environmental contamination should pay for its cleanup. MCL 324.20102(f) provides that "liability for response activities to address

environmental contamination should be imposed upon those persons who are responsible for the environmental contamination." The logic of *Mundy* is decisive in this case: Because the people of Michigan through their Legislature have expressed an interest in the proper allocation of response activity costs for environmental cleanup, it is "too narrow a view" to conclude that the people would not also be interested in the proper interpretation of a statute that affects the allocation of those costs. The majority's attempt to distinguish *Mundy* on the ground that the Attorney General represented an "actual party" in that case is unpersuasive. The majority fails to grasp that the people of Michigan became an "actual party" once the Attorney General intervened in a timely manner on their behalf.

I would conclude that the Attorney General may intervene on behalf of the people of Michigan to seek a proper interpretation of state law.

II

In addition to having the authority to intervene on behalf of the people of Michigan, the Attorney General has the authority to intervene in this matter on behalf of the MDEQ. The MDEQ is a department of the executive branch. MCL 14.29 provides that "[i]t shall be the duty of the attorney general, at the request of the governor . . . to prosecute and defend all suits relating to matters connected with [the Governor's] departments."

This Court, including the members of this majority, has specifically recognized that the Attorney General's authority to litigate in matters of state interest necessarily includes the authority to litigate "on behalf of the state's political subdivisions in matters of state interest." *In re Certified Question, supra* at 545, citing

Michigan ex rel Kelley v CR Equip Sales, Inc, 898 F Supp 509, 514 (WD Mich, 1995). Further, the NREPA expressly provides that the Attorney General may commence a civil action "on behalf of the state" seeking relief, including "[a]ny other relief necessary for the enforcement of this part." MCL 324.20137(1)(k).[9] The

[9] MCL 324.20137(1) provides in full:

> In addition to other relief authorized by law, the attorney general may, on behalf of the state, commence a civil action seeking 1 or more of the following:
>
> (a) Temporary or permanent injunctive relief necessary to protect the public health, safety, or welfare, or the environment from the release or threat of release.
>
> (b) Recovery of state response activity costs pursuant to section 20126a.
>
> (c) Damages for the full value of injury to, destruction of, or loss of natural resources resulting from the release or threat of release, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release or threat of release.
>
> (d) A declaratory judgment on liability for future response costs and damages.
>
> (e) A civil fine of not more than $1,000.00 for each day of noncompliance without sufficient cause with a written request of the department pursuant to section 20114(1)(h). A fine imposed under this subdivision shall be based on the seriousness of the violation and any good faith efforts of the person to comply with the request of the department.
>
> (f) A civil fine of not more than $10,000.00 for each day of violation of this part or a rule promulgated under this part. A fine imposed under this subdivision shall be based upon the seriousness of the violation and any good faith efforts of the person to comply with this part or a rule promulgated under this part.
>
> (g) A civil fine of not more than $25,000.00 for each day of violation of a judicial order or an administrative order issued pursuant to section 20119, including exemplary damages pursuant to section 20119.

majority's opinion, however, fails to recognize or analyze the interest of the MDEQ in this case.

The MDEQ has a tangible interest in the resolution of this case. In 1995, the MDEQ notified defendant, Oakland County Road Commission, that the department had identified and confirmed a release of "free product"[10] from an underground storage tank on defendant's property that had migrated to plaintiff's property. The MDEQ's letter refers to plaintiff's property as the CMS "facility."[11] The MDEQ letter states that the treatment system constructed to remediate the plaintiff's 1988 separate release of hazardous substances at the CMS facility had been activated in August 1992. The system had removed hazardous substances associated with the plaintiff's release at the CMS facility through approximately June 1993. The letter indicates that from January 1994 through September 1994, no hazardous substances had been observed in the plaintiff's treatment system.

(h) Enforcement of an administrative order issued pursuant to section 20119.

(i) Enforcement of information gathering and entry authority pursuant to section 20117.

(j) Enforcement of the reporting requirements under section 20114(1), (3), and (6).

(k) Any other relief necessary for the enforcement of this part.

[10] " 'Free product' means a hazardous substance in a liquid phase equal to or greater than 1/8 inch of measurable thickness that is not dissolved in water and that has been released into the environment." MCL 324.20101(r).

[11] " 'Facility' means any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located." MCL 324.20101(o).

However, in November 1994, the letter states that the CMS treatment system encountered hazardous substances again. After an investigation by the department staff, it was confirmed that the hazardous substances appearing in CMS's treatment system were different in kind from that which had been released by the plaintiff. The investigation confirmed that the new hazardous substances that had appeared in plaintiff's treatment system derived from a separate release from defendant's facility.

The record does not suggest that the MDEQ's investigation of the separate release from defendant's facility is complete. Indeed, the letter recommends that several actions be taken by defendant to address the hazardous substances, and that remedial action for the confirmed April 5, 1991, release at the defendant's facility be continued. The letter recommends that remedial actions taken by the defendant be coordinated with those already occurring at the CMS facility. The letter also provides that the letter "should not be construed as a sign-off on all site investigations or corrective actions that may be required at [defendant's] site." In other words, the MDEQ has an interest in ongoing investigations and remediation of environmental contamination from defendant's facility.

The MDEQ's interest in this case derives from its enforcement responsibility under the NREPA.[12] The NREPA provides that the owner or operator of a facility "is responsible for an activity causing a release" of hazardous substances into the environment. MCL 324.20126(1)(a). MCL 324.20126a(1) provides that a person who is liable for a release is jointly and severally liable for the following:

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[12] MCL 324.20102(m).

> (a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity . . . .
>
> (b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgate under this part.
>
> (c) Damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.

The letter from the MDEQ to defendant reveals that there was a confirmed release of hazardous substances into the environment at defendant's facility in April 1991, but that the release from defendant's facility did not appear in plaintiff's treatment system until November 1994. Under the NREPA, defendant is jointly and severally liable for the costs associated with defendant's release. MCL 324.20126a(1). The MDEQ is and should be interested in the proper enforcement of the NREPA against defendant.

The Court of Appeals, however, concluded that this cost-recovery action against defendant was barred by the statute of limitations because more than six years had passed since plaintiff began construction of its treatment system in November 1991. The NREPA statute of limitations at issue provides that the period of limitations

> [f]or the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a), (b), or (c), [is] within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility . . . . [MCL 324.20140(1)(a).]

Plaintiff initiated its cost-recovery action against defendant in November 2000, within six years from the date that it was confirmed that defendant's separate release had comingled with plaintiff's. The Attorney General, on behalf of the MDEQ, argues that the Court of Appeals conclusion that the period ran from November 1991, before plaintiff was even aware of defendant's separate release, was wrong. Therefore, the Attorney General intervened on behalf of the MDEQ and filed this timely application for leave to appeal.

The Attorney General has the authority to represent the MDEQ's interest in challenging the Court of Appeals interpretation of the NREPA statute of limitations. The MDEQ is conducting an ongoing investigation into the separate release of hazardous substances for which defendant is liable at defendant's separate facility. There is no evidence in the record that there has been any "initiation of physical on-site construction activities for the remedial action selected or approved by the department" at defendant's facility.[13] It is notable that plaintiff's treatment facility was constructed to remediate the contamination caused by plaintiff at plaintiff's separate facility. It defies common sense to commence the running of the period of limitations from the initiation of construction activities at plaintiff's facility, when those activities preceded any confirmation of and perhaps even any actual comingling of hazardous substances from defendant's separate release and facility.

The majority fails to analyze the independent interest of the MDEQ in this matter. Instead, it ignores it and suggests that the Attorney General's authority to intervene must be predicated on a losing party's decision to appeal. This reasoning ignores this Court's prior

[13] MCL 324.20140(1)(a).

case law that recognized that the interest of a state department in the subject matter of a lawsuit justifies the Attorney General's participation in the suit on behalf of that department.

In *Russell v Peoples Wayne Co Bank of Dearborn,* 275 Mich 415; 266 NW 401 (1936), this Court held that the Attorney General could intervene on behalf of the state banking commissioner in a matter involving agreements for the liquidation of certain banks. The state banking commissioner had approved the agreements, but when a dispute later arose between the parties, the Attorney General intervened on behalf of the banking commissioner. This Court rejected a challenge to the authority of the Attorney General to intervene, stating:

> [T]he suits at bar grew out of the mentioned agreements, approved by the banking commissioner, and assertion of right by the Reconstruction Finance Corporation as a creditor and, therefore, the State, through its banking commissioner, with power over banks and banking, had an interest in the subject-matter of the litigation.
>
> The liquidation by agreement was consented to by the banking commissioner and, inasmuch as liquidation of a State bank is under control of the banking commissioner, when plaintiff sought by the suit for the appointment of liquidating receivers rather than under the approved agreements, the banking commissioner was again a party in interest.
>
> The attorney general not only had a right to intervene but to move to dismiss the bills for want of jurisdiction in the court to appoint a receiver. [*Russell, supra* at 418-419.]

As in *Russell,* I would hold that the Attorney General has the authority to intervene and represent the interests of the MDEQ in this case. The majority's attempt to distinguish *Russell* on the ground that the Attorney General in that case represented an "actual party"

again misses the mark, because in this case the MDEQ was an actual party once the Attorney General intervened.

The people, through the Legislature, have expressed in the NREPA a strong interest in appropriate response activities with respect to releases of hazardous substances[14] and in the proper allocation of liability[15] for such releases. With respect to the allocation of response activity costs, MCL 324.20102(f) provides that "liability for response activities to address environmental contamination should be imposed upon those persons who are responsible for the environmental contamination." The statute further provides at MCL 324.20126a(7) that the "costs recoverable under this section may be recovered in an action brought by the state or any other person."

The MDEQ is charged with the enforcement of the NREPA.[16] The Attorney General, on behalf of the MDEQ, has standing to challenge the Court of Appeals interpretation of the six-year statute of limitations at issue in this case. The Court of Appeals holding that the

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[14] MCL 324.20102(c) provides:

> That it is the purpose of this part to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, and welfare, or to the environment from environmental contamination at facilities within the state.

[15] MCL 324.20102(e) provides:

> That the responsibility for the cost of response activities pertaining to a release or threat of release and repairing injury, destruction, or loss to natural resources caused by a release or threat of release should not be placed upon the public except when funds cannot be collected from, or a response activity cannot be undertaken by, a person liable under this part.

[16] MCL 324.20102(m).

limitations period commenced running when plaintiff began construction of a treatment system fails to recognize that plaintiff's construction began before plaintiff was even aware of the release at defendant's site and years before comingling of defendant's release with the plaintiff's was confirmed by the MDEQ. The Court of Appeals interpretation of the statute of limitations at issue undermines the MDEQ's ability to enforce the NREPA's cost-recovery provisions against defendant.

III

Even though the specific issue of who qualifies as an "aggrieved party" was not raised or briefed by the parties, the majority chooses this case to redefine and limit who is an "aggrieved party" for the purpose of invoking appellate court jurisdiction.[17] The majority uses this case to expand the erroneous standing theory that it adopted in *Nat'l Wildlife, supra,*[18] by applying it

[17] Even though the jurisdiction of the Court of Appeals is not at issue in this case, the majority seizes this opportunity to also redefine who qualifies as an "aggrieved party" under MCR 7.203(A), the court rule defining the jurisdiction of the Court of Appeals. At issue in this case, however, is this Court's jurisdiction over appeals. This Court's jurisdiction is governed by MCR 7.301(A). In relevant part, MCR 7.301(A)(2) simply provides that "[t]he Supreme Court may . . . review by appeal a case . . . after decision by the Court of Appeals." The applicable court rule thus provides no foundation for the majority's holding in this case.

[18] In *Nat'l Wildlife,* the same majority of four overruled 30 years of precedent when it held that the Legislature may not confer standing on "any person" under the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*. Under the majority's *Nat'l Wildlife* decision, citizen standing is controlled by a test the majority imported from federal law and that is premised on federal constitutional provisions that do not exist in Michigan. As I stated in *Nat'l Wildlife, supra* at 654:

> While pretending to limit its "judicial power," the majority's application of *Lee's* judicial standing test in this case actually expands the power of the judiciary at the expense of the Legisla-

to parties appealing from a trial court judgment. The majority requires that to have the right to appeal, a party must be an "aggrieved party," and to be "aggrieved"

> 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. [*Ante* at 291-292.]

For this new test, the majority cites two inapplicable federal cases that address the limitation on federal court jurisdiction imposed by the case or controversy requirement of the federal constitution, art III, § 2. In *Nat'l Wildlife,* the same majority superimposed the same inapplicable federal constitutional constraints on the standing of Michigan citizens in state court actions. As I previously addressed in *Nat'l Wildlife,* art III, § 2 constraints do not apply to state court jurisdiction. See *Nat'l Wildlife, supra* at 660-661 (WEAVER, J., concurring in result only.) This is true at both the trial court and appellate court levels.

The majority's redefinition of "aggrieved party" to require a "concrete and particularized injury" imposes a higher threshold than this Court's previous articulations of "aggrieved party." This Court has previously held that to be an "aggrieved party" simply requires that a party have some interest, "pecuniary or other-

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ture by undermining the Legislature's constitutional authority to enact laws that protect natural resources. [WEAVER, J., concurring in result only.]

In this case, the majority further expands its judicial power, this time at the expense of the power properly vested in the Attorney General as representative of the executive branch and the people of Michigan.

wise," in the subject matter of a case. See *In re Critchell's Estate,* 361 Mich 432, 450; 105 NW2d 417 (1960). *In re Critchell* recognized that an interest may be something other than pecuniary, for example, in cases involving the adoption of a child. *Id.* at 449, citing *In re Draime*, 356 Mich 368; 97 NW2d 115 (1959). The majority's new test for invoking appellate jurisdiction unnecessarily heightens the burden of all parties who pursue an appeal.

The majority's decision severely erodes the authority of the Attorney General to defend state interests in this Court. Without analysis, the majority concludes that neither the MDEQ nor the people of the state of Michigan are aggrieved by the decision of the Court of Appeals under the majority's new test. The majority implies that the people of Michigan and the MDEQ's interests are "tangential" and declares that despite the Attorney General's timely and proper intervention on behalf of state interests in this case, the Attorney General cannot appeal to this Court unless a losing party also files a timely appeal. The majority states:

> To the extent one might read MCL 14.101 or MCL 14.28 as allowing the Attorney General to prosecute an appeal from a lower court ruling without the losing party below also appealing, and without the Attorney General himself being or representing an aggrieved party, the statutes would exceed the Legislature's authority because, except where expressly provided, this Court is not constitutionally authorized to hear nonjusticiable controversies. [*Ante* at 294-295.]

As explained in the preceding parts of this dissent, in the context of this case, the people of Michigan and the MDEQ have clear and defined interests in the outcome of this appeal. The interests of the people of Michigan and the MDEQ in this case are sufficient under Michigan's prior case law to make them "aggrieved parties."

As discussed above, both the people of Michigan and the MDEQ have some interest, pecuniary or otherwise, in the outcome of this case. See, e.g., *In re Critchell*, *supra* at 450. Further, the Attorney General intervened in a timely manner to represent those interests and has the statutory authority to "prosecute and defend all actions in the supreme court, in which the state shall be interested . . . ." MCL 14.28.

Yet, the majority fails to analyze or address the state's interests in this case. Instead, the majority opines that there is no "justiciable controversy" before this Court because Federated did not appeal properly. *Ante* at 294. In so holding, the majority overrules without any explanation Michigan's longstanding precedent that recognized the Attorney General's broad authority to intervene, prosecute, and defend matters of state interest in the Supreme Court.[19]

IV

In order to represent the interests of the people of Michigan or the MDEQ in this litigation, the majority effectively requires the Attorney General to convince another party, over whom the Attorney General has no control and who the Attorney General does not represent, to pursue an appeal. There are many reasons that a party might not pursue an appeal, and it is wrong to hinge the defense of the interests of the people of Michigan and those of the MDEQ on the decisions or strategies of another party. Moreover, it is wrong for the majority to use this case to limit who is an "aggrieved party" for the purpose of invoking appellate court

[19] See, e.g., *In re Certified Question, supra*; *People v Johnston, supra*; *Mundy, supra*; *Attorney General ex rel Lockwood*, *supra*; *Russell*, *supra*.

jurisdiction, especially since the definition of "aggrieved party" was neither raised nor briefed by the parties.

For these reasons, I dissent and would hold that the Attorney General has the authority, on behalf of the people of Michigan and on behalf of the MDEQ, to pursue this appeal.

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

PEOPLE v DERROR
PEOPLE v KURTS

Docket Nos. 129269, 129364. Argued January 10, 2006 (Calendar No. 3). Decided June 21, 2006.

Delores M. Derror was charged in the Grand Traverse Circuit Court with operating a motor vehicle while under the influence of marijuana (a schedule 1 controlled substance) and with causing a motor vehicle accident resulting in death and serious impairment of body function while driving under the influence of marijuana, whose psychoactive ingredient is tetrahydrocannabinol (THC). The court, Philip E. Rogers, J., determined that the substance in her blood, 11-carboxy-THC, is not a schedule 1 controlled substance, determined that a jury could find from that substance in her blood that she had THC in her body at the time of the accident, and required the prosecution to establish at trial that the presence of THC in Derror's blood was a proximate cause of the accident for the purposes of the charges of causing a motor vehicle accident resulting in death or serious impairment of body function. The prosecution appealed in the Court of Appeals by leave granted.

Dennis W. Kurts was charged in the Jackson Circuit Court with operating a motor vehicle while under the influence of marijuana. The court, Chad C. Schmucker, J., dismissed the charge, ruling that there was insufficient evidence for a jury to find that Kurts was operating a motor vehicle while under the influence of marijuana on the basis of the presence of 11-carboxy-THC in his blood. The prosecution appealed in the Court of Appeals by leave granted.

The Court of Appeals, COOPER, P.J., and JANSEN and HOEKSTRA, JJ., consolidated the appeals and, on reconsideration, affirmed in part, reversed in part, and remanded for further proceedings with regard to each appeal. 268 Mich App 67 (2005). The Court affirmed the trial courts' rulings that 11-carboxy-THC is not a schedule 1 controlled substance. In *Kurts*, the Court also reversed the trial court's dismissal of the charge under MCL 257.625(8), which prohibits the operation of a motor vehicle with any amount of a schedule 1 controlled substance in the body, concluding that, although only 11-carboxy-THC was found in the defendant's

blood, evidence existed from which a jury could conclude that the defendant had THC in his blood at the time that he was driving, because Kurts admitted that he had smoked marijuana before he was arrested and expert testimony revealed that the presence of 11-carboxy-THC in a person's body conclusively establishes prior ingestion of THC. In *Derror*, the Court also held that the prosecution need only prove that the defendant's driving, not her intoxication, was the proximate cause of the accident, but also held that the prosecution must prove that the defendant knew that she might be intoxicated. The prosecution in both cases sought leave to appeal the determinations that 11-carboxy-THC is not a schedule 1 controlled substance. In *Derror*, the prosecution also sought leave to appeal the Court of Appeals determination that, in a prosecution involving MCL 257.625(8), a prosecutor must prove that the defendant knew that he or she might be intoxicated. The Supreme Court granted both applications and ordered that the cases be submitted together. 474 Mich 886 (2005); 474 Mich 887 (2005).

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

1. 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212 of the Public Health Code. A person operating a motor vehicle with 11-carboxy-THC in his or her system may be prosecuted under MCL 257.625(8), which prohibits the operation of a motor vehicle by a person with any amount of a schedule 1 controlled substance in his or her body.

2. In a prosecution under MCL 257.625(8), a prosecutor is not required to prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated, but must prove only that the defendant had any amount of a schedule 1 controlled substance in his or her body. The judgment of the Court of Appeals in both cases must be reversed, and the matters must be remanded to their respective trial courts for further proceedings consistent with the opinion of the Supreme Court.

3. While MCL 333.7212(1)(c) does not specifically list 11-carboxy-THC as a schedule 1 controlled substance, it does list marijuana. The Public Health Code, MCL 333.7106(3), includes within the definition of "marijuana" every compound and derivative of the plant or its seeds or resin. The term "derivative" encompasses metabolites. 11-carboxy-THC is a metabolite of THC, the main psychoactive substance found in the cannabis plant. 11-carboxy-THC is produced when the body metabolizes THC. The definition of a "derivative" as a "chemical substance related structurally to another substance and theoretically derivable from it" includes 11-carboxy-THC as a derivative of THC.

4. Neither MCL 257.625(8) nor MCL 333.7212 requires that a substance have pharmacological properties in order to constitute a schedule 1 controlled substance.

5. MCL 257.625(8) does not require that a defendant be impaired while driving; it punishes the operation of a motor vehicle with any amount of a schedule 1 controlled substance in the body.

6. MCL 257.625(4) and (5), which provide for an enhanced sentence for causing death or serious impairment of a body function while operating a motor vehicle while having any amount of a schedule 1 controlled substance in the body, and (8) do not require proof of a defendant's knowledge of his or her intoxication.

7. In prosecutions involving violations of MCL 257.625(8), the prosecution is not required to prove beyond a reasonable doubt that a defendant knew that he or she might be intoxicated. The opinion in *People v Schaefer*, 473 Mich 418 (2005), must be modified to be consistent with this determination.

Reversed and remanded to the respective trial courts.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, would hold that 11-carboxy-THC is not a schedule 1 controlled substance and would affirm the Court of Appeals decision. 11-carboxy-THC is not a "derivative" of THC, as that term is used in the Public Health Code. The majority's conclusion that 11-carboxy-THC is a schedule 1 controlled substance is inconsistent with comparable federal law and ignores relevant provisions of the Public Health Code concerning schedule 1 controlled substances. Under the majority's holding, the presence in a driver's body of any detectible amount of 11-carboxy-THC, a substance with no pharmacological effects, will subject that person to criminal liability, regardless of how long ago the person ingested marijuana, regardless of whether the ingestion occurred through passive inhalation, and regardless of whether the person remains impaired at the time of driving. This interpretation is unconstitutional because it fails to provide any guidance of what conduct is prohibited or allowed, creates tremendous potential for arbitrary and discriminatory enforcement, and is not rationally related to the statute's objective, which is to prevent persons from operating motor vehicles while under the influence of drugs.

1. CONTROLLED SUBSTANCES — SCHEDULE 1 CONTROLLED SUBSTANCES — 11-CARBOXY-THC — MARIJUANA.

11-carboxy-THC is a schedule 1 controlled substance of the Public Health Code for purposes of the Michigan Vehicle Code provision that prohibits the operation of a motor vehicle by a person with

any amount of a schedule 1 controlled substance in his or her body (MCL 257.625[8], 333.7212[1][c]).

2. CRIMINAL LAW — AUTOMOBILES — SCHEDULE 1 CONTROLLED SUBSTANCES.

The prosecution, in an action under the Michigan Vehicle Code provision that prohibits the operation of a motor vehicle by a person with any amount of a schedule 1 controlled substance in his or her body, need only prove that the defendant's driving, not his or her intoxication, was the proximate cause of the accident (MCL 257.625[8]).

3. CRIMINAL LAW — AUTOMOBILES — SCHEDULE 1 CONTROLLED SUBSTANCES — INTOXICATION.

The prosecution, in an action under the Michigan Vehicle Code provision that prohibits the operation of a motor vehicle by a person with any amount of a schedule 1 controlled substance in his or her body, need not prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated by a controlled substance (MCL 257.625[8]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Alan Schneider*, Prosecuting Attorney, and *Robert A. Cooney*, Deputy Civil Counsel, for the prosecution in *Derror*.

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

State Appellate Defender (by *Christine A. Pagac*) for Delores M. Derror.

Jerry M. Engle for Dennis W. Kurts.

CORRIGAN, J. In these consolidated appeals, we are called upon to determine whether 11-carboxy-THC, a "metabolite" or byproduct of metabolism created when the body breaks down THC (tetrahydrocannabinol), the psychoactive ingredient of marijuana, is a schedule 1 controlled substance under MCL 333.7212 of the Public

Health Code. We hold that it is. Thus, a person operating a motor vehicle with 11-carboxy-THC in his or her system may be prosecuted under MCL 257.625(8), which prohibits the operation of a motor vehicle with any amount of a schedule 1 controlled substance in the body.

Additionally, in Docket No. 129269, we clarify our decision in *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005), and hold that, in a prosecution under MCL 257.625(8), a prosecutor is not required to prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated. Rather, the prosecutor need only prove that the defendant had any amount of a schedule 1 controlled substance in his or her body. Accordingly, we reverse the judgment of the Court of Appeals and remand both cases to the trial courts for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In Docket No. 129269, defendant Delores M. Derror was driving east on snow- and slush-covered M-72 when she crossed into oncoming traffic and collided with another vehicle, killing the front-seat passenger, paralyzing two children in the rear seat, and injuring a third child. The accident occurred at approximately 6:00 p.m. Derror admitted that she had smoked marijuana, at 2:00 p.m., earlier that day. Two blood samples were taken, one at approximately 8:00 p.m. and one at approximately 11:00 p.m. The first blood sample reflected 38 nanograms of 11-carboxy-THC per milliliter, and the second contained 31 nanograms of 11-carboxy-THC per milliliter. Derror was charged with operating a motor vehicle with the presence of a schedule 1 controlled substance in her body, causing death and serious

injury, under MCL 257.625(4), (5), and (8). Derror was also charged with possession of marijuana, MCL 333.7403(2)(d).

In Docket No. 129364, defendant Dennis Kurts was stopped at approximately 9:00 p.m. for driving erratically. The officer smelled the odor of alcohol on Kurts. Kurts also had glassy, bloodshot eyes. Kurts admitted consuming two beers. During a pat-down search, the officer found a marijuana pipe in Kurts' pocket. Kurts then admitted that he had smoked marijuana a half-hour earlier. A blood sample was taken at approximately 10:00 p.m. Tests revealed that his blood contained eight nanograms of 11-carboxy-THC per milliliter and 0.07 grams of alcohol per 100 milliliters. Kurts was charged with operating a motor vehicle while intoxicated, third offense, MCL 257.625(9); operating a motor vehicle with the presence of a schedule 1 controlled substance in the body, MCL 257.625(8); and operating a vehicle with a suspended or revoked license, MCL 257.904(3)(a).

Pretrial evidentiary hearings were held in both cases in which expert testimony regarding the characteristics of marijuana, THC, and 11-carboxy-THC was introduced. The Court of Appeals summarized this expert testimony as follows:

> The experts agreed that carboxy THC is a "metabolite," or byproduct of metabolism, created in the human body during the body's biological process of converting marijuana into a water-soluble form that can be excreted more easily. Its presence in the blood conclusively proves that a person ingested THC at some point in time. However, carboxy THC itself has no pharmacological effect on the body and its level in the blood correlates poorly, if at all, to an individual's level of THC-related impairment. In fact, carboxy THC could remain in the blood long after all THC has gone, as THC quickly leaves the blood and enters the

> body's tissues. [*People v Derror (On Reconsideration)*, 268 Mich App 67, 71-72; 706 NW2d 451 (2005).]

The prosecution expert in *Derror*, Dr. Michelle Glinn, further testified, without dispute:

> THC is taken up into the brain and into fat cells and into other tissues, and it leaves its effects on the brain and central nervous system for quite a while after it's not detectible in the blood any further.
>
> The effects of—it causes chemical changes in the brain, basically, that persist for quite a while. And you can document defects in lab studies of THC beyond the time when it's no longer detectible in the blood.

In discussing the structural differences between THC and 11-carboxy-THC, Dr. Glinn explained, also without dispute, that THC and 11-carboxy-THC are identical except that in 11-carboxy-THC, two oxygen atoms are added to, and three hydrogen atoms are removed from, the eleventh carbon to make it more water soluble and easier to excrete.

Following the evidentiary hearings, the trial courts in both cases determined that the Legislature did not intend to include 11-carboxy-THC as a schedule 1 controlled substance because it has no pharmacological effect on the human body. The trial courts, however, reached divergent results regarding the effect of this conclusion. In *Kurts,* the trial court granted Kurts's motion to dismiss the charge of operating a motor vehicle while under the influence of a schedule 1 controlled substance in violation of MCL 257.625(8) on the grounds of insufficient evidence. In *Derror*, however, the trial court ruled that, although 11-carboxy-THC is not itself a schedule 1 controlled substance, evidence of 11-carboxy-THC in Derror's blood at the time of testing may be presented to the jury as circum-

stantial evidence to establish that Derror had THC in her blood at the time of driving.

The prosecutors in both cases appealed to the Court of Appeals, which consolidated the appeals and affirmed the trial courts' rulings that 11-carboxy-THC is not a schedule 1 controlled substance.[1] In *Kurts*, the Court of Appeals also reversed the trial court's dismissal of the MCL 257.625(8) charge, concluding that although only 11-carboxy-THC was found in Kurts's blood, evidence existed from which a jury could conclude that Kurts had THC in his blood at the time that he was driving.[2] The Court of Appeals reached this conclusion because Kurts admitted that he had smoked marijuana one half-hour before he was arrested, and because the expert testimony revealed that the presence of 11-carboxy-THC in a person's body conclusively establishes prior ingestion of THC.

The prosecutors in both cases applied for leave to appeal the Court of Appeals determination that 11-carboxy-THC is not a schedule 1 controlled substance within the meaning of MCL 257.625(8). In Docket No. 129269, the prosecutor also sought leave to appeal the Court of Appeals determination that, in a prosecution involving MCL 257.625(8), a prosecutor must prove that the defendant knew he or she might be intoxicated. We granted both applications and ordered that the cases be submitted together.[3]

II. STANDARD OF REVIEW

Whether 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212 of the Public Health

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[1] *People v Derror (On Reconsideration)*, 268 Mich App 67; 706 NW2d 451 (2005).

[2] *Id*.

[3] 474 Mich 886 (2005); 474 Mich 887 (2005).

Code for the purpose of MCL 257.625(8) is a matter of statutory interpretation. Statutory interpretation is a question of law that is reviewed by this Court de novo. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005), citing *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004), and *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). When interpreting statutes, our goal is to give effect to the intent of the Legislature by applying the plain language of the statute. *People v Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002).

Whether, in a prosecution involving MCL 257.625(8), the prosecutor must prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated is also a question of law that we review de novo. *Schaefer, supra* at 427.

III. 11-CARBOXY-THC IS A SCHEDULE 1 CONTROLLED SUBSTANCE UNDER MCL 333.7212(1)(d)

MCL 257.625(8), which both Kurts and Derror were charged with violating, prohibits the operation of a vehicle while a controlled substance is present in the body. It provides, in relevant part:

> A person . . . shall not operate a vehicle . . . within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section . . . .

MCL 333.7212(1)(c) specifically lists marijuana as a schedule 1 controlled substance, except for certain exceptions not applicable to these cases.

The term "marijuana" is defined in MCL 333.7106(3) as follows:

> "Marihuana" means all parts of the plant Canabis [sic] sativa L., growing or not; the seeds thereof; the resin

> extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.

In addition to specifically listing marijuana, MCL 333.7212(1)(d) and (e) provide that the following substances also qualify as schedule 1 controlled substances:

> (d) Except as provided in subsection (2), synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical structure or pharmacological activity, or both, such as the following, are included in schedule 1:
>
> (*i*) $\triangle^1$ cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (*ii*) $\triangle^6$ cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (*iii*) $\triangle^{3,4}$ cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (e) Compounds of structures of substances referred to in subdivision (d), regardless of numerical designation of atomic positions, are included.

The Court of Appeals held that 11-carboxy-THC was not a schedule 1 controlled substance under MCL 333.7212(1)(c) because it is not expressly listed in the statute. The Court of Appeals, however, failed to consider other provisions of the Public Health Code in reaching its conclusion; specifically, the provision that defines marijuana. While MCL 333.7212(1)(c) does not specifically list 11-carboxy-THC as a schedule 1 controlled substance, it does list marijuana. As stated above, the Public Health Code includes within the definition of marijuana every compound and derivative of the plant or its seeds or resin.

THC is the main psychoactive substance found in the cannabis plant. 11-carboxy-THC is a metabolite of THC

in that it is produced when the body metabolizes THC. See *Stedman's Online Medical Dictionary*, which defines "metabolite" as "[a]ny product or substrate (foodstuff, intermediate, waste product) of metabolism, especially of catabolism."[4] The question presented before us is whether 11-carboxy-THC is also a derivative of THC.

We hold that the term "derivative" encompasses metabolites. We construe "all words and phrases . . . according to the common and approved usage of the language," but give terms of art and "technical words and phrases" any "peculiar and appropriate meaning" ascribed by the Legislature or acquired in common usage in the absence of legislative definition. MCL 8.3a; *Schaefer, supra* at 435. In the context of this case, the term "derivative" is a scientific term, definable only by reference to scientific dictionaries.

Medical dictionaries have defined the term "derivative" in a variety of ways. *Stedman's Online Medical Dictionary* defines a "derivative" as "[s]omething produced by modification of something preexisting," or "[s]pecifically, a chemical compound that may be produced from another compound of similar structure in one or more steps, as in replacement of H by an alkyl, acyl, or amino group."[5] Under the first part of this definition, 11-carboxy-THC qualifies as a derivative because it is produced when the body breaks down or naturally modifies THC. 11-carboxy-THC also qualifies as a derivative under the second part of this definition because it is a chemical compound produced when the body metabolizes THC, which is a compound of similar

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[4] <http://www.stedmans.com/section.cfm/45> (accessed March 8, 2006).

[5] <http://www.stedmans.com/section.cfm/45> (accessed March 8, 2006).

structure. It is undisputed that THC and 11-carboxy-THC are identical except that in 11-carboxy-THC, two oxygen atoms are added to and three hydrogen atoms are removed from the eleventh carbon to make it more water soluble and easier to excrete.

Merriam-Webster's Online Medical Dictionary defines a "derivative" as "something that is obtained from, grows out of, or results from an earlier or more fundamental state or condition," or "a chemical substance related structurally to another substance and theoretically derivable from it," or "a substance that can be made from another substance."[6] The first and third parts of this definition are as broad as the one from *Stedman's* and would include 11-carboxy-THC because it is produced from THC; it results from the metabolization of THC. The second of the three parts of this definition, however, is more limited in that it includes only "a chemical substance related structurally to another substance . . . ." 11-carboxy-THC also fits within this definition because, as stated above, it has an identical chemical structure to THC except for the eleventh carbon atom.

Defendants agree that 11-carboxy-THC potentially qualifies as a derivative under the above definitions, but contend that defining the term "derivative" broadly under the Public Health Code would produce nonsensical results because it would include almost every chemical substance, including carbon dioxide, which is also a metabolite of THC. We agree that most of the above definitions of "derivative" would encompass metabolites such as carbon dioxide. Not all of the above definitions, however, do so. The second part of the *Merriam-Webster's Online Medical Dictionary* describes

[6] <http://www2.merriam-webster.com/cgi-bin/mwmednlm> (accessed March 8, 2006).

a "derivative" as a "chemical substance related structurally to another substance and theoretically derivable from it." This definition seems to include 11-carboxy-THC as a derivative of THC because it is related structurally to THC, but the definition is not so broad as to include other metabolites such as carbon dioxide.

Given these divergent definitions, we must choose one that most closely effectuates the Legislature's intent. *Stanton v Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).[7] In doing so, we apply the definition of the term "derivative" as defined in the second part of

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[7] The dissent criticizes our choice of the definition of derivative that most closely effectuates the intent of the Legislature, claiming that because more than one definition exists, the term is ambiguous. Contrary to the dissent's contention, however, a word is not ambiguous merely because different dictionary definitions exist. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 535 n 6; 676 NW2d 616 (2004), citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 317-318; 645 NW2d 34 (2002). Moreover, in *Stanton*, Justice CAVANAGH used the very principles we use today to define "motor vehicle," a term in which varying dictionary definitions existed. He stated:

> It is possible to find varying dictionary definitions of the term "motor vehicle." For example, the *Random House Webster's College Dictionary* (2001) defines a "motor vehicle" as "an automobile, truck, bus, *or similar* motor-driven conveyance," a definition that does not include a forklift. In our view, this definition appropriately reflects the commonly understood meaning of the term. *The American Heritage Dictionary* (2d College ed), on the other hand, defines "motor vehicle" as "self-propelled, wheeled conveyance that does not run on rails," a definition, which would arguably include a forklift. Given these divergent definitions, we must choose one that most closely effectuates the Legislature's intent. Fortunately, our jurisprudence under the governmental tort liability act provides an answer regarding which definition should be selected. As previously noted, it is a basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed. Thus, this Court must apply a narrow definition to the undefined term "motor vehicle." [*Stanton, supra* at 617-618 (citation omitted).]

the *Merriam-Webster's Online Medical Dictionary*. As stated above, this definition includes 11-carboxy-THC as a derivative of THC because it is related structurally to THC, but is not so broad as to include other metabolites such as carbon dioxide. Moreover, this definition is consistent with the purpose of the Public Health Code to protect the health, safety, and welfare of the people of this state.[8]

The Court of Appeals further held, and the dissent agrees, that 11-carboxy-THC was not a schedule 1 controlled substance because it has no pharmacological effect on the human body. Contrary to the Court of Appeals holding and the dissent's contention, neither MCL 257.625(8) nor MCL 333.7212 requires that a substance have pharmacological properties to constitute a schedule 1 controlled substance. Nor does MCL 257.625(8) require that a defendant be impaired while driving. Rather, it punishes for the operation of a motor

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In choosing which definition of the term "derivative" is most appropriate here, we do not use our own "personal beliefs," as suggested by the dissent. Rather, we use the plain language of the statute to divine the Legislature's intent.

[8] The dissent contends that we conclude that 11-carboxy-THC is a derivative of THC because both substances look similar in structure. It further contends that we reach our conclusion by relying on an area of science in which experts do not even agree instead of relying on the plain language of the statute. To the contrary, we conclude that 11-carboxy-THC is a derivative of THC because it is related structurally to THC and is derivable from THC. See *Merriam-Webster's Online Medical Dictionary*. We do not rely on expert testimony in reaching our conclusion. Rather, we rely on the plain language of the statutes in question. Specifically, we rely on MCL 333.7212(1)(c), which lists marijuana as a schedule 1 controlled substance, and MCL 333.7106(3), which defines "marijuana" as including derivatives of the plant. Also, contrary to the dissent's suggestion, although the experts do not agree on all issues in this case, the experts do not dispute that 11-carboxy-THC and THC are nearly identical in structure and that 11-carboxy-THC is derived from the breakdown of THC.

vehicle with any amount of a schedule 1 controlled substance in the body.[9] The Legislature expressly listed marijuana as a schedule 1 controlled substance. The Legislature expressly included the term "derivative" within the definition of "marijuana." It is not our place to second-guess the Legislature's intent when the language in the statute is plain and unambiguous.[10] *Koonce, supra* at 518. The Legislature undoubtedly has the power to, and often does, criminalize activity that is

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[9] The dissent relies on MCL 333.7211 in concluding that schedule 1 controlled substances must have a pharmacological effect on the human body. It states:

> The administrator shall place a substance in schedule 1 if it finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. [MCL 333.7211.]

This statute, however, is silent with regard to the pharmacological effects of a substance. Rather, it mandates the placement of a substance in schedule 1 if the substance has a high potential for abuse. It does not prohibit the inclusion of other substances in schedule 1. In any event, we note that marijuana has been expressly listed as a schedule 1 controlled substance. Because 11-carboxy-THC is included within the definition of "marijuana" as a derivative, it too constitutes a schedule 1 controlled substance.

[10] The dissent contends that our construction of Michigan's definition of "marijuana" as including 11-carboxy-THC is contrary to and inconsistent with years of federal law. We first note that no federal court has specifically excluded 11-carboxy-THC from the definition of "marijuana." Moreover, the dissent itself points out that the federal courts that have dealt with similar issues have reached their conclusions by interpreting the legislative history, rather than the plain language of the analogous federal statute. We are not bound by federal precedent in interpreting state law, *Continental Motors Corp v Muskegon Twp*, 365 Mich 191, 194; 112 NW2d 429 (1961), and we decline to adopt the federal precedents the dissent cites when they do not comport with the actual words that our Legislature used to convey its meaning.

Additionally, the Legislature has directed that the statute should not only be construed consistently with applicable federal law, but also

not itself necessarily dangerous or illegal because it is closely related to activity that is dangerous or illegal.[11]

The Court of Appeals also held that 11-carboxy-THC was not a schedule 1 controlled substance under MCL 333.7212(1)(d) because it is a natural, rather than a synthetic, byproduct of THC. Regardless of whether MCL 333.7212(1)(d) applies to synthetic substances only, 11-carboxy-THC qualifies as a schedule 1 controlled substance under MCL 333.7212(1)(c) and, thus, we need not apply subsection 1(d).

Because 11-carboxy-THC qualifies as a derivative, and since derivatives are included within the definition of marijuana, which MCL 333.7212(1)(c) specifically lists as a schedule 1 controlled substance, we hold that 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212(1)(c) for the purpose of MCL 257.625(8). We, therefore, reverse the Court of Appeals judgment that held that 11-carboxy-THC is not a schedule 1 controlled substance, and remand both cases to the trial courts for further proceedings consistent with this opinion.

IV. MCL 257.625(4), (5), AND (8) DO NOT REQUIRE PROOF OF A DEFENDANT'S KNOWLEDGE OF HIS OR HER INTOXICATION

In Docket No. 129269, defendant Derror was charged with violating both MCL 257.625(4) and (5), in addition to subsection 8. Subsections 4 and 5 provide for an enhanced sentence for causing death or serious impair-

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"liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2). The definition employed by the majority meets both directives.

[11] See, for example, MCL 257.624a, in which the Legislature has made it illegal for a driver or passenger of a motor vehicle to transport or possess alcoholic liquor in an open container, regardless of whether the persons in the car actually drink the alcoholic beverage.

ment of a body function while operating a motor vehicle with any schedule 1 controlled substance in the body. MCL 257.625 states, in relevant part:

> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime . . . .
>
> (5) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony . . . .
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> * * *
>
> (8) A person, whether licensed or not, shall not operate a vehicle . . . if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code . . . .

In interpreting the above provisions, the trial court held that the prosecutor had to prove that Derror's intoxication was a proximate cause of the accident. The Court of Appeals originally affirmed this holding, relying on *People v Lardie,* 452 Mich 231, 256; 551 NW2d 656 (1996), in which this Court held that MCL 257.625(4) "requires the people to prove that a defendant, who kills someone by driving while intoxicated, acted knowingly in consuming an intoxicating liquor or a controlled substance, and acted voluntarily in deciding to drive after such consumption." *Id.* at 256. The *Lardie* Court further noted that "the statute must have been designed to punish drivers when their *drunken* driving caused another's death." *Id.* at 257 (emphasis in original).

We, however, subsequently overruled portions of the *Lardie* case in the companion cases of *People v Schaefer*

and *People v Large,* 473 Mich 418; 703 NW2d 774 (2005). In these companion cases we held:

> Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant's status as "intoxicated" is a separate element of the offense used to identify the class of persons subject to liability under § 625(4). [*Id.* at 433 (emphasis in original).]

We further held:

> [T]he prosecution, in proving OUIL causing death, must establish beyond a reasonable doubt that (1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1), (3), or (8); (2) the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death. [*Id.* at 434, citing MCL 257.625(4).]

The Court of Appeals granted reconsideration in the *Derror* case in light of our decision in *Schaefer*, and held that the prosecution need only prove that Derror's driving, not her intoxication, was the proximate cause of the accident.[12] The Court of Appeals further held that *Schaefer* applied to both MCL 257.625(4) and (5), although *Schaefer* analyzed subsection 4 only.[13]

We agree with the Court of Appeals application of *Schaefer* in this case to hold that the prosecution need only prove that Derror's driving, not her intoxication, was the proximate cause of the accident. MCL 257.625(8) does not require intoxication or impairment—it simply requires that a person have

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[12] 268 Mich App 82.

[13] *Id*. at 81.

"any amount" of a schedule 1 controlled substance in his or her body while driving. We further agree that *Schaefer's* holding applies to subsections 4 and 5 alike. The Court of Appeals stated, and we agree, that no reason exists to interpret the identical language of MCL 257.625(5) differently from MCL 257.625(4). We take this opportunity, however, to modify *Schaefer* to the extent that its holding is inconsistent with the plain language of MCL 257.625(4), (5), and (8).

MCL 257.625(4) and (5) punish for the operation of a motor vehicle causing death or serious impairment of a body function in violation of subsections 1, 3, and 8. Here, Derror operated a motor vehicle causing death and serious impairment of body function in violation of subsection 8. *Schaefer* would seem to require the prosecution to prove that Derror voluntarily decided to drive, knowing that she had consumed an intoxicating agent *and might be intoxicated*. The plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated. MCL 257.625(8) does not require intoxication, impairment, or knowledge that one might be intoxicated; it simply requires that the person have "any amount" of a schedule 1 controlled substance in his or her body when operating a motor vehicle. We thus clarify *Schaefer* and hold that, in prosecutions involving violations of subsection 8, the prosecution is not required to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated. Because subsections 1 and 3 are not at issue in this case, we do not disturb our holding in *Schaefer* with regard to these subsections.

V. RESPONSE TO THE DISSENT

The dissent claims that the majority's interpretation of MCL 257.625(8) is unconstitutional because it: (1)

fails to provide notice about what conduct is prohibited, (2) is vague and provides potential for arbitrary and discriminatory enforcement, and (3) is not rationally related to the objective of the statute.

First, the only constitutional issue raised by defendant in his Statement of Questions was that the "expansion" of the definition of "marijuana" rendered the statute unconstitutionally vague and overbroad. Neither party raised the first and third constitutional concerns posed by the dissent. That the justices inquired at oral argument regarding the Legislature's power to enact the statute in question does not preserve these constitutional issues as the dissent suggests. In his dissent in *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), Justice CAVANAGH strongly criticized the practice of raising issues that have never been argued or properly briefed by the parties. He stated:

> In reaching its holding, the majority disregards the foundational principles of our adversarial system of adjudication. As protectors of justice, we refrain from deciding issues without giving each party a full and fair opportunity to be heard. But not for this concern, the judicially created doctrine of standing would be discarded, as it ensures "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination . . . ." However, the majority has disregarded such considerations, misconstruing the proper scope of its authority, by making dispositive an issue never argued or briefed by the parties. Neither of the parties has had the benefit of sharing with this Court their thoughts on the effect of the tort immunity act on this case, though the implications of the majority's holding are vast. Never before have I witnessed such overreaching conduct from members of this Court. [*Id.* at 213 (CAVANAGH, J., dissenting) (citation omitted).]

Nevertheless, we will address these unpreserved constitutional issues. First, the dissent claims that our

interpretation of the statute does not provide an ordinary person with notice of prohibited conduct. To the contrary, the plain language of the statute is clear and unambiguous. MCL 257.625(8) prohibits the operation of a motor vehicle with any amount of a schedule 1 controlled substance in the body. In essence, the statute prohibits a person from driving after smoking marijuana. It is irrelevant that an "ordinary" marijuana smoker allegedly does not know that 11-carboxy-THC could last in his or her body for weeks. It is also irrelevant that a person might not be able to drive long after any possible impairment from ingesting marijuana has worn off. The use of marijuana is classified as a misdemeanor under current law, MCL 333.7404(1) and (2)(d). The Legislature's prohibition of the operation of a motor vehicle with *any* amount of marijuana, which explicitly includes derivatives of marijuana, in the body provides more than adequate notice regarding the prohibited conduct. The corollary of this prohibition is that once the schedule 1 substance is no longer in the body, one can resume driving. It is irrelevant that the "ordinary person" cannot determine, without drug testing, when the schedule 1 substance is no longer detectible in the body.

The dissent next argues that our interpretation of the statute is unconstitutionally vague because it provides the potential for arbitrary and discriminatory enforcement. Specifically, it claims that our interpretation of the statute makes criminals of persons who have merely inhaled marijuana or people who are no longer under the influence of marijuana.

As previously stated, MCL 257.625(8) does not require that a person be under the influence of a schedule 1 controlled substance to violate the statute. It merely requires that a person have *any* amount of a schedule 1

controlled substance in the person's body. It is irrelevant that a person who is no longer "under the influence" of marijuana could be prosecuted under the statute. If the Legislature had intended to prosecute only people who were under the influence while driving, it could have written the statute accordingly.[14]

Moreover, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though doubtful cases could be hypothesized. See *United States v Petrillo*, 332 US 1, 5-8; 67 S Ct 1538; 91 L Ed 1877 (1947). In *Petrillo*, the United States Supreme Court stated:

> The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more. [*Id.* at 7-8.]

In this case, both defendants admitted smoking marijuana just hours before driving. No question exists that that statute proscribes their conduct. Moreover, the statute sufficiently conveyed that operating a vehicle after smoking marijuana is illegal. Because a hypothetical case could be posed where doubts might arise does not render the statute unconstitutionally vague. The statute, as applied to these defendants, is constitutional.

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[14] The Legislature has included an "under the influence" requirement in other sections of MCL 257.625. See subsections 1 to 3. Thus, if the Legislature had also intended to include the same requirement in subsection 8, it would have done so.

Finally, the dissent contends that our plain language interpretation of the statute does not pass muster under the rational basis test. Initially, we agree that rational basis review is appropriate because the statute is social legislation[15] enacted under the state's traditional police power to regulate public safety, public health, morality, and law and order.[16] Further, under this highly deferential standard of review, the legislation must be upheld unless the challenger can show that it is " ' "arbitrary, and wholly unrelated in a rational way to the objective of the statute." ' "[17] We reject the dissent's assertion that the statute is not rationally related to its objective.

The dissent claims that the statute's objective is to prevent people from driving under the influence of a controlled substance. Not so. The statute's stated objective is to prevent persons from driving with any amount of a schedule 1 controlled substance in the body, whether or not the substance is still influencing them. This is clearly a legitimate exercise of the Legislature's police power since 11-carboxy-THC is indisputably only present in the body after someone has ingested marijuana, i.e., done something illegal.

Nevertheless, assuming that the statute's objective is to prevent persons from driving under the influence of marijuana, the statute passes constitutional muster.

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[15] See *Phillips v Mirac, Inc,* 470 Mich 415, 434; 685 NW2d 174 (2004).

[16] *Berman v Parker,* 348 US 26, 32; 75 S Ct 98; 99 L Ed 27 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.").

[17] *Phillips, supra* at 433, quoting *Crego v Coleman,* 463 Mich 248, 259; 615 NW2d 218 (2000), quoting *Smith v Employment Security Comm,* 410 Mich 231, 271; 301 NW2d 285 (1981); see also *Harvey v Michigan,* 469 Mich 1, 7; 664 NW2d 767 (2003).

While the dissent seemingly concedes that preventing people from driving under the influence of marijuana is a legitimate government objective, it asserts that, under our interpretation, the statute is not rationally related to that objective because 11-carboxy-THC has no pharmacological effect and, therefore, cannot influence the person's driving. That the statute might apply to some persons who are not actually under "the influence" of marijuana does not render the statute unconstitutional. Rather, under the rational basis standard of review, our only inquiry is whether *any* conceivable set of facts, either known or that can reasonably be assumed, even if they are debatable, might support the Legislature's judgment that making it a crime for persons to drive with any amount of 11-carboxy-THC in the body will prevent them from driving under the influence of a controlled substance.[18]

Such a conceivable set of facts certainly exists in this case. It is undisputed that the presence of 11-carboxy-THC conclusively proves that a person, at some point, ingested THC, which is an ingredient in marijuana and which *does* have a pharmacological effect on the body. It is also undisputed that THC itself begins to break down and leave the bloodstream shortly after entering the body, but that its effects can last long after it is no longer detectible in the blood. It is thus conceivable that the Legislature enacted this statute to further the objective of preventing persons from driving under the influence of marijuana by enabling the prosecution of persons who might be under the influence of THC, but for whom only traces of 11-carboxy-THC, and not THC itself, are still present in the body.

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[18] *Muskegon Area Rental Ass'n v Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001); *Harvey, supra* at 7.

Moreover, under the rational basis test, we do not consider the wisdom of the Legislature's choice, or whether that choice was made with mathematical nicety, or whether it is most narrowly drawn to obtain its objective, or whether it may be inequitable when put into practice.[19] In short, we do not consider the effects of the statute or its consequences, only its purpose.[20] As long as the Legislature's objective is legitimate, the means that it chooses to obtain that objective is not rendered unconstitutional merely because it may be overinclusive.

In *New York City Transit Auth v Beazer*, 440 US 568; 99 S Ct 1355; 59 L Ed 2d 587 (1979), the United States Supreme Court upheld a statute applying the rational basis standard. The *Beazer* case involved a challenge to the New York City Transit Authority's refusal to employ persons who used methadone, a drug used to cure heroin addiction, under a general safety-oriented policy against employing persons who use narcotic drugs. *Id.* at 570-573. The plaintiffs, participants in state-regulated methadone treatment programs who had been denied employment with the transit authority, challenged the blanket exclusion as overinclusive. Specifically, they asserted that the exclusion, at least as applied to them, did not further the policy's goal of safety because methadone administered in such treatment programs does not produce euphoria, is an effective cure for heroin addiction, and frees the majority of persons involved in such programs from illicit drug use. *Id*. at 573-577.

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[19] *Phillips, supra* at 434; *Muskegon Area Rental, supra* at 464; *Harvey, supra* at 7.

[20] *Phillips, supra* at 435, quoting *Duke Power Co v Carolina Environmental Study Group,* 438 US 59, 83-84; 98 S Ct 2620; 57 L Ed 2d 595 (1978).

The Court rejected the plaintiffs' challenge. After concluding that the transit authority's blanket exclusion was probably broader than necessary to achieve its goal of ensuring safety, *id.* at 592, the Court stated that "it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole." *Id.* at 593. The same is true here. The goal of the legislation is legitimate. That the Legislature could have conceivably enacted a more perfectly precise statute does not render the current statute constitutionally invalid.[21]

VI. CONCLUSION

We hold that 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212(1)(c) of the Public Health Code for the purpose of construing MCL 257.625(8) of the Michigan Vehicle Code. Accordingly, we reverse the judgment of the Court of Appeals regarding this issue, and remand both cases to the trial courts for further proceedings consistent with this opinion. We do not retain jurisdiction.

We reaffirm our holding in *Schaefer* that the prosecution need only prove that a defendant's driving, not his or her intoxication, was a proximate cause of the accident. Further, *Schaefer's* holding applies to both MCL 257.625(4) and (5). Accordingly, we affirm the judgment of the Court of Appeals regarding this issue in Docket No. 129269.

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[21] Contrary to the dissent's contention, we are not "ignor[ing] [our] mandate to reasonably construe a statute to ensure that it is constitutional . . . ." *Post* at 355 n 5. Our construction of the statute, which is consistent with the plain language of the statute, does not render the statute unconstitutional. Thus, we need not construe the statute differently.

We also modify *Schaefer* to hold that, in a prosecution involving MCL 257.625(8), the prosecutor need not prove beyond a reasonable doubt that the defendant knew he or she might be intoxicated.

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

CAVANAGH, J. (*dissenting*). Today, the majority holds that 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) is a schedule 1 controlled substance and that a person violates the law if he drives with *any* amount of 11-carboxy-THC in his body. The full import of this decision can only be understood by recognizing that the majority's interpretation means that a person can no longer legally drive a car if scientific testing can detect *any amount* of 11-carboxy-THC in his system. This means that weeks, months, and even years after marijuana was ingested, and long after any risk of impairment has passed, a person cannot drive a car without breaking the law if a test can detect the presence of 11-carboxy-THC. Because I believe that this interpretation disregards the statutory language chosen by the Legislature and results in an interpretation that violates the United States Constitution and the Michigan Constitution, I respectfully dissent.

11-CARBOXY-THC IS NOT A SCHEDULE 1 CONTROLLED SUBSTANCE BECAUSE IT IS NOT A DERIVATIVE OF MARIJUANA

This case involves an issue of statutory interpretation, and the primary goal of statutory interpretation is to give effect to the intent of the Legislature. The first step is to review the language of the statute. 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.

In re MCI Telecom Complaint, 460 Mich 396, 411; 596 NW2d 164 (1999). However, when a statute is ambiguous, "so that reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine the meaning." *Id*.

MCL 257.625(8) states in relevant part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body *any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code*, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section . . . . [Emphasis added.]

Marijuana itself is a schedule 1 controlled substance. MCL 333.7212(1)(c). "Marijuana" is defined as follows:

> "Marihuana" means all parts of the plant Canabis [sic] sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. [MCL 333.7106(3).]

Further, MCL 333.7212(1)(d) states that the following are also schedule 1 controlled substances:

> Except as provided in subsection (2), synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical struc-

ture or pharmacological activity, or both, such as the following, are included in schedule 1:

(*i*) $\triangle^1$ cis or trans tetrahydrocannabinol, and their optical isomers.

(*ii*) $\triangle^6$ cis or trans tetrahydrocannabinol, and their optical isomers.

(*iii*) $\triangle^{3,4}$ cis or trans tetrahydrocannabinol, and their optical isomers.

Notably, when construing MCL 333.7212 as part of the Public Health Code, the provisions are "intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1). Michigan's definition of "marijuana" is identical in all relevant portions to the federal definition. See 21 USC 802(16).[1] Yet no federal court has held that 11-carboxy-THC is a schedule 1 controlled substance. As the Seventh Circuit Court of Appeals stated, "The legislative history of the [Controlled Substances] Act indicates that the purpose of banning marijuana was to ban the euphoric effects produced by THC." *United States v Sanapaw*, 366 F3d 492, 495 (CA 7, 2004). Significantly, as every expert who testified in these cases acknowledges, 11-carboxy-THC has *no* pharmacological effects on a person.

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[1] The federal statute states:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. [21 USC 802(16).]

Further, the District of Columbia Court of Appeals held that "the definition of marijuana was intended to include those parts of marijuana which contain THC and to exclude those parts which do not." *United States v Walton*, 168 US App DC 305, 307; 514 F2d 201 (1975). Numerous courts have also long held that the statute is intended to outlaw "all species of marijuana containing *tetrahydrocannabinol* . . . ." See, e.g., *United States v Lupo*, 652 F2d 723, 728 (CA 7, 1981) (emphasis added). Therefore, construing Michigan's definition of "marijuana" to include 11-carboxy-THC is contrary to and inconsistent with years of federal law.

While the majority subtly criticizes the federal courts for using legislative history to reach their conclusions, as opposed to the "plain language" of the statute, the majority itself is guilty of ignoring the plain language of MCL 333.1111(1) to reach its conclusion. In MCL 333.1111(1), the Legislature states that provisions of the Public Health Code are intended to be construed *consistently* with applicable federal law. The Legislature did *not* state that the clear mandate to construe provisions consistently with federal law can be ignored when the majority believes that the federal courts have not properly decided the cases before them. Further, the majority's seemingly minor critique of the use of legislative history is actually quite remarkable when one considers that the statutory language at issue in this case—as well as the language in the federal statute—is certainly not plain and unambiguous, no matter how much the majority tries to convince a reader that it is. This is best illustrated by reviewing the majority's approach to interpreting this "plain" language.

To decide this case, the majority recognizes that the term "derivative" needs to be defined, so it consulted scientific dictionaries to do so. The majority found that

there were "divergent" definitions of "derivative" to such a degree that the members of the majority had to choose the one they *believed* would best effectuate the Legislature's intent, using nothing to guide them except their beliefs.[2] Notably, the majority even states that it decided not to follow "most" definitions. Instead, the majority chooses to ignore most definitions because these definitions would not support the majority's outcome, and the majority ultimately settles on the one definition that would allow it to best support its position.

Simply, contrary to the majority's bold assertions, there is nothing plain or unambiguous about a statute that uses a term with definitions that are so diverse that they can support two totally different outcomes. In fact, this is the very meaning of the term "ambiguous." A statute is ambiguous when "reasonable minds could differ with respect to its meaning . . . ." *In re MCI*, *supra* at 411; see also *Perez v Keeler Brass Co*, 461 Mich 602, 610; 608 NW2d 45 (2000) (In a unanimous opinion from this Court, the term "refuses" was deemed ambiguous because it could reasonably be construed narrowly or broadly, resulting in two different meanings and two different outcomes.). And in cases in which statutory language is ambiguous, such as the case before us, and the cases involving similar language before the federal courts, use of legislative history to try and best effectuate the intent of the Legislature when interpreting unclear and ambiguous statutory language

[2] The majority consulted medical dictionaries. A further review of various chemical dictionaries indicates exactly what the majority has stated—there are widely divergent definitions of "derivative" and "metabolite," such that a definition alone cannot resolve this issue. See, e.g., *Grant & Hackh's Chemical Dictionary* (5th ed); *Glossary of Chemical Terms* (2d ed); *Hawley's Condensed Chemical Dictionary* (12th ed).

is a better method than an analysis that attempts to divine the Legislature's intent using nothing more than the personal beliefs of those in the majority.[3]

Moreover, not only does the majority ignore federal law in its analysis, it also ignores other relevant statutory provisions. To support its outcome, the majority merely cites various sources for the definition of "derivative" and notes that these sources offer divergent definitions. However, the majority resolves this ambiguity by ultimately selecting a definition that describes a derivative as a " 'chemical substance related structurally to another substance and theoretically derivable from it.' " *Ante* at 328, quoting *Merriam-Webster's Online Medical Dictionary*. The majority does this because it believes that this definition most closely effectuates the intent of the Legislature.

But the majority ignores other statutory provisions that indicate that 11-carboxy-THC is not a schedule 1 controlled substance. Contrary to the majority's position, MCL 333.7212 does not plainly and unambiguously classify 11-carboxy-THC as a schedule 1 controlled substance. 11-carboxy-THC is not listed

[3] I note that the majority attempts to create an inconsistency in my position when none actually exists. *Ante* at 328-329 n 7. The majority references a prior case that I wrote—*Stanton v Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002)—and states that I used the same principles that I criticize the majority for using in this case. However, the majority should read my opinion in *Stanton* more closely. In *Stanton*, I recognized that there were divergent definitions of the term "motor vehicle" and that one should be selected that most closely effectuates the Legislature's intent. I further stated, "Fortunately, our *jurisprudence under the governmental tort liability act provides an answer regarding which definition should be selected*." *Id*. at 618 (emphasis added). In direct contrast to my analysis in *Stanton*, the majority has not used jurisprudence to guide its decision; instead, those in the majority have solely used their personal beliefs about what the outcome of this case should be to guide their decision. As such, the majority has ignored the rules of statutory construction in its effort to arrive at its desired result.

anywhere in the statute. The majority rests its entire argument on the use of the word "derivative" in the statute, but this analysis is flawed because the majority reaches a result that dismissively ignores the fact that 11-carboxy-THC has no pharmacological effect on a person. While MCL 333.7211 does not explicitly require that a substance have a pharmacological effect to constitute a schedule 1 controlled substance, the statute does explicitly state that a substance is classified as a schedule 1 controlled substance if it has a high potential for abuse, which naturally requires a pharmacological effect.

Our Legislature has stated that a substance is placed "in schedule 1 if [the administrator] finds that the substance has *high potential for abuse* and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." MCL 333.7211 (emphasis added). But there is no dispute that 11-carboxy-THC has *no* pharmacological effect. All the experts—including experts Dr. Michelle Glinn, who is the supervisor of the toxicology laboratory of the Michigan State Police Crime Lab, and Dr. Felix Adatsi, both called to testify by the prosecution—admit that 11-carboxy-THC has *no pharmacological effect on a person whatsoever*.

Other factors listed by the Legislature to consider in making a determination about the classification of a substance are:

> (a) The actual or relative potential for abuse.
>
> (b) The scientific evidence of its pharmacological effect, if known.
>
> (c) The state of current scientific knowledge regarding the substance.
>
> (d) The history and current pattern of abuse.

(e) The scope, duration, and significance of abuse.

(f) The risk to the public health.

(g) The potential of the substance to produce psychic or physiological dependence liability.

(h) Whether the substance is an immediate precursor of a substance already controlled under this article. [MCL 333.7202.]

None of these factors that are used to determine if a substance should be classified as a schedule 1 controlled substance applies to 11-carboxy-THC. 11-carboxy-THC has *no* pharmacological effect on a person, and, therefore, it has no potential for abuse or potential to produce dependence. Further, as expert witness Dr. Michael Evans testified, it is impossible to take 11-carboxy-THC and make it into THC; therefore, it is not an immediate precursor of a substance already classified as a schedule 1 controlled substance.

Our Legislature selected these factors and the words "high potential for abuse" for a reason—they cannot be ignored by the majority merely because they cannot be reconciled with the majority's rationale. "It is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993). "To that end, the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *City of Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922). The majority's analysis ignores the very reasons that a substance is classified as a schedule 1 controlled sub-

stance, and it reaches a result that completely disregards other relevant provisions of the statute.

Further, the majority makes pronouncements such as 11-carboxy-THC is a derivative "because it is a chemical compound produced when the body metabolizes THC, which is a compound of similar structure." *Ante* at 326-327. The majority then states that "THC and 11-carboxy-THC are identical except that in 11-carboxy-THC, two oxygen atoms are added to and three hydrogen atoms are removed from the eleventh carbon to make it more water soluble and easier to excrete." *Ante* at 327. But merely because a compound *looks* similar in its basic chemical formula does not mean that it is a compound of similar structure for the purposes of controlled substance classification methods. Water and hydrogen peroxide look similar—H2O and H2O2—but they are, of course, very different substances. One is a substance you must drink to survive; the other will kill you if you drink it. Instead of trying to delve into areas of science in which the experts do not even agree, the majority should simply refer to the statutory language and the fact that when considering the factors selected by the Legislature, there is no rationale to classify 11-carboxy-THC as a schedule 1 controlled substance.

Incredibly, the majority attempts to present the expert testimony as being in agreement. See *ante* at 329 n 8. Yet this inaccurate representation is not supported when one actually reads and considers the *full* testimony of the experts. The experts are *not* in agreement about whether 11-carboxy-THC is a derivative of marijuana and, therefore, a schedule 1 controlled substance. While the experts may be in agreement over some scientific principles, they disagree over the key issue in this case, and it is misleading to present this in any

other manner. Notably, Dr. Daniel McCoy and Dr. Evans both testified that 11-carboxy-THC was a metabolite, but it was not a derivative and, therefore, 11-carboxy-THC was not a schedule 1 controlled substance. As Dr. McCoy explained, under the interpretation adopted by the majority "everything is a derivative, every chemical on earth can be derived from something else." He further explained that, using the majority's interpretation, if THC is burned, "we will develop a lot of chemicals, including carbon dioxide, to the extent a derivative is something that comes from and has similar chemical structure to some part, carbon dioxide would be scheduled material . . . . ." Dr. Evans testified, "It [11-carboxy-THC] is not a derivative. . . . To call carboxy THC a derivative of THC would be like—carbon dioxide is a metabolite of THC. You'll get that when you exhale or take in a breath. . . . If you were to call carboxy THC a derivative, you would have to call carbon dioxide a derivative of THC . . . ." In short, Dr. McCoy and Dr. Evans disagreed with the majority's interpretation because the rationale that would support classifying 11-carboxy-THC as a derivative would also apply to carbon dioxide; therefore, a person could be guilty of violating MCL 257.625(8) with *carbon dioxide* in his system—a result that even the majority finds to be insupportable. Further, the majority even highlights the scientific disagreement when it refers to the divergent definitions for "derivative" and states "that most of the above definitions of 'derivative' would encompass metabolites such as carbon dioxide. Not all of the above definitions, however, do so." *Ante* at 327. Thus, it is false to suggest that this case is one in which the experts agree that 11-carboxy-THC is a derivative of marijuana and, therefore, a schedule 1 controlled substance.

As it pertains to MCL 333.7212(1)(d), the Court of Appeals properly held that the statute was enacted to deal with substances that were produced synthetically. The statute refers to "synthetic equivalents" and "synthetic substances, derivatives, and their isomers with similar chemical structure or pharmacological activity . . . ." MCL 333.7212(1)(d). Synthetic substances are substances that were altered, sometimes in minor ways, but that can still have pharmacological effects on a person. However, 11-carboxy-THC is a metabolite; it is a natural substance that occurs when a person's body breaks down THC, and it is not a synthetic substance. Therefore, 11-carboxy-THC is also not classified as a schedule 1 controlled substance by MCL 333.7212(1)(d). Moreover, in *Hemp Industries Ass'n v Drug Enforcement Admin*, 333 F3d 1082, 1089 (CA 9, 2003), the Ninth Circuit Court of Appeals interpreted a regulation with language similar to that used in MCL 333.7212(1)(d) and held that this regulation was enacted because THC was being produced *synthetically* and should be controlled. Likewise, the comparable statute at issue addresses substances produced synthetically and not those produced naturally through metabolism.

Finally, the Legislature knows how to use the term "metabolite" when it wants to. In MCL 722.623a, the Legislature specifically uses the term "metabolite" in discussing child abuse reporting requirements. The statute specifically refers to "a metabolite of a controlled substance." The Legislature is presumed to be aware of all existing statutes when it enacts another. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). The fact that the Legislature specifically chose not to include the word "metabolite" is further indication that 11-carboxy-THC should not be

classified as a schedule 1 controlled substance under the language selected by the Legislature.

Thus, the majority's interpretation that 11-carboxy-THC is a schedule 1 controlled substance is flawed for numerous reasons. Namely, the interpretation ignores federal case law, the statutory language chosen by our Legislature, and other relevant statutory provisions, as well as the basic tenets of statutory construction. Notably, the majority's unsupportable theory results in an interpretation that is not just analytically flawed but is also unconstitutional.

THE ISSUE WHETHER THE MAJORITY'S INTERPRETATION OF THE STATUTE IS UNCONSTITUTIONAL IS PROPERLY PRESERVED

The issue whether the majority's interpretation of the statute is unconstitutional has been properly raised and preserved. Contrary to the majority's assertion that the constitutional issue has not been properly preserved, defendant Derror did sufficiently raise this issue. Defendant Derror's first question presented states, "IS CARBOXY THC, A METABOLITE OF MARIJUANA WITH NO PHARMACOLOGIC EFFECTS, A SCHEDULE 1 CONTROLLED SUBSTANCE?" One of the reasons that defendant Derror argues 11-carboxy-THC is not a schedule 1 controlled substance is that such an interpretation would be unconstitutional. This is explicitly expressed in one of the subheadings addressing this issue, which states, "The Definition Of Marijuana In MCL 333.7106 Does Not Include Carboxy THC. The Unprecedented Expansion Of This Definition, Originally Adopted By The U.S. Congress In 1937, Is Contrary To The Plain Language Of The Statute, Legislative Intent, And Renders The Statute Constitutionally Vague And Overbroad."

Further, defendant Derror's second question presented states, "CAN MCL 257.625(4), (5) AND (8) BE INTERPRETED TO CREATE STRICT LIABILITY CRIMES WITHOUT VIOLATING DEFENDANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS?" In addressing this issue, defendant Derror further explains why classifying 11-carboxy-THC as a schedule 1 controlled substance would violate a person's due process rights. Notably, the prosecutor in *Derror* responded to these arguments in his brief, specifically arguing that Michigan's statute is constitutional because there is a legitimate state interest in proscribing the use of *any* amount of certain controlled substances. Not only was this issue briefed, but Chief Justice TAYLOR specifically questioned the parties about the constitutionality of the statute during oral argument, as did Justice YOUNG and Justice MARKMAN. Accordingly, the majority's contention that I have strongly criticized the practice of raising issues that have never been argued or briefed by the parties is an accurate statement, but it is *wholly inapplicable to this case*. The parties not only had the opportunity to address the constitutional issue in this case, but *they indeed did so*. The majority misrepresents the record in this case and quotes from a prior opinion that I wrote to try and conjure up an inconsistency in my position when indeed no such inconsistency exists. The issue of constitutionality has been properly raised and preserved, and, as such, I find the majority's interpretation of the statute to be unconstitutional.

THE MAJORITY'S INTERPRETATION OF THE STATUTE IS UNCONSTITUTIONAL

It is indisputable that due process requires that citizens "be apprised of conduct which a criminal statute prohibits." *People v Turmon*, 417 Mich 638, 655; 340

NW2d 620 (1983).[4] "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v Harriss*, 347 US 612, 617; 74 S Ct 808; 98 L Ed 989 (1954). No person "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id*. For a criminal statute to be constitutional, it "must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' " *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994), quoting *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983). Moreover, if the general class of offenses affected by a statute "can be made constitutionally definite by a reasonable construction of the statute, [a court] is under a duty to give the statute that construction." *Harriss*, *supra* at 618.[5]

The majority's interpretation of the statute is unconstitutional for three reasons. First, the majority's interpretation of the statute does not provide an ordinary

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[4] The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . [US Const, Am V.]

The Michigan Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty or property, without due process of law. [Const 1963, art 1, § 17.]

[5] I note that the majority does not refer to this rule of law, instead only stating that a statute will not be struck down as vague even though doubtful cases can be imagined. See *ante* at 337. The majority's choice to ignore its mandate to reasonably construe a statute to ensure that it is constitutional is central for it to reach its decision today.

person with notice about what conduct is prohibited. MCL 257.625(8) prohibits driving with *any* amount of a schedule 1 controlled substance in a person's body. However, the majority interprets the statute in such a way as to provide no guidance to an ordinary person about *when* he can legally drive given the scientific testimony that 11-carboxy-THC can easily be found in a person's system for *weeks* after marijuana was ingested. This means that long after any possible impairment from ingesting marijuana has worn off, a person still cannot drive according to the majority's version of the statute. It also means that whether a person is deemed to have any amount of 11-carboxy-THC in his system depends on whatever cutoff standard for detection is set by the laboratory doing the testing.[6] This lacks any sort of guidance to give a person fair notice of when he can legally drive a car. Further, as explained by Dr. McCoy, as tests become more sophisticated, scientists will ultimately be able to determine if a person *ever* actively or passively ingested marijuana. Under the majority's theory, no one could legally drive a car if he *ever* inhaled marijuana. The majority states that it is "irrelevant" that a person cannot legally drive until long after any possible impairment from ingesting marijuana has worn off, even if this is weeks, months, or years. Further, the majority deems it "irrelevant" that a person cannot determine without clinical drug testing when 11-carboxy-THC can no longer be detected in a person's system. The majority believes all this is constitutional, and a person is on notice that driving may be indefinitely prohibited because ingesting marijuana is a misdemeanor. MCL 333.7404. But the penalty for ingesting marijuana under MCL 333.7404(2)(d) is "im-

[6] For example, cutoff standards have been reported at 100, 50, 20, and 5 nanograms. Huestis, *Cannabis (marijuana) — Effects on human behavior and performance*, 14 Forensic Sci Rev 15, 26-27 (2002).

prisonment for not more than 90 days or a fine of not more than $100.00, or both." The penalty for violating this misdemeanor statute is *not* being prohibited from possibly *ever* driving a car again. Thus, there is nothing in MCL 333.7404 that serves to put a person on notice that ingesting marijuana may very well mean that he cannot drive indefinitely or even permanently.

The majority's interpretation now criminalizes a broad range of conduct and makes criminals out of people who have no knowledge of the conduct that they must now seek to avoid. The majority's interpretation even makes criminals out of people who have inhaled marijuana smoke merely through passive inhalation. Dr. Evans, who testified in a hearing regarding defendant Kurts and who has worked with numerous agencies, including the United States Drug Enforcement Administration, stated, "You can get up to levels of five, eight, or ten nannograms [sic] per mil of carboxy THC in the blood by passive inhalation."[7] The prosecutor's expert in the *Derror* case, Dr. Glinn, admitted that Dr. Marilyn Huestis is one of the top experts on cannabis and its metabolites in the area of toxicology and chemistry. In an article written by Dr. Huestis, she states: "Environmental exposure to cannabis smoke can occur through passive inhalation of side-stream and exhaled smoke by non-users. Several research studies have indicated that it is possible to produce detectable concentrations of cannabinoid metabolites in the urine and plasma after passive inhalation of cannabis smoke."

[7] The prosecutor in the *Kurts* case argued to the contrary at oral argument and cited an article that he stated supported his position. While this article was never admitted into the record, a review of the article indicates that it does not stand for the blanket proposition that the prosecutor argued.

Huestis, *Cannabis (marijuana) — Effects on human behavior and performance*, 14 Forensic Sci Rev 15, 32 (2002).

There is scientific evidence that 11-carboxy-THC can indeed get into a person's body through passive inhalation. This is contrary to the majority's assertion that 11-carboxy-THC is only present in a person's body after they have "done something illegal." *Ante* at 338. Scientific evidence of 11-carboxy-THC being present after passive inhalation means that a person who attends a concert or a gathering where someone is smoking marijuana and passively inhales this smoke will have 11-carboxy-THC in his body. With no standard in place to use as a cutoff, it does not matter what level of 11-carboxy-THC this inhalation results in because, under the majority's interpretation of the statute, it is now illegal for that person and any person who has ever ingested marijuana to drive if 11-carboxy-THC can be detected. As the trial court in the *Derror* case correctly noted, under the majority's theory, "as long as we can identify [11-]carboxy-THC in [a person's] system, apparently they can't be on the highway and, as science progresses, that could be for years."

While such an argument may at first seem farfetched, it is the logical result of the majority's interpretation of the statute. The majority's interpretation is only limited by the scientific testing used in a particular case. If a test can detect 11-carboxy-THC from marijuana that was ingested one year ago, ten years ago, or 20 years ago, it is now a crime to drive, according to the majority.

Because of the tremendous potential for arbitrary and discriminatory enforcement in charging Michigan citizens with a crime under the majority's interpretation, the statute is unconstitutional for this second

reason as well. The United States Supreme Court has recognized that a critical aspect of the vagueness doctrine is " 'the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender*, *supra* at 358, quoting *Smith v Goguen*, 415 US 566, 574; 94 S Ct 1242 ; 39 L Ed 2d 605 (1974). Otherwise, a criminal statute would permit enforcement on the basis of the whims of police officers and prosecutors.

The majority's belief that it is a crime to operate a vehicle with *any* amount of 11-carboxy-THC in a person's body means that a prosecutor can choose to charge a person found to have 0.01 nanograms of 11-carboxy-THC in his system if the prosecutor chooses. In the *Kurts* case, the trial court also discussed the possibility that a person could be charged weeks after ingesting marijuana, stating that "maybe you can test positive [for 11-carboxy-THC] three weeks later, but there isn't any evidence that you could be under the influence of it." The prosecutor responded that it was a question for the jury, but, "hopefully, our office wouldn't even charge such a case." But the reality is that under the majority's interpretation of the statute, a prosecutor *could* charge in that case and many others because of the majority's improper interpretation of the statute, leaving Michigan citizens unsure of what conduct will be deemed criminal.[8]

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[8] Unlike the prosecutor in the *Kurts* case, the prosecutor in the *Derror* case noted that a charge was a very real possibility, as indicated by the following exchange during a hearing. The trial court stated to the prosecutor, "[I]t seems like what you are saying now is that it's your position that we could assume hypothetically that the consumption of this marijuana had absolutely no effect, whatsoever, on this lady's driving, but the penalty should still be enhanced from two to 15 years." The prosecutor replied, "That is the position of the People, Your Honor . . . ."

Third, and finally, the majority's interpretation of the statute is unconstitutional because it is not rationally related to the objective of the statute. See *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003). For a statute to be deemed unconstitutional under rational-basis review, it must be shown that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981).

Simply put, the statute at issue seeks to prevent a person from operating a vehicle while under the influence of drugs. But 11-carboxy-THC has no pharmacological effect on a person, and therefore cannot affect a person's driving. While 11-carboxy-THC does indicate that a person had THC in his system at *some point in the past*, there is no indication of *when* the THC was in the person's system. Dr. Glinn admitted that the levels of 11-carboxy-THC do not indicate whether the effects of the parent drug—marijuana—are still present. She stated, "You can't correlate the levels with the effects very well." Further, *no expert* testified that a person who had ingested marijuana days and weeks ago would still be impaired. To the contrary, Dr. Glinn testified that the effects may be seen "up to 24 hours . . . ." The scientific evidence is irrefutable that 11-carboxy-THC stays in a person's system far past the point of any impairment. There is simply no rational reason to charge a person with 11-carboxy-THC in his system *weeks* after marijuana was originally ingested when a person can no longer be impaired from the effects of the marijuana.

Plainly, there is no rational reason to charge a person who passively inhaled marijuana smoke at a rock concert a month ago and who now decides to drive to work. There is no rational reason to charge a person who

inhaled marijuana two weeks ago and who now decides to drive to the store to pick up a gallon of milk. While I certainly agree with the Legislature's position that a person should be punished for driving while under the influence of a controlled substance because of the potential for tragic outcomes, the majority's interpretation of the statute is arbitrary and wholly unrelated in a rational way to the objective of the statute. To say that driving while a person's system contains *any* amount of a substance that has *no pharmacological effect* is a crime—given that under the most conservative estimates offered by the prosecution, the current scientific testing can find evidence of the substance for at least four weeks—is not permissible under the Constitution. It is this Court's role to construe statutes to avoid a danger of unconstitutionality, see *Harriss*, *supra* at 618, yet today the majority has ignored this longstanding principle. A reasonable construction of the statutory language is possible—for example, finding that 11-carboxy-THC may be used as *circumstantial* evidence of a statutory violation—yet the majority has chosen a position that is contrary to the Constitution and the rights of our citizens.

CONCLUSION

Because the majority interprets the statutory provisions at issue contrary to the express wording chosen by the Legislature, as well as contrary to the intent of the Legislature, I must respectfully dissent. Today's holding now makes criminals of numerous Michigan citizens who, before today, were considered law-abiding, productive members of our communities. Now, if a person has ever actively or passively ingested marijuana and drives, he drives not knowing if he is breaking the law, because if any amount of 11-carboxy-THC can be

detected—no matter when it was previously ingested—he is committing a crime. The majority's interpretation, which has no rational relationship to the Legislature's genuine concerns about operating a vehicle while impaired, violates the United States Constitution and the Michigan Constitution. Therefore, I would affirm the decision of the Court of Appeals.

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

MICHIGAN CHIROPRACTIC COUNCIL v
COMMISSIONER OF THE OFFICE OF FINANCIAL
AND INSURANCE SERVICES

Docket Nos. 126530, 126531. Argued November 8, 2005 (Calendar No. 6). Decided June 28, 2006. Rehearing denied 477 Mich 1207.

The Michigan Chiropractic Council and the Michigan Chiropractic Society petitioned the Ingham Circuit Court for judicial review of a decision of the Commissioner of the Office of Financial and Insurance Services rejecting the petitioners' challenge of the commissioner's approval of a preferred provider organization (PPO) endorsement offered in no-fault automobile insurance policies of Farmers Insurance Exchange and Mid-Century Insurance Company. The PPO endorsement permitted policyholders the option of receiving a reduction in their personal injury protection (PIP) premium in exchange for agreeing to obtain medical treatment exclusively from providers in the insurers' PPO network. The petitioners contended that the PPO endorsement constituted an unfair, deceptive, or misleading trade practice and violated the no-fault insurance act. The circuit court, Thomas L. Brown, J., allowed the insurers to intervene as respondents and concluded that the PPO endorsement inherently conflicted with the no-fault insurance scheme of a fee-for-service system by implementing a managed care system that limited the choice policyholders had in obtaining medical services. On that basis, the circuit court reversed the commissioner's decision to permit the respondent insurers' usage of the no-fault PPO endorsement. The commissioner and the respondent insurers appealed to the Court of Appeals separately, and the appeals were consolidated. The Court of Appeals, FITZGERALD, P.J., and NEFF and WHITE, JJ., affirmed the judgment of the circuit court. 262 Mich App 228 (2004). The Supreme Court granted the insurers' application for leave to appeal, directing the parties to address whether the petitioners had standing to challenge the PPO endorsement on behalf of the appellants' insureds (count I of the petition) and the chiropractic providers (count II of the petition). 472 Mich 899 (2005).

In separate opinions, the Supreme Court *held*:

The petitioners do not satisfy the test for third-party standing and may not litigate the claims of the appellants' insureds (count I). The allegation of a violation of MCL 500.3157 (count II) is not ripe for judicial review. The judgments of the circuit court and the Court of Appeals must be vacated and the decision of the Commissioner of the Office of Financial and Insurance Services must be reinstated.

The Michigan Supreme Court and the federal courts, to make certain that the judiciary does not usurp the power of coordinate branches of government and exercises only the "judicial power," have developed justiciability doctrines to ensure that cases before the courts are appropriate for judicial action. These include the doctrines of standing, ripeness, and mootness. These doctrines are jurisdictional in nature and may be raised at any time, even sua sponte, and may not be waived by the parties. The questions of justiciability concern the judiciary's constitutional jurisdiction to adjudicate cases involving a genuine controversy.

Where a lower court has erroneously exercised its judicial power, an appellate court has jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit.

A litigant generally may not vindicate the rights of another. However, a litigant may assert the rights of another where (1) the litigant establishes standing, (2) the litigant has a close relationship with the person who possesses the right sought to be asserted, and (3) the litigant establishes that there is a hindrance to that person's ability to protect his or her own interests. To establish standing a plaintiff must show (1) that the plaintiff has suffered a concrete injury in fact, (2) the existence of a causal connection between the injury and conduct complained of that is fairly traceable to the challenged action of the defendant, and (3) that the injury will likely be redressed by a favorable decision. In this case, there is no evidence that any obstacle or hindrance prevents the appellants' insureds from protecting their own interests through litigation.

Justice YOUNG, joined by Chief Justice TAYLOR and Justice CORRIGAN, stated the reasoning and the result with regard to the Court's determination concerning count I. With regard to count II, the allegation of a violation of MCL 500.3157, which concerns charges for medical services, assuming that the petitioners have standing, they failed to show that any of their members have experienced an actual injury in the form of inadequate reimbursement as a result of the appellants' policy endorsement. Therefore, the allegation in count II is not ripe for review and is not

justiciable. The judgments of the circuit court and the Court of Appeals should be vacated and the administrative decision should be reinstated.

Justice KELLY, concurring in the result only, stated that Michigan's standing requirements before *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), were sufficient, that *Lee's* requirement of a particularized injury has no support in the Michigan Constitution, and that *Lee* wrongly blocks access to our state courts.

Justice WEAVER, concurring in the result only and dissenting in part, stated her disagreement with the reasoning and analysis of the majority that mistakenly transforms the prudential doctrines of mootness and ripeness into constitutionally based doctrines that affect the jurisdiction of the Supreme Court.

Justice CAVANAGH, concurring in part of the result and dissenting in part, concurred only with the result reached by the majority with regard to count I, and dissented from the majority's decision not to reach the merits of the petitioner's claim regarding count II. The petitioners' allegations are sufficient to confer standing on them to pursue the claim regarding count II.

Justice MARKMAN, concurring in part and dissenting in part, concurred in the analysis and the result reached with respect to the claim concerning the rights of the insureds (count I), but disagreed that the justiciability analysis traditionally applied to inquires concerning the exercise of the "judicial power" is necessarily sufficient to dispose of the questions presented with respect to the claim concerning the rights of the providers (count II). Because a number of constitutional questions exist concerning review of the administrative process, and because they must be resolved for a proper determination of this case, the parties should be directed to file supplemental briefs on these issues.

Circuit court and Court of Appeals judgments vacated; administrative decision reinstated.

ACTIONS — THIRD PARTIES — STANDING.

A litigant generally may not vindicate the rights of another person but may vindicate the rights of that person where the litigant (1) establishes standing, (2) has a close relationship with that person, and (3) establishes that there is a hindrance to that person's ability to protect his or her own interests; standing is established by a showing that (1) the plaintiff has suffered a concrete injury in fact, (2) there is a causal connection between the injury and conduct

complained of that is fairly traceable to the challenged action of the defendant, and (3) the injury will likely be redressed by a favorable decision.

Miller Canfield Paddock & Stone, PLC (by *Kevin J. Moody* and *Jaclyn Shoshana Levine*), for Michigan Chiropractic Council and Michigan Chiropractic Society.

Warner Norcross & Judd LLP (by *Jeffrey O. Birkhold, Joseph A. Kuiper*, and *Ryan D. Cobb*) for Farmers Insurance Exchange and Mid-Century Insurance Company.

Amici Curiae:

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

Willingham & Coté, P.C. (by *John A. Yeager, Matthew K. Payok*, and *Leon J. Letter*), for Insurance Institute of Michigan.

Hertz, Schram & Saretsky, P.C. (by *Robert P. Geller* and *William D. Adams*), for PPOM, L.L.C.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas, L. Page Graves*, and *Steven A. Hicks*), for Coalition Protecting Auto No-Fault (CPAN).

YOUNG, J. Petitioners, two organizations representing the interests of Michigan chiropractors, challenged the validity of the "Preferred Provider Option" offered by appellants to their policyholders. In count I of their petition, petitioners claimed that the option violated the rights of the appellants' insureds. In count II of their petition, petitioners claimed a violation of the rights of chiropractic providers. Regarding count I, we hold that

petitioners do not satisfy the test for third-party standing, and may not litigate the claims of appellants' insureds. Regarding count II, assuming arguendo that petitioners have standing to sue on behalf of their membership, petitioners have not established an actual or imminent injury. Thus, petitioners' claim is not ripe for judicial review. Therefore, we vacate the judgments of the circuit court and the Court of Appeals and reinstate the decision of the Commissioner of the Office of Financial and Insurance Services (the Commissioner).[1]

I. FACTS AND PROCEDURAL HISTORY

The appellant-insurers offer a "Preferred Provider Option" (PPO) to their no-fault automobile insurance policyholders, allowing their insureds to elect to limit their choice of medical care providers in the event they require personal injury protection (PIP) benefits. In exchange for reduced PIP premiums, insureds agree to receive treatment from a network of medical care providers maintained by Preferred Providers of Michigan (PPOM). In the event that a policyholder seeks treatment from a provider outside the PPOM network, the insured must pay a deductible, and provider reimbursement is limited to PPOM's customary reimbursement rate. The "Preferred Provider Option" is entirely voluntary; if policyholders do not opt for the endorsement, they do not receive the premium discount and are not limited to the PPOM network of providers.

Appellants began offering the discounted policy option in July 2000.[2] In August 2000, petitioners filed a

[1] Because we dispose of this case on the basis of standing and ripeness, we do not address the substantive merits of appellants' appeal.

[2] The policy option was deemed approved after the Commissioner failed to act within 30 days after the endorsement was submitted for approval pursuant to MCL 500.2236(1).

request with the Commissioner for a contested case hearing pursuant to MCL 500.2028 and MCL 500.2029, claiming that the PPO endorsement violated the Insurance Code, MCL 500.100 *et seq*. Petitioners asked the Commissioner to withdraw approval of the endorsement pursuant to MCL 500.2236(5) and to issue a cease and desist order to respondents.[3]

The Commissioner sought additional information from respondents and petitioners, which petitioners refused to supply. On the basis of the record established, the Commissioner rejected petitioners' request for a contested case hearing. The Commissioner concluded that the endorsement did not violate the no-fault act, MCL 500.3101 *et seq*. Petitioners appealed to the circuit court, which reversed the decision of the Commissioner and held that the "Preferred Provider Option" was not authorized by law.

The Court of Appeals affirmed the circuit court judgment, holding that respondents' PPO endorsement was inconsistent with the no-fault act and that the authority to issue the endorsement must emanate from the Legislature.[4]

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[3] Petitioners' amended petition contained four counts; however, only the two counts referenced above are relevant to this appeal. As noted, count I alleged that the endorsement violated the rights of insureds and count II alleged that the endorsement violated the rights of chiropractic providers. Count III alleged that the $500 deductible imposed when a policyholder sought treatment from a nonnetwork provider was a penalty, which "potentially imposes a tremendous hardship on insureds." However, following an adverse decision by the Commissioner, petitioners did not seek review of count III in the circuit court. Count IV challenged appellants' refusal to pay for chiropractic care in favor of allegedly comparable care provided by osteopathic physicians. This issue, which was not addressed by the Commissioner, was resolved in petitioners' favor in *Sprague v Farmers Ins Exch*, 251 Mich App 260; 650 NW2d 374 (2002), lv den 469 Mich 914 (2003).

[4] 262 Mich App 228; 685 NW2d 428 (2004).

We granted leave to appeal, directing the parties to address among the issues briefed whether petitioners had standing to challenge the Preferred Provider Option on behalf of appellants' insureds and chiropractic providers.[5]

II. STANDARD OF REVIEW

Whether a party has standing is a question of law that we review de novo.[6] Moreover, questions of justiciability implicate constitutional separation of powers principles.[7] Constitutional questions are likewise reviewed de novo.[8]

III. ANALYSIS

a. JUSTICIABILITY

Our tripartite system of government is constitutionally established in both our state and federal constitutions. US Const, art III, § 1 confers upon the courts only "judicial power"; US Const, art III, § 2 limits the judicial power to "[c]ases" and "[c]ontroversies." Similarly, our state constitution, Const 1963, art 3, § 2, provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

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[5] 472 Mich 899 (2005).

[6] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004); *Crawford v Dep't of Civil Service*, 466 Mich 250; 645 NW2d 6 (2002); *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001).

[7] *Nat'l Wildlife*, *supra*; *Lee*, *supra*.

[8] *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004).

The powers of each branch are outlined in the Michigan Constitution, which assigns to the Legislature the task of exercising the "legislative power,"[9] the Governor the task of exercising the "executive power,"[10] and the judiciary the task of exercising the "judicial power."[11]

In *Nat'l Wildlife*, this Court described and defined the Court's constitutionally assigned "judicial power":

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [471 Mich 614-615.]

In seeking to make certain that the judiciary does not usurp the power of coordinate branches of government, and exercises only "judicial power," both this Court and the federal courts have developed justiciability doctrines to ensure that cases before the courts are appropriate for judicial action.[12] These include the doctrines of stand-

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[9] Const 1963, art 4, § 1.

[10] Const 1963, art 5, § 1.

[11] Const 1963, art 6, § 1. As this Court noted in *Anway v Grand Rapids R Co*, 211 Mich 592, 598; 179 NW 350 (1920), "By the Constitution the judicial power was vested in the courts and it was vested in no other department of the government. To the courts was committed the judicial power *and no other*." (Emphasis added.)

[12] Justiciability doctrines such as standing, " ' "mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our

ing,[13] ripeness,[14] and mootness.[15]

Federal courts have held that doctrines such as standing and mootness are constitutionally derived and jurisdictional in nature, because failure to satisfy their elements implicates the court's constitutional authority to exercise only "judicial power" and adjudicate only actual cases or controversies.[16] Because these doctrines

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kind of government." ' " *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196; 631 NW2d 733 (2001), quoting *Allen v Wright*, 468 US 737, 750; 104 S Ct 3315; 82 L Ed 2d 556 (1984), quoting *Vander Jagt v O'Neill*, 226 US App DC 14, 26-27; 699 F2d 1166 (1983) (Bork, J., concurring).

[13] The doctrine of standing requires "the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy." *House Speaker v State Admin Bd,* 441 Mich 547, 554; 495 NW2d 539 (1993). In order to establish standing, a plaintiff must establish three elements: (1) that the plaintiff has suffered a concrete " ' "injury in fact" ' "; (2) the existence of a causal connection between the injury and conduct complained of that is " ' "fairly . . . trace[able] to the challenged action of the defendant" ' "; and (3) that the injury will likely be " ' "redressed by a favorable decision." ' " *Lee*, *supra* at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (citations omitted).

[14] Ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon " 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985) (citation omitted). See also *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380; 455 NW2d 1 (1990).

[15] Mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where " 'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Los Angeles Co v Davis*, 440 US 625, 631; 99 S Ct 1379; 59 L Ed 2d 642 (1979), quoting *Powell v McCormack*, 395 US 486, 496; 89 S Ct 1944; 23 L Ed 2d 491 (1969). See also *Wedin v Atherholt*, 298 Mich 142; 298 NW 483 (1941).

[16] *Lewis v Casey*, 518 US 343, 349 n 1; 116 S Ct 2174; 135 L Ed 2d 606 (1996)("standing . . . is jurisdictional and not subject to waiver"); *Iron Arrow Honor Society v Heckler*, 464 US 67,70; 104 S Ct 373; 78 L Ed 2d 58 (1983) (courts "lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies");

are jurisdictional in nature, they may be raised at any time and may not be waived by the parties.[17]

Likewise, our case law has also viewed the doctrines of justiciability as affecting "judicial power," the absence of which renders the judiciary constitutionally powerless to adjudicate the claim.[18] This is a point made in *Anway v Grand Rapids R Co*:[19]

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that

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Reno v Catholic Social Services, Inc, 509 US 43, 58 n 18; 113 S Ct 2485; 125 L Ed 2d 38 (1993) (noting that ripeness doctrine is drawn from constitutional limitations on judicial power as well as prudential considerations).

[17] *Reno*, *supra* (noting that ripeness question may be raised on the Court's own motion, and that the Court cannot be bound by the parties); *Lewis*, *supra* (standing not subject to waiver); *Nat'l Org for Women, Inc v Scheidler*, 510 US 249, 255; 114 S Ct 798; 127 L Ed 2d 99 (1994) (standing "remains open to review at all stages of the litigation"); *Calderon v Moore*, 518 US 149, 150; 116 S Ct 2066; 135 L Ed 2d 453 (1996) ("mootness can arise at any stage of litigation").

[18] In contrast, an administrative agency does not possess "judicial power"; rather, the authority of the administrative agency is derived from the statute that created it. *Holloway v Ideal Seating Co*, 313 Mich 267; 21 NW2d 125 (1946). While administrative agencies "often act in a quasi-judicial capacity, it is recognized that they are established to perform essentially executive functions." *Judges of 74th Judicial Dist v Bay Co*, 385 Mich 710, 727; 190 NW2d 219 (1971). As an administrative agency does not possess and may not exercise "judicial power," neither is it bound by the limitations of "judicial power." In other words, administrative agencies are not bound by the same justiciability limitations that affect the authority of the judiciary. See *North Carolina Utilities Comm v Fed Communications Comm,* 537 F2d 787 (CA 4, 1976); *Tennessee Gas Pipeline Co v Fed Power Comm*, 197 US App DC 1; 606 F2d 1373 (1979); *Climax Molybdenum Co v Secretary of Labor*, 703 F2d 447 (CA 10, 1983); *Fed Communications Comm v Pacifica Foundation*, 438 US 726, 735; 98 S Ct 3026; 57 L Ed 2d 1073 (1978).

[19] 211 Mich 592, 615; 179 NW 350 (1920).

> opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." [Citation omitted.]

Similarly, in *Novi v Robert Adell Children's Funded Trust*,[20] this Court recently stated:

> Where the facts of a case make clear that a litigated issue has become moot, a court is, of course, bound to take note of such fact and dismiss the suit, even if the parties do not present the issue of mootness. " ' "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." ' " Because " '[t]he judicial power . . . is the right to determine actual controversies arising between adverse litigants,' " a court hearing a case in which mootness has become apparent would lack the power to hear the suit. [Citations omitted.][21]

Because "the most critical element" of the "judicial power" requires that a case contain a genuine controversy between the parties,[22] we must ensure that one exists before exercising our judicial authority. The judiciary arrogates to itself the powers of the executive and

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[20] 473 Mich 242, 255 n 12; 701 NW2d 144 (2005).

[21] See also Justice WEAVER's lead opinion in *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633 n 3; 537 NW2d 436 (1995), where she noted that "[s]tanding is a jurisdictional issue that concerns the power of a court to hear and decide a case and does not concern the ultimate merits of the underlying substantive issues of the action."

[22] *Nat'l Wildlife*, *supra* at 615.

legislative branches whenever it acts outside the constitutional confines of "judicial power." Fidelity to our constitutional structure compels this Court to be "vigilant in preventing the judiciary from usurping the powers of the political branches."[23] Thus, we reiterate that questions of justiciability concern the judiciary's *constitutional jurisdiction* to adjudicate cases containing a genuine controversy.[24] Questions of justiciability may be raised at any stage in the proceedings, even sua sponte, and may not be waived by the parties.[25] Where a lower court has erroneously exercised its judicial power, an appellate court has "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."[26]

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[23] *Lee*, *supra* at 737.

[24] This notion of "constitutional jurisdiction" is conceptually distinct from "subject-matter jurisdiction." The term "jurisdiction" is broadly defined as "the authority which the court has to hear and determine a case." *Ward v Hunter Machinery Co*, 263 Mich 445, 449; 248 NW 864 (1933). Subject-matter jurisdiction is a court's authority to try a case of a certain kind or character. See *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992). Our authority to hear only cases containing a genuine controversy does not depend on the subject matter of the case; rather, it flows from the structural boundaries delineated in our constitution. See also *Travelers Ins v Detroit Edison*, *supra* (discussing distinctions between primary jurisdiction and subject-matter jurisdiction).

[25] We note that some recent Court of Appeals cases have erroneously equated standing with capacity to sue for the purposes of dispositive motions under MCR 2.116(C)(5). See, for example, *Rogan v Morton*, 167 Mich App 483; 423 NW2d 237 (1988); *Afshar v Zamarron*, 209 Mich App 86; 530 NW2d 490 (1995). However, as this Court previously noted in *Leite v Dow Chemical Co*, 439 Mich 920 (1992), the two concepts are unrelated. Our courts are admonished to avoid conflating the two.

[26] *United States v Corrick*, 298 US 435, 440; 56 S Ct 829; 80 L Ed 1263 (1936).

b. THIRD-PARTY STANDING

In count I of their amended petition, petitioners challenge appellants' policy endorsement as violating the rights of appellants' insureds. Thus, count I of the petition concerns third-party standing—whether petitioners may litigate to vindicate the rights of others.

The general rule is that a litigant cannot vindicate the rights of a third party.[27] The rule disfavoring *jus tertii*—litigating the rights of a third party—"assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation."[28] Furthermore, this rule reflects a "healthy concern" that if the claim is brought by a third party, "the courts might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.' "[29]

As is often the case with general rules, there are recognized exceptions. While third-party standing is generally disfavored, federal jurisprudence has permitted, under certain limited circumstances, a litigant to assert the rights of another. In addition to requiring

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[27] See *People v Smith*, 420 Mich 1; 360 NW2d 841 (1984); *Ver Hoven Woodward Chevrolet, Inc v Dunkirk*, 351 Mich 190; 88 NW2d 408 (1958); *People v Rocha*, 110 Mich App 1; 312 NW2d 657 (1981). "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v Seldin*, 422 US 490, 499; 95 S Ct 2197; 45 L Ed 2d 343 (1975) (citing *Tileston v Ullman*, 318 US 44; 63 S Ct 493; 87 L Ed 603 [1943]).

[28] *Kowalski v Tesmer*, 543 US 125, 129; 125 S Ct 564; 160 L Ed 2d 519 (2004).

[29] *Id*. (citation omitted).

that the litigant establish standing,[30] the litigant must also make two additional showings. First, the litigant must have a sufficiently "close relation to the third party."[31] Second, "there must exist some hindrance to the third party's ability to protect his or her own interests."[32]

Michigan's third-party standing jurisprudence is considerably less developed. In *Mary v Lewis*,[33] a garnishee defendant challenged the constitutionality of a codefendant's prejudgment garnishment. This Court discussed and denied third-party standing to the defendant after discussing factors from a United States Supreme Court *dissenting* opinion:[34]

> As a general rule, one party may not raise the denial of another person's constitutional rights. . . . Defendant quotes portions of Justice Brennan's dissent in *Village of Belle Terre v Boraas*, 416 US 1; 94 S Ct 1536; 39 L Ed 2d 797 (1974), where two exceptions to this general rule are discussed: first, those situations where there is evidence that the direct consequence of the denial of the constitutional rights of the other would impose substantial economic injury upon the party asserting the right; second, those instances where the litigant's interest and the other's interest intertwine and the latter's rights may not be

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[30] *Singleton v Wulff*, 428 US 106; 96 S Ct 2868; 49 L Ed 2d 826 (1976).

[31] *Powers v Ohio*, 499 US 400, 411; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

[32] *Id.*; *Tesmer*, *supra* at 130.

[33] 399 Mich 401, 416; 249 NW2d 102 (1976).

[34] In *People v Rocha,* 110 Mich App 1; 312 NW2d 657 (1981), the Court of Appeals rejected the defendant's equal protection argument on the basis that the defendant could not assert the constitutional rights of a third party. Inexplicably, the *Rocha* panel did not cite or discuss this Court's decision in *Mary v Lewis*, decided five years earlier. Rather, the panel relied on two law review articles in setting forth the requirements for third-party standing.

> effectively vindicated in any other manner because they are capable of evading constitutional review.
>
> In this case the bank does not show how it qualifies under either of these exceptions. . . . We therefore conclude that the bank has no standing to interpose the due process rights of the principal defendant regarding the prejudgment garnishment. [399 Mich at 416.]

Thus, the *Mary* Court would permit *jus tertii* where a litigant could establish an economic injury, show that the interests between the litigant and the party possessing the right "intertwine," and show that the third party's rights "are capable of evading constitutional review."

In our judgment, the test utilized by the *Mary* Court is analytically deficient. Requiring that a litigant establish an injury, economic or otherwise, is merely a component of our traditional standing doctrine.[35] Moreover, that the litigant and the third party have "intertwining interests" does not lead to the inference that the party establishing *jus tertii* will be an ardent proponent of the rights of the third party. The third factor is the most curious, for whether a claim is capable of evading review is a consideration that is recognized as relevant to mootness, not standing.[36]

Accordingly, we adopt the traditional federal test for third-party standing as articulated in *Tesmer*. A party seeking to litigate the claims of another must, as an initial matter, establish standing under the test established in *Lee*, *supra*.[37] Second, the party must have a "close relationship" with the party possessing the right

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[35] See footnote 13.

[36] See *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002); *In re Midland Publishing Co, Inc*, 420 Mich 148; 362 NW2d 580 (1984).

[37] See footnote 13.

in order to establish third-party standing. Last, the litigant must establish that there is a "hindrance" to the third party's ability to protect his or her own interests.

As applied to the facts of this case, petitioners cannot meet the requirements of third-party standing and cannot litigate the rights of appellants' insureds. Assuming arguendo that petitioners could satisfy the *Lee* elements,[38] and assuming without deciding that petitioners share a sufficiently "close relationship" with appellants' insureds,[39] there is absolutely no evidence that any obstacle or hindrance prevents appellants' insureds from protecting their own interests through litigation. Therefore, we hold that petitioners do not have standing to assert that the rights of appellants' insureds were violated by appellants' managed care endorsement.

c. RIPENESS

The doctrine of ripeness is closely related to the doctrine of standing, as both justiciability doctrines assess pending claims for the presence of an actual or imminent injury in fact.[40] However, standing and ripe-

[38] Petitioners' amended petition maintains that petitioners are "unable to obtain reasonable access to no-fault insureds." For the purposes of this opinion, we do not address whether this claimed injury is a legally protected interest, as required by *Lee*.

[39] Petitioners maintain that their members "provide reasonably necessary medical care" to appellants' insureds. The patient-physician relationship is frequently deemed sufficiently intimate to permit third-party standing. See *Singleton*, footnote 30 of this opinion (asserting rights of female patients regarding abortion); *Griswold v Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965)(asserting rights of married patients regarding contraceptives).

[40] See *Warth v Seldin*, *supra*, 422 US 499 n 10 (standing "bears close affinity to questions of ripeness"). See also 13A Wright, Miller & Cooper,

ness address different underlying concerns.[41] The doctrine of standing is designed to determine whether a particular party may properly litigate the asserted claim for relief.[42] The doctrine of ripeness, on the other hand, does not focus on the suitability of the party; rather, ripeness focuses on the *timing* of the action.[43]

Count II of the petitioners' petition asserts that appellants' managed care option violates the rights of chiropractic providers, including petitioners' membership. As a nonprofit organization, petitioners have standing to litigate on behalf of their members to the degree that their members would have standing as individual plaintiffs.[44] The petition asserts that provid-

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Fed Practice & Procedure, § 3531.12, p 50, noting that the justiciability doctrines are "tied closely together." See also *Wilderness Society v Alcock*, 83 F3d 386, 390 (CA 11, 1996), noting that the "confusion in the law of standing and ripeness" was "hardly surprising," as both doctrines require actual or imminent injury. However, an "important distinction" existed between the two doctrines.

[41] See *Renne v Geary*, 501 US 312, 320; 111 S Ct 2331; 115 L Ed 2d 288 (1991), which noted that "[j]usticiability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention."

[42] "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v Cohen*, 392 US 83, 99-100; 88 S Ct 1942; 20 L Ed 2d 947 (1968).

[43] "[R]ipeness is peculiarly a question of timing." *Blanchette v Connecticut Gen Ins Corps*, 419 US 102, 140; 95 S Ct 335; 42 L Ed 2d 320 (1974). See also *Navegar, Inc v United States,* 322 US App DC 288, 292; 103 F3d 994 (1997) (ripeness "focuses on the timing of the action rather than on the parties seeking to bring it"); *Peoples Rights Organization, Inc v City of Columbus,* 152 F3d 522 (CA 6, 1998); *Wilderness Society*, *supra* at 390, noting that "[w]hen determining ripeness, a court asks whether this is the correct *time* for the complainant to bring the action." (Emphasis in original.)

[44] *Nat'l Wildlife*, *supra,* 471 Mich 629. Appellants ask this Court to adopt the holding of *Hunt v Washington State Apple Advertising Comm,*

ers "are entitled to be paid their reasonable and customary charge,"[45] but significantly, appellees assert as their injury that appellants' policy endorsement violates MCL 500.3157 by reimbursing providers at a rate less than their *customary charge*.[46] Review of the record in this case reveals no evidence that any of petitioners' members have experienced an actual injury as a result of appellants' policy endorsement. Because petitioners seek relief for a hypothetical injury, the ripeness of the claim comes into question.

The ripeness doctrine is supported by both constitu-

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432 US 333; 97 S Ct 2434; 53 L Ed 2d 383 (1977), requiring additional elements to establish organizational standing. However, because we resolve this issue on ripeness grounds, we need not address the propriety of adopting *Hunt*.

[45] To the degree that petitioners seek relief based on the customary charges of their membership, the Court of Appeals panel below determined that petitioners' argument failed in light of *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 377; 670 NW2d 569 (2003). See 262 Mich App 246 n 12. *Advocacy Org* was affirmed by this Court, with all six participating justices concluding that reasonable, rather than customary, fees are compensable. 472 Mich 91; 693 NW2d 358 (2005). Additionally, petitioners did not appeal the Court of Appeals ruling, nor did they file a cross-appeal. Therefore, the issue is not properly before us and will not be further reviewed. *Therrian v Gen Laboratories, Inc,* 372 Mich 487; 127 NW2d 319 (1964).

[46] As noted in footnote 45 of this opinion, the statute permits a medical provider to charge a reasonable amount for its services. MCL 500.3157 provides:

> 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. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

tional and prudential principles.[47] As a threshold matter, the Michigan Constitution permits the judiciary to exercise only "judicial power," the "most critical element" of which is the requirement that a genuine controversy exist between the parties.[48] A claim lacks ripeness, and there is no justiciable controversy, where "the harm asserted has [not] matured sufficiently to warrant judicial intervention . . . ."[49]

Petitioners' allegation that appellants' policy endorsement violates the rights of their members in violation of MCL 500.3157 is not yet ripe for review. Nothing in the record before us indicates that petitioners' members have in fact been reimbursed at less than a reasonable amount. The lack of ripeness is further buttressed by the particularly fact-intensive nature of petitioners' claim. MCL 500.3157 provides that chiropractors "may charge a reasonable amount" for services rendered. Petitioners have the burden of establishing the reasonableness of their members' charges in order to impose liability on the insurer.[50] Moreover, questions surrounding the reasonableness of petitioners' members' charges are factual in nature and must be resolved by the jury.[51] Because the record is completely devoid of

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[47] See *Nat'l Park Hospitality Ass'n v Dep't of Interior*, 538 US 803, 807; 123 S Ct 2026; 155 L Ed 2d 1017 (2003). The prudential considerations require that a court consider both " 'the fitness of the issues for judicial decision' " and " 'the hardship to the parties of withholding court consideration . . . .' " *Thomas v Union Carbide*, *supra* at 581 (citation omitted).

[48] *Nat'l Wildlife*, *supra*, 471 Mich 615. See also *Thomas v Union Carbide*, *supra* at 579 (ripeness must be established "[a]s a threshold matter").

[49] *Warth v Seldin*, 422 US 490, 499 n 10; 95 S Ct 2197; 45 L Ed 2d 343 (1975).

[50] *Nasser v Auto Club Ins Ass'n*, 435 Mich 33; 457 NW2d 637 (1990).

[51] *Id.*

any facts supporting an actual or imminent injury in fact, we conclude that petitioners' claim is not ripe for review at this juncture and is not justiciable.[52]

IV. CONCLUSION

Issues of justiciability concern the judiciary's constitutionally delineated jurisdiction to exercise only "judicial power" and hear only cases involving an actual controversy. Therefore, questions of justiciability may be raised at any stage in the proceedings and may not be waived by the parties.

Regarding count I, we hold that petitioners do not satisfy the test for third-party standing, and may not litigate on behalf of appellants' insureds. In count II, petitioners assert the rights of their members. Assuming that petitioners could otherwise litigate the claims of their members, petitioners have not established an actual or imminent injury; thus, the claim is not ripe for review.

We therefore vacate the judgments of the circuit court and the Court of Appeals and reinstate the decision of the Commissioner.

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

KELLY, J. (*concurring in the result only*). I agree with the result reached by the majority. However, I continue to have concerns with the judicial test for standing this

[52] See *Johnson v Muskegon Hts,* 330 Mich 631, 633; 48 NW2d 194 (1951) (Courts generally "will not decide a case or question, in or on which there is no real controversy" because " '[i]t is not our duty to pass on moot questions or abstract propositions.' " [Citation omitted.]).

Court adopted in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 747; 629 NW2d 900 (2001) (KELLY, J., dissenting).

The test in *Lee* incorporates the requirements set forth in *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). Under *Lee*, a plaintiff seeking standing must establish an actual or imminent injury that is concrete and particularized. There must be a causal connection between the defendant's action and the plaintiff's injury, and the injury must be one for which the court can provide redress. As I stated in my concurrence in result only in *Nat'l Wildlife Federation & Upper Peninsula Environmental Council v Cleveland Cliffs Iron Co*,[1] I have come to believe that *Lee* wrongly adopted in toto these federal standing requirements.

By adopting the *Lujan* "case" and "controversy" rule, the Court creates impediments to access to Michigan courts not found in our Constitution. There is no mandatory particularized injury requirement for standing under either the federal or state constitutions. See my opinion in *Nat'l Wildlife*, *supra* at 682-683.

I still believe that Michigan's standing requirements before *Lee* were sufficient and that *Lee* wrongly blocks access to our state courts.

WEAVER, J. *(concurring with the result only and dissenting in part)*. I concur with the result reached by the majority. But I strongly dissent from its reasoning and analysis.

In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608; 684 NW2d 800 (2004), a majority of four justices fundamentally changed and heightened

[1] 471 Mich 608, 676; 684 NW2d 800 (2004).

the burden of standing to pursue causes of action when they superimposed the federal constitutional "case or controversy" standing constraints on the plaintiffs.

Today the majority is again expanding its earlier, incorrect, decisions in *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726; 629 NW2d 900 (2001), and *Nat'l Wildlife Federation*. In *Lee* and *Nat'l Wildlife Federation* the majority imposed the United States Constitution's "cases and controversies" restrictions on standing in Michigan courts. This change of law constitutionalized Michigan's standing doctrine, which was formerly a prudential limitation. Relying on *Nat'l Wildlife,* the same majority narrowed who qualifies as an "aggrieved party" for the purpose of invoking the appellate jurisdiction of this Court in *Federated Ins Co v Oakland Co Rd Comm,* 475 Mich 286; 715 NW2d 846 (2006).

The majority now compounds these errors by transforming the prudential doctrines of mootness[1] and ripeness[2] into constitutionally based doctrines that affect the jurisdiction of the Court. See *ante* at 370-374.

When the mootness and ripeness doctrines are viewed as prudential limits, a state court has *discretion* in applying those doctrines. By contrast, the "case or controversy" clause in US Const, art III, § 2 *requires* federal courts to dismiss cases that are moot or not ripe. By transforming the doctrines of mootness and ripeness into constitutional requirements, the majority requires

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[1] "Generally, an action is considered 'moot' when it no longer presents a justiciable controversy because issues involved have become academic or dead." Black's Law Dictionary (6th ed), p 1008.

[2] Ripeness refers to the threshold conditions that must exist before a dispute is sufficiently mature to enable a court to decide it on the merits. Maraist, *Environmental and land use law: The ripeness doctrine in Florida land use law,* 71 Fla B J 58 (February, 1997).

these doctrines to be treated as jurisdictional issues by the Michigan state courts as well.

The majority states, albeit in dicta, that the mootness doctrine is a justiciability doctrine that concerns the judiciary's constitutional jurisdiction to adjudicate cases. *Ante* at 370-371, 374. But shifting mootness from a prudential doctrine to a constitutional doctrine conflicts with this Court's most recent decisions concerning mootness. In both *In re Midland Publishing Co, Inc,* 420 Mich 148, 151 n 2; 362 NW2d 580 (1984), and *Federated Publications, Inc v City of Lansing,* 467 Mich 98; 649 NW2d 383 (2002), the Court cited the venerable rule that the Court will not decide moot issues unless the issue is one of public significance that is likely to recur, yet may evade judicial review. However, if the mootness doctrine is one that affects the Court's constitutional jurisdiction, then the Court could not decide a moot issue, regardless of how significant it may be to the public, nor how likely it would be to recur and evade judicial review. See *Honig v Doe,* 484 US 305, 330; 108 S Ct 592; 98 L Ed 2d 686 (1988) (Rehnquist, C.J., concurring) ("If it were indeed Art. III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the 'capable of repetition, yet evading review' exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are 'capable of repetition, yet evading review.' ").

The majority asserts that the ripeness doctrine "is supported by both constitutional and prudential principles." *Ante* at 380-381. In the *federal* courts the ripeness doctrine is based on both art III "case or

controversy" limitations on judicial power and on prudential reasons for refusing to exercise jurisdiction. *Regional Rail Reorganization Act Cases,* 419 US 102, 138; 95 S Ct 335; 42 L Ed 2d 320 (1974). But, as I explained in *Nat'l Wildlife,* the federal constitution's art III, § 2 limitations apply to the federal court's judicial power; they do not apply to the power of Michigan's state courts. *Nat'l Wildlife, supra* at 660-661 (WEAVER, J., concurring in result only). Thus, while the federal court's ripeness doctrine involves both the "case or controversy" requirement of art III, § 2 of the federal constitution and prudential concerns, *Duke Power Co v Carolina Environmental Study Group, Inc,* 438 US 59, 81-82; 98 S Ct 2620; 57 L Ed 2d 595 (1978), Michigan's courts need only consider prudential concerns. Further, for the same reasons explained above, holding that the ripeness doctrine is based on constitutional grounds is inconsistent with this Court's recognition that a showing of futility may trigger an exception to the ripeness doctrine. See *Paragon Properties Co v City of Novi,* 452 Mich 568, 581-583; 550 NW2d 772 (1996) (considering, but rejecting, the futility argument), and *Lucas v South Carolina Coastal Council,* 505 US 1003, 1014 n 3; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

For these reasons I concur only in the result of the majority opinion, and dissent from the majority's reasoning and analysis that mistakenly transforms the prudential doctrines of mootness and ripeness into constitutionally based doctrines that affect the jurisdiction of the Court.

CAVANAGH, J. (*concurring with part of the result and dissenting in part*). I concur with the result reached by the majority with respect to count I of the petition. However, I respectfully dissent from the majority's

position regarding count II. Petitioners allege that respondent Farmers Insurance Exchange sought to reduce the use of chiropractic services by improperly limiting access to chiropractic providers and by improperly determining rates to be paid to chiropractic providers, contrary to the no-fault act. See MCL 500.3107(1)(a); MCL 500.3157. Because I believe these allegations are sufficient to confer standing on petitioners to pursue count II, I disagree with the majority's decision to not reach the merits of petitioners' claim.

MARKMAN, J. (*concurring in part and dissenting in part*). I concur in both the analysis and the result reached by the lead opinion with respect to count I of the petition. However, with respect to count II, I do not believe that the traditional justiciability analysis that is normally applied to inquiries under Const 1963, art 6, § 1 is necessarily sufficient to dispose of the questions presented. Because I would order additional briefing and reargument on these questions, I cannot join in the lead opinion's analysis and results with respect to count II.

I. BACKGROUND

Intervening respondents Farmers Insurance Exchange and Mid-Century Insurance Company offered an endorsement to their no-fault automobile policies in which insureds agreed to accept medical care from a network of preferred provider organizations (PPOs) in exchange for a 40 percent discount in their premiums. Petitioners Michigan Chiropractic Council and Michigan Chiropractic Society filed a request with respondent Commissioner of the Office of Financial and Insurance Services to conduct a contested-case hearing

and invalidate the endorsement as being contrary to the no-fault act, MCL 500.3101 *et seq*.

The commissioner concluded that there was nothing improper about the endorsement and declined to conduct a hearing. Included in the commissioner's written order were findings of fact and conclusions of law addressing several of petitioners' arguments. With respect to petitioners' claim that the endorsement violated the rights of the insureds (count I), the commissioner concluded that the endorsement was not inherently inconsistent with MCL 500.3107 (setting forth the type of benefits a no-fault insurer is liable for under the act). With respect to petitioners' claim that the endorsement violated the rights of medical providers (count II), the commissioner concluded that nothing in the no-fault act, including MCL 500.3157 (detailing allowable provider charges), conferred the right on any provider to be chosen to provide care, that nothing in the endorsement conflicted with the requirement that no-fault insurers pay reasonable and customary charges, and that the endorsement did not unreasonably or deceptively affect the risk purportedly assumed.[1]

The trial court reversed the commissioner, ruling that the endorsement was inconsistent with the no-fault act, and the Court of Appeals affirmed in a published opinion. *Mich Chiropractic Council v Comm'r of the Office of Financial and Ins Services,* 262 Mich App 228; 685 NW2d 428 (2004). The Court of Appeals concluded that the PPO option violated the no-fault act because it (1) limited an insured's choice of medical providers and (2) could mislead consumers about the potential savings to be achieved in selecting this option.

[1] The commissioner's findings with respect to counts III and IV are omitted because those findings are not at issue on appeal here.

We granted leave to appeal, directing the parties to include among the issues to be addressed

> (1) whether an optional managed care endorsement such as that offered by intervenors is permissible under the no-fault act, MCL 500.3101 *et seq*., (2) whether the Court of Appeals erred in relying on its finding that the endorsement is potentially deceptive and misleading, (3) whether petitioners have standing to bring their petition, in light of some number of their members having participated in the managed care program, or any other reason affecting standing, and whether petitioners have standing with regard to all or only some of the counts in their petition, and (4) the standard of review to be applied by the circuit court to the administrative decision denying the petition. [472 Mich 899 (2005).]

II. STANDARD OF REVIEW

Whether a party has standing and whether a dispute falls within the scope of the "judicial power" are constitutional questions, which we review de novo. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004); *Warda v Flushing City Council*, 472 Mich 326, 330; 696 NW2d 671 (2005).

III. ANALYSIS

The lead opinion focuses on justiciability inquiries usually raised in the context of questions regarding the scope of this Court's "judicial power." Const 1963, art 6, § 1. As noted by the lead opinion, whether the resolution of a case is within the "judicial power" is usually the dispositive inquiry with respect to whether this Court possesses jurisdiction over a claim, i.e., whether the claim is justiciable. *Ante* at 373-374. The "judicial power" is traditionally understood as the authority of the courts to adjudicate cases or controversies of, and to provide meaningful relief to, parties who have a con-

crete and present interest in the outcome of a dispute. See *Nat'l Wildlife Federation, supra* at 614-615.

However, while most matters cognizable by this Court fall within this traditional scope of the "judicial power," our jurisdiction is not always so defined. In certain instances, the Michigan Constitution specifically permits or requires the judiciary to take cognizance of actions that fall outside the traditional understanding of the "judicial power." For instance, Const 1963, art 3, § 8 permits this Court to render advisory opinions "as to the constitutionality of legislation after it has been enacted into law but before its effective date."[2] See, e.g., *In re Request for Advisory Opinion On Constitutionality of 2005 PA 71*, 474 Mich 1230 (2006); *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93; 422 NW2d 186 (1988); see also *In re Certified Question (Melton v Prime Ins Syndicate, Inc)*, 472 Mich 1225 (2005). Although an advisory opinion is outside the scope of the traditional "judicial power," because there is no present case or controversy, this does not preclude us from entertaining such a case in light of the language of our Constitution effectively redefining the "judicial power" in Michigan.

With this in mind, I believe that significant questions arise with respect to whether the judiciary can— or must— take cognizance of the petitioners' claims under Const 1963, art 6, § 28, which, at least on its face, does not seem to require that we engage in the usual

[2] That provision provides, in its entirety:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date. [Const 1963, art 3, § 8.]

justiciability inquiries.[3] Const 1963, art 6, § 28, provides in part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

The use of the word "shall" indicates a mandatory and imperative directive. *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). What is "provided by law" under the Insurance Code is that final decisions

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[3] The justices in the lead opinion apparently believe that, because the parties have not raised this issue, we need not reach it. However, it has long been the practice of this Court to raise issues sua sponte where consideration of such issues is necessary to a full and fair determination of the case before it. See, e.g., *City of Dearborn v Bacila*, 353 Mich 99, 118; 90 NW2d 863 (1958); *Auditor General v Bolt*, 147 Mich 283, 286-287; 111 NW 74 (1907). "Where the adversarial process fails to provide valuable assistance, a court's duty to correctly expound the law is not excused." *Mack v Detroit*, 467 Mich 1211, 1213 (2002) (YOUNG, J., concurring).

Moreover, questions relating to subject-matter jurisdiction, in particular questions of a constitutional dimension, may be raised at any time by the parties, or sua sponte by a court. *Nat'l Wildlife Federation, supra* at 630; MCR 2.116(D)(3). Subject-matter jurisdiction involves the power of a court to hear and determine a cause or matter. *Langdon v Wayne Circuit Court Judges*, 76 Mich 358, 367; 43 NW 310 (1889). It is conferred on the court by the authority that established such court. *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). Const 1963, art 6, § 1 established the current judicial system in Michigan, and Const 1963, art 6, § 28 provides that certain agency decisions "shall be subject to direct review by the courts . . . ." Accordingly, it is entirely appropriate, in my judgment, that we address the effect of Const 1963, art 6, § 28 on the issues presented.

will be subject to judicial review under Michigan's Administrative Procedures Act (APA), MCL 24.201 *et seq*.:

> A person aggrieved by a final order, decision, finding, ruling, opinion, rule, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306. [MCL 500.244(1).]

The APA, in turn, provides that

> [w]hen a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review, by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy. [MCL 24.301.]

Here, the commissioner denied petitioners' request for a contested-case hearing, finding that they had failed to demonstrate probable cause in support of their request. However, rather than simply declining to hold a hearing, the commissioner proceeded to conclude, as a matter of law, that respondents' PPO option did not violate the Insurance Code.[4]

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[4] In so doing, the commissioner was apparently acting pursuant to his authority under MCL 500.2236(5), which provides, in part:

> Upon written notice to the insurer, the commissioner may disapprove, withdraw approval or prohibit the issuance, advertis-

It seems reasonably clear that the commissioner's order here constituted a "final order, decision, finding, ruling, opinion, rule, action, or inaction," MCL 500.244(1), and fell within the scope of "final decisions, findings, rulings and orders of any administrative officer or agency . . . ." Const 1963, art 6, § 28. Given that the commissioner's order contained findings of fact and conclusions of law, it also seems fair to characterize this order as "judicial or quasi-judicial" in nature. *Id.*

In light of the foregoing then, a number of questions arise:

(1) Does the fact that we are dealing with a "final decision[] . . . of [an] administrative officer or agency," Const 1963, art 6, § 28, authorize judicial review of the commissioner's order independently of the justiciability inquiry required for cases traditionally heard pursuant to the "judicial power"? In other words, *may* this Court take cognizance of petitioners' claims by virtue of Const 1963, art 6, § 28 and the APA, without regard to whether these claims are ripe and without regard to whether the parties have *Cleveland Cliffs* standing? Indeed, *must* we take cognizance of these claims? Moreover, if Const 1963, art 6, § 1 *does* require the judiciary to consider a case such as the instant one, does this

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ing, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.

The commissioner noted in his decision that he possessed the authority to withdraw approval of insurance policy forms pursuant to MCL 500.2236, and that in their complaint, petitioners specifically sought the withdrawal of the endorsement at issue under that section. Because the commissioner's findings and conclusions went far beyond what was necessary to simply deny petitioners' request for a contested-case hearing under MCL 500.2028 and 500.2029, I can only conclude that such findings were made pursuant to his authority under MCL 500.2236.

raise the concern that traditional requirements of standing can be circumvented by the mere tactic of first introducing a dispute into the administrative process? Would, for example, the *brother* of a chiropractor who challenged the administrative rule at issue in this case be equally empowered upon an adverse decision by the commissioner to pursue a judicial appeal?

(2) Notwithstanding Const 1963, art 6, § 28, to what extent, if any, is the commissioner's decision subject to judicial review? In addition to presenting a significant issue concerning the relationship between an administrative agency and the judicial branch of government, this case presents a significant issue concerning the relationship between an administrative agency and the legislative branch of government, namely, whether the Legislature intended that the commissioner's decision to hold a contested-case hearing, or not, constitutes an entirely discretionary and unreviewable decision.

It could be argued, perhaps, that, even if we concluded that petitioners had satisfied justiciability requirements, petitioners would still lack a remedy because the only remedy this Court could conceivably provide would be to order the commissioner to hold a contested-case hearing. However, on initial review, even that relief may be unavailable because the commissioner's decision whether to hold a contested-case hearing would seem to be a discretionary one under MCL 500.2028 and MCL 500.2029, which provide, respectively:

> Upon *probable cause*, the commissioner shall have power to examine and investigate into the affairs of a person engaged in the business of insurance in this state to determine whether the person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by sections 2001 to 2050. [MCL 500.2028 (emphasis added).]

> When the commissioner has *probable cause* to believe that a person engaged in the business of insurance has been engaged or is engaging in this state in an unfair method of competition, or an unfair or deceptive act or practice in the conduct of his business, as prohibited by sections 2001 to 2050, and that a hearing by the commissioner in respect thereto would be in the interest of the public, he shall first give notice in writing, pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws, to the person involved, setting forth the general nature of the complaint against him and the proceedings contemplated pursuant to sections 2001 and 2050. [MCL 500.2029 (emphasis added).]

The "nondelegation doctrine" forbids the delegation of legislative powers to the executive or judicial branches. *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 8 n 5; 658 NW2d 127 (2003).[5] A delegation of power to an administrative agency is proper only when the controlling statute provides the agency with sufficient standards to effectively transform an administrative agency's decision from a legislative decision into an executive decision. *Taylor*, *supra* at 10 n 9; *People v*

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[5] As we noted in *Taylor*, *supra* at 8-9:

> A simple statement of this doctrine is found in *Field v Clark*, 143 US 649, 692; 12 S Ct 495; 36 L Ed 294 (1892), in which the United States Supreme Court explained that "the integrity and maintenance of the system of government ordained by the Constitution" precludes Congress from delegating its legislative power to either the executive branch or the judicial branch. This concept has its roots in the separation of powers principle underlying our tripartite system of government. Yet, the United States Supreme Court, as well as this Court, has also recognized "that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Mistretta v United States*, 488 US 361, 371; 109 S Ct 647; 102 L Ed 2d 714 (1989).

Turmon, 417 Mich 638, 641-642, 644; 340 NW2d 620 (1983). If there are no such standards, the delegation is improper because the Legislature's powers have been improperly given to an agency of the executive branch. *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 53-55; 367 NW2d 1 (1985). In evaluating the sufficiency of legislative standards set forth in an act delegating power to an agency, we presume that the act is constitutional. *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976).

MCL 500.2028 and MCL 500.2029 suggest that the commissioner need not hold a hearing except on "probable cause" to believe that unfair practices have occurred or are occurring. Thus, it seems that the commissioner's determination of probable cause is the critical event. We noted in *Warda, supra* at 334, that the courts have no authority to compel an actor belonging to another branch of government to undertake a decision or determination when such decision or determination is purely discretionary. The question naturally arises: Does the commissioner's probable cause determination constitute a purely discretionary determination? Or has the Legislature provided, either explicitly or implicitly, any standards to guide this determination?

In *Warda*, we addressed the obligation of a city council (a legislative entity) to reimburse a police officer for legal fees incurred in defending himself against criminal charges. The officer sought, and the city council denied, reimbursement pursuant to MCL 691.1408(2), which provides:

> When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the

> governmental agency *may* pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. [Emphasis added.]

In determining that the city council's choice was a "purely discretionary" decision that was not subject to judicial review absent some constitutional infirmity, we reasoned:

> The use of the word "may" in § 8 makes clear that the decision to pay an officer's attorney fees is a matter left to the discretion of the municipality. Further, we note that the statute does not limit or qualify the word "may" (with, for instance, a requirement of reasonableness) or provide any other standards by which that discretion is to be exercised. As such, the Flushing city council had full discretion under MCL 691.1408(2) in choosing whether to reimburse plaintiff's attorney fees. [*Warda, supra* at 332.]

We also noted that

> [t]he exercise of the "judicial power" by this Court, Const 1963, art 6, § 1, contemplates that there will be standards —legally comprehensible standards—on the basis of which agency decisions can be reviewed. Whether such standards consist of the provisions of the constitution, or the provisions of other pertinent laws, a judicially comprehensible standard is required in order to enable judicial review. [*Id.* at 339.]

Because the Legislature did not include any meaningful standard by which a court could review the exercise of the municipality's discretion, we concluded that the city council's decision to deny reimbursement was not subject to judicial review.

Unlike the standardless discretion statutorily afforded the municipality in *Warda*, however, the relevant statutes here provide that "[u]pon probable cause, the commissioner shall have power to examine and investi-

gate," MCL 500.2028, and that "[w]hen the commissioner has probable cause to believe that a person" is engaging in improper practices "and that a hearing by the commissioner in respect thereto would be in the interest of the public," the commissioner shall take certain steps. MCL 500.2029.

In light of this language, can it be said that "probable cause" is, in fact, a *standard* being employed to guide the commissioner's discretion? Or did the Legislature merely intend that "probable cause" serve to define a quantum of proof, and that the commissioner's decision to hold a contested-case hearing is purely discretionary? "Probable cause" is a concept normally found in the criminal law,[6] but it is a well-understood and well-defined concept in our jurisprudence. As such, is "probable cause" a "legally comprehensible standard[] . . . on the basis of which agency decisions can be [judicially] reviewed"? *Warda, supra* at 339. Or does "probable cause" instead establish a burden of proof that petitioners must satisfy? If it is merely a standard of proof, given that trial courts are accustomed to making probable cause determinations, and that appellate courts are accustomed to assessing whether trial courts have correctly established probable cause, does review of the commissioner's determination concerning whether probable cause exists fall squarely within the judicial power? Or should it instead be inferred from the discretionary nature of the "probable cause" decision that the Legislature intended that the commissioner's assessment of "probable cause" be unreviewable? If the

[6] We have defined "probable cause" as " 'a reasonable ground of suspicion, supported by circumstances strong [in themselves] to warrant a cautious person in the belief that the accused is guilty of the offense charged.' " See *People v Richardson*, 469 Mich 923, 929 (2003) (CORRIGAN, C.J., concurring) (citation omitted).

Legislature did so intend, does that body have the power to make such a decision unreviewable, given the language of Const 1963, art 6, § 28 and the nondelegation doctrine?

If we were to conclude that the commissioner's ultimate decision in this case— denying the petition for a contested-case hearing and ruling that the PPO option was valid— was authorized by law— i.e., because no probable cause was found, the commissioner was not required to hold a hearing— is judicial review precluded upon that determination? Or does the ultimate question remain whether this is a "case[] in which a hearing is required"? Const 1963, art 6, § 28. If the latter is the case, would that require that we review the commissioner's determination of a lack of probable cause? If so, would that decision be reviewed under the standard of "competent, material and substantial evidence on the whole record"? Have petitioners here shown that they have actually been harmed by the endorsement at issue, such that the commissioner's determination was not supported by "competent, material and substantial evidence on the whole record"? Must they?

(3) Of what significance are the commissioner's legal conclusions apart from his decision not to hold a contested-case hearing? Even if we were to conclude that the commissioner's probable cause determination was discretionary and therefore unreviewable, it appears that MCL 500.2028 and MCL 500.2029 are not the only provisions relied on by the commissioner in reaching the decision. The commissioner also asserted that he possessed the authority to withdraw approval of insurance policy forms pursuant to MCL 500.2236(5). That provision provides:

> Upon written notice to the insurer, the commissioner may disapprove, withdraw approval or prohibit the issu-

> ance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately.

The commissioner proceeded to conclude— apparently pursuant to his authority under MCL 500.2236— that the PPO option did not violate the Insurance Code. With respect to petitioners' claim that the endorsement violated the rights of insureds (count I), the commissioner found that the endorsement was not inherently inconsistent with MCL 500.3107. With respect to petitioners' claim that the endorsement violated the rights of medical providers (count II), the commissioner concluded that nothing in the no-fault act, including MCL 500.3157, conferred the right on any provider to be chosen to provide care, that nothing in the endorsement conflicts with the requirement that no-fault insurers pay reasonable and customary charges, and that the endorsement does not unreasonably or deceptively affect the risk purportedly assumed.

Thus, it appears that the commissioner did not merely decline to hold a contested-case hearing; rather, he also affirmatively reached a number of legal conclusions. Because petitioners are challenging these conclusions, and not simply the failure to hold a hearing, I am not certain that the arguably discretionary nature of the commissioner's authority to hold a contested-case hearing under MCL 500.2028 and MCL 500.2029 is

dispositive of the justiciability inquiry. Rather, if petitioners are "aggrieved by a final order, decision, finding, ruling, opinion, rule, action, or inaction provided for under this act," MCL 500.244(1), are they not entitled to proceed under the APA?

(4) Finally, are petitioners even "aggrieved" pursuant to MCL 500.244(1)? How is this determination made? Might this ultimately boil down to the equivalent of a justiciability inquiry? That is, can it be argued that an adverse decision at the administrative level is the equivalent of a "present injury" required to meet the standing and ripeness requirements?[7] Might it also be argued that an adverse decision below— even a decision on a matter that could not have been brought before the judiciary because it was otherwise not justiciable— *itself* constitutes a present injury?

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[7] At first blush, this position would appear to be consistent with the use of "aggrieved" in MCR 7.203(A), as interpreted recently in *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006), in that it suggests that one is "aggrieved" when one has suffered an adverse decision below. MCR 7.203(A) provides that the Court of Appeals has jurisdiction of an appeal of right by an "aggrieved party" of:

> (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court
>
> (a) on appeal from any other court or tribunal;
>
> (b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;
>
> An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.
>
> (2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule.

I believe these questions present constitutional issues that must be resolved for a proper determination of the case before us, and that they are not addressed, much less resolved, by the lead opinion. In my judgment, further briefing is required by the parties and further consideration is required by this Court.

IV. CONCLUSION

I do not believe that the justiciability analysis that is traditionally applied to inquiries under Const 1963, art 6, § 1 is necessarily dispositive in this case. Rather, a number of constitutional questions concerning the administrative process in Michigan exist apart from this analysis, and these questions should be resolved for a proper determination of the case before us. The lead opinion fails to address, much less answer, these questions. As such, I believe additional consideration by this Court is warranted, and I would direct the parties to file supplemental briefs on the issues raised in this opinion.

COSTA v COMMUNITY EMERGENCY MEDICAL SERVICES, INC

Docket Nos. 127334, 127335. Decided June 28, 2006. On applications by the plaintiffs for leave to appeal and by the defendants for leave to cross-appeal, the Supreme Court, in lieu of granting the applications, ordered the clerk to schedule oral argument on whether to grant the applications or take other appropriate action. Following oral argument, the Supreme Court issued an opinion per curiam affirming the part of the judgment of the Court of Appeals that reversed the order of the trial court that denied the defendants' motion for summary disposition and remanding the matter to the trial court for the entry of an order granting summary disposition to the defendants.

Richard and Cindy Costa brought a medical malpractice action in the Wayne Circuit Court against Community Emergency Medical Services, Inc.; Dave Henshaw; Scott Meister; Donald Farenger; and Lisa M. Schultz, alleging that the defendants failed to provide proper medical treatment to Richard Costa at the scene of an assault. Defendants Farenger and Schultz, who had arrived on the scene of the assault on behalf of the city of Taylor Fire Department emergency medical service, moved for summary disposition, claiming that they were immune from liability under the governmental immunity act, MCL 691.1407, because they were not grossly negligent and their conduct had not been the proximate cause of the injury to Richard Costa. Community Emergency Medical Services and its employees, Henshaw and Meister, both of whom had arrived on the scene of the assault, sought summary disposition on the basis of the emergency medical services act, MCL 333.20965(1), claiming that they were not grossly negligent. The plaintiffs sought summary disposition or a default judgment on the basis of the failure of Farenger and Schultz to timely file affidavits of meritorious defense under MCL 600.2912e. The trial court, John H. Gillis, Jr., J., denied all the motions. Schultz appealed as of right and Farenger cross-appealed. Community Emergency Medical Services and Henshaw and Meister appealed by leave granted. The plaintiffs cross-appealed. The Court of Appeals, SAAD, P.J., and TALBOT, J. (BORRELLO, J., concurring in part and dissenting in part), consolidated the appeals and affirmed in part and reversed in part, holding that the trial court erred in denying the

defendants' motions for summary disposition. The Court of Appeals also held that the trial court did not err in denying the plaintiffs' motion for summary disposition regarding their claim that Farenger and Schultz failed to file the affidavits of meritorious defense under MCL 600.2912e. 263 Mich App 572 (2004). The Supreme Court, in lieu of granting the plaintiffs' application for leave to appeal and the defendants' application for leave to cross-appeal, ordered oral argument on whether to grant the applications or take other appropriate action. 473 Mich 877 (2005).

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

Governmental employees are immune from liability for breaches of the standard of ordinary care. The affidavit of merit requirements of MCL 600.2912e, which pertain to claims of ordinary negligence, are inapplicable to a defendant who is entitled to governmental immunity. Governmental employees do not lose the benefit of governmental immunity by failing to timely file an affidavit of meritorious defense. Where a governmental employee has asserted the defense of governmental immunity, the defendant is not obligated to comply with the affidavit of meritorious defense requirement of § 2912e unless an order has been entered denying governmental immunity. Where such an order has been entered, the defendant's obligation to comply with the requirements of § 2912e is stayed during the pendency of an appeal of that order. The part of the judgment of the Court of Appeals that reversed the trial court's order denying the defendants' motion for summary disposition must be affirmed and the matter must be remanded to the trial court for entry of an order granting summary disposition in favor of the defendants.

Affirmed in part and remanded to the trial court.

Justice KELLY, joined by Justice CAVANAGH, dissenting, would hold that the defendants should not be excused from filing affidavits of meritorious defense simply because they are claiming governmental immunity and that default is a proper remedy against a medical malpractice defendant who fails to file an affidavit of meritorious defense. MCL 600.2912e clearly and unambiguously mandates that a defendant in a medical malpractice action file an affidavit of meritorious defense. The statute has no exceptions to the affidavit requirement. In addition, the burden was on the defendants to assert the governmental immunity defense. The proofs needed to demonstrate governmental immunity would require facts from which a finding of no gross negli-

gence could be made. The proofs needed in an affidavit of meritorious defense by a medical first responder would require facts showing no gross negligence by the defendant first responder. Thus, the goals of the governmental immunity statute, the medical first responder statute, and the medical malpractice statute are fulfilled by requiring first responders who are governmental employees to file affidavits. Entry of a default judgment is the proper remedy if a defendant fails to file an affidavit of meritorious defense because the defendant's answer in such a case is a nullity. The Court of Appeals should be reversed, and the case remanded to the trial court for entry of a default judgment in the plaintiffs' favor.

ACTIONS — MEDICAL MALPRACTICE — GOVERNMENTAL IMMUNITY — AFFIDAVITS OF MERITORIOUS DEFENSE.

A governmental employee who satisfies the requirements of MCL 691.1407(2) for governmental immunity is not required to file an affidavit of meritorious defense under MCL 600.2912e where the defendant governmental employee invokes the defense of governmental immunity in a medical malpractice action; where the defense of governmental immunity is invoked but the trial court has entered an order denying such immunity, the affidavit requirements of § 2912e must be stayed during the pendency of any appeal from that order.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Barbara A. Patek, P.L.C.* (by *Barbara A. Patek*), for the plaintiffs.

Galbraith & Booms (by *Henry L. Gordon* and *Steven B. Galbraith*) for Community Emergency Medical Services, Inc., and Dave Henshaw and Scott Meister.

Secrest Wardle (by *Janet Callahan Barnes*) (*Allen J. Kovinsky* and *Johnson, Rosati, LaBarge, Aseltyne & Field, P.C.* [by *Edward D. Plato*], of counsel) for Donald Farenger and Lisa M. Schultz.

Michael H. Loomis for Donald Farenger.

Amicus Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Patrick J. O'Brien* and *Ann M. Sherman*, Assistant Attorneys General, for the Attorney General.

PER CURIAM. The question presented is whether medical malpractice defendants who have asserted the defense of governmental immunity must nonetheless file an affidavit of meritorious defense pursuant to MCL 600.2912e. Because governmental immunity is a complete defense to such a suit, we hold that where a plaintiff has otherwise failed to overcome the barrier of governmental immunity, such defendants are relieved from the burden of filing an affidavit of meritorious defense.

I. BACKGROUND

Plaintiff Richard Costa,[1] in the city of Taylor for a business meeting, was knocked unconscious when he was punched in the face by a coworker and struck his head on the pavement. Defendants Donald Farenger and Lisa M. Schultz arrived on the scene on behalf of the city of Taylor Fire Department emergency medical service, and defendants Dave Henshaw and Scott Meister arrived on the scene on behalf of defendant Community Emergency Medical Services, Inc. These emergency responders revived plaintiff and attempted to determine his level of consciousness and mental capacity. While plaintiff was able to recall his name, his location, and the nature of his visit to Taylor, he was unable to recall the altercation with his coworker and had difficulty walking unassisted. However, after he

[1] Because plaintiff Cindy Costa's claims are derivative of the injuries suffered by her husband, Richard, we will refer to Richard Costa as the singular "plaintiff."

correctly answered a series of questions, defendants concluded that he was competent to refuse medical treatment. Plaintiff signed a form refusing medical treatment and returned to his hotel with the assistance of his coworker. Unfortunately, medical personnel had to be summoned again the next morning, when the coworker was unable to awaken plaintiff. Plaintiff had to undergo an emergency craniotonomy to treat an epidural hematoma. Plaintiff alleges that as a result of that hematoma, he has lost the vision in one eye and suffers from various ongoing cognitive impairments.

Plaintiff filed the instant medical malpractice action, alleging that defendants failed to provide proper treatment at the scene of the assault. Defendants Farenger and Schultz filed motions for summary disposition, asserting that under the governmental immunity act, MCL 691.1407, they were immune because they were not grossly negligent and their conduct was not "the proximate cause" of plaintiff's injury. The remaining defendants sought summary disposition under the emergency medical services act, MCL 333.20965(1), claiming that they were not grossly negligent. Plaintiff also filed a motion for summary disposition or a default judgment, based on the failure of Farenger and Schultz to file timely affidavits of meritorious defense under MCL 600.2912e. The trial court denied each motion, but allowed Farenger and Schultz to file appropriate affidavits within 30 days. The trial court failed to stay proceedings while defendants pursued an appeal of right, as required by MCR 7.209(E)(4). That rule provides that if a governmental party files a claim of appeal from an order denying governmental immunity, "the trial court shall stay proceedings regarding that party during the pendency of the appeal, unless the Court of Appeals directs otherwise."

The Court of Appeals, affirming in part and reversing in part, reversed the order of the trial court regarding defendants' motion for summary disposition, ruling that plaintiff had not shown gross negligence, and also indicating that plaintiff was not entitled to a default judgment against Farenger and Schultz on the affidavit issue. *Costa v Community Emergency Medical Services, Inc,* 263 Mich App 572; 692 NW2d 712 (2004).

We granted oral argument on the applications for leave to appeal and to cross-appeal, directing the parties to include among the issues to be addressed at oral argument:

> (1) whether among the remedies against a party who fails to file an affidavit of meritorious defense, as required by MCL 600.2912e, is a default, and under what circumstances, if any, is such a remedy mandatory; and (2) the effect, if any, that reliance on the defense of governmental immunity has on the obligation to file an affidavit of meritorious defense under MCL 600.2912e. [*Costa v Community Emergency Medical Services, Inc*, 473 Mich 877 (2005).]

Because the answer to the second of these questions is dispositive of the issues presented in this case, we address only that question.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). This case involves statutory interpretation, which is a question of law that we review de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

III. ANALYSIS

The question presented is whether MCL 600.2912e requires a defendant to file an affidavit of meritorious

defense, notwithstanding the fact that the defendant also asserts a claim of governmental immunity under the government tort liability act (GTLA), MCL 691.1407(2). MCL 600.2912e(1) provides, in pertinent part:

> In an action alleging medical malpractice . . . the defendant or, if the defendant is represented by an attorney, the defendant's attorney *shall* file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit [of merit], an affidavit of meritorious defense signed by a health professional . . . .[Emphasis added.]

The Legislature's use of the word "shall" in a statute generally "indicates a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). As such, the statute suggests that a medical malpractice defendant is obligated to file an affidavit of meritorious defense.

However, MCL 691.1407(2) provides that a governmental employee is "immune from tort liability" if all the following conditions are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

We have never specifically addressed the applicability of MCL 600.2912e to defendants who are governmental employees. However, we have repeatedly observed that governmental immunity legislation " 'evidences a clear legislative judgment that public and private tortfeasors should be treated differently.' " *Robinson v Detroit,* 462

Mich 439, 459; 613 NW2d 307 (2000) (citation omitted). We have also observed that a "central purpose" of governmental immunity is "to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity." *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2002).

We believe that the expense and burden of obtaining an expert to prepare an affidavit of meritorious defense fall squarely within this purpose. It would be incongruous to conclude that the failure to comply with a pleading requirement of this nature would subject a defendant to tort liability, where such a defendant is already immune from tort liability by virtue of his or her status as a governmental employee. Allowing governmental employee defendants to raise an immunity defense while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare an unnecessary affidavit of meritorious defense, would render illusory the immunity afforded by the GTLA.[2]

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[2] The dissent is quick to point out that the word "shall," as used in MCL 600.2912e, indicates a mandatory directive. *Post* at 420. However, the dissent fails to explain why the Legislature's directive in MCL 691.1407(2), that a governmental employee "*is* immune" from liability, is not equally mandatory. The dissent offers no explanation regarding why the Legislature's determination that something "shall" be is more imperative than its determination that something "is." This case would be a much easier one if there were not these apparently conflicting provisions.

Governmental immunity is "a characteristic of government" that was historically recognized at common law until it was abrogated by this Court in *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961). *Mack, supra* at 202. The Legislature reinstituted and preserved this characteristic when it enacted the GTLA. *Id.* Therefore, the primacy of governmental immunity in this case is reinforced by "the sequence of the judicial and legislative events" forming the backdrop of the GTLA. *Id*. Moreover, Black's Law Dictionary (6th ed) defines "immunity" as "[e]x-

Moreover, we note that the affidavit required by MCL 600.2912e must address whether the medical malpractice defendant complied with the applicable medical "standard of practice or care."[3] A claim that a defendant has violated an applicable standard of practice or care sounds in ordinary negligence. However, the plain language of the governmental immunity statute indicates that the Legislature limited governmental employee liability to "gross negligence"— situations in which the contested conduct was substantially more than negligent. "Gross negligence" is defined by the GTLA as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL

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emption, as from serving in an office, *or performing duties which the law generally requires other citizens to perform*." (Emphasis added.) Thus, in enacting MCL 691.1407(2), the Legislature singled out governmental employees and exempted them from performing at least some duties that the law generally requires other citizens to perform. In light of this, the dissent's suggestion that "[n]othing in the [GTLA] or the medical malpractice act . . . excuses these defendants" from filing an affidavit of meritorious defense, *post* at 415, is unpersuasive. While the medical malpractice act itself does not specifically state that the Legislature intended to treat governmental employees differently, when that act is read, as it must be, in conjunction with the GTLA's directive that governmental employees are immune, such a conclusion becomes clear.

[3] MCL 600.2912e(1)(b) to (d) provide that an affidavit of meritorious defense must provide:

> (b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
>
> (c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.
>
> (d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

691.1407(7)(a). Thus, MCL 600.2912e permits the assertion of a violation of the standard of care of ordinary negligence, which is a distinct and lesser standard of care than the gross negligence standard set forth in the GTLA. As such, even if a plaintiff could show that a government employee defendant's conduct breached "the applicable standard of practice or care," such a showing would not be sufficient to impose liability upon the employee. Rather, such a plaintiff would still have to make the additional showing that the employee's conduct amounted to "gross negligence" that was "the proximate cause" of the injury. Because the affidavit only requires a plaintiff to address the irrelevant question of ordinary negligence, and not the ultimate question of gross negligence, we conclude that the Legislature could not have intended that a governmental employee's failure to timely comply with the affidavit of merit requirements would deprive that employee of governmental immunity from tort liability.[4]

Because governmental employees are immune from breaches of the standard of ordinary care, the affidavit of merit requirements of MCL 600.2912e are not rel-

[4] The dissent misinterprets the requirements of the affidavit of meritorious defense statute, MCL 600.2912e, by conflating the elements of *duty* and *breach* in a negligence action. The "standard of practice or care . . . applicable to the action" addresses defendants' *duty*. Defendants' affiant must identify the specific conduct a reasonable health professional or health facility would undertake under the particular circumstances presented in that case and whether defendants complied with that standard. The dissent believes that the affiant is required to make a legal determination as to whether defendants *breached* their duty by acting with gross negligence. However, nothing in MCL 600.2912e compels the affidavit of meritorious defense to address whether defendants acted with gross negligence in breaching their duty. Therefore, we reject the dissent's argument that MCL 600.2912e proves that the Legislature intended the affidavit of merit requirement to take priority over the defense of governmental immunity.

evant to a defendant otherwise entitled to governmental immunity, and we therefore conclude that such a defendant may not lose the benefit of that immunity merely by failing to timely file the affidavit of meritorious defense.[5]

However, our opinion today should not be read to suggest that the mere assertion of a governmental immunity defense forever precludes the defendant making that assertion from the obligation to file the affidavit required by MCL 600.2912e. Where it has been determined that a defendant claiming governmental immunity is not entitled to immunity under MCL 691.1407(2), the defendant would, of course, then be obligated to comply with the same requirements as any other private tortfeasor. Yet, because of the 91-day filing requirement contained in MCL 600.2912e, a ruling against the defendant on the immunity issue coming after 91 days would arguably prejudice the ability of a defendant to comply with MCL 600.2912e.

Under MCR 7.202(6)(v), an "order denying governmental immunity to a governmental party, including a governmental agency, official, or employee" is a "final order," from which an immediate appeal of right may be taken. Moreover, MCR 7.209(E)(4) provides that when a governmental party takes such an appeal, "the trial court shall stay proceedings regarding that party during

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[5] In addition, we note that under the Michigan Court Rules, entry of a default would not be permitted under the instant circumstances. MCR 2.603(A)(1) provides: "If a party against whom a judgment for affirmative relief is sought *has failed to plead or otherwise defend* as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." (Emphasis added.) Defendants here did not fail to defend; rather, defendants asserted the complete defense of governmental immunity in their answer. As such, the provisions of the court rule pertaining to the entry of default are, by their own language, inapplicable.

the pendency of the appeal, unless the Court of Appeals directs otherwise."

In light of our interpretation today of the relevant statutes, and in view of these court rules, we hold that where a defendant has asserted the defense of governmental immunity, that defendant is not obligated to comply with the affidavit of meritorious defense requirement of MCL 600.2912e, unless an order has been entered denying governmental immunity to the defendant.[6] Where such an order has been entered, the defendant's obligation to comply with the requirements of MCL 600.2912e will be stayed during the pendency of the appeal of that order.

IV. CONCLUSION

Because governmental immunity provides a complete defense from tort liability for governmental employees, a governmental employee who satisfies the requirements of MCL 691.1407(2) is not required to file an affidavit of meritorious defense under MCL 600.2912e where such an employee is a defendant in a medical malpractice action. Moreover, where a governmental employee has invoked the defense of governmental immunity, but a trial court enters an order denying immunity to that employee, the requirements of MCL 600.2912e shall be stayed during the pendency of any appeal on that issue.

We therefore affirm that part of the judgment of the Court of Appeals that reversed the trial court's order denying defendants' motion for summary disposition.

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[6] Contrary to the dissent's suggestion, *post* at 421 n 5, this opinion does not implicate the "absurd results" rule for there is nothing herein that reaches a result that we view to be contrary to the actual language of the law. Rather, we are simply attempting to reasonably accommodate the provisions of MCL 600.2912e and MCL 691.1407(2).

Accordingly, we remand this case to the Wayne Circuit Court for the entry of an order granting summary disposition to defendants.

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

KELLY, J. (*dissenting*). We granted oral argument on the applications for leave to appeal and to cross-appeal in this case to discuss two issues: (1) whether, in a medical malpractice case, a party who fails to file an affidavit of meritorious defense as required by MCL 600.2912e may be defaulted and (2) whether a defendant who relies on the defense of governmental immunity must file an affidavit of meritorious defense. The majority finds that no affidavit is needed unless and until the court determines that a defendant is not protected by governmental immunity. The majority also notes that in this case failure to file the affidavit of meritorious defense does not require entry of a default judgment. Because I disagree with the majority's reasoning and the result, I must respectfully dissent.

Defendants Farenger and Schultz should not be excused from filing affidavits of meritorious defense simply because they were claiming governmental immunity. Nothing in the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., or the medical malpractice act, MCL 600.2912e, excuses these defendants from the mandatory requirement to file an affidavit of meritorious defense under MCL 600.2912e. Moreover, the mandatory requirement of MCL 600.2912e, applicable to all defendants in this type of case, does not conflict with or frustrate the purpose of the GTLA. Also, default is a proper remedy to be used against a medical malpractice defendant who fails to file such an affidavit.

Thus, on the basis of the unambiguous language of MCL 600.2912e, I would reverse the Court of Appeals judgment. And, in reliance on this Court's precedent in *Scarsella v Pollack*,[1] I would remand the case to the trial court for entry of a default judgment in plaintiffs' favor.

I. STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary disposition de novo. *Wold Architects & Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006). Issues of statutory interpretation are questions of law that also are reviewed de novo. *Sands Appliance Services v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

II. ANALYSIS

The medical malpractice act, MCL 600.2912e, requires that all defendants in medical malpractice cases file affidavits of meritorious defense. It provides in pertinent part:

> (1) In an action alleging medical malpractice . . . the defendant or, if the defendant is represented by an attorney, the defendant's attorney *shall* file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional . . . . [Emphasis added.]

The question presented is how, if at all, that mandatory requirement is affected by the GTLA, MCL 691.1407(2).

Under the GTLA, governmental employees are immune from tort liability when all of the following conditions are met:

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[1] 461 Mich 547; 607 NW2d 711 (2000).

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]

Construing the GTLA in light of the mandatory duty to file an affidavit of defense as set forth in MCL 600.2912e, the majority concludes that the GTLA must trump the medical malpractice act. It gives three reasons for this conclusion: (1) an absurd result would ensue if defendants protected from tort liability by governmental immunity had to present a sworn statement demonstrating that they are not liable in tort, (2) this result would also require governmental employees needlessly to expend time and taxpayer resources to obtain these sworn statements, and (3) any contrary conclusion would erode governmental immunity. But as explained below, none of these reasons is persuasive.

A. GOVERNMENTAL IMMUNITY IS NOT AUTOMATIC

Underlying the majority's decision in this case is its decision in *Mack v Detroit,* 467 Mich 186; 649 NW2d 47 (2002). Here, as in *Mack*, the majority again suggests that governmental immunity is automatic, that it is an entitlement because it is a characteristic of government. Moreover, the majority again posits that the burden is always on the plaintiff not only to plead in avoidance of governmental immunity, but also to disprove immunity if the defendant claims it. And the majority uses these foundational conclusions to support

its ultimate finding that requiring an affidavit of merit from governmental defendants will defeat the purpose of governmental immunity.

I disagree both with the majority's interpretation of the nature of governmental immunity itself and with its conclusion that the affidavit requirement will defeat the purpose of governmental immunity. Therefore, I disagree with its conclusion in this case because I believe that it is based on an incorrect view of the GTLA, which can be traced to *Mack*.

In *Mack*, this Court held that a party suing a unit of government must plead in avoidance of governmental immunity. In so holding, a majority of this Court overruled *McCummings v Hurley Med Ctr*,[2] which held that governmental immunity is an affirmative defense that must be pleaded by the government defendant. *Mack, supra* at 190. And although I am required to follow the majority holding in *Mack,* I continue to agree with Justice CAVANAGH's dissent in that case, with which I concurred. Today's unfortunate decision serves as additional proof why *Mack* was wrongly decided and why extending it is unwise.

As explained by Justice CAVANAGH in his dissent in *Mack*, whereas governmental immunity traditionally was viewed as a characteristic of government, this view changed once the Legislature codified the common-law doctrine. *Id.* at 222 (CAVANAGH, J., dissenting). As a consequence, Justice CAVANAGH argued, there is not a textual presumption in favor of blanket governmental immunity. Rather, it is a defense. *Id.* Although *Mack* requires a plaintiff to plead that the defendant is not immune from suit, the government still bears the onus of proving the defense. *Id.*

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[2] 433 Mich 404; 446 NW2d 114 (1989).

Governmental immunity should properly be viewed as an affirmative defense. Therefore, it is difficult to conclude that the purpose of the GTLA will be frustrated by requiring governmental medical malpractice defendants to comply with the mandatory duty in MCL 600.2912e. For example, plaintiffs pled in avoidance of governmental immunity in the medical malpractice claim. They alleged that defendants were grossly negligent under the applicable standard of care[3] and that this gross negligence was the proximate cause of Richard Costa's injury. Accordingly, I believe that the burden was on defendants to assert the defense of governmental immunity; immunity did not adhere as a matter of course.

In order to prepare this immunity defense, defendants necessarily had to investigate plaintiffs' claim and assemble proofs. They had to expend resources on this defense. Significantly, the proofs needed in an affidavit of meritorious defense would include a showing of the applicable standard of care and compliance with that standard. The purpose, of course, is to demonstrate that defendants were not grossly negligent. The proofs needed to demonstrate governmental immunity would also require facts from which a finding of no gross negligence could be made. Accordingly, the purpose of the governmental immunity statute, rather than being thwarted, is served by requiring the governmental defendants in this case to file affidavits of meritorious defense. Indeed, the goals of the governmental immunity statute, the medical first responder statute, and the medical malpractice statute are fulfilled.

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[3] Gross negligence is required in order to recover against a medical first responder under MCL 333.20965.

I fail to see how the majority can reasonably conclude that complying with MCL 600.2912e would require governmental employees (1) needlessly to expend time and taxpayer resources to prepare the affidavits or (2) that this process would erode governmental immunity.

B. NOTHING IN THE STATUTORY TEXT OF THE GTLA OR MEDICAL MALPRACTICE ACT EXCUSES DEFENDANTS FROM FILING AFFIDAVITS UNDER MCL 600.2912e

In addition to my disagreement with the foundational underpinnings of the majority's opinion, I find that nothing in the medical malpractice act or the GTLA supports the majority's result. Everyone on the Court is in accord that, if its language is clear and unambiguous, a statute must be enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). Moreover, we all agree that the Legislature is presumed to have intended the meaning it expressed. *Id*. MCL 600.2912e states that, in an action alleging medical malpractice, the defendant shall file an affidavit of meritorious defense. The use of the word "shall" indicates a mandatory directive.[4] *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997).

[4] The majority asserts that the statement in MCL 691.1407(2) that a governmental employee "is immune" should be read as a mandatory directive barring compliance with MCL 600.2912e. However, it must be stressed that the immunity granted in MCL 691.1407(2) is not an unfettered mandatory directive. Rather, it is a contingency requiring an initial finding, among others, that the employee's conduct did not amount to gross negligence. By contrast, there are no contingencies to the directive in MCL 600.2912e that all defendants "shall" file an affidavit of meritorious defense. The flaw in the majority's argument is based on its belief that MCL 600.2912e and MCL 691.1407(2) necessarily are in conflict. A conflict does not ever arguably exist in a case like this one where there is evidence that the employee's conduct was grossly negligent.

Nothing in the medical malpractice act leads to the conclusion that the Legislature intended the language of MCL 600.2912e be applied differently to different defendants or in different types of claims. I find it particularly noteworthy that the Legislature wrote no exception for any reason whatsoever to the affidavit of meritorious defense requirement.

In creating the GTLA, the Legislature determined that governmental employees may be liable for acts of gross negligence. MCL 691.1407(2)(C). It is incongruous that a governmental employee would not be obliged to comply with rules that the Legislature created merely because the employee ultimately might be deemed immune from liability. The Legislature easily could have exempted governmental employees from MCL 600.2912e, or deferred them from its requirements pending a ruling on whether they were subject to governmental immunity. It did not do so.

I believe that the statute speaks for itself. I would hold that, under the language of MCL 600.2912e, a governmental employee must file an affidavit of meritorious defense when the plaintiff's claim sounds in medical malpractice.[5]

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[5] Contrary to its assertions, the majority's analysis is not grounded in the statutory text. See *ante* at 414 n 6. Rather, its analysis depends solely on its own interpretation of what it perceives as the GTLA's purpose. Because the majority relies on considerations that are outside the statutory text, its opinion must be considered a repudiation of the principles announced in *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999). In my view, the majority makes a thinly veiled absurd-result analysis in this case. In effect, it argues that it would be an absurd result to conclude that the Legislature intended governmental defendants to show by affidavit facts supporting a finding of no ordinary negligence. The absurdity, the majority asserts, lies in the fact that defendants cannot be liable even if they are ordinarily negligent. They must be shown to be grossly negligent under MCL 691.1407(2).

C. THE APPROPRIATE SANCTION FOR A VIOLATION OF MCL 600.2912e IS A DEFAULT

Another issue considered in plaintiffs' application for leave to appeal is whether default is an appropriate sanction for a violation of MCL 600.2912e. MCL 600.2912d requires a plaintiff to file an affidavit of merit with the complaint. Also, MCL 600.2912e requires a defendant to file an affidavit of meritorious defense no later than 91 days after the plaintiff files its affidavit of merit. I conclude that a defendant who fails to file an affidavit of meritorious defense may be defaulted, because an answer without an affidavit is viewed by the courts as a nullity. A default judgment is proper where a party has "failed to plead or otherwise defend [an action.]" MCR 2.603(A)(1). To hold otherwise would not only ignore our precedent and court rules, it would treat medical malpractice plaintiffs differently from medical malpractice defendants.

For example, in *Scarsella, supra,* this Court addressed the proper remedy for a plaintiff's failure to file an affidavit pursuant to MCL 600.2912d. We held that the Legislature's use of "shall" in MCL 600.2912d, " 'indicates that the affidavit accompanying the complaint is mandatory and imperative.' " *Scarsella, supra* at 549 (citation omitted). This Court concluded that failure to meet the affidavit requirement does not toll the applicable statute of limitations because the filing is ineffective. *Id.* The complaint itself is viewed as a nullity. Hence, there is nothing to toll.

But MCL 600.2912e makes no mention of "ordinary negligence," "standard of care of ordinary negligence," or "ordinary care," nor does it differentiate between ordinary negligence and gross negligence. *Ante* at 411-412. Rather, the majority has added this language to the statute. And the majority latches on to this judicially created language to create a conflict where none exists.

Similarly, in *Omelenchuk v City of Warren*,[6] this Court held that "a plaintiff cannot file suit without giving the notice required by [MCL 600.2912b(1)]." The failure of a plaintiff to give the notice means that a subsequently filed complaint is not viable. That complaint, too, would be viewed as a nullity.

Consider now the requirement that defendants in medical malpractice cases must file an affidavit of meritorious defense pursuant to MCL 600.2912e. Applying the reasoning in *Scarsella* and *Omelenchuk*, there having been no statutorily required affidavits filed, defendants' answers were deficient and should be considered a nullity. Therefore, the trial court should have granted plaintiffs' motion for a default judgment. The majority points out that defendants properly asserted governmental immunity. But, proper assertion of that defense does not remove defendants from *Scarsella* and *Omelenchuk*. Defendants still failed to file a complete answer.

This approach not only fosters consistent treatment of medical malpractice plaintiffs and defendants, it effectuates the intent of the Legislature as expressed in MCL 600.2912e. After a plaintiff has filed an affidavit of merit and a complaint as required by MCL 600.2912d, the defendant must file an answer within 21 days. Then, as required under MCL 600.2912e, the defendant has 91 days from the filing of the plaintiff's affidavit and complaint to file an affidavit of meritorious defense. In this case, defendants' failure to follow these procedural requirements should have led the trial court to grant plaintiffs' motion for default judgment, as mandated by *Scarsella* and *Omelenchuk*.

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[6] 461 Mich 567, 572; 609 NW2d 177 (2000), overruled in part on other grounds *Waltz v Wyse,* 469 Mich 642 (2004).

III. CONCLUSION

I would reverse the decision of the Court of Appeals and remand this case to the trial court for entry of a default judgment in plaintiffs' favor. MCL 600.2912e required defendants to file an affidavit of meritorious defense. Nothing in the statute excused them from this requirement by virtue of the fact that they claimed the defense of governmental immunity.

Because defendants failed to file an affidavit of meritorious defense, their answer is a legal nullity. Accordingly, a default judgment was the proper remedy. The judgment of the Court of Appeals should be reversed and, in reliance on *Scarsella*, the case should be remanded to the trial court for entry of a default judgment in plaintiffs' favor.

CAVANAGH, J., concurred with KELLY, J.

FORD MOTOR COMPANY v CITY OF WOODHAVEN
FORD MOTOR COMPANY v CITY OF STERLING HEIGHTS
FORD MOTOR COMPANY v BRUCE TOWNSHIP

Docket Nos. 127422-127424. Argued March 9, 2006 (Calendar No. 4). Decided June 28, 2006.

Ford Motor Company filed personal property statements with the appropriate taxing units with regard to property in the city of Woodhaven and Wayne County, the city of Sterling Heights, and the city of Romeo. In each report, some of the information was misreported. The assessor in each taxing unit accepted and relied on the personal property statements as accurate when calculating Ford's tax liability and issued tax bills for an amount that was in excess of what would have been due had the statements been accurate. Ford paid the tax bills. After discovering its errors, Ford petitioned the Michigan Tax Tribunal (MTT) for refunds under MCL 211.53a for the excess taxes paid, alleging the excess payments were the result of mutual mistakes of fact.

With regard to the petition against the city of Romeo, the MTT concluded that it lacked subject-matter jurisdiction because Ford did not protest the assessments to the board of review. The MTT also held that there was no mutual mistake of fact because the mistake was solely the result of Ford's failure to prepare accurate statements. The MTT also held that Ford should have sought relief from the State Tax Commission. Ford appealed. The Court of Appeals denied Romeo's motion to dismiss on the asserted grounds that it was not the appropriate taxing unit, reversed the order of the MTT, and remanded the matter to the MTT to address the joinder or substitution of parties. *Ford Motor Co v Romeo*, unpublished order of the Court of Appeals, entered September 13, 2002 (Docket No. 240649). On remand, the MTT granted Ford's motion to substitute Bruce Township for Romeo, denied Ford's motion to file an amended petition, and dismissed the petition on the basis of lack of subject-matter jurisdiction, including lack of jurisdiction because the petition covered two parcels of property in violation of the MTT's rules. Ford appealed, and the Court of Appeals, CAVANAGH and FORT HOOD, JJ. (GRIFFIN, P.J., dissenting), affirmed. 264 Mich App 1 (2004). The Court held that the MTT had subject-

matter jurisdiction but had properly determined that there was no mutual mistake. The Court also held that the MTT properly denied Ford's motion to amend its petition. Ford sought leave to appeal in the Supreme Court.

With regard to the petition against Sterling Heights, the city moved for summary disposition. The MTT granted the motion for reasons identical to those noted with regard to the petition against Bruce Township. The Court of Appeals, CAVANAGH and FORT HOOD, JJ. (GRIFFIN, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued October 5, 2004 (Docket No. 246379). Ford sought leave to appeal in the Supreme Court.

With regard to the petition against Woodhaven and Wayne County, the MTT granted the respondents' motion to dismiss for the same reasons it dismissed the other two petitions. The Court of Appeals, CAVANAGH and FORT HOOD, JJ. (GRIFFIN, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued October 5, 2004 (Docket No. 246378). Ford sought leave to appeal in the Supreme Court. The Supreme Court granted leave to appeal with regard to all three cases. 474 Mich 886 (2005).

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

Ford has stated valid claims of mutual mistake of fact that can be remedied under MCL 211.53a. In each of these cases, Ford and the respondent involved shared and relied on an erroneous belief about a material fact that affected the substance of the transactions. The MTT adopted a wrong principle and misapplied the law by failing to give the proper meaning to the legal term "mutual mistake of fact." The MTT abused its discretion in failing to allow Ford to amend its petition against Bruce Township. The judgments of the MTT and the Court of Appeals must be reversed and the matters must be remanded to the MTT for further proceedings consistent with the opinion of the Supreme Court.

1. The term "mutual mistake of fact" is not limited to one particular area of the law. However, it is most commonly applicable to the law of contracts. The MTT and the Court of Appeals majority erred in stating that contract law or any other area of the law has no role in the Supreme Court's duty to ascertain the Legislature's intent and give effect to the common-law term "mutual mistake of fact." The phrase "mutual mistake of fact" in MCL 211.53a means an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction. Ford has stated valid claims of mutual mistakes of fact under MCL 211.53a.

2. The MTT erred in denying Ford's motion to amend its petition against Bruce Township. Because Ford stated valid claims under MCL 211.53a, it was error to deny the motion on the basis that a valid claim under MCL 211.53a could not be made. The other reason articulated by the MTT for dismissal, that the petition covered two parcels of property in violation of MTT rules, does not rise to the level of the particularized reasons articulated by the Supreme Court for denying a motion to amend a petition. The MTT abused its discretion in denying the motion to amend.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, concurring, wrote separately to state three additional reasons for concluding that Ford has stated valid claims under MCL 211.53a. First, the Legislature enacted MCL 211.53a in response to *Consumers Power Co v Muskegon Co*, 346 Mich 243 (1956), a case in which this Court rejected the plaintiff's claim for taxes voluntarily paid because of a mutual mistake of fact on the grounds that 1948 CL 211.53 did not permit such a claim. In enacting MCL 211.53a, the Legislature provided a remedy in cases involving a mutual mistake of fact and thereby broadened the types of situations under which a taxpayer could claim a refund for overpayment. Second, prior decisions by this Court interpreting and applying the common-law phrase "mutual mistake of fact" support the conclusion that Ford has stated valid claims under MCL 211.53a. Finally, the structure of the General Property Tax Act, MCL 211.1 *et seq*., supports the conclusion that Ford has stated valid claims under MCL 211.53a. That act places the responsibility on the assessor to ascertain the personal property located in the assessor's jurisdiction and to exercise sound judgment. When an assessor simply relies on a taxpayer's personal property statement and subsequently calculates the assessment on the basis of this information alone, as in these cases, the assessor adopts the facts in those statements. Thus, a mistake in a taxpayer's personal property statement, if adopted by the assessor as described above, is a mutual mistake under MCL 211.53a.

Reversed and remanded to the MTT for further proceedings.

1. TAXATION — PROPERTY TAXES — MUTUAL MISTAKE OF FACT.

The phrase "mutual mistake of fact" in MCL 211.53a, which allows for the recovery of property taxes paid in excess of the correct amount because of a mutual mistake of fact made by an assessor and a taxpayer, means an erroneous belief, that is shared and relied on by both parties, about a material fact that affects the substance of the transaction.

2. TAXATION — TAX TRIBUNAL — AMENDMENT OF PETITIONS.

A motion to amend a petition in the Tax Tribunal should be granted unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory tactics, (3) repeated failure to cure deficiencies by amendment previously allowed, (4) undue prejudice to the opposing party, or (5) futility.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich, Jeffrey A. Hyman, Michael B. Shapiro,* and *Daniel L. Stanley*) for the petitioner.

Johnson & McPherson, P.L.C. (by *Dale T. McPherson*), for the city of Woodhaven.

Adem E. Elder and *Richard G. Stanley* for Wayne County.

O'Reilly Rancilio P.C. (by *Robert Charles Davis* and *Ralph Colasuonno*) for the city of Sterling Heights.

Seibert and Dloski, PLLC (by *Lawrence W. Dloski*), for Bruce Township.

Amicus Curiae:

James P. Hallan for Michigan Retailers Association.

CAVANAGH, J. These cases call on this Court to interpret the meaning and applicability of the phrase "mutual mistake of fact" as it is used in MCL 211.53a. In each of these cases, petitioner Ford Motor Company (Ford) filed a personal property statement with the appropriate taxing jurisdiction, the respective respondents. But Ford misreported some of the information in its personal property statements. Because respondents' assessors accepted and relied on Ford's personal property statements as accurate when calculating Ford's tax liability, respondents issued tax bills for amounts in excess of what would have been due had the statements

been accurate. Ford paid the taxes, but it later sought refunds under MCL 211.53a when it discovered the errors, claiming the excessive taxes were paid because of a mutual mistake of fact.

We hold that Ford has stated valid claims of mutual mistake of fact that were intended to be remedied under MCL 211.53a. In these cases, Ford and respondents shared and relied on an erroneous belief about a material fact that affected the substance of the transactions. Our conclusion is consistent with the Legislature's intent and the peculiar meaning the term "mutual mistake of fact" has acquired in our law. In dismissing Ford's petitions, the Michigan Tax Tribunal (MTT) adopted a wrong principle and misapplied the law by failing to give the proper meaning to the legal term "mutual mistake of fact." Further, we hold that the MTT abused its discretion when it failed to allow Ford to amend its petition against respondent Bruce Township. Therefore, we reverse the judgments of the MTT and the Court of Appeals, and we remand these cases to the MTT for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In each of these cases, Ford filed a personal property statement with the appropriate taxing jurisdiction, the respective respondents. But Ford mistakenly reported some of the information in its personal property statements and, therefore, overstated the quantity of taxable property it owned. Because respondents' assessors accepted and relied on Ford's personal property statements as accurate when calculating Ford's tax liability, respondents issued excessive tax bills. Without any party realizing that the tax bills were excessive, Ford paid the amounts due and respondents accepted Ford's payments.

Ford eventually discovered the errors in its personal property statements. Ford then filed three separate petitions with the MTT—one against the city of Romeo (which should have been filed against Bruce Township), one against the city of Sterling Heights, and one against the city of Woodhaven and Wayne County. In each petition, Ford argued that it paid excessive taxes because of a mutual mistake of fact and, thus, was entitled to a refund under MCL 211.53a. MCL 211.53a provides:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

Even though Ford filed three separate petitions, our analysis of the issue presented in these cases is the same. But because each petition was treated separately by the MTT and the Court of Appeals, we will detail each petition's relevant history.

A. BRUCE TOWNSHIP

After learning that it double reported certain assets, Ford filed a petition with the MTT against the city of Romeo.[1] Specifically, Ford claimed in this petition that it was entitled to a refund from Romeo under MCL 211.53a because a mutual mistake of fact occurred regarding the taxability of Ford's personal property. After considering the matter, the MTT sua sponte issued an order dismissing Ford's petition. The MTT concluded that it lacked subject-matter jurisdiction

[1] Apparently, Ford double reported certain assets after it completed a sale-leaseback transaction on these assets and failed to dispose of the assets' historical cost.

under MCL 205.735 because Ford did not protest the assessments to the Romeo Board of Review.[2] Further, the MTT held that the assessments at issue were not the result of a mutual mistake of fact because the assessments were solely the result of Ford's failure to prepare accurate statements. Accordingly, the MTT reasoned that it did not have subject-matter jurisdiction under MCL 211.53a because there was no mutuality of mistake. In support of this conclusion, the MTT relied on its opinion in *Gen Products Delaware Corp v Leoni Twp*, 2001 WL 432245 (Docket No. 249550, March 8, 2001), and on the Court of Appeals majority opinion in *Wolverine Steel Co v Detroit*, 45 Mich App 671; 207 NW2d 194 (1973). Finally, the MTT opined that Ford

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[2] MCL 205.735 provides, in relevant part:

> (1) A proceeding before the tribunal is original and independent and is considered de novo. For an assessment dispute as to the valuation of property or if an exemption is claimed, the assessment must be protested before the board of review before the tribunal acquires jurisdiction of the dispute under subsection (2) . . . .
>
> (2) The jurisdiction of the tribunal in an assessment dispute is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved. Except in the residential property and small claims division, a written petition is considered filed by June 30 of the tax year involved if it is sent by certified mail on or before June 30 of that tax year. . . . In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 30 days after the final decision, ruling, determination, or order that the petitioner seeks to review, or within 35 days if the appeal is pursuant to section 22(1) of 1941 PA 122, MCL 205.22. . . . An appeal of a contested tax bill shall be made within 60 days after mailing by the assessment district treasurer and the appeal is limited solely to correcting arithmetic errors or mistakes and is not a basis of appeal as to disputes of valuation of the property, the property's exempt status, or the property's equalized value resulting from equalization of its assessment by the county board of commissioners or the state tax commission.

should have sought relief from the Michigan State Tax Commission under MCL 211.154.

Ford appealed to the Court of Appeals, but Romeo moved to dismiss the appeal because it was not the taxing jurisdiction that assessed Ford's personal property. While not addressing the merits of the petition, the Court of Appeals denied Romeo's motion, reversed the MTT order, and remanded the matter to the MTT to address the issue of the necessary joinder or substitution of the parties. *Ford Motor Co v Romeo*, unpublished order of the Court of Appeals, entered September 13, 2002 (Docket No. 240649). Ford then filed a motion with the MTT to amend its petition to substitute Bruce Township for Romeo, as well as to make minor corrections. Ford's proposed amended petition again maintained that under MCL 211.53a, it was entitled to a refund because its personal property was reported and assessed twice, which Ford claimed was a mutual mistake of fact. Further, Ford argued that the MTT had jurisdiction to hear the case under MCL 205.731(b).[3]

The MTT granted Ford's motion to substitute Bruce Township for Romeo. But the MTT denied Ford's motion for leave to file an amended petition and dismissed the petition on the ground that Ford had still failed to invoke the MTT's subject-matter jurisdiction.

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[3] MCL 205.731 provides:

> The tribunal's exclusive and original jurisdiction shall be:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws.

Once again, the MTT held that because there was not a mutual mistake of fact, it lacked jurisdiction under MCL 211.53a. Further, the MTT concluded that it lacked subject-matter jurisdiction because the proposed amended petition covered two parcels of property; therefore, the proposed petition violated the MTT's rule of procedure, 1999 AC, R 205.1240, which prohibits a petition from covering more than one parcel.[4] Ford appealed to the Court of Appeals.

In a split, published decision, the Court of Appeals affirmed the MTT's order. 264 Mich App 1; 689 NW2d 764 (2004). First, the Court of Appeals majority opined that the MTT had subject-matter jurisdiction over Ford's petition because the MTT is vested with the power and authority to adjudicate tax refund cases, citing *In re AMB*, 248 Mich App 144, 166-167; 640 NW2d 262 (2001). But the Court of Appeals majority agreed with the MTT that Ford was not entitled to relief under MCL 211.53a because there was not a mutual mistake of fact.

In this regard, the Court of Appeals referenced the history surrounding MCL 211.53a, as well as Black's Law Dictionary (7th ed), and opined that MCL 211.53a "requires that both the assessing officer and the taxpayer have the same erroneous belief regarding the same material fact, which belief directly caused both the excess assessment and excess payment of taxes." *Bruce Twp*, *supra* at 9. Notably, the Court of Appeals majority preferred its definition of "mutual mistake of fact" to that articulated by the MTT in *Gen Products Delaware Corp*, *supra*, because the majority believed that the MTT's characterization was "more compli-

[4] In its proposed amended petition, Ford identified two parcels of property, 50-043-900-015-00 and 50-043-800-900-11.

cated than necessary." *Id*. at 11.[5] Proceeding under its own understanding of MCL 211.53a, the Court of Appeals majority then concluded that Bruce Township and Ford were not operating under the same mistake of fact. According to the majority, the mistake was not mutual because Ford's mistake concerned its erroneous belief that certain assets were taxable, whereas Bruce Township's erroneous belief was that Ford's personal property statement was accurate. Moreover, the Court of Appeals majority reasoned that there was no mutual mistake of fact giving rise to a remedy under MCL 211.53a because the excessive tax was a direct result of Ford's sole mistake. Additionally, the majority rejected the proposition that the treatment of the phrase "mutual mistake" in contract law cases was applicable to property tax cases.

Therefore, the Court of Appeals majority held that the MTT properly concluded that Ford was not entitled to a refund under MCL 211.53a because there was no mutual mistake of fact. Moreover, the majority reasoned that the MTT properly denied Ford's motion to amend its petition because the amendment would have been futile in light of the MTT's conclusion that relief could not be granted under MCL 211.53a. Accordingly, the Court of Appeals majority held that the MTT had the right and duty to dismiss Ford's petition, and it affirmed the order of the MTT.

The Court of Appeals dissent, however, would have reversed the order of the MTT. The Court of Appeals dissent agreed with the majority that the MTT had subject-matter jurisdiction to adjudicate Ford's claim, but for slightly different reasons. According to the dissent, the MTT confused the issue of subject-matter

[5] The Court of Appeals majority also disagreed with the interpretation of MCL 211.53a set forth in *Wolverine Steel Co*, *supra*.

jurisdiction with whether Ford stated a claim under MCL 211.53a for which relief could be granted. Further, the dissent opined that the MTT had subject-matter jurisdiction under MCL 205.731(b). So when the MTT dismissed Ford's petition on the basis that it lacked subject-matter jurisdiction because Ford failed to state a claim under MCL 211.53a, the dissent would have held that the MTT erred as a matter of law.

Unlike the majority, however, the dissent reasoned that the MTT also erred in determining that Ford failed to allege a mutual mistake of fact under MCL 211.53a. The dissent reasoned that the MTT's interpretation of a mutual mistake of fact was excessively narrow and would effectively eliminate personal property from the scope of MCL 211.53a. Relying in part on *Carpenter v Ann Arbor*, 35 Mich App 608; 192 NW2d 523 (1971), the Court of Appeals dissent reasoned that both Ford and Bruce Township shared the same factual mistake, namely, that all the property listed in Ford's statement was taxable. Because both parties relied on this factual mistake, the dissent concluded, the parties operated under a mutual mistake of fact. Therefore, the Court of Appeals dissent would have reversed the order of the MTT on the basis that the MTT erred in applying the law and adopting an incorrect legal principle.

Additionally, the Court of Appeals dissent opined that the MTT did not have the authority to dismiss sua sponte Ford's petition. Again, the dissent noted that the MTT had subject-matter jurisdiction and, therefore, it should not have dismissed the petition on this ground. Further, the dissent asserted that the MTT's other basis for dismissing the petition, failure to state a claim under MCL 211.53a, was akin to a ruling under MCR 2.116(C)(8). According to the dissent, this was effectively a grant of summary disposition erroneously is-

sued without briefing. Finally, the Court of Appeals dissent observed that the MTT's refusal to allow Ford to amend its petition was an abuse of discretion requiring reversal, and that Ford should be allowed to split the petition into two petitions to comply with the MTT's rule of procedure.

B. STERLING HEIGHTS

Like what occurred with its personal property statement filed with Bruce Township, Ford later learned that it double reported certain assets on its statement filed with the city of Sterling Heights. So Ford filed a petition with the MTT against Sterling Heights, seeking a refund under MCL 211.53a because a mutual mistake of fact occurred. In lieu of an answer, Sterling Heights moved for summary disposition under MCR 2.116(C)(8) and (10). Ford did not respond to Sterling Heights' motion. However, the MTT, for reasons virtually identical to those noted earlier in this opinion with regard to the Bruce Township petition, granted the Sterling Heights' motion to dismiss. For example, the MTT held that Ford did not properly invoke the MTT's subject-matter jurisdiction because Ford failed to protest the assessments to the Sterling Heights Board of Review. Moreover, the MTT likewise held that Ford's incorrect reporting on its personal property statement was not a mutual mistake of fact made by both Ford and Sterling Heights. Therefore, the MTT held that it also lacked subject-matter jurisdiction under MCL 211.53a.

In a split, unpublished opinion per curiam, the Court of Appeals affirmed. *Ford Motor Co v Sterling Hts*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket No. 246379). The Court of Appeals decision was issued on the same day

and by the same panel, resulted in the same split, and employed virtually the same reasoning as in the decision in *Bruce Twp*, *supra*.

C. WOODHAVEN AND WAYNE COUNTY

Similar to what transpired with its personal property statements noted above, Ford later learned that its statement to the city of Woodhaven was inaccurate. In this personal property statement, Ford discovered that certain assets that it listed were classified incorrectly, not taxable personal property, retired, or idle. After this discovery, Ford filed a refund petition with the MTT against Woodhaven and Wayne County under MCL 211.53a, alleging that a mutual mistake of fact occurred. Woodhaven and Wayne County then moved to dismiss the petition under MCR 2.116(C)(4), asserting that the MTT lacked subject-matter jurisdiction under MCL 211.53a. The MTT granted the motion to dismiss for the same reasons it dismissed Ford's other two petitions.

In a split, unpublished opinion per curiam, the Court of Appeals affirmed. *Ford Motor Co v Woodhaven*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket No. 246378). Likewise, the Court of Appeals decision was issued on the same day and by the same panel, resulted as in the same split, and employed the same reasoning in the decisions in *Bruce Twp*, *supra*, and *Sterling Hts*, *supra*.

Ford sought leave to appeal in all three cases, arguing that the MTT and the Court of Appeals erred in interpreting and applying MCL 211.53a, as well as in denying Ford's motion to amend its Bruce Township petition. This Court granted leave to consider the judgments of the Court of Appeals. 474 Mich 886 (2005).

II. STANDARD OF REVIEW

Absent fraud, our review of a decision by the MTT is limited to determining whether the MTT erred in applying the law or adopting a wrong legal principle. *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 18-19; 678 NW2d 619 (2004). Further, the central dispute in these cases involves the proper interpretation and application of a statute, MCL 211.53a. This is a question of law that we review de novo. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004).

III. ANALYSIS

These cases call on this Court to interpret MCL 211.53a.[6] Specifically, these cases require us to interpret the meaning and applicability of the phrase "mutual mistake of fact" as it is used in that statutory provision. As noted earlier in this opinion, MCL 211.53a provides:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Title Office*, *supra* at 519. The first step is to review the statute's language. *Id*. And if the statute is plain and unambiguous, then

[6] Apart from brief references in *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151; 97 NW2d 25 (1959), and *Booker v Detroit*, 469 Mich 892 (2003) (YOUNG, J., dissenting), this Court has not had formal occasion to interpret MCL 211.53a.

this Court will apply the statute as written. *Id*. Moreover, this Court is guided by MCL 8.3a, which provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Here, we agree with the Court of Appeals majority and dissent that the term "mutual mistake of fact" is a technical term that has acquired a peculiar meaning under the law. Indeed, the term has a defined common-law meaning.

A. THE COMMON-LAW MEANING OF MUTUAL MISTAKE OF FACT

This Court follows the principle that when a statute dealing with the same subject uses a common-law term and there is no clear legislative intent to alter the common law, this Court will interpret the statute as having the same meaning as under the common law. *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994). Moreover, "common-law meanings are assumed to apply even in statutes dealing with new and different subject matter, to the extent that they appear fitting and in the absence of evidence to indicate contrary meaning." 2B Singer, Statutes and Statutory Construction (6th ed), § 50:03, p 152. Here, because there is nothing in MCL 211.53a or the General Property Tax Act (GPTA), MCL 211.1 *et seq*., that shows a legislative intent to alter the meaning the term "mutual mistake of fact" has acquired in our law, we will examine how Michigan's common law uses the term "mutual mistake of fact." Additionally, we are also cognizant that "it is a well-established rule of statutory construction that the Legislature is presumed to be

aware of judicial interpretations of existing law when passing legislation." *Pulver*, *supra* at 75.

Moreover, because "mutual mistake of fact" is a legal term, resort to a legal dictionary to determine its meaning may also be helpful. *People v Jones*, 467 Mich 301, 304-305; 651 NW2d 906 (2002). "Mistake" is defined as

> 1. An error, misconception, or misunderstanding; an erroneous belief. 2. *Contracts*. The situation in which the parties to a contract did not mean the same thing — or when one or both, while meaning the same thing, formed untrue conclusions about the subject matter of the contract — as a result of which the contract may be rendered void. [Black's Law Dictionary (7th ed).]

Moreover, "mutual mistake" is defined as

> 1. A mistake in which each party misunderstands the other's intent. — Also termed *bilateral mistake*. 2. A mistake that is shared and relied on by both parties to a contract. • A court will often revise or nullify a contract based on a mutual mistake about a material term. — Also termed (in sense 2) *common mistake*. [*Id*.]

Further, "mistake of fact" is defined as "[a] mistake about a fact that is material to a transaction." *Id*.

Accordingly, it is discernable from the various definitions set forth above that the term "mutual mistake of fact" is not limited to one particular area of the law; however, it is most commonly applicable to the law of contracts. As such, we disagree with the Court of Appeals majority and the MTT that contract law, or any other area of the law for that matter, has no place in our duty to ascertain the Legislature's intent and give effect to the common-law term "mutual mistake of fact."

Many law students are introduced to the law of mistake in their first-year contracts course by reading

our decision in *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887)—the famous barren cow case. In *Sherwood*, the parties contracted for the sale of a cow, and both parties believed and understood that the cow was barren and, thus, useless for breeding. After the contract was entered into, but before delivery, it was discovered that the cow was pregnant. Because the fertile cow was worth considerably more than the agreed-upon price, the defendants refused to deliver the cow. The plaintiff sued for replevin and secured a favorable judgment.

On appeal, this Court reversed that judgment, opining that the trial court should have instructed the jury that if it found that both parties understood that the cow was barren at the time of contracting and it was later discovered that the cow was not barren, then the defendants had a right to rescind under a theory of mutual mistake of fact. *Id*. at 578. While acknowledging that this was a close case, this Court concluded:

> But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,— such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. . . .
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> * * *
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> "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." *Kennedy v. Panama, etc., Mail Co.*, L.R. 2 Q.B. 580, 588. [*Sherwood*, *supra* at 576-577.]

In light of these principles, this Court held that a mutual mistake of fact occurred. Specifically, the *Sherwood* Court reasoned that the mistake was mutual, and that the mistake went to the whole substance of the parties' agreement. In this regard, this Court observed that the parties would not have made the contract of sale except upon the understanding that the cow was barren; therefore, the mistake "went to the very nature of the thing." *Id*. at 577.

Our review of our precedents involving the law of mistake indicates that the peculiar and appropriate meaning that the term "mutual mistake of fact" has acquired in our law has not changed since *Sherwood*, *supra*. See, e.g., *Lee State Bank v McElheny*, 227 Mich 322, 327-328; 198 NW 928 (1924); *Goldberg v Cities Service Oil Co*, 275 Mich 199; 266 NW 321 (1936); *Lake Gogebic Lumber Co v Burns*, 331 Mich 315; 49 NW2d 310 (1951); *McCleery v Briggs*, 333 Mich 522, 525; 53 NW2d 361 (1952); *Gordon v City of Warren Planning & Urban Renewal Comm*, 388 Mich 82, 88-89; 199 NW2d 465 (1972). And the term's meaning was not intended to be altered when the Legislature imported the common-law term "mutual mistake of fact" into MCL 211.53a. Accordingly, the phrase "mutual mistake of fact" must be construed and understood consistent with its peculiar meaning. Therefore, consistent with our case law, we interpret the phrase "mutual mistake of fact" in MCL 211.53a to mean an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.

B. FORD HAS STATED VALID CLAIMS UNDER MCL 211.53a BASED ON MUTUAL MISTAKE OF FACT

Consistent with our interpretation of the legal term "mutual mistake of fact" as it is used in MCL 211.53a, the key issue in these cases is whether there was an

erroneous belief shared and relied on by both Ford and respondents about a material fact that affected the substance of the transactions. Under our interpretation of MCL 211.53a, we hold that Ford has stated valid claims of mutual mistakes of fact that were intended to be remedied under MCL 211.53a.

Here, there is little doubt that a mistake occurred—the personal property statements erroneously overstated the amount of Ford's taxable property, including reporting the same property twice. This resulted in excessive assessments that were paid in full. Further, the mistakes made in these cases are best characterized as mutual. In our view, each assessor's erroneous belief that Ford's personal property statement was accurate does not practically differ from Ford's belief that the statement was accurate. In other words, if Ford believed that it owned certain personal property and reported it properly at the time, then Ford believed that each statement was accurate. Similarly, if each assessor believed that Ford's statement was accurate, then the assessor likewise believed Ford owned certain personal property and reported it properly. As such, the parties shared a mistaken belief about a material fact that went to the very nature of the transaction—that all the personal property Ford claimed in its personal property statements was taxable. And the parties relied on this shared, erroneous belief—respondents when they assessed the property, and Ford when it subsequently paid the excessive assessments. Therefore, we conclude that Ford has stated valid claims under MCL 211.53a under the theory of mutual mistake of fact because the parties shared and relied on their erroneous beliefs about material facts that affected the substance of the assessments.[7]

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[7] We here focus our analysis on MCL 211.53a, because Ford did not seek relief under MCL 211.53b. We must note, however, that MCL 211.53b

C. THE STRUCTURE OF THE GPTA SUPPORTS OUR CONCLUSION THAT FORD HAS STATED VALID CLAIMS OF MUTUAL MISTAKES OF FACT UNDER MCL 211.53a

Further, the nature of personal property statements and the scheme set forth under the GPTA also compels our conclusion that a mutual mistake of fact occurred in these cases. Under the GPTA, personal property located within Michigan is subject to taxation by the applicable taxing authority. MCL 211.1; MCL 211.14. Further, MCL 211.10(1) provides that "[a]n assessment of all the property in the state liable to taxation shall be made annually in all townships, villages, and cities by the applicable assessing officer . . . ." To this end, MCL 211.19(1) provides:

> A supervisor or other assessing officer, as soon as possible after entering upon the duties of his or her office or as required under the provisions of any charter that makes special provisions for the assessment of property, shall ascertain the taxable property in his or her assessing district, the person to whom it should be assessed, and that person's residence.

To assist the assessing officer in ascertaining the taxable personal property in his jurisdiction, MCL 211.19(2) provides that if the assessing officer believes

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also deals with mutual mistakes of fact. But MCL 211.53b is somewhat different in scope. For example, MCL 211.53b applies to both overpayments and underpayments, and it permits both the taxpayer and the assessor to file a claim. These claims are also handled initially by a different body, and the time frame in which to bring a claim is different than that provided in MCL 211.53a. However, we must also note that one year after the Court of Appeals decisions in the instant cases, the Legislature amended MCL 211.53b to provide for the possibility of relief if a taxpayer makes an error in preparing its statement of assessable personal property. In the instant cases, however, we need not consider whether the language of MCL 211.53b, as amended, differentiates a mutual mistake from an error on a personal property statement such as Ford's because the Legislature enacted that amendment after these proceedings commenced and Ford filed its petitions under MCL 211.53a.

that a person possesses taxable personal property, the assessing officer must require that person to make a statement of all his personal property.[8] Long ago, this Court observed that "[t]he statements made by the property owners are not binding upon the assessors, and are for the purpose of assisting these officers in making a proper and fair assessment of the property. The valuations therein stated are not conclusive, and the assessor must exercise his own judgment in making the assessment." *United States Radiator Corp v Wayne Co*, 192 Mich 449, 452; 158 NW 1030 (1916) (internal citation omitted). Indeed, MCL 211.24(1)(f) provides, in relevant part, that when the assessor makes and completes the assessment roll, "[t]he assessor shall estimate the true cash value of all the personal property of each person, and set the assessed value and tentative taxable value down opposite the name of the person." It further states that "[i]n determining the property to be assessed and in estimating the value of that property, the assessor is not bound to follow the statements of any person, but shall exercise his or her best judgment." *Id*.

We are aware that it is understandably common for assessors to accept personal property statements as accurate and simply base their assessments on the information contained in these statements. However, this common practice does not relieve the assessor of the responsibility to ascertain the taxable property in his jurisdiction and to exercise his best judgment when making an assessment. Moreover, to help an assessor exercise his best judgment and, thus, make an accurate

[8] The taxpayer's personal property statement must be completed and delivered to the assessor on or before February 20 of each year. MCL 211.19(2). And the statement must be in a form prescribed by the State Tax Commission. MCL 211.19(5).

assessment, the GPTA gives the assessor many tools besides the ability to require a personal property statement from a property owner and subsequently rely on the submitted statement.[9] For example, if the assessing officer is satisfied that a personal property statement is incorrect, the assessing officer may examine, under oath, any person the assessing officer believes has knowledge of the personal property. MCL 211.22. Additionally, the assessing officer may send a written request to examine the taxpayer's property and books, and a certified personal property examiner of the taxing jurisdiction then conducts the examination and audits the records of the taxpayer.

In sum, the GPTA requires the assessor to ascertain what personal property is in his jurisdiction and assess it accordingly. In doing so, the assessor must exercise his best judgment and has many tools available to better fulfill his statutory responsibility. And while the personal property statements greatly assist the assessor in carrying out that responsibility, the assessor is not bound by the taxpayer's personal property statement. MCL 211.24(1); *United States Radiator Corp*, *supra* at 452. So when an assessor simply relies on a taxpayer's personal property statement and subsequently calculates the assessment on the basis of this information alone—like in these cases—the assessor is effectively adopting the personal property statement as his own belief of what the taxpayer owns. In other words, under these circumstances, there is a mutual understanding of what property the taxpayer owns, and this mutual understanding goes to the very nature of the

[9] Significantly, under MCL 211.21, a person who willfully neglects or refuses to make out and deliver a personal property statement is guilty of a misdemeanor. A person is also guilty of a misdemeanor under MCL 211.21 if he falsely answers questions concerning his personal property.

transaction—an accurate tax assessment. Therefore, the GPTA and the assessment process itself lead us to the inescapable conclusion that mutual mistakes of fact occurred in these cases.

In sum, in these cases, the MTT erred in applying the law and adopting a wrong legal principle. Specifically, the MTT's interpretation of MCL 211.53a is inconsistent with the peculiar meaning the term "mutual mistake of fact" has acquired in our law. Similarly, the Court of Appeals interpretation and application of MCL 211.53a is at odds with MCL 211.53a and, thus, was erroneous.

D. THE MTT ABUSED ITS DISCRETION IN DENYING FORD'S MOTION TO AMEND ITS PETITION

In light of our holding that Ford has stated valid claims under MCL 211.53a, we must next decide whether the MTT abused its discretion when it failed to allow Ford to amend its petition against Bruce Township. This Court will not reverse a tribunal's decision to deny a party leave to amend a petition unless the decision constituted an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). Further, a motion to amend should be granted unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory tactics, (3) repeated failure to cure deficiencies by amendment previously allowed, (4) undue prejudice to the opposing party, or (5) futility. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Here, the MTT denied Ford's motion to amend because it lacked subject-matter jurisdiction and Ford's petition covered two parcels in violation of the MTT's rule of procedure. While the Court of Appeals majority concluded that the MTT had subject-matter jurisdiction to

hear Ford's claim, the majority nonetheless found that the MTT did not abuse its discretion when it denied Ford's motion because the amendment would be futile in light of its conclusion that Ford failed to state a claim under MCL 211.53a for which relief could be granted. We disagree.

Contrary to the conclusions reached by the MTT and the Court of Appeals majority, Ford has stated valid claims under MCL 211.53a. As such, futility is not a legitimate particularized reason by which the MTT could have denied Ford's motion to amend. Therefore, the MTT abused its discretion in this respect. Further, we believe that the MTT abused its discretion when it denied Ford's motion to amend on the basis that the amended petition would violate the MTT's rule of procedure. In this regard, we find the Court of Appeals dissent persuasive and adopt the following reasoning as our own:

> The other reason articulated by the tribunal for dismissal, that the petition covers two parcels of property rather than one, does not rise to the level of the particularized reasons articulated by the Supreme Court for denying a motion to amend a petition. Petitioner's original petition dealt with five parcels of property. In its proposed amended petition, petitioner limited the petition to two parcels of personal property. The tribunal stated that part of the reason it would not grant the motion to amend was that the proposed amendment violated tribunal rule 1999 AC, R 205.1240 requiring separate petitions for each parcel of property. Principles of statutory interpretation apply to construction of administrative rules. This Court must enforce the intent of the rule drafters by applying the meaning plainly expressed. Lacking ambiguity, judicial interpretation is not permitted. *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003). Therefore, we must enforce the plain language of the rule. The plain language of this rule requires

petitioner to file two separate petitions for the personal property in question, because it is in different parcels.

Even though the petition was flawed because it dealt with two parcels instead of one, the tribunal should not have dismissed the case and denied petitioner's motion to amend. The flaw in the petition does not rise to the level of undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice, or futility. Respondent would not be prejudiced by an amendment separating this petition into two petitions because the facts would not change, and respondent was placed on notice by the original petition. There has been no previous amendment or bad faith on the part of petitioner. Finally, the amendment would not be futile. Given that none of the particularized reasons articulated by the Supreme Court for denying a motion to amend exists, the tribunal abused its discretion in denying petitioner's motion to amend. *Sands Appliance Services*, *supra* at 239-240. [*Bruce Twp*, *supra* at 25-27 (GRIFFIN, P.J., dissenting).]

IV. CONCLUSION

Simply stated, on the basis of the incorrect personal property statements, Ford believed it owed the assessed taxes and respondents believed that they were entitled to the amounts assessed. Consistent with the Legislature's apparent intent and our case law, the parties were mutually mistaken about a material fact that affected the substance of the assessments. Accordingly, the MTT and the Court of Appeals erred when they concluded that Ford did not state valid claims of mutual mistake of fact within the meaning of MCL 211.53a. Further, the MTT abused its discretion when it denied Ford's motion to amend its petition. Therefore, we reverse the judgments of the MTT and the Court of Appeals, and we remand these cases to the MTT for further proceedings consistent with this opinion.

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

CAVANAGH, J. (*concurring*). Obviously, I concur with the well-written majority opinion in this case. I write separately, however, to set forth additional reasons why I believe Ford has stated valid claims under MCL 211.53a. Specifically, the history surrounding the enactment of MCL 211.53a supports this Court's conclusion that Ford has stated valid claims under that statute. Additionally, our precedents interpreting and applying the common-law term "mutual mistake of fact" support this Court's conclusion that Ford has stated valid claims under MCL 211.53a. Finally, the structure of the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, also supports this Court's ultimate conclusion that Ford has stated valid claims under MCL 211.53a and, therefore, the lower courts erred.

A. *CONSUMERS* AND THE ENACTMENT OF MCL 211.53a

To fully understand the contours of these cases, I believe it is helpful to take note of the history surrounding the enactment of MCL 211.53a. This must necessarily begin with *Consumers Power Co v Muskegon Co*, 346 Mich 243, 246-247; 78 NW2d 223 (1956), overruled by *Spoon-Shacket, Co, Inc v Oakland Co,* 356 Mich 151; 97 NW2d 25 (1959). Notably, *Consumers* was decided shortly before the enactment of MCL 211.53a. In *Consumers*, the plaintiff paid excess taxes and later claimed that it was entitled to a refund because its payment was due to a mistake of fact made by both it and the assessor—the assessor mistakenly calculated the tax and made an excessive assessment, and the plaintiff failed to discover the error until after it paid the taxes.

At the time of the plaintiff's claim, the controlling statutory provision, 1948 CL 211.53, simply provided:

> [The taxpayer] may pay any tax or special assessment, whether levied on personal or real property, under protest, to the treasurer, specifying at the time, in writing, signed by [the taxpayer], the grounds of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may, within 30 days and not afterwards, sue the township for the amount paid, and recover, if the tax or special assessment is shown to be illegal for the reason shown in such protest.

Despite the absence of any language in 1948 CL 211.53 pertaining to mutual mistake, the plaintiff nonetheless argued that it was entitled to a refund under equitable principles. This Court disagreed and refused to apply equitable principles in that case. The *Consumers* Court opined that taxation is controlled solely by statutory and constitutional provisions. *Consumers, supra* at 247, citing *Langford v Auditor General*, 325 Mich 585, 590; 39 NW2d 82 (1949). Because 1948 CL 211.53 did not permit a claim for taxes voluntarily paid because of a mutual mistake of fact, the *Consumers* Court rejected the plaintiff's claim. This Court reasoned that "[t]o grant the relief requested by the plaintiff would require this Court to exercise legislative prerogatives—namely, to write into the statute the right to recover taxes paid under mutual mistake. This cannot be done." *Consumers*, *supra* at 251.

Justice SMITH, however, dissented and would have allowed the plaintiff to recoup its excess payments. For example, Justice SMITH asserted that the plaintiff did not voluntarily pay the excessive tax, reasoning:

> It is my opinion that under existing Michigan law we require no legislative authority to order the restitution of

> moneys paid to and received by the taxing authorities through mutual mistake of fact. It is enough that we have no valid statute forbidding it. It seems beyond question that the excess moneys were paid involuntarily. One who pays 10 times as much in taxes as he should, because of a mutual mistake of fact, can in no real sense be said to be paying "voluntarily". He pays in ignorance, under a misapprehension of the true facts. Had he known the facts, the tax paid would have been only the sum authorized. The point need not be labored. [*Consumers*, *supra* at 260-261 (SMITH, J., dissenting).]

Accordingly, because the plaintiff paid the taxes involuntarily, the dissent opined that the plaintiff could recover on its claim.

Further, Justice SMITH disagreed with the *Consumers* majority that equitable powers may not be employed in taxation cases. The exercise of equitable powers in tax cases, Justice SMITH reasoned, is not contrary to the principle that governmental powers of taxation are controlled by statutory and constitutional provisions. Rather, Justice SMITH viewed the exercise of equitable power as complementary to this principle. Moreover, the dissent observed that the law on mistake was clear that it is inequitable and unconscionable to allow anyone to retain monies and unjustly enrich himself because of another's mistake. And it does not matter, according to Justice SMITH, that the government is the entity retaining the money or that the taxpayer was careless in making the overpayment. Justice SMITH argued that the law was well-settled on this point, and to hold otherwise, as the *Consumers* majority did, would result in a "double standard of morality . . . ." *Id*. at 256. Specifically, Justice SMITH questioned the majority's rationale that individuals may not benefit through a mutual mistake of fact, but, at least in taxation cases, the government may benefit if the mistake is not timely

discovered. Therefore, Justice SMITH would have affirmed the judgment of the trial court and permitted the plaintiff to recoup the overpayment that resulted from the mutual mistake of fact.

Just two years after this Court issued its opinion in *Consumers*, however, the Legislature amended the GPTA and enacted MCL 211.53a. In doing so, the Legislature responded to the *Consumers* decision by providing a remedy in cases involving a mutual mistake of fact and thereby broadening the types of situations under which a taxpayer could claim a refund for overpayment. Moreover, roughly three years after *Consumers* was decided, this Court overruled *Consumers* in *Spoon-Shacket*, *supra*, and in doing so implied that had MCL 211.53a been in place when the *Consumers* plaintiff filed its claim, the plaintiff would have been permitted to recoup its overpayment. *Spoon-Shacket*, *supra* at 168.[1]

In light of the history surrounding the enactment of MCL 211.53a, what is at issue in these cases becomes clearer and, therefore, this Court's conclusion that Ford has stated valid claims under MCL 211.53a finds additional support. Further, this Court's conclusion that Ford has stated valid claims of mutual mistake of fact within the meaning of MCL 211.53a finds support and is consistent with our precedents.

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[1] *Spoon-Shacket* largely focused on the proper place of equity in taxation cases. Again, the *Consumers* majority reasoned that equitable principles do not apply to the law of taxation. Rather, the majority followed the principle that taxes voluntarily paid cannot be refunded in the absence of a controlling constitutional or statutory provision. The *Spoon-Shacket* Court, however, rejected this principle and instead preferred the rationale set forth in Justice Smith's *Consumers* dissent. Nonetheless, this Court need not weigh in on this issue in the cases now before us because Ford grounds its petitions on MCL 211.53a and seeks a legal remedy, not an equitable remedy.

B. OUR PRIOR DECISIONS INTERPRETING AND APPLYING THE COMMON-LAW PHRASE "MUTUAL MISTAKE OF FACT" SUPPORT OUR CONCLUSION THAT FORD HAS STATED VALID CLAIMS UNDER MCL 211.53a

As noted in the majority opinion in these cases, the term "mutual mistake of fact" is a technical term that has acquired a peculiar meaning under the law. *Ante* at 439. Because the Legislature used this common-law term in MCL 211.53a and did not intend to alter the meaning of this term, it is necessary to examine how Michigan's common law interprets the term "mutual mistake of fact." Consistent with our precedents, this Court interprets the term "mutual mistake of fact" in MCL 211.53a the same as our common law: an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction. I believe, however, that it is also proper to examine not only how our case law defines the term "mutual mistake of fact," but also how our case law applies that term. After such an examination, this Court's conclusion that Ford has stated valid claims of mutual mistake of fact within the meaning of MCL 211.53a is consistent with our precedents.

For example, the majority opinion relies on *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887), for its interpretation of the common-law term "mutual mistake of fact." But the *Sherwood* Court's application of the law to the facts in that case supports the conclusion that Ford has stated valid claims here. In *Sherwood*, the parties established the contract price for the cow on the mistaken belief that the cow was barren. *Id*. at 569-570. This Court reasoned that the contract should have been rescinded because the defendants inadvertently represented the fact that the cow was barren, and the plaintiff relied on and accepted this fact as the basis for the parties' transaction. *Id*. at 577-578. The same

situation is presented in these cases. Here, Ford inadvertently reported certain property in its personal property statements, and the assessors relied on and accepted the information contained in the statements as the basis for the assessments. Accordingly, this Court must likewise conclude that a mutual mistake of fact occurred in these cases.

Moreover, I find persuasive those cases in which this Court has found that a mutual mistake of fact occurs when property is incorrectly identified and the identification is later relied on by the parties when they enter into a particular transaction. For example, in *Lee State Bank v McElheny*, 227 Mich 322, 324; 198 NW 928 (1924), the plaintiff bank brought suit to reform a mortgage given to the defendants, the property owners. The mortgage covered several parcels of real estate, but after the mortgage was recorded, it was discovered that one of the parcels listed was not actually owned by the defendants. The plaintiff argued that there was a mutual mistake and that the mortgage should be reformed to reflect the correct property that the defendants owned. The trial court agreed, and this Court affirmed that judgment. This Court reasoned that "[t]here was either a mutual mistake, or a mistake by the bank, accompanied by fraud on the part of [one of the defendants], and either one gives right to have reformation as to [this defendant]." *Id*. at 327. However, this Court found that the parties intended the mortgage to cover all the property actually owned by the defendants. Accordingly, this Court held that the trial court properly reformed the mortgage, opining as follows:

> We are fully convinced that all parties to the mortgage understood the security was to cover the 19 feet of lot 173, and not the 19 feet of lot 175; for certainly the defendants did not intend to give a mortgage upon property they knew they did not own. Defendants are in no position to urge

> that the mortgage was not taken in good faith. The bank wanted security and defendants gave the mortgage, and we are not inclined to say that a fraud was perpetrated instead of a mutual mistake committed. [*Id*. at 328.]

This Court reached an analogous result in *Gordon v City of Warren Planning & Urban Renewal Comm*, 388 Mich 82; 199 NW2d 465 (1972). In *Gordon*, the plaintiff wished to build low-rise multiple dwellings and submitted a proposal to the defendant city of Warren Planning and Urban Renewal Commission. When the defendant failed to approve the plan, the plaintiff brought suit. In the trial court, the defendant argued that the plaintiff's proposed construction was too close to Mound Road, which was set to be widened at an unspecified future date. The trial court suggested that the parties attempt to relocate the plaintiff's proposed dwellings. The parties followed the trial court's suggestion and came to an agreement that some of the proposed dwellings would be relocated; this agreement was reflected in a subsequent judgment. After the judgment, however, it was discovered that the plaintiff's planning consultant incorrectly prepared and drafted a site plan that showed that Mound Road was narrower than it truly was. And this incorrect site plan was incorporated by reference into the trial court's judgment. Accordingly, the relocated proposed dwellings as reflected in the judgment would still be in the path of a widened Mound Road.

On appeal, this Court concluded that the trial court's judgment was erroneously entered because it was based on a mutual mistake of fact. We reasoned:

> Plaintiffs contend that they entered into the agreement only because they believed their buildings would be west of the 240-foot line. Defendant asserts that a representative of plaintiffs made the mistake and that plaintiffs should be bound by it. It is true that the mistake was made by a planning consultant employed by plaintiffs. One of plain-

> tiffs' construction personnel was, in fact, also aware of this mistake. However, it is also clear that plaintiffs themselves did not have any knowledge of this fact. Both plaintiffs and defendant honestly and in good faith believed that the site plan was proper and that the agreement worked out by the parties could be fulfilled. Thus, we hold that there was a mutual mistake of fact which occurred in the original judgment entered by the trial court. [*Gordon, supra* at 88-89.]

In other words, this Court concluded that the mutuality of the mistake occurred when both parties relied on the incorrect site plan and proceeded to enter into their agreement, and that fault was largely irrelevant.

In the instant cases, mutuality is similarly satisfied because both Ford and the assessors relied on the incorrect personal property statements when entering into their transactions. Ford did not intend to pay taxes on personal property that was nontaxable, and the assessors did not intend to assess nontaxable property. Accordingly, similar to how the incorrect listing of property in *Lee* and *Gordon* was found to have resulted in mutual mistakes of fact, so too must the incorrect reporting of the property in the instant cases be considered mutual mistakes of fact. And, under *Gordon*, it does not matter that Ford was the entity that initially made the error. What matters under *Gordon* is that both Ford and the assessors believed that the personal property statements were accurate and that the subsequent assessments based on the statements were incorrect.

Indeed, this very rationale is reflected in *Consumers*, *supra*, which served as the catalyst for the enactment of MCL 211.53a. I find it telling that both the majority and the dissent in *Consumers* seem to have categorized the events in that case as an instance of mutual mistake of fact. Again, the assessor in that case incorrectly calcu-

lated the tax on the plaintiff's property, and this resulted in an excessive assessment. And the plaintiff did not realize that the assessment was excessive until after it paid the assessment in full. The plaintiff claimed that this was a mutual mistake of fact. It appears that both the majority and the dissent in *Consumers* agreed that a mutual mistake of fact occurred in that case; they simply disagreed on the dispositive issue whether the plaintiff was entitled to an equitable remedy. But both sides determined that the mistake in *Consumers* was the inaccurate calculation. And both the assessor and the plaintiff shared and relied on this mistake—the assessor in levying an excessive assessment and the plaintiff when it paid the excessive assessment in full. Finally, the majority and the dissent in *Consumers* necessarily opined that the mutual mistake affected the very nature of the assessment. Accordingly, the mistakes in these cases are indistinguishable from the mutual mistake of fact found in *Consumers*. Therefore, on the basis of our precedents applying this common-law term, and the Legislature's apparent response to *Consumers*, our holding that Ford has stated valid claims of mutual mistakes of fact under MCL 211.53a finds additional support.

C. THE STRUCTURE OF THE GPTA

The majority opinion finds support for its conclusion that Ford has stated valid claims under MCL 211.53a by examining the structure of the GPTA. In short, the GPTA requires the assessor to ascertain what personal property is in his jurisdiction and assess it accordingly. In doing so, the assessor must exercise his best judgment and has many tools available to better fulfill his statutory responsibility. And while personal property statements greatly assist the assessor in carrying out

that responsibility, the assessor is not bound by the taxpayer's statement. MCL 211.24(1). So when an assessor simply relies on a taxpayer's personal property statement and subsequently calculates the assessment on the basis of this information alone—like in these cases—the assessor is effectively adopting the personal property statement as his own belief of what the taxpayer owns. Accordingly, under these circumstances, there is mutual understanding of what property the taxpayer owns, and this mutual understanding goes to the very nature of the transaction—an accurate tax assessment. Therefore, the GPTA and the assessment process lead this Court to conclude that mutual mistakes of fact occurred in these cases.

Further, while not a case brought under the GPTA, a similar result was reached in *Schwaderer v Huron-Clinton Metro Auth*, 329 Mich 258; 45 NW2d 279 (1951). In *Schwaderer*, the plaintiff contractor, rather than conducting its own survey when preparing its bid, relied on the acreage listed in a map prepared by the defendant. The plaintiff's bid was the lowest, and the parties entered into a written contract under which the plaintiff was to clear some of the defendant's land for an artificial lake. However, the acreage listed on the map was incorrectly stated too low. The plaintiff subsequently brought suit after it expended considerably more resources clearing the land, claiming, among other things, entitlement to reformation of the contract on the basis of mutual mistake. The trial court agreed, and this Court affirmed. In doing so, this Court observed:

> Under the facts in the case the conclusion is fully justified that defendant accepted the map as correct and, like the plaintiff, entered into the contract under a mistake of fact. If the mistake was not mutual, then the situation is one in which there was a mistake on the part of the

> plaintiff and conduct on the part of defendant, acting through its officers and agents, of such character as to justify the granting of equitable relief.
>
> If plaintiff is, as defendant argues, without remedy, the result is that defendant, as pointed out by the trial court, has been unjustly enriched through the performance of the contract by plaintiff in reliance on the representations made to him. To prevent such enrichment, resulting from mutual mistake, equity may properly grant relief. [*Id*. at 270-271.]

Similarly, both the assessors and Ford in the cases now before us relied on Ford's statements as accurate and necessarily based the substance of their transactions on this erroneous belief. In other words, like the parties in *Schwaderer*, Ford and the assessors entered into their transactions with the shared understanding that the factual information that served as the basis for each assessment was accurate.

Additionally, the statutory scheme summarized earlier also leads to the conclusion that these cases are best categorized as instances of mutual *mistakes* of fact, not merely instances of *ignorance* of fact. Accordingly, I disagree with the Court of Appeals analysis in *Gen Products Delaware Corp v Leoni Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2003 (Docket No. 233432), a case factually similar to the instant cases. In *Gen Products Delaware Corp*, the Court of Appeals held that the petitioner had not made out a claim of mutual mistake of fact under MCL 211.53a when it misreported several items in its personal property statements, which had, in turn, resulted in an excessive assessment. In support of its holding, the panel partially relied on the following reasoning:

> The Restatement (First) of Restitution, § 6 Mistake (1937) defines a mistake as a "state of mind not in accord with the facts." It goes on to state, "There may be igno-

> rance of a fact without mistake as to it, since mistake imports advertence to facts and one is ignorant of many facts as to which he does not advert." Here, the assessor based the assessment on the personal property statement, thus he was ignorant of the real facts and did not have a state of mind that allowed for a mutual mistake of fact. [Slip op at 3.]

As summarized earlier, and detailed in the majority opinion, however, this rationale ignores the fact that the GPTA places the responsibility on the *assessor* to ascertain the personal property located in his jurisdiction and to exercise sound judgment. Again, when an assessor simply relies on a taxpayer's personal property statement and subsequently calculates the assessment on the basis of this information alone—like in these cases—the assessor is "adverting" to the facts in the personal property statement and adopting those facts as his own belief of what the taxpayer owns. Accordingly, these cases present instances of mutual *mistakes* of fact within the intended meaning of MCL 211.53a and the GPTA.

For the reasons stated above, I am simply unpersuaded by the arguments advanced by respondents and embraced by the Court of Appeals majority and the MTT that the mistakes in these cases are best characterized as unilateral under our existing law. Moreover, under their preferred interpretation, I would be hardpressed to envision any situation where a mutual mistake of fact could be found. Rather, MCL 211.53a already accounts for distinct claims involving clerical errors made by both the assessor and the taxpayer in addition to claims of a mutual mistake of fact. So if this Court were to conclude that situations like the ones presented in these cases lacked mutuality within the meaning of MCL 211.53a and engage in the sticky business of assigning fault, then the phrase "mutual

mistake of fact" would be rendered meaningless. In other words, such a conclusion would necessarily adopt a rule that any mistake in the personal property statement, absent a clerical or typographical error, may not be remedied under MCL 211.53a. This is not a conclusion this Court should make because it would require rewriting the statute and effectively deleting the phrase "mutual mistake of fact" from MCL 211.53a. Instead, this Court has interpreted the term "mutual mistake of fact" consistent with its common-law meaning and in harmony with the Legislature's apparent intent in enacting MCL 211.53a.

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

HERALD COMPANY, INC v EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS

Docket No. 128263. Argued November 10, 2005 (Calendar No. 9). Decided July 19, 2006.

The Herald Company, Inc., brought an action in the Washtenaw Circuit Court against the Eastern Michigan University Board of Regents, seeking disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., of a letter from the university's vice president of finance to a board member regarding expenditures involved in the construction of the university president's residence. The court, David B. Swartz, J., granted summary disposition for the board after determining that the letter fell within the frank communication exemption from disclosure of the FOIA, MCL 15.243(1)(m). The Court of Appeals, SAAD and SAWYER, JJ. (WHITBECK, C.J., dissenting), affirmed on the basis that the circuit court did not commit clear error. 265 Mich App 185 (2005). The Supreme Court granted the plaintiff's application for leave to appeal. 472 Mich 928 (2005).

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

The circuit court did not abuse its discretion in determining that the public interest in frank communication clearly outweighed the public interest in disclosure. The judgment of the Court of Appeals must be affirmed and the matter must be remanded to the circuit court to separate the exempt information from the nonexempt information in the disputed letter, to the extent practicable, and make the nonexempt material available to the plaintiff.

1. The clear error standard of review is the appropriate standard where the parties in an FOIA action challenge the factual findings of the trial court. However, where the parties do not dispute the underlying facts but challenge the trial court's exercise of discretion, the appellate court must review that determination for an abuse of discretion. An abuse of discretion occurs when the trial court's determination falls outside the principled range of outcomes.

2. The discretionary decision reached by the circuit court in this particular instance was within the principled range of outcomes and, therefore, the court did not abuse its discretion.

3. Legal determinations are reviewed under a de novo standard in FOIA cases.

4. A document is a "frank communication" under MCL 15.243(1)(m) if the trial court finds that it is a communication or note of an advisory nature made within a public body or between public bodies, it covers other than purely factual material, and it is preliminary to a final agency determination of policy or action.

5. Under MCL 15.244, a public body that is asked to disclose a public record must, to the extent practicable, facilitate a separation of exempt information from nonexempt information and make the nonexempt material available to the party requesting the record.

Justice WEAVER, concurring in part and dissenting in part, concurred with part II of the majority's opinion, correcting the standard of review in FOIA cases. Justice WEAVER also agreed with and signed Justice CAVANAGH's dissenting opinion except with regard to part II of that opinion concerning the standards of review.

Justice KELLY, concurring in part and dissenting in part, agreed with and signed Justice CAVANAGH's dissenting opinion except with regard to part II concerning the standard of review. The judgment of the Court of Appeals should be reversed and the matter should be remanded to the circuit court for the release of the letter and an award of attorney fees. She concurred with the majority that discretionary decisions in FOIA cases should be reviewed for an abuse of discretion.

Affirmed and remanded.

Justice CAVANAGH, joined by Justices WEAVER and KELLY except with regard to part II of his opinion concerning the standard of review, dissenting, noted that the FOIA requires a public body to disclose a public record upon proper request unless the record is expressly exempt and that, if the public body denies the request, the public body has the burden to prove that its denial comports with the law. The frank communication exception does not apply unless the public body shows that, in the particular instance, the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. The defendant failed to provide specific evidence that disclosure of the letter would inhibit frank communication and failed to meet its burden. The generic argu-

ments and generalizations of the defendant were insufficient to show that in this situation the balance favored nondisclosure. The trial court's decision regarding the applicability of the frank communication exemption is properly reviewed under the "clear error" standard rather than the "abuse of discretion" standard chosen by the majority. Nevertheless, even under the higher standard of abuse of discretion, the trial court abused its discretion because its decision was not a reasonable and principled outcome in light of the defendant's failure to present evidence supporting its position. The judgment of the Court of Appeals should be reversed and the matter should be remanded to the trial court for an expedited proceeding to release the entire letter and award attorney fees, costs, and disbursements to the plaintiff.

1. FREEDOM OF INFORMATION ACT — APPEAL — STANDARDS OF REVIEW.

A de novo standard of review is applied in actions under the Freedom of Information Act with regard to the application of exemptions involving legal determinations; the clear error standard of review is appropriate where a party challenges the underlying facts that support the trial court's decision; an appellate court reviewing a decision committed to the trial court's discretion must review the discretionary determination for an abuse of discretion and cannot disturb the decision unless it falls outside the principled range of outcomes (MCL 15.231 *et seq*.).

2. FREEDOM OF INFORMATION ACT — EXEMPTIONS — FRANK COMMUNICATIONS.

A document is a "frank communication" for purposes of the Freedom of Information Act where the trial court finds that it is a communication or note of an advisory nature made within a public body or between public bodies, it covers other than purely factual material, and it is preliminary to a final agency determination of policy or action (MCL 15.243[1][m]).

Soble Rowe Krichbaum, LLP (by *Jonathan D. Rowe* and *Matthew E. Krichbaum*), for the plaintiff.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Michael S. Bogren*), for the defendant.

Amici Curiae:

Debra A. Kowich, *Eileen K. Jennings, William C. Collins, Marvin Krislov, Carol L. J. Hustoles, Victor A.*

Zambardi, and *Robert A. Noto*, for the Regents of the University of Michigan, the Board of Trustees of Western Michigan University, Central Michigan University Board of Trustees, Saginaw Valley State University, the Board of Control of Michigan Technological University, the Board of Trustees of Oakland University, the Board of Control of Northern Michigan University, and the Board of Trustees of Michigan State University.

Honigman Miller Schwartz and Cohn LLP (by *Herschel P. Fink* and *Brian D. Wassom*) for Detroit Free Press, Inc.

Bernardi, Ronayne & Glusac, P.C. (by *John J. Ronayne, III*; and *Elise N. Reed*), for Michigan Association of Broadcasters and Michigan Press Association.

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by *John H. Bauckham*), for Michigan Townships Association.

YOUNG, J. The question presented in this case is whether the Washtenaw Circuit Court (the circuit court) properly withheld from disclosure a letter (Doyle letter) written by Eastern Michigan University's (EMU) Vice President of Finance Patrick Doyle to a member of defendant EMU Board of Regents, Jan Brandon. The circuit court held that the letter was exempt as a frank communication under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The Doyle letter was written at Brandon's request as part of defendant's investigation of allegations that the then-president of EMU, Samuel Kirkpatrick, had run the construction of a new president's house (University House project) precipitously over budget.

Applying the balancing test set forth in the statutory language of MCL 15.243(1)(m), the frank communica-

tion exemption, the circuit court concluded that the public interest in encouraging frank communication clearly outweighed the public interest in disclosure and, therefore, that the Doyle letter was exempt from disclosure. The Court of Appeals affirmed in a split decision, determining that the circuit court did not commit clear error. We granted leave to appeal.

We affirm the result reached by the Court of Appeals, but we take this opportunity to clarify the appropriate standard of review of discretionary determinations in FOIA cases. In *Federated Publications, Inc v City of Lansing*,[1] we held that appellate courts must review the trial court's discretionary determinations in FOIA cases for clear error. We continue to hold that the clear error standard of review is appropriate where the parties challenge the *factual findings* of the trial court. However, where the parties do not dispute the underlying facts but rather challenge the trial court's exercise of discretion, we hold that an appellate court must review that determination for an abuse of discretion, which this Court now defines as a determination that is outside the principled range of outcomes.[2]

In this case, the parties do not dispute the underlying facts. Rather, they dispute the import of those facts as they factor into the weighted balancing test of the frank communication exemption. Accordingly, we review the circuit court's decision to affirm the nondisclosure of the Doyle letter for an abuse of discretion. We hold that the circuit court reached a decision that was within the principled range of outcomes when it determined the

[1] 467 Mich 98; 649 NW2d 383 (2002).

[2] *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) ("Discretion is abused when the decision results in 'an outcome falling outside this principled range of outcomes.' ").

balance of competing interests favored nondisclosure and that it therefore did not abuse its discretion.

We also hold that, pursuant to MCL 15.244, the public body must "to the extent practicable, facilitate a separation of exempt from nonexempt information" and "make the nonexempt material available for examination and copying." Accordingly, we remand this case to the circuit court to separate this material from the Doyle letter and make the nonexempt material available to plaintiff.

I. FACTS AND PROCEDURAL HISTORY

Established by the Michigan Constitution, which confers upon it "general supervision of the institution and the control and direction of all expenditures from the institution's funds,"[3] defendant has broad constitutional and statutory [4] oversight to govern Eastern Michigan University. Pursuant to this constitutional mandate, defendant investigated the University House project controversy as it unfolded in 2003. The Doyle letter arose out of this internal investigation.

Plaintiff Herald Company, Inc., doing business as Booth Newspapers, Inc., and the Ann Arbor News, sent FOIA requests to defendant on September 10 and 11, 2003, as it conducted its own investigation, seeking numerous documents related to the University House project.[5] In an October 1, 2003, letter, defendant granted plaintiff's FOIA requests except where defendant indicated either the documents sought did not exist or were in the possession of a separate corporate

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[3] Const 1963, art 8, § 6.

[4] MCL 390.553.

[5] In the September 10, 2003, FOIA request, plaintiff sought two categories of correspondence:

entity, the EMU Foundation. Defendant sent a second letter to plaintiff on October 7, 2003, that specifically identified the Doyle letter and advised plaintiff that it would not disclose the letter pursuant to the frank communication exemption of the FOIA.

On February 5, 2004, plaintiff filed simultaneously in the circuit court a complaint and an emergency motion to compel disclosure of the Doyle letter under the FOIA. After a hearing and viewing the letter in camera, the circuit court issued a written opinion and concluded that the Doyle letter met the statutory definition of a frank communication. In resolving the required statutory balancing test, the circuit court concluded that the balance favored nondisclosure. It permitted defendant to withhold the Doyle letter in its entirety.

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1. Copies of all correspondence, including but not limited to letters, reports, memos and e-mails, to and from the following parties since Jan. 1, 2002, regarding the new University House on campus:

• Vice President for Business and Finance Patrick Doyle or other staff members of the Office of Business and Finance.

• The EMU Board of Regents.

• EMU President Samuel Kirkpatrick.

2. Copies of all correspondence, including but not limited to letters, reports, memos and e-mails, between Vice President for Business and Finance Patrick Doyle to and from the EMU Board of Regents, EMU President Samuel Kirkpatrick and/or the Office of Human Resources, regarding Doyle's recent resignation and-or retirement.

In the September 11, 2003, FOIA request, plaintiff sought all (1) budgets, (2) bank accounts, (3) invoices, (4) change orders, (5) bids, (6) funding sources, (7) board of regents resolutions, (8) and fees, salary, or other income paid to Pamela Kirkpatrick, wife of EMU President Samuel Kirkpatrick, related to the University House project.

In a split, published decision, the Court of Appeals affirmed the circuit court.[6] Chief Judge WHITBECK filed a dissent, arguing that the circuit court committed clear error by misconstruing the balancing test. We subsequently granted plaintiff's application for leave to appeal.[7]

II. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo.[8] To effectuate the intent of the Legislature, we interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage.[9]

In addition, certain FOIA provisions require the trial court to balance competing interests.[10] In *Federated*, this Court announced the appropriate standard of review of discretionary determinations in FOIA cases. While discussing both factual findings and discretionary determinations, we stated in *Federated* that when an appellate court is called upon to evaluate the trial court's discretionary determinations, it must defer to the trial court's decision unless there was clear error.[11]

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[6] 265 Mich App 185; 693 NW2d 850 (2005).

[7] 472 Mich 928 (2005). The parties were instructed to brief: (1) whether the Court of Appeals correctly applied the appropriate standard of review; (2) whether the Washtenaw Circuit Court clearly erred in applying the § 13(1)(m) FOIA exemption, MCL 15.243(1)(m), to the public record in question; and (3) whether purely factual materials, if any, contained within the public record were properly included within the scope of the exemption.

[8] *Federated, supra* at 101.

[9] *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

[10] For example, in addition to the weighted balancing test in the frank communication exemption, the Legislature codified FOIA balancing tests at MCL 15.243(1)(c), (k), (n), (s), and (y).

[11] *Federated, supra* at 101.

Clear error exists only when the appellate court "is left with the definite and firm conviction that a mistake has been made."[12]

Federated inadvertently misstated the appropriate standard of review for discretionary determinations in FOIA cases.[13] In Michigan, the clear error standard has historically been applied when reviewing a trial court's factual findings[14] whereas the abuse of discretion standard is applied when reviewing matters left to the trial court's discretion.[15] We take this opportunity to refine our position in *Federated*. First, we continue to hold that legal determinations are reviewed under a de novo

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[12] *Id.* at 107.

[13] We disagree with Justice CAVANAGH's argument that the abuse of discretion standard is inappropriate because the plaintiff has not and cannot view the contents of the withheld document. Although the plaintiff does not know the factual content of a requested document, such is the nature of litigation under the FOIA. This asymmetry does not reveal a defect in the abuse of discretion standard of review.

Justice CAVANAGH does not disagree that, under Michigan's traditional jurisprudence, discretionary determinations are reviewed for abuse of discretion, and he does not answer how, under the clear error standard, the plaintiff could better challenge facts of which it is unaware. Consistent with our law, it is more appropriate for appellate courts to consider whether the trial court abused its discretion when it makes a discretionary determination in light of the constellation of known facts that form the "particular instance." Both parties concede that the Doyle letter contains Doyle's written impressions about the University House project, and hence its legal status as a "frank communication," and that the audit released a flood of financial information also pertaining to the project. It is the importance of the former in light of the latter that is disputed by the parties. Resolving this dispute in the context of the statutory weighted balancing test requires the trial court to make a judgment call. Therefore, we review that judgment call for an abuse of discretion.

[14] See, e.g., *Federated, supra* at 106; *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); MCR 2.613(C).

[15] See, e.g., *Babcock, supra* at 265, 268-270; *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997); *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

standard. Second, we also hold that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion, such as the balancing test at issue in this case, we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.[16]

III. THE FOIA AND THE FRANK COMMUNICATION EXEMPTION

The Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies.[17] However, by expressly codifying exemptions to the FOIA, the Legislature shielded some "affairs of government" from public view. The FOIA exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure.[18] In many of

[16] Cf. *Babcock, supra* at 265 ("whether a factor *exists* [fact question] is reviewed for clear error . . . whether a reason is substantial and compelling [discretionary determination] is reviewed for abuse of discretion") (emphasis added).

[17] 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.").

[18] See MCL 15.243.

these instances, the Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body. Indeed, in *Federated* we instructed that a circuit court "should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records."[19]

The frank communication exemption at issue in this case provides that a public body may exempt from disclosure as a public record

> [c]ommunications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. *This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.*[20]

The frank communication exemption ultimately calls for the application of a weighted balancing test where the circuit court must weigh the public interest in disclosure versus the public interest in encouraging frank communication. Under the plain language of the provision, these competing interests are not equally situated, and the Legislature intended the balancing test to favor disclosure. The Legislature's requirement that the public interest in disclosure must be clearly outweighed demonstrates the importance it has attached to disclosing frank communications absent significant, countervailing reasons to withhold the document. Hence, the public record is not exempt under the frank communication exemption *unless*

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[19] *Federated, supra* at 110.

[20] MCL 15.243(1)(m) (emphasis added).

the public body demonstrates that the public interest in encouraging frank communication between officials and employees of public bodies *clearly outweighs* the public interest in disclosure.[21]

In addition to the statutory language initially favoring disclosure of a frank communication, it is important to consider carefully other words and phrases in the statutory text. First, we must be cognizant of the competing interests at stake *in the particular instance*.[22] Rather than speak in platitudes and generalities, the parties and the courts must consider how the unique circumstances of the "particular instance" affect the public interest in disclosure versus the public interest in encouraging frank communication. Second, the Legislature decided that the public has an interest in *encouraging* frank communication so that public officials' *ongoing* and *future* willingness to communicate frankly in the course of reaching a final agency determination is an essential component in the balancing test. Therefore, when a court interprets the "particular instance" in the frank communication exemption, it must remember that there is a valid public interest that officials and employees of a public body aspire to communicate candidly when the public body

[21] Michigan is not alone in valuing and protecting frank communication. As aptly noted by the Court of Appeals majority, other state legislatures and the United States Congress have recognized that a public agency's sensitive, internal deliberations must be granted some level of protection from public disclosure to promote the quality of those deliberations and to ensure overall good governance by the public agency. See, e.g., 5 USC 552(b)(5); Cal Gov't Code 6254(a); Colo Rev Stat 24-72-204(2)(a)(XIII); Conn Gen Stat 1-210(b)(1); Hawaii Rev Stat 92F-13(3); Ind Code 5-14-3-4(b)(6); Ky Rev Stat Ann 61.878(1)(j); Wash Rev Code 42.17.310(1)(i); W Va Code 29B-1-4(a)(8); Wyo Stat Ann 16-4-203(b)(v).

[22] Cf. *Federated, supra* at 110, interpreting "in the particular instance" in a different FOIA context.

considers an issue that is "preliminary to a final agency determination of policy or action."

Before the trial court may apply the balancing test, the public body must demonstrate to the satisfaction of the trial court that the public record is a "frank communication."[23] Drawing from the statutory language, the Court of Appeals has held that the public body must establish two things.[24] First, the document must cover other than purely factual materials, and, second, the document must be preliminary to a final determination of policy or action. We agree with the Court of Appeals precedent, but we conclude that a third qualification is apparent in the statutory language: the document sought must also be a communication or note *of an advisory nature* within a public body or between public bodies.

Therefore, a document is a "frank communication" if the trial court finds that it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action. If, in the trial court's judgment, the document fails any one of these threshold qualifications, then the frank communication exemption simply does not apply. For example, if the document is composed entirely of purely factual materials, it is not a frank communication, and the public body must disclose the document to the requesting party unless it has asserted an alternate, valid basis for nondisclosure.

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[23] If the public body denies the requesting party access to a public record, and the requesting party commences an action in the trial court, "*the burden is on the public body to sustain its denial*." MCL 15.240(4) (emphasis added).

[24] See *Herald Co, Inc v Ann Arbor Public Schools,* 224 Mich App 266, 274; 568 NW2d 411 (1997), citing *Milford v Gilb*, 148 Mich App 778, 782; 384 NW2d 786 (1985).

In this case, the circuit court concluded that the Doyle letter was a frank communication.[25] It found that defendant carried its burden of proving (1) that the Doyle letter was of an advisory nature and covered other than purely factual materials, (2) the communication was made between officials and employees of public bodies, and (3) the communication was preliminary to a final agency determination.

The circuit court then moved to the balancing test and concluded that the balance of interests favored nondisclosure. The court offered four reasons to support the balance it struck. Its third and fourth reasons specifically address the balance of interests favoring nondisclosure of the Doyle letter:

> (1) The letter contains substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the contents: Doyle's views concerning the President's involvement with the University House project.
>
> (2) The letter is preliminary to a final determination of policy or action. The communication was between officials of public bodies. The letter concerns Defendant's investigation and ultimate determination of what action, if any, would be taken regarding the University House controversy.
>
> (3) The public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. Plaintiff's specific need for the letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house", or the public's general interest in disclosure, is outweighed by

[25] Plaintiff concedes that the Doyle letter is a frank communication. It challenges only the application of the weighted balancing test.

Defendant's interest in maintaining the quality of its deliberative and decision-making process.

(4) Defendant conducted an investigation and recently published a "voluminous and exhaustive report" concerning its findings regarding the University House project, a copy of which was furnished to Plaintiff.

The circuit court identified the two competing interests. On one hand, plaintiff had an interest in obtaining the letter to "shed light" on President Kirkpatrick's involvement in the University House project. On the other hand, defendant needed to preserve its "deliberative and decision-making process" to carry out an effective internal investigation. The circuit court found that defendant had published and distributed to plaintiff a "voluminous and exhaustive report" of financial data related to the controversy. Defendant hired Deloitte & Touche to audit the expenditures related to the University House project and disseminated this audit to plaintiffs about the time plaintiffs filed suit to obtain the Doyle letter. In the circuit court's judgment, the wave of data related to the University House project flowing from this independent report lessened plaintiff's interest in disclosure of the Doyle letter and tipped the balance in defendant's favor such that the public interest in encouraging frank communication *clearly outweighed* the public interest in disclosure.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION

Reiterating what we said in *Federated*, we note that the *trial court* must determine whether defendant met its burden of proof that a public record is exempt. In this case, the circuit court found that defendant met its burden of showing that the public interest in encouraging frank communication clearly outweighed the interest of disclosure in "the particular instance." On appeal

we are to evaluate that conclusion for an abuse of discretion to determine if that decision falls outside the principled range of outcomes.

Plaintiff claims that two "outcome determinative" facts tip the balance of interests decisively in favor of disclosure and should compel this Court to find the circuit court committed clear error. First, bringing to public light any criticism supposedly leveled by Doyle against President Fitzgerald in the letter would foster accountability and facilitate good government, which plaintiff contends is the core purpose of the FOIA. Second, Doyle wrote the letter in view of his impending departure, so in this "particular instance" defendant has a relatively weak interest in encouraging frank communication. According to plaintiff, because the balancing test is already tilted in favor of disclosure, it is inconceivable that the circuit court's decision to withhold the Doyle letter did not amount to error requiring reversal.

Reviewing the circuit court's decision for an abuse of discretion rather than clear error, we reject, first, plaintiff's blanket assertion that every frank communication that criticizes a public official must be disclosed to assure good governance and accountability and accomplish the "core purpose" of the FOIA. That a frank communication contains criticism of a public official or a public body, which is unremarkable considering that these are *frank* communications, certainly factors into the balancing test, but it cannot singularly serve to outweigh the public interest in nondisclosure. Were we to adopt such a rule, we would eviscerate the frank communication exemption. We doubt that officials within a public body would offer *candid*, *written* feedback, or that they would do so for very long, if that feedback would invariably find its way into the public

sphere. If the frank communication exemption can never protect a candid communication, which almost assuredly contains unfiltered criticism of policies and people, then we will have rendered this FOIA exemption a nullity. We agree with the Court of Appeals majority that defendant "need[s] more than cold and dry data to do its job, it need[s] the unvarnished candid opinion of insiders to make policy judgments and, particularly, to conduct sensitive investigations of top administrators" and to conclude otherwise would "sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public."[26]

As for plaintiff's second "outcome determinative" consideration, we are not persuaded that Doyle's retirement marginalized the public interest in encouraging frank communication within the public body. In plaintiff's view, Doyle's retirement diminished the public interest in nondisclosure because, with Doyle departing, *he* would suffer no employment-related retribution by disclosing his honest feedback. By emphasizing this fact, plaintiff erroneously conflates the interests of the disclosing person, *one member* of the public body, with the public body's need, as an *institution*, to encourage frank communication in this "particular instance."

Quite simply, Doyle's resignation does not negate defendant's need to investigate thoroughly this controversy and future controversies. That one out-going member of defendant's administration might not be inhibited by the possibility of disclosure does not allay the concern that every other member of defendant's administration may harbor if Doyle's communications, and possibly theirs, are disclosed for public consumption. This Court has recognized, in a related FOIA

[26] *Herald Co*, 265 Mich App 202-203, 205.

context, that internal investigations are perilous precisely because employees are frequently afraid to make candid disclosures:

> "1. Internal investigations are inherently difficult because employees are reluctant to give statements about the actions of fellow employees.
>
> "2. If their statements would be a matter of public knowledge they might refuse to give any statements at all or be less than totally forthcoming and candid.
>
> "3. Also, disclosure could be detrimental to some employees.
>
> "4. Public disclosure of records relating to internal investigations into possible employee misconduct would destroy or severely diminish the Sheriff Department's ability to effectively conduct such investigations."[27]

Defendant was investigating the possible misconduct of the most senior member of management, President Kirkpatrick, and, in doing so, sought Doyle's candid observations regarding the matter. Disclosure of Doyle's letter would foster a fear among university officials that they could no longer communicate candidly about a sensitive topic without their written communications being disclosed to the public. This would create a chilling effect that would surely dry up future frank communications. Thus, the departure of Doyle has very little bearing on the institutional interests protected by the frank communication exemption.

Plaintiff would transform the weighted balancing test of the frank communication exemption into an irrebuttable presumption of disclosure. We decline to adopt plaintiff's position. The plain language of the balancing test requires the public interest in encourag-

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[27] *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 365-366; 616 NW2d 677 (2000) (citation omitted).

ing frank communication to *clearly outweigh* the public interest in disclosure, but it does not tacitly create an insurmountable obstacle to the public body's seeking to withhold a frank communication from disclosure. The circuit court in this case acknowledged that the frank communication exemption required a weighted balancing test. Therefore, we cannot conclude that it misapprehended the weighted balancing test when it exempted the Doyle letter from disclosure.

We do not minimize the general public interest in the disclosure of frank communications. The Legislature explicitly codified within the frank communication exemption its policy determination that a frank communication must be disclosed to the public *unless* the public interest in disclosure is *clearly outweighed*. Moreover, the public has a keen interest in receiving information regarding the alleged misuse of public funds, which, if such misuse were true, might undermine the public's trust and confidence in the public body. If public resources are squandered under their watch, then it calls into question whether members of the public body are fit to discharge the responsibilities that have been committed to them on behalf of the general public.

However, we do not hypothesize generally whether the public interest in disclosure should prevail over the public interest in nondisclosure. We only consider the balance struck by the circuit court in the context of this "particular instance." The circuit court reviewed the evidence and made appropriate findings of fact pertaining to the Doyle letter. It found that defendant had released a "voluminous and exhaustive report" that tipped the balance in favor of nondisclosure because the Deloitte audit disclosed for the public record pertinent financial data related to the University House project.

Without question, the circuit court's decision is controversial. But a circuit court is permitted to reach a controversial conclusion with which reasonable people and reasonable appellate courts may disagree without abusing its discretion and reaching a result outside the principled range of outcomes. Members of this Court, members of the Court of Appeals, or another circuit judge might have resolved this balance of interests differently, but the circuit court did not abuse its discretion.

V. SEPARATION OF EXEMPT AND NONEXEMPT MATERIAL

For the foregoing reasons, we affirm the circuit court's conclusion that the Doyle letter is exempt as a frank communication. However, pursuant to MCL 15.244, we hold that the exempt and nonexempt material within the Doyle letter must be separated and the latter disclosed to plaintiff.

The FOIA requires that

> [i]f a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.[28]

The public body is assigned the responsibility, "to the extent practicable, [to] facilitate a separation of exempt from nonexempt information."[29] This provision applies without exception to every public record. Accordingly, we remand this matter to the circuit court with the direction that it separate the opinion from the purely factual material and disclose the latter to plaintiff.

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[28] MCL 15.244(1).

[29] MCL 15.244(2).

VI. CONCLUSION

The circuit court did not abuse its discretion by determining that the public interest in frank communication clearly outweighed the public interest in disclosure. In this "particular instance," defendant had a strong interest in preserving candid internal investigatory communications. Although Doyle may have retired soon after writing the letter, defendant maintained its interest in preventing a ripple effect of chilled communications during this or subsequent investigations. The public interest in disclosure is favored initially in the weighted balancing test. However, the circuit court found that defendant's release of financial data mitigated that interest. As such, we cannot conclude that the circuit court abused its discretion. Accordingly, we affirm the grant of summary disposition in favor of defendant and remand this matter to the circuit court to separate the exempt and nonexempt information in the Doyle letter, to the extent practicable, and make the nonexempt material available to plaintiff.

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

WEAVER, J. (*concurring in part and dissenting in part*). I concur with part II of the majority's opinion, correcting the standard of review in Freedom of Information Act[1] cases. In all other respects I join in the analysis and conclusion of Justice Cavanagh's dissent, signing all but part II of that dissent.

KELLY, J. (*concurring in part and dissenting in part*). I agree with and sign all but part II of Justice Cavanagh's dissenting opinion. Defendant did not carry its

[1] MCL 15.231 *et seq*.

burden of proving that the letter was exempt. The statutory language supports no other decision. Therefore, the trial court abused its discretion. I would reverse the judgment of the Court of Appeals and remand the case to the circuit court for release of the letter and an award of attorney fees.

I concur with the majority's clarification of the standard of review in Freedom of Information Act[1] cases and agree that discretionary decisions in them should be reviewed for an abuse of discretion.

CAVANAGH, J. (*dissenting*). Today's majority decision is an example of a court properly articulating the law, yet failing to apply it correctly. Because I strongly disagree with the majority's position that the trial court did not abuse its discretion when it held that defendant Eastern Michigan University Board of Regents met its burden under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., I must respectfully dissent.

I. FACTS AND PROCEEDINGS

Plaintiff Herald Company, Inc., doing business as Booth Newspapers, Inc., and Ann Arbor News, sought disclosure of a number of public records related to the building of the Eastern Michigan University president's new house.[1] One of the records requested was a letter written by Eastern Michigan University's vice president of finance, Patrick Doyle. Doyle wrote the letter at the request of an Eastern Michigan University regent to offer insight about expenditures associated with the president's residence. Defendant granted in part plaintiff's request for documents, but it declined to produce

[1] MCL 15.231 *et seq*.

[1] The president at the time, Samuel Kirkpatrick, has since resigned.

the Doyle letter, citing MCL 15.243(1)(m). Plaintiff filed a complaint under the FOIA, and the trial court granted summary disposition to defendant, finding that the letter was exempt from disclosure under the "frank communication" exemption of the FOIA, MCL 15.243(1)(m). The trial court listed four reasons why it believed that the letter was exempt.

> (1) The letter contains substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the contents: Doyle's views concerning the President's involvement with the University House project.
>
> (2) The letter is preliminary to a final determination of policy or action. The communication was between officials of public bodies. The letter concerns Defendant's investigation and ultimate determination of what action, if any, would be taken regarding the University House controversy.
>
> (3) The public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. Plaintiff's specific need for the letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house", or the public's general interest in disclosure, is outweighed by Defendant's interest in maintaining the quality of its deliberative and decision-making process.
>
> (4) Defendant conducted an investigation and recently published a "voluminous and exhaustive report" concerning its findings regarding the University House project, a copy of which was furnished to Plaintiff.

The Court of Appeals affirmed in a split decision. 265 Mich App 185; 693 NW2d 850 (2005). This Court granted plaintiff's application for leave to appeal. 472 Mich 928 (2005).

II. STANDARDS OF REVIEW

Summary disposition was granted to defendant on the basis of the FOIA. This Court reviews the grant or denial of summary disposition de novo. *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). Similarly, the proper interpretation of a statutory provision is a question of law that this Court reviews de novo. *Id*. Application of FOIA exemptions involving legal determinations are also reviewed under a de novo standard of review. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 106; 649 NW2d 383 (2002). Exemptions involving discretionary determinations, such as an exemption requiring a court to engage in a balancing of public interests, are reviewed under the clearly erroneous standard of review. *Id*. at 107.

"A finding is 'clearly erroneous' if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (citation omitted). As stated by the United States Supreme Court, this is the foremost of the general principles governing the clearly erroneous standard. *Anderson v City of Bessemer City*, 470 US 564, 573; 105 S Ct 1504; 84 L Ed 2d 518 (1985). The Supreme Court further explained that as long as a trial court's "account of the evidence is plausible in light of the record *viewed in its entirety*, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id*. at 574 (emphasis added). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id*. This standard, however, does not suggest that the mere fact that a court has viewed the evidence in a particular manner necessarily amounts to a permissible view of the evidence. Rather, "[d]ocu-

ments or objective evidence may contradict [a] witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it." *Id*. at 575. Where such factors are present, a court may indeed find clear error. The majority claims that the clear error standard of review was "inadvertently misstated" in *Federated Publications*, *supra*, but I fail to see how this is so. The *Federated Publications* majority opinion was written by Justice Markman and signed by six members of this Court, including all justices in the majority in this case. The standard of review was not just mindlessly inserted into *Federated Publications*; a discussion of the standard of review spanned *three pages*.

Yet even more important is that the standard of review as articulated in *Federated Publications* is correct. The majority now states "that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision." *Ante* at 472. "However, where the parties do not dispute the underlying facts but rather challenge the trial court's exercise of discretion," the proper standard of review is abuse of discretion. *Id*. at 467. In this case, the majority asserts that the parties do not dispute the underlying facts, they only dispute the import of those facts as they factor into the weighted balancing test of the frank communication exemption. *Ante* at 467. Therefore, the majority asserts the proper standard of review is abuse of discretion.

But the majority ignores the obvious reason why clear error is the proper standard of review when a court is analyzing FOIA *exemptions* requiring a determination of a discretionary nature. Simply, the party challenging the exemption *has never seen the document*

being sought.[2] It will often be impossible for a party seeking a document to dispute the underlying facts when those facts are only to be found in the document that the party cannot see. Plainly put, plaintiff needs to see the document to challenge underlying facts, but plaintiff cannot see the document because defendant is claiming it is exempt. The majority now holds that because plaintiff has not challenged the underlying facts, a higher standard of review applies. Not only does this nonsensical argument ignore the reality of proceedings dealing with FOIA exemptions, it also ignores the reality in this case because plaintiff *did* challenge an underlying fact.

Plaintiff challenges the claim that the letter is not relevant in light of the "exhaustive" public report defendant issued. Plaintiff argues that all the facts in the Doyle letter are not contained in the public report, contrary to the trial court's opinion.[3] But, of course, plaintiff is limited in its arguments by the fact that *plaintiff has never seen the letter*. Further, plaintiff cannot further challenge any other underlying facts because defendant has offered no evidence to support its position. Defendant's position, reiterated by the trial court, is based on nothing more than generalized assumptions about what is in the public's interest. Because defendant never came forward with any factual evidence to support its position, there were no other *facts* for plaintiff to challenge. In essence, defendant has not met its burden under the statute, yet plaintiff is

[2] As plaintiff stated, "Indeed, at oral argument the only person in the courtroom who will *not* have seen the Doyle letter will be undersigned counsel, who must rely upon the public Opinions of the reviewing courts to know anything about what is in the letter." (Reply Brief of Plaintiff-Appellant, p 4.)

[3] This argument is supported by Chief Judge WHITBECK's thorough dissent in the Court of Appeals. *Herald*, *supra* at 222.

being penalized with a more deferential standard of review for defendant's failing. However, even using the abuse of discretion standard adopted by the majority to evaluate this case, the trial court still abused its discretion because the trial court's decision was certainly not a reasonable and principled outcome when defendant presented no evidence to support its position, contrary to the clear language of the statute.

III. ANALYSIS

This case involves an issue of statutory interpretation. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The first step is to review the language of the statute. *Id*. 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*.

The FOIA starts from a basic premise—the disclosure of public documents is the cornerstone of responsible government. The FOIA provides, "It is the public policy of this state that all persons . . . are entitled to *full and complete information regarding the affairs of government* and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2) (emphasis added). The FOIA also recognizes that the public has a strong interest in ensuring that it receives information to make sure that those individuals in government who are entrusted with the operation of public institutions do so in a responsible manner. To this end, the FOIA provides, "The people shall be informed so that they may fully participate in the democratic process." *Id*. This Court has consistently held that the FOIA is

intended primarily as a prodisclosure statute. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991); see also *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 109; 404 NW2d 606 (1987); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231-232; 507 NW2d 422 (1993).

Accordingly, under the FOIA, unless expressly exempt, a public body must disclose a public record if provided with a written request that sufficiently describes the record. MCL 15.233(1). A person has a right to inspect, copy, or receive a copy of the requested record. *Id*. If a public body denies access to a public record, the public body has the burden to prove that its denial comports with the law. MCL 15.240(4).

In this case, defendant is the governing body of a Michigan public university and is a public body as defined by the FOIA. See MCL 15.232(d). Plaintiff provided defendant with a specific written request for the Doyle letter, and defendant denied this request claiming that the letter was exempt under MCL 15.243(1)(m) as a "frank communication."

MCL 15.243(1)(m) states, in relevant part, that a public body may exempt from disclosure the following:

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that *in the particular instanc*e the public interest in encouraging frank communication between officials and employees of public bodies *clearly outweighs* the public interest in disclosure. [Emphasis added.]

In assessing whether a public record can be withheld under the "frank communication" exemption, a court must determine whether a public body has met its burden of showing that the requested public record is of an advisory nature and contains other than purely factual materials that are preliminary to a final agency determination of policy or action. If so, the court must next determine whether "*in the particular instance*," the public interest in encouraging frank communication between officials and employees of public bodies "*clearly outweighs*" the public interest in disclosing the record.

If a court determines that the document should not be disclosed because the public body has met its burden of showing that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure, see MCL 15.243(1)(m), then the court must next determine if fact can be separated from opinion in the document. If so, then the document must be redacted and factual information disclosed. MCL 15.244.[4]

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[4] MCL 15.244 provides the following:

> (1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
>
> (2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

The Legislature has plainly set forth that the provision is weighted toward disclosure. Indeed, the "frank communication" exemption states that the exemption *does not apply* unless the public body shows that the public interest in not disclosing the record *clearly outweighs* disclosure in the particular instance. Notably, the "frank communication" exemption is the only FOIA provision that uses the term "clearly outweighs." Other provisions merely use the term "outweighs" when providing for a balancing test. See, e.g., MCL 15.243(1)(c), (k), (n), (s), and (y).

In this case, the letter at issue is a communication of an advisory nature within a public body. It covers materials other than purely factual materials because it contains facts and the vice president's opinions, and the letter, when written, was preliminary to a final agency determination about the house controversy. The trial court used this set of facts as one of its reasons to support the decision to grant summary disposition to defendant. The trial court stated that nondisclosure was favored because the letter was preliminary to a final determination of policy or action, the communication was between officials of public bodies, and the letter concerned defendant's investigation and ultimate determination of what action, if any, would be taken regarding the university housing controversy. However, this "finding" does not favor disclosure or nondisclosure. It is merely a recitation of the circumstances that must initially be met for a document to fall within the "frank communication" exemption. Even when all the above circumstances are met, the public body must still show that in that particular instance, the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. See MCL 15.243(1)(m).

Not only does the majority neglect the fact that defendant has offered *nothing* but mere platitudes to support its position, it uses these platitudes in an attempt to bolster its analysis. The majority states, "Disclosure of Doyle's letter would foster a fear among university officials that they could no longer communicate candidly about a sensitive topic without their written communications being disclosed to the public. This would create a chilling effect that would surely dry up future frank communications." *Ante* at 480. Yet defendant offered no evidence that this was or would be the case. There is no evidence of any chilling effect or any future chilling effect. There is certainly no evidence of any fear among university officials. The majority assumes that people will not speak candidly if their opinions will be made public, but such a blanket assertion is not relevant under the statute as it was written by our Legislature. While the majority may believe that secrecy is critical to good government, this belief has no bearing when interpreting the language selected by the Legislature.

Based on the *facts* of the case, defendant has not met its burden to prove that the public interest in nondisclosure to encourage frank communication in this particular instance clearly outweighs the public interest in disclosure, and the trial court abused its discretion when it held otherwise.[5] Defendant merely offers general arguments about how a public body needs candid input to maintain the quality of its decision-making process. However, defendant has offered no convincing argument about why in this "*particular instance*" the

[5] I note that plaintiff also argued that defendant did not meets its burden under the statute *based on the facts of the case*. I disagree with the majority that plaintiff advocated a "blanket exemption" for every frank communication that contains criticism of a public official or public body.

public interest in nondisclosure to encourage frank communication clearly outweighs the public interest in disclosure. Rather, defendant has presented generic arguments that could be applicable to almost *any* case, and the trial court and the majority have accepted these generalizations without question. But the Legislature did not seek to create a blanket exemption for frank communications. The Legislature only created an exemption when the public interest in nondisclosure to encourage frank communication clearly outweighs the public interest in disclosure in "*the particular instance*" at issue.

This Court examined the phrase "in the particular instance" as it relates to the FOIA law enforcement exemption, MCL 15.243(1)(s), and a request for records relating to various subjects in *Federated Publications*, *supra* at 110. We stated that the word "particular" means " 'pertaining to a single or specific person, thing, group . . . not general,' " and "instance" "means 'a case or occurrence of something.' " *Id*., quoting *Random House Webster's College Dictionary* (2001). We noted that "a FOIA request may be general and entail a request for records relating to varied subjects, arguably implicating several different aspects of the public interest." *Id*. at 111. When a request is made for records relating to varied subjects, a "court may be required to conduct a 'particular instance' categorization of records to enable it to identify and weigh similar aspects of the public interest in favor of disclosure or nondisclosure." *Id*. However, "[i]n some cases, it may be clear that the FOIA request is comprised of a sufficiently precise or narrow category of records that the circuit court can adequately balance the public interests at stake without the need of further 'particular instance' categorization." *Id*. at 110.

In this case, the request was not for records related to varied subjects, but for documents related to the vice

president's resignation and expenditures for the president's home. This request was sufficiently narrow so the court could adequately balance the public interests at stake without further categorization.[6] However, the general discussion in *Federated Publications* is still helpful. The meaning of "the particular instance" in both the law enforcement exemption and the "frank communication" exemption requires an examination of the arguments relating to the specific case at hand. The "frank communication" exemption requires a public body to make *specific* arguments about the public interest in the particular instance at issue. It is not sufficient for a public body to simply make general statements about what is in the public interest.

The majority's acceptance of the generalized arguments proffered by defendant results in the "frank communication" exemption being effectively eliminated. See, e.g., *Evening News Ass'n v City of Troy*, 417 Mich 481, 492; 339 NW2d 421 (1983) ("We hold that a 'generic determination' does not satisfy the FOIA."). It

[6] The September 10, 2003, request was for the following:

> 1. Copies of all correspondence, including but not limited to letters, reports, memos and e-mails, to and from the following parties since Jan. 1, 2002, regarding the new University House on campus:
>
> • Vice President for Business and Finance Patrick Doyle or other staff members of the Office of Business and Finance.
>
> • The EMU Board of Regents.
>
> • EMU President Samuel Kirkpatrick.
>
> 2. Copies of all correspondence, including but not limited to letters, reports, memos and e-mails, between Vice President for Business and Finance Patrick Doyle to and from the EMU Board of Regents, EMU President Samuel Kirkpatrick and/or the Office of Human Resources, regarding Doyle's recent resignation and-or retirement.

should go without saying that in many, if not most, cases, a public body may prefer that public records that express criticism or cast the public body in a negative light be withheld to avoid embarrassment. However, the purpose of the FOIA is not to provide a shield to public bodies. The purpose of the FOIA is to ensure that our citizens fully participate in the democratic process. MCL 15.231(2). Knowledge, not secrecy, is fundamental to ensuring that this purpose is fulfilled.

In this case, defendant is a public body, and there was much criticism and concern about the high cost of the president's new residence. The public's interest in who approved the costs associated with the house and how expenditures were authorized is certainly an important matter. It is not merely a matter of "morbid public curiosity," as expressed by one amicus curiae. The letter at issue was written by the vice president of *finance* at the university. The letter provides information about how expenditures were authorized and reviewed, as well as the president's level of involvement in the expenditures. The vice president's insights are undoubtedly relevant to the possible misuse of tuition, fundraising, and taxpayer dollars. The public has an interest in learning if those who have been charged with administering a public university are doing so properly and responsibly.

The fact that defendant had released a report on the matter was not a sufficient reason to find that the public interest favored nondisclosure, contrary to the trial court's holding. Defendant's investigation and release of a report does not lessen the public interest in disclosing a letter written by the *vice president of finance*. As the vice president of finance, Doyle was in a unique position to comment on how funds were spent, who was involved, and what exactly happened. The fact

that defendant may have fulfilled its role by investigating and reporting on the matter does not lessen the public's interest in learning what occurred *before* the matter was investigated and reported. In other words, the public has a genuine interest in learning *how* the misuse happened in the first place and if the misuse was the result of faulty procedures or oversight. The vice president is particularly qualified to discuss the situation and the concerns about the expenditures that go to the core of governmental accountability. This is not a private matter, but a *public* one.

As it specifically relates to Vice President Doyle, he had already decided to retire when the letter was written, and defendant has presented no specific evidence explaining how keeping the letter undisclosed would encourage further communications. Notably, Doyle's letter has a section labeled in bold "Why did I decide to retire?" The vice president then goes on to detail in the letter itself the reasons why he decided to retire. Contrary to the majority's assertion, this fact is critical in examining whether the public interest in nondisclosure clearly outweighs the public interest in disclosure in *this particular instance*. In this particular instance, defendant has not provided specific evidence that disclosure of the letter would inhibit frank communication. The letter writer had decided to retire, and there is certainly no evidence that disclosing the letter would inhibit any future frank communications from him. Notably, there is also no evidence that disclosing the letter would inhibit *anyone* from offering additional insight. There is no indication that *any employee* was reluctant to share information because of a fear of retribution.

The majority has stated that Doyle's retirement "does not allay the concern that every other member of

defendant's administration may harbor if Doyle's communications, and possibly theirs, are disclosed for public consumption." *Ante* at 479. But defendant has not offered *one instance* where an employee expressed any concern about providing information or an opinion that would prohibit defendant from engaging in any type of decision-making process. Defendant has offered not one example of encountering any type of hindrance in investigating this matter—or any matter—because a person was afraid their communication would be made public. The majority is expressing a general concern that is not grounded in the facts of this case. The statute uses the phrase "in the particular instance," yet the majority ignores that there has been *no evidence* offered of any hint of fear or hesitation in this particular instance.

Notably, there is also no indication that defendant was continuing its investigation and would need to seek additional information from other employees. In fact, in an attempt to show that the release of the letter is unnecessary, defendant argues that it released an "exhaustive" report on its findings. However, the release of this report indicates that defendant's investigation into the housing matter was complete.

In an attempt to support its flawed analysis, the majority offers only generalizations. The majority states, "We doubt that officials within a public body would offer *candid*, *written* feedback, or that they would do so for very long, if that feedback would invariably find its way into the public sphere." *Ante* at 478-479 (emphasis in original). The majority further asserts, "Disclosure of Doyle's letter would foster a fear among university officials that they could no longer communicate candidly about a sensitive topic without their written communications being disclosed to the public.

This would create a chilling effect that would surely dry up future frank communications." *Ante* at 480. But the majority's general concerns are not grounded in any facts presented by defendant, and they are certainly not grounded in the statutory language. Defendant has offered no specific evidence that releasing the letter would have a chilling effect on *an investigation that was essentially over* nor has defendant presented any evidence of a chilling effect on future investigations. The majority's incredible statement that they "do not hypothesize generally," *ante* at 481, about the public interests is false. All that the majority relies on—as the trial court did as well—are *generalizations* about the public interest. Accordingly, the trial court's finding that defendant's interest in maintaining the quality of its deliberative and decision-making process outweighed the public interest in disclosure was an abuse of discretion because defendant offered only general arguments and no specific evidence explaining *why* disclosing the letter would inhibit its decision-making process. The trial court's decision is not a reasonable and principled outcome because there is *no* evidence to support such a decision.

Vague and rote arguments about the chilling effect of disclosing the letter are insufficient to satisfy the Legislature's clear mandate that a public body offer evidence pertinent to the *particular instance* at issue. See, e.g., *Evening News Ass'n*, *supra* at 501-503, 506-507 (Generic claims that revealing names would have a chilling effect on the investigation in that matter were entirely conclusory because no reasons were given.). The majority's decision grants public bodies almost complete control over determining what is and what is not in the public interest. Abdicating this control to a public body is not consistent with the FOIA, which was enacted to ensure disclosure to prevent abuses in the

operation of government. See *Swickard*, *supra* at 543. The Legislature has mandated that our courts require more from our public bodies than merely deferring to broad arguments that are not grounded in fact. Mere platitudes are insufficient to meet the statutory requirements.

Because defendant has not met its burden to prove that, in this particular instance, the public interest in nondisclosure to encourage frank communication clearly outweighs the public interest in disclosure, I believe the entire requested document must be disclosed. Therefore, while fact can be separated from opinion in the letter, it is unnecessary to do so because I believe the whole letter must be released.[7]

IV. CONCLUSION

Our citizens' full participation in the democratic process requires openness and accountability. Today, the majority has ignored the language of the statute and embraced generalizations that are not supported in any manner by the evidence presented by defendant. The impact of such a decision is to effectively abolish the

[7] It is not relevant whether the letter contains more opinion than fact, as the trial court stated. The statute applies to communications and notes that cover "other than purely factual materials . . . ." MCL 12.243(1)(m). The letter in this case covers other than purely factual material because it contains both fact and the vice president's opinions; therefore, it is analyzed under the "frank communication" exemption. The statute does not provide different standards based on how much opinion is in the document as opposed to how much factual material is in the document. The statute merely refers to documents that "cover other than purely factual materials," which this document does. Therefore, the trial court abused its discretion in using the fact that there was more opinion than fact in the letter as a basis to deny disclosure because the statute applies to all documents that contain "other than purely factual materials" and provides for no further categorization.

"frank communication" exemption that was crafted by our Legislature. Because I believe that defendant has not met its burden of showing that the public interest in nondisclosure to encourage frank communication clearly outweighs the public interest in disclosure in this particular instance, I would reverse the judgment of the Court of Appeals and remand the matter to the circuit court for an expedited proceeding under MCL 15.240(5) to release the letter and award reasonable attorney fees, costs, and disbursements to plaintiff, in accord with MCL 15.240(6). I believe that the statutory language and lack of evidence presented by defendant support no other decision.

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

GREENE v A P PRODUCTS, LTD

Docket Nos. 127718, 127734. Argued March 7, 2006 (Calendar No. 2). Decided July 19, 2006. Rehearing denied 477 Mich 1201.

Cheryce Green, as the personal representative of the estate of her deceased eleven-month-old son, Keimer Easley, brought a products-liability action in the Wayne Circuit Court against A.P. Products, Ltd.; Revlon Consumer Products Corporation, A.P.'s successor corporation; and Super 7 Beauty Supply, Inc., and its predecessor corporations, seeking damages for Keimer's wrongful death caused by the ingestion and inhalation of a hair and body moisturizing product produced by A.P. and sold by Super 7. The product's label did not warn that it should be kept from the reach of children or that it was toxic and potentially fatal. The court, Kaye Tertzag, J., granted summary disposition for the defendants, having determined that the dangers arising from ingestion of the product were open and obvious and that the plaintiff had sufficient knowledge of the dangers to obviate any requirement to warn her of the dangers. The Court of Appeals, BORRELLO, P.J., and MURPHY and NEFF, JJ., reversed the judgment of the trial court and remanded the matter to the trial court, concluding that the questions whether the hair oil required a warning label, whether the defendants breached an implied warranty, and whether the plaintiff established proximate cause should have been submitted to the jury. 264 Mich App 391 (2004). The Supreme Court granted the defendants' applications for leave to appeal. 474 Mich 886 (2005).

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

The Court of Appeals erred in holding that a duty existed to warn of the kind of injuries that were suffered and in allowing various warranty claims to proceed on the basis that the warnings on the product were inadequate. The judgment of the Court of Appeals must be reversed and the trial court's order granting summary disposition to the defendants must be reinstated.

1. MCL 600.2948(2) imposes a duty to warn that extends only to material risks not obvious to a reasonably prudent product user and that are not, or should not be, a matter of common knowledge to persons in the same or a similar position as the person who

suffered the injury in question. A "material risk" is an important or significant exposure to the chance of injury or loss. It is obvious to a reasonably prudent product user that a material risk is involved with ingesting and inhaling hair oil. Therefore, a failure to warn against the ingestion and inhalation of the hair oil is not actionable.

2. Because no warning was required, the claims of inadequate warning on the product label are without merit.

Justice WEAVER, concurring, agreed with the majority's result and analysis, except for part IV of its opinion, which responds to Justice CAVANAGH's dissent.

Reversed; trial court order of summary disposition for the defendants reinstated.

Justice CAVANAGH, dissenting, concurred with Justice KELLY that the plaintiff presented a genuine issue of material fact with regard to whether a reasonably prudent product user would have known that ingesting or inhaling the hair oil could prove fatal. The majority ignores the Legislature's use of the word "a" before the phrase "material risk" in the statute, and reaches the erroneous conclusion that the obviousness of one risk from ingesting or inhaling the hair oil, i.e., illness, obviates the need to warn of other risks, such as death, that are not obvious. These risks do not have the same level of materiality because reasonably prudent product users would most likely act differently when aware of each risk.

Justice KELLY, dissenting, stated that the plaintiff presented sufficient evidence to raise a question of material fact concerning whether the material risk of death from ingesting or aspirating Wonder 8 Hair Oil is open and obvious to a reasonably prudent product user. The question should be decided by the trier of fact, not the Supreme Court. Rather than allowing the jury to determine the adequacy of the general warning on the product, the majority makes the decision for itself. And it fails to consider the evidence in the light most favorable to the plaintiff, as it must. It concludes that there is no need for any warning whatsoever. The trial court's grant of summary disposition for the defendants should be reversed, and the case should be remanded to the trial court for further proceedings.

PRODUCTS LIABILITY — DUTY TO WARN.

A manufacturer's or seller's duty to warn of product risks under MCL 600.2948(2) extends only to material risks not obvious to a reasonably prudent product user and to material risks that are not, or should not be, a matter of common knowledge to persons in the same or a similar position as the person who suffered the

injury in question; a "material risk" is an important or significant exposure to the chance of injury or loss.

McKeen & Associates, P.C. (by *Brian J. McKeen* and *Ramona C. Howard*) and *Frederick M. Rosen* for the plaintiff.

Plunkett & Cooney, P.C. (by *Ernest R. Bazzana* and *Edward J. Higgins*), for A.P. Products, Ltd., and Revlon Consumer Products Corporation.

Kaufman, Payton & Chapa (by *Howard S. Weingarden* and *Frank A. Misuraca*) for Super 7 Beauty Supply, Inc.

CORRIGAN, J. In this case we consider the scope of a manufacturer's or seller's duty to warn of product risks under MCL 600.2948(2). We conclude that the statute imposes a duty to warn that extends only to material risks not obvious to a reasonably prudent product user, and to material risks that are not, or should not be, a matter of common knowledge to persons in the same or a similar position as the person who suffered the injury in question. Because the material risk associated with ingesting and inhaling Wonder 8 Hair Oil, as occurred here, would have been obvious to a reasonably prudent product user, the failure to warn against the risk is not actionable. The Court of Appeals misunderstood this duty and held that a duty also existed to warn of the kind of injuries that were suffered. The Court of Appeals also incorrectly allowed various warranty claims to proceed on the basis that the warning was inadequate. Because no warning was required, these holdings were in error. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition to all defendants.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

In April 1999, plaintiff purchased a spray bottle of African Pride Ginseng Miracle Wonder 8 Oil, Hair and Body Mist-Captivate (Wonder 8 Hair Oil) from defendant Pro Care Beauty Supply, which is currently known as Super 7 Beauty Supply, Inc. Defendant A.P. Products, which was subsequently acquired by Revlon Consumer Products Corporation, packaged and labeled Wonder 8 Hair Oil. Wonder 8 Hair Oil was marketed principally to African-Americans as a new type of spray-on body and hair moisturizer containing eight natural oils. Plaintiff decided to try the oil after reading the ingredients on the label,[1] some of which were familiar to her and some of which were not. Although the bottle's label cautioned the user never to spray the oil near sparks or an open flame, it did not warn that the hair oil should be kept out of reach of children or that it was potentially harmful or fatal if swallowed.[2] Plaintiff's 11-month-old son, Keimer Easley, had been left unattended. Somehow he obtained the bottle of hair oil, which had been left within his reach. He ingested and inhaled the hair oil.[3]

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[1] The ingredients listed on the label are Gin Gro Oil Complex (paraffin oil, tea tree oil, kuki nut oil, evening primrose oil, avocado oil, coconut oil, wheat germ oil), isopropryl myristate, fragrance, Gin Gro herbal complex (rosemary, sage, angelica root, licorice root, Job's tears, cedar, hyacinth, clove, lemon balm, chamomile), carrot oleo resin, azulene, tocopherol acetate (Vitamin E), retinyl palmitate (Vitamin A), and cholecalciferol (Vitamin D).

[2] The hair oil was packaged in a clear plastic 7.5 ounce bottle with a nonaerosol pump actuator.

[3] When plaintiff first observed that her son had possession of the hair oil, he was standing with the bottle of Wonder 8 Oil in his hand and oil in and around his mouth. Evidently, the child put an unknown amount of hair oil into his mouth, some of which eventually wound up in his lungs. When he was admitted to the hospital, he was diagnosed with hydrocarbon ingestion and chemical pneumonitis. It is not clear how Keimer managed to put the oil into his mouth. Plaintiff testified that when she

The child died about one month later from multisystem organ failure secondary to chemical pneumonitis, secondary to hydrocarbon ingestion. In other words, the mineral oil clogged the child's lungs, causing inflammatory respiratory failure.

Plaintiff filed this products-liability action, alleging that defendants breached their duty to warn that the product could be harmful if ingested and that it should be kept out of reach of small children. Plaintiff further claimed that defendants breached an implied warranty by failing adequately to label the product as toxic.

Defendants moved for summary disposition. AP Products and Revlon argued that they had no duty to warn because the material risks associated with ingesting Wonder 8 Hair Oil were obvious to a reasonably prudent product user. They further argued that the lack of warning was not the proximate cause of the injury and that the product had been misused in a way that was not reasonably foreseeable. Super 7 Beauty Supply argued that plaintiff failed to establish that it, as a nonmanufacturing seller, had independently breached an express or implied warranty or was independently negligent. It further argued that plaintiff failed to show that the product was not fit for its ordinary uses or for a particular purpose.

The trial court granted defendants' motions for summary disposition. The Court of Appeals reversed and remanded, concluding that the questions whether the Wonder 8 Hair Oil required a warning label, whether

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last used the product earlier that day, the cap had been intact. When she later saw the child with the bottle of oil, the plastic top covering the pump actuator and the actuator were missing. The plastic base of the pump actuator had been cracked vertically so that the pump could be peeled off and the oil could be poured out.

defendants breached an implied warranty, and whether plaintiff established proximate cause should have been submitted to a jury.[4]

Defendants sought leave to appeal in this Court. We granted defendants' applications for leave to appeal.[5]

II. STANDARD OF REVIEW

This case requires us to determine whether the Court of Appeals erred in reversing the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10). We review this issue de novo. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In reviewing such a decision, we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Rose, supra* at 461, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose, supra* at 461, citing MCR 2.116(C)(10).

III. ANALYSIS

Before 1995, a manufacturer's or seller's duty to warn of material risks in a products-liability action was governed by common-law principles. Tort reform legislation enacted in 1995,[6] however, displaced the common

[4] 264 Mich App 391; 691 NW2d 38 (2004).

[5] 474 Mich 886 (2005).

[6] 1995 PA 249, effective March 28, 1996.

law. MCL 600.2948, in chapter 29 of the Revised Judicature Act, now governs a defendant's duty to warn of an obvious danger in a products-liability action. It states, in relevant part:

> A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action. [MCL 600.2948(2).][7]

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[7] At common law, a duty to warn of dangers involving the use of a product was imposed on a manufacturer or seller under negligence principles summarized in 2 Restatement Torts, 2d, § 388. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 389-390; 491 NW2d 208 (1992). A manufacturer or seller could be held liable for failure to warn if it (a) had actual or constructive knowledge of the claimed danger, (b) had no reason to believe that those for whose use the product is supplied would realize its dangerous condition, and (c) failed to exercise reasonable care to inform users of the product's dangerous condition or of the facts that make it likely to be dangerous. *Id.*, citing 2 Restatement Torts, 2d, § 388, p 301.

Michigan also recognized the common-law "obvious danger" rule. *Glittenberg, supra* at 393. A manufacturer had no duty to warn if it reasonably perceived that the product's potentially dangerous condition was readily apparent or could have been disclosed by a mere casual inspection. *Id.* at 390. Michigan, however, narrowed application of the "obvious danger" rule to cases involving "simple tools or products." *Id.* at 393, citing *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982). No duty existed to warn of the obvious danger of a simple product because an obvious danger was no danger to a "reasonably" careful person. *Glittenberg, supra* at 395-396. In other words, as stated by this Court in *Glittenberg*, "where the very condition that is alleged to cause the injury is wholly revealed by casual observation of a simple product in normal use, a duty to warn serves no fault-based purpose." *Id.* at 396, citing *Prentis v Yale Mfg Co*, 421 Mich 670; 365 NW2d 176 (1984). A product was considered simple if it was a " 'thing of universally known characteristics, not a device with parts or mechanism, the only danger being not latent but obvious to any possible user . . . .' " *Glittenberg, supra* at 391, quoting *Jamieson v Woodward & Lothrop*, 101 US App DC 32, 37; 247 F2d 23 (1957).

Under the plain language of MCL 600.2948(2), a manufacturer has no duty to warn of a material risk associated with the use of a product if the risk: (1) is obvious, or should be obvious, to a reasonably prudent product user, or (2) is or should be a matter of common knowledge to a person in the same or a similar position as the person upon whose injury or death the claim is based.[8] Accordingly, this statute, by looking to the reasonably prudent product user, or persons in the same or a similar position as the injured person,[9] establishes an objective standard.[10]

In determining what constitutes a material risk, we are mindful that the statutes governing statutory construction direct us to construe "all words and phrases . . . according to the common and approved usage of the language," but construe "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law" according to such peculiar and appropriate meaning. MCL 8.3a; *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). Our research reveals that the term "material risk" has no prior "peculiar and appropriate meaning in

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[8] The principles set forth in MCL 600.2948(2) incorporate most of the common-law principles regarding the "obvious danger" doctrine. The statute, however, does not incorporate principles regarding "simple tools and products." Under the statute, a defendant need not show that the product in question was a "simple" product in order for the "obvious danger" doctrine to apply.

[9] Because it would not be a matter of common knowledge to a person in the same or a similar position as plaintiff's son, an 11-month-old, that a material risk is involved with ingesting Wonder 8 Hair Oil, the only issue in this case is whether it would be obvious to a reasonably prudent product user that a material risk is involved with ingesting Wonder 8 Hair Oil.

[10] Interestingly, the Legislature's use of an objective standard is consistent with this Court's case law predating the statute. See *Glittenberg, supra* at 391-392.

the law." It is thus not a term of art. When considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as *Webster's* is appropriate. *Id.* at 756. *Random House Webster's College Dictionary* (1997) defines "material," in relevant part, as "important: to make a material difference; pertinent: a material question." *Random House Webster's College Dictionary* (1997) defines "risk" as "exposure to the chance of injury or loss." We thus conclude that a "material risk" is an important or significant exposure to the chance of injury or loss.

Finally, regarding the meaning of the statute, we conclude that the Legislature has imposed no duty to warn beyond obvious material risks. The statute does not impose a duty to warn of a specific type of injury that could result from a risk. The Court of Appeals, however, mistakenly held that warnings must cover not only material risks, as described, but must also cover potential injuries that could result.

While the Court of Appeals properly applied an objective standard in determining the suitability of the warning, it stated that it could not conclude that "as a matter of law, *the risk of death* from the ingestion of Wonder 8 Hair Oil would be obvious to a reasonably prudent product user and be a matter of common knowledge, especially considering the lack of *any* relevant warning." 264 Mich App at 401 (first emphasis added). The Court of Appeals thus required that the warning indicate specific injuries a product user could incur. Yet, as we have stated, the statute does not require that a warning address possible injuries that might occur.[11]

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[11] In *Glittenberg, supra* at 400, this Court addressed whether a defendant must warn of specific harms. The plaintiff in *Glittenberg* argued that the danger of diving in a shallow pool was not open and obvious because

Here, tragically, plaintiff's 11-month-old son died after ingesting and inhaling Wonder 8 Hair Oil.[12] Under the law, however, defendants owed no duty to warn of specific injuries or losses, no matter how severe, if it is or should have been obvious to a reasonably prudent product user that ingesting or inhaling Wonder 8 Hair Oil involved a material risk. We conclude that it is

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the specific harm of paralysis or death is not generally recognized. *Id.* This Court noted, however, that the "threshold issue is not whether a shallow dive can be successfully executed but, rather, whether people in general are unaware of the fact that there is a risk of serious harm when diving in shallow water." *Id*. at 401. This Court concluded:

> [W]here the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, and no disputed question exists regarding the danger of the product, the law does not impose a duty upon a manufacturer to warn of conceivable ramifications of injuries that might occur from the use or foreseeable misuse of the product. [*Id.* at 402.]

If the Legislature had intended to require a defendant to warn of specific dangers, it would have explicitly mandated that alteration in MCL 600.2948(2).

Justice CAVANAGH mistakenly asserts that we rely on common-law principles set forth in *Glittenberg, supra*, in reaching our conclusion. We, however, rely solely on the plain language of MCL 600.2948(2) in reaching our conclusion. As stated above, MCL 600.2948(2) does not require that a defendant warn of specific dangers, and it is not within this Court's authority to read such language into the statute.

[12] Justice KELLY contends that the vast majority of the ingredients listed on the label are seemingly food products. She further contends that none of the ingredients alerts a reasonably prudent product user to the fatal result of ingestion. We reiterate, however, that plaintiff's 11-month-old son died from complications stemming from *inhaling* Wonder 8 Hair Oil into his lungs. That the child swallowed some of the hair oil was incidental to his death. But because it would be obvious to a reasonably prudent product user that harm could result from allowing a young child to possess a bottle of oil, whether the harm occurs through ingestion or inhalation or some other action, we hold that no duty exists to warn of the injuries that actually result from allowing the child to possess the oil.

obvious to a reasonably prudent product user that a material risk is involved with ingesting and inhaling Wonder 8 Hair Oil.

The product, as plaintiff concedes, was not marketed as safe for human consumption or ingestion. Rather, the label clearly states that the product is intended for use as a hair and body oil. Although subjective awareness is not the standard, we find it noteworthy that plaintiff herself demonstrated an understanding that Wonder 8 Hair Oil posed a material risk if ingested. We believe it would also be obvious to a reasonably prudent user that ingestion and inhalation of the product poses a material risk. The ingredient label's inclusion of eight natural oils has no bearing on our conclusion. Many, if not all, oils are natural. It should be obvious to a reasonably prudent product user that many oils, although natural, pose a material risk if ingested or inhaled. For instance, the reasonably prudent product user would know that breathing oil would be harmful. A reasonably prudent product user would also know that ingesting such things as crude oil or linseed oil poses a material risk although such oils are natural and pose no immediate danger from contact with hair or skin. In fact, paraffin oil is listed as one of the ingredients in Wonder 8 Hair Oil. It should be obvious to a reasonably prudent product user that ingesting paraffin oil poses a material risk since paraffin is commonly associated with such things as wax.

Additionally, the product label on Wonder 8 Hair Oil does not state that it contains *only* natural oils. Indeed, it lists numerous other ingredients, many of which would be unfamiliar to the average product user, such as isopropryl myristate, fragrance, and azulene. Given such unfamiliar ingredients, a reasonably prudent product user would be, or should be, loath to ingest it.

Accordingly, we hold that defendants owed no duty to warn plaintiff that her son's ingestion and inhalation of the Wonder 8 Hair Oil posed a material risk. Moreover, defendants owed no duty to warn of the potential injuries that could arise from ingesting and inhaling the product.

The plaintiff also pleaded breach of implied warranty under MCL 600.2947(6)(a) and breach of implied warranty of merchantability under MCL 440.2314(2)(e) with respect to the nonmanufacturing seller, Super 7 Beauty Supply. Plaintiff claimed that, in the absence of a warning, the oil was not properly labeled. Because no warning was required, however, these claims are without merit. Defendants are therefore entitled to judgment as a matter of law.

IV. RESPONSE TO JUSTICE CAVANAGH'S DISSENT

The crux of Justice CAVANAGH's dissent is that we erroneously conclude that the obviousness of *one* risk means the obviousness of *all* risks. This contention, however, is a gross mischaracterization of our holding and can be found nowhere in our opinion. Rather, we hold that a defendant has no duty to warn of a material risk that is or should be obvious to a reasonably prudent product user. We further hold that the material risk associated with the ingestion and inhalation of hair oil is or should be obvious to a reasonably prudent product user. This conclusion is entirely consistent with the plain language of the statute and focuses on the obviousness of the material risk in question. It does not charge Michigan consumers with "knowledge of hidden dangers" as suggested by Justice CAVANAGH. *Post* at 524.

Justice CAVANAGH also contends that we fail to identify the material risk in question and mislabel the risk as "ingesting or inhaling" the hair oil. Contrary to his

contention, we have clearly identified the material risk in this case. To the contrary, Justice CAVANAGH has mislabeled the risk as the "consequence" that results from the misuse of the product.

The material risk in this case is neither the misuse of the product (the inhalation or ingestion) nor the consequence of the misuse (injury or death). Rather the material risk is the important or significant exposure to the chance of loss or injury stemming from certain behavior, in this case, the ingestion and inhalation of hair oil. In simple terms, the material risk is the chance that injury could result from drinking or inhaling hair oil. Because a reasonable person knows or should know that ingesting or inhaling hair oil would expose that person to the chance of injury or loss, a defendant has no duty to warn that ingesting or inhaling hair oil could result in exposure to injury or loss. Furthermore, the statute does not require that a person be aware of the worst injury or loss (death) that could possibly result from the misuse of the product. Rather, under the plain language of the statute, it need only be obvious to a reasonably prudent product user that a chance exists that he or she might suffer an injury or loss if they drink or inhale hair oil.

We respectfully remind our dissenting colleague that the Legislature, not this Court, refused to impose a duty to warn of obvious material risks. Justice CAVANAGH does not deny this, but evidently chooses to ignore it. By what authority can a court under our Constitution do that? Justice CAVANAGH gives none. The Legislature also refused to require that a defendant list every possible injury that could result from the misuse of a product. Again, Justice CAVANAGH does not deny this, but chooses to ignore it. How does a court obtain such authority? Justice Cavanagh fails to provide an answer, probably

because no such authority exists. The rule must and should be that a court applies the statute as written. Applying the plain language of the statute to the facts of this case, we conclude that the material risk associated with ingesting and inhaling hair oil is or should be obvious to a reasonably prudent product user. Thus, defendant had no duty to warn of that material risk.

V. CONCLUSION

We conclude that the Court of Appeals erroneously reversed the trial court's grant of summary disposition to defendants A.P. Products and Revlon. The material risk of harm associated with ingesting and inhaling Wonder 8 Hair Oil is obvious to a reasonably prudent product user. Defendants thus owed no duty to warn plaintiff of that harm.

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

WEAVER, J. (*concurring*). I concur in the majority's result and analysis, except for part IV, the majority's response to Justice CAVANAGH's dissent.

CAVANAGH, J. (*dissenting*). Michigan consumers beware: If you know or should know that there is *any* material risk from using or accidentally misusing the product you buy, then the manufacturer of that product now has no duty to warn you of any risk at all, even when the potential harm you knew of is not the harm you ultimately suffer. Stated differently, if you know or should know that if, for example, you accidentally drink or inhale a product, you may become ill, then you are charged with knowing that if you accidentally drink or inhale that product, you could die. And the manufac-

turer need not warn you of *either* of those risks—illness or death. According to the majority, the obviousness of any material risk, such as that of illness, is identical to and has the same effect on your behavior as the obviousness of all risks, including death.

To cut right to the core of the majority's faulty reasoning, the majority completely misreads MCL 600.2948(2), and, in doing so, reaches the erroneous conclusion that obviousness of *one* risk means obviousness of *all* risks. The governing statute states:

> A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action. [*Id.*]

The majority ignores key words and basic grammatical structure. Specifically, the Legislature used the word "a" in the phrase "*a* material risk," thus directing its mandate toward *that* particular risk. "A" is an "[i]ndefinite article functioning as an adjective" and is "[u]sed before nouns and noun phrases that denote a single, but unspecified, person or thing[.]" *The American Heritage Dictionary, New College Edition* (1981). Notably, then, the word that "a" precedes is limited to "a single" noun. Thus, in this case, "a material risk" refers to "a single," or one, material risk. As a result, the otherwise unspecified single material risk to which the statute refers must be identified before it can be determined whether that risk was common knowledge or obvious to a reasonably prudent product user.

But the majority ignores the word "a," fails to correctly identify the material risk at issue, and writes the word "obvious" completely out of the statute. In doing so, the majority erroneously concludes that all

risks are obvious as long as some risk is obvious. Accordingly, the majority holds that the alleged obviousness of "any" material risk absolves a manufacturer from warning about "all" material risks, even if other material risks are not obvious. The effect on this case is the result that because a reasonably prudent product user would have purportedly known that there was a risk of illness from misusing the Wonder 8 Hair Oil, plaintiff should have known there was a risk of death. Therefore, defendants had no duty to warn their consumers about any risk at all.

By concluding this way, the majority rewrites the statute and, consequently, fails to effectuate the protections the Legislature intended. Had the Legislature intended what the majority holds, it would have written the statute as follows: "A defendant is not liable for failure to warn of *any* material risk when *a* material risk should be obvious to a reasonably prudent product user . . . ." Or it would have stated, "A defendant need not warn about *all* material risks if *one* material risk should be obvious to a reasonably prudent product user . . . ." Plainly, it did not write the statute that way, and the majority errs by ignoring the unambiguous language.[1]

To determine in what instances a manufacturer will have no duty to place a warning on its product and what

[1] This is interesting in light of the majority's self-described inexorable adhesion to the categorical interpretation of words such as "a" and "the." See e.g., *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000); *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000). I have consistently maintained that the words "a" and "the" must be read in context and not in rigid isolation. For example, in *Robinson*, I joined Justice KELLY's dissent, which recognized the dictionary meanings of the words but would have also recognized that in that particular instance, "the proximate cause" had several possible meanings when considered in light of governing causation principles.

The majority's unbending faithfulness to reading the word "a" flounders in this case. Interestingly, under either an isolationist view or

exactly it must warn about, it must first be determined what the "material risk" is alleged to be.[2] By the majority's own proffered definition, "material" means " 'important: to make a material difference; pertinent: a material question.' " *Ante* at 510, quoting *Random House Webster's College Dictionary* (1997). The first question, then, is "In what must the material difference be made?" According the word its common meaning in the context in which it is used, for the risk to be "material," it must make an important or pertinent difference in the consumer's actions with respect to the product. For instance, the risk would be material if it would bear on whether the consumer purchases the product or how the user deals with the product after purchasing it. Thus, if, to require a warning, the risk must be an important one that makes a material difference in the user's actions, and it must be obvious as well, then the risk involved must be identified. Otherwise, there is no way to determine whether the risk is obvious and no way to determine whether it would make some "material difference."

So it is clear from the statutory language that all risks are not equal, for one is likely to act differently depending on the risk involved. Simply stated, even

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a contextual one, the result is the same: "a" material risk can mean nothing other than the material risk of which a plaintiff claims she had no warning.

[2] In most, if not all, instances, a plaintiff will be the first to identify the material risk when the plaintiff sues, complaining that he or she was not warned of that particular material risk. The defendant will then affirmatively defend by asserting that the material risk the plaintiff claims was not warned of was obvious or common knowledge. In this instance, plaintiff alleges that she was not warned that ingesting or inhaling the product could be fatal. It makes no sense to say that defendant can defend that it warned of some other material risk or that some other material risk was obvious.

assuming that a reasonably prudent product user would know that there was a risk of becoming ill from a product, this same consumer does not necessarily know that there is a risk of death. It is not enough to equate two different risks and charge the consumer with knowledge of the more serious one if he has knowledge of the one less serious because it is unreasonable to assume that a reasonably prudent product user would act the same in both circumstances. Thus, the risk of illness, if found to be "a" material risk, must be considered separately from other material risks, such as death. In other words, because the statute states that a manufacturer has no duty "to warn of *a* material risk that is or should be obvious to a reasonably prudent product user or *a* material risk that is or should be a matter of common knowledge to persons in the same or similar position," MCL 600.2948(2), the question becomes whether knowledge of the risk of death would have caused the person to act differently, making it a "material" risk, and, if so, whether that risk was or should have been "obvious." We can determine neither whether a risk was "material" nor whether it was obvious unless we know what the risk is alleged to be.[3]

By alternatively failing to identify the material risk at issue in this case and mislabeling the risk as "ingesting or inhaling" the oil, the majority prevents the statute from operating as the Legislature intended and deprives Michigan consumers of their right to assess levels of risk when making purchasing decisions. The majority seems to try to hide its incomplete analysis by

[3] Although this is not a subjective inquiry, it is worth noting plaintiff's testimony that she assumed this product could cause illness if misused but that she would not have bought the product if she had known or been warned that the product would cause death. In other words, the risk of death was a material risk because it would have caused plaintiff to act differently with respect to this product.

repeatedly asserting that the product posed "a material risk," because, though that refrain recurs numerous times, the majority either does not name the "material risk" that was supposed to have been obvious or it misidentifies it. Consider the following: "Because the material risk associated with ingesting and inhaling Wonder 8 Hair Oil, as occurred here, would have been obvious to a reasonably prudent product user, the failure to warn against the risk is not actionable." *Ante* at 504. "We conclude that it is obvious to a reasonably prudent product user that a material risk is involved with ingesting and inhaling Wonder 8 Hair Oil." *Id.* at 511-512. "[W]e find it noteworthy that plaintiff herself demonstrated an understanding that Wonder 8 Hair Oil posed a material risk if ingested. We believe it would also be obvious to a reasonably prudent [product] user that ingestion and inhalation of the product poses a material risk." *Id.* at 512. "It should be obvious to a reasonably prudent product user that many oils, although natural, pose a material risk if ingested or inhaled." *Id.* "A reasonably prudent product user would also know that ingesting such things as crude oil or linseed oil poses a material risk . . . ." *Id.* "It should be obvious to a reasonably prudent product user that ingesting paraffin oil poses a material risk since paraffin is commonly associated with such things as wax." *Id.* "Given such unfamiliar ingredients, a reasonably prudent product user would be, or should be, loath to ingest it."[4] *Id.* "[W]e hold that defendants owed no duty to warn plaintiff that her son's ingestion and inhalation of the Wonder 8 Hair Oil posed a material risk." *Id.* at 513. "The material risk of harm associated with ingesting

[4] Of course, whether one is "loath to ingest" a product is not the test. Many people would be "loath to ingest" castor oil or Play-Doh, but that says nothing about whether those products pose a material risk if ingested.

and inhaling Wonder 8 Hair Oil is obvious to a reasonably prudent product user." *Id.* at 515.

The inconsistencies are self-evident. On one hand, the majority claims that the material risk is "ingesting or inhaling" the product. On the other, the majority asserts that ingesting or inhaling this product poses a material risk, which risk is unidentified. Neither conclusion squares with a plain reading of the statute.

Ingesting or inhaling a product is not the material risk in question. That would make no sense at all because a warning that the product could be accidentally ingested or inhaled does not reveal the specific risk involved with ingesting or inhaling and, thus, does not allow a person to assess the risk and act accordingly. So the risk that must be warned about is not ingestion or inhalation itself.[5]

Rather, ingesting or inhaling is a *misuse* of the product, and the risk posed by that misuse—the one that must be warned of if not obvious—is the consequence of that misuse, i.e., the consequence of ingestion or inhalation. As such, each risk must be identified, assessed for materiality (whether that risk would affect a reasonably prudent product user's actions), and assessed for obviousness. The majority fails at each of these tasks.

This leads to another of the majority opinion's shortcomings: its assumption that knowledge of one risk is knowledge of all. The majority's erroneous conclusion is inconsistent with the plain language of the statute, which speaks of "a" material risk. As two of the defendants aptly explained in their brief, "No one needs to be told what is already known," citing *Dist of*

[5] Notably, though, under the majority's apparent conclusion that inhalation or ingestion is the risk, that risk is obvious, so no warning is needed at all—not even, "Do not ingest or inhale."

Columbia v Moulton, 182 US 576, 581; 21 S Ct 840; 45 L Ed 1237 (1901).[6] See also *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 391; 491 NW2d 208 (1992). Thus, if a risk, such as illness, is "material," and if someone knows or should know that risk, then that person need not be warned of it. But that says nothing regarding whether that person knows of a different risk, here, the risk of death. Defendants did not need to warn of the risk of death only if a reasonably prudent product user would have already known of it because a person need not be told what he or she already knows.

In this case, then, to absolve defendants from liability, it must be shown that a reasonably prudent product user would or should have known of the specific material risk the product posed or that that material risk was common knowledge. Even assuming that a reasonably prudent product user would or should have known that inhaling or ingesting Wonder 8 Hair Oil posed a risk of illness, plaintiff raised a genuine issue of material fact regarding whether the user would have known that inhaling or ingesting Wonder 8 Hair Oil posed the risk of death and whether the same was common knowledge. Thus, it cannot be concluded as a matter of law that the manufacturer had no need to attach any warnings to this product merely because a reasonable person might know that the product could make one *sick*. The risks of illness and death simply do not have the same level of materiality because reasonably prudent product users will most likely act differently in each instance.

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[6] The *Moulton* Court examined whether, when a steamroller was left on the street in plain view, the plaintiff needed to be warned of its presence so that his horses would not be frightened by it.

In affirming the grant of summary disposition for defendants, the majority allows manufacturers to keep consumers ignorant of hidden dangers, i.e., material risks, posed by their products. Consider other common household or health and beauty products. For example, a hair spray bottle may warn that spraying the product in the user's eyes could cause irritation and instruct the user to rinse the eyes thoroughly for 15 minutes should that misuse occur. This information would likely cause the consumer to employ a specifically tailored level of care based on the potential risk of eye irritation. But if that product could also cause blindness, a very different material risk is at play. Knowledge of the material risk of irritation, be it from a warning or from common knowledge, is not knowledge of the risk of blindness. The two risks do not have the same level of materiality because the two risks would likely cause a consumer to make drastically different decisions with regard to the product. In other words, while the risk of eye irritation is a material one because it would cause a user to employ one specific level of care, the risk of blindness is quite another material risk indeed, and one that would likely significantly alter the user's decision-making process. Thus, each is "a material risk" that must be assessed independently. If the material risk of blindness cannot be said to be obvious, even if the material risk of irritation can, then hairspray that could cause blindness would require a warning to that effect.[7]

The same can be said for a tube of toothpaste, to use an example provided by plaintiff. If reasonably prudent product users could be said to assume that eating the

[7] It should again be noted that if the risk of eye irritation could be said to be obvious to the reasonably prudent product user, the majority would require no warning on the label, even if spraying it in the eyes might cause blindness, because knowledge of the material risk of eye irritation is knowledge of the material risk of blindness.

contents of a tube of toothpaste would cause an upset stomach, for instance, then becoming sick from ingesting the toothpaste would be an obvious risk requiring no warning. Toothpaste is routinely left on countertops, despite that consumers presumably understand that there may be a slight risk if a child ingests it. That risk is known and assessed, and the consumer acts accordingly. But assume that the toothpaste could actually kill a child if ingested. Presumably, the toothpaste would be treated quite differently. If that consequence were widely known or if toothpaste tubes carried a warning that swallowing the contents could be fatal, then consumers would most probably act differently by either seeking a different product or by keeping the toothpaste under lock and key. Yet under the majority's reasoning, as long as the user knows of some material risk, all material risks are deemed known.

In charging consumers with knowledge of hidden dangers, the majority completely writes the word "obvious" out of the statute. As such, warnings that spraying hairspray into one's eyes may cause blindness, that swallowing toothpaste may cause death, or that inhaling hair oil could prove fatal are not required. Under today's opinion, manufacturers need not alert consumers of hidden risks or allow consumers to assess those risks and make informed choices. Rather, knowledge of one material risk is knowledge of all.

An opposite conclusion does not necessarily mean that a manufacturer must warn of the specific medical consequences of misusing the product.[8] For instance, in

[8] The majority's reliance on *Glittenberg* is misplaced. There, this Court's analysis was governed by the common law. In contrast, this case is governed by MCL 600.2948, which, as the majority itself notes, "displaced the common law." *Ante* at 507-508. A number of the majority's statements in *Glittenberg* did not survive the enactment of MCL 600.2948. Particularly, its analysis was largely, if not entirely, informed by

this case, the label did not need to state that the product, if inhaled, could cause "multisystem organ failure secondary to chemical pneumonitis," which is the medical consequence the product caused the child in this case. Rather, it is enough that a warning speak in general terms, as long as the particular material risk that is not obvious to the reasonably prudent product user is revealed. So in this case, the manufacturer could have simply warned, as multitudes of manufacturers do, that the product could be fatal if inhaled or ingested.[9]

A consumer has a legislatively given right to rely on product labeling in making purchasing decisions, and when a label does not warn of a material risk such as death, the consumer has a right to assume that the product does not pose that risk. By wording the statute

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the principles surrounding simple tools and products, which principles were not incorporated into the statutory enactments. The majority ignores these facts and continues to attempt to graft common-law principles onto the statutory provision at issue. For instance, the majority asserts that had the Legislature "intended to require a defendant to warn of specific dangers, it would have explicitly mandated that alteration in MCL 600.2948(2)." *Ante* at 511 n 11. But the Legislature did explicitly mandate that. After *Glittenberg*, the Legislature explicitly mandated that a manufacturer warn of any "material" risk that is not obvious to the reasonably prudent product user. When the term "material" is given meaning, it is clear that the Legislature intended that a manufacturer warn of any danger that would cause a consumer to behave differently with respect to the product. The majority tries desperately to find a way around this simple truth, but it can do so only by a misplaced reliance on outdated concepts.

[9] The majority's opinion is frighteningly far-reaching. For instance, one wonders whether manufacturers of toxic household products, such as bleach or ammonia, need no longer place any warnings on their products. I think this is the result because the majority would most likely conclude that anyone would know that accidentally drinking these products would cause illness. Thus, no warning that the products are fatal if ingested would be needed. Consumer protection has certainly taken two steps back today.

the way it did, the Legislature attempted to ensure a consumer's ability to make an informed decision regarding whether to buy the product and how to handle the product after purchase. But warning of one risk is not warning of all, and the lack of warning of an obvious risk, such as illness, is not a warning of a hidden risk, such as death. By its clear words, the Legislature deemed it unnecessary for a manufacturer to warn of "a" material risk, e.g., illness, when that risk is obvious, but it in no way obviated the need to warn of a different material risk, i.e., death, that is hidden. Yet, after today, manufacturers need warn of nothing, as long as a consumer should know that *something* could happen as a result of misusing a product.

Thus, all hidden and unknown risks are now relegated to the realm of "common knowledge," and consumers must play a guessing game with the biggest risk being that their guess turns out to be fatal. Despite being given one by the Legislature, consumers now have no right to know of hidden risks that would have changed their decision-making process regarding the products they choose to buy.

For these reasons, I concur with Justice KELLY that plaintiff presented a genuine issue of material fact with respect to whether a reasonably prudent product user would have known that ingesting or inhaling Wonder 8 Hair Oil could prove fatal. This Court gravely errs by rewriting the law of products liability clearly set forth by the Legislature and thereby depriving plaintiff of an opportunity to seek redress for the death of her child. As such, I respectfully dissent.

KELLY, J. (*dissenting*). I agree with the majority that MCL 600.2948(2) imposes a duty to warn that extends only to material risks not obvious to a reasonably

prudent product user. I agree that the duty involves material risks that are not, or should not be, a matter of common knowledge to the person who was injured by the product. However, I disagree with the majority's determination that the risk of ingesting or aspirating Wonder 8 Hair Oil is, as a matter of law, obvious to a reasonably prudent product user. Hence, the trial court's grant of summary disposition to defendants should be reversed and the case remanded for further proceedings.

There is evidence that the plaintiff in this case was a reasonably prudent product user to whom the risk may not have been obvious. The Court of Appeals observed:

> In her deposition, plaintiff testified that she always kept her nail care products, e.g., polish and acrylic, in a locked case because she knew that they could be harmful if swallowed. She stated that most of these products displayed a warning to that effect. . . .
>
> In an affidavit, plaintiff confirmed that she kept her nail care products in a locked case because of her knowledge that such products could be toxic. Additionally, she averred that . . . she stored all products that she knew to be toxic, such as bleach and ammonia, in a locked cabinet. Plaintiff asserted that, generally, it was her habit to read product labels because she had two small children. [*Greene v A P Products*, 264 Mich App 391, 396; 691 NW2d 38 (2004).]

Manufacturers and sellers must disclose safety-related information when they know or should know that the buyer or user is unaware of that information. *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379, 386; 491 NW2d 208 (1992). The Wonder 8 Hair Oil container did not bear any warning that it should be kept out of the reach of children or that it was toxic and potentially fatal, let alone harmful. It provided no information about how to respond to accidental ingestion or aspiration.

Nonetheless the majority concludes that the statute imposes "no duty to warn beyond obvious material risks" or "to warn of a specific type of injury that could result from a risk." *Ante* at 510. The majority acknowledges that the Court of Appeals "properly applied an objective standard in determining the suitability of the warning," but goes on to fault that Court's determination that it could not conclude that " 'as a matter of law, *the risk of death* from the ingestion of Wonder 8 Hair Oil would be obvious to a reasonably prudent product user and be a matter of common knowledge, especially considering the lack of *any* relevant warning.' " *Ante* at 510, quoting *Greene* at 401 (first emphasis added in the majority opinion).

No duty to warn exists where the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product. *Glittenberg* at 386. I do not believe that the consumer is in as good a position as the manufacturer to realize that Wonder 8 Hair Oil can cause death.

Plaintiff presented sufficient evidence to raise a question of material fact concerning whether the material risk of death from ingesting or aspirating Wonder 8 Hair Oil is open and obvious. Rather than allowing the jury to determine the adequacy of the general warning on the product, the majority makes the decision for itself. And it fails to consider the evidence in the light most favorable to the plaintiff, as it must. It concludes that there is no need for any warning whatsoever.

The majority dismisses the product label's inclusion of "eight natural oils" and simply asserts that "[i]t should be obvious to a reasonably prudent product user that many oils, although natural, pose a material risk if ingested or inhaled." *Ante* at 512. It also concludes that,

"[g]iven such unfamiliar ingredients, a reasonably prudent product user would be, or should be, loath to ingest it." *Id.*

I disagree. The vast majority of the ingredients listed on the label are seemingly edible food products. They include avocado oil, coconut oil, and wheat germ oil. Also, the label contains a number of safely ingestible herbs: rosemary, sage, angelica root, licorice root, Job's tears, cedar, clove, lemon balm, and chamomile. In addition, the product label announces that it contains Vitamins E, A, and D. None of these ingredients alerts a reasonably prudent product user to the fatal result of ingesting them. On the contrary, they seem harmless and inviting.

I agree with the Court of Appeals that reasonable minds can differ on whether the danger presented by swallowing or inhaling Wonder 8 Hair Oil is open and obvious. As that Court concluded:

> Whether plaintiff was aware of the specific danger of serious harm or death, i.e., knowledgeable of the true extent of the risk, remembering the lack of any warning and considering the listed ingredients, is a question for the jury to resolve, not a court as a matter of law, in light of the documentary evidence presented. [*Greene* at 404.]

CONCLUSION

Here, the majority improperly holds as a matter of law that Wonder 8 Hair Oil's material fatal risk was open and obvious. It finds that all reasonable users of this product should be aware that swallowing or inhaling it can result in death. Like the Court of Appeals, I do not believe that is true. The question whether the material risk is open and obvious is for the jury to decide.

I would reverse the trial court's grant of summary disposition to defendants and remand the case to the trial court for further proceedings.

REED v BRETON
KUENNER v BRETON

Docket Nos. 127703, 127704. Argued March 7, 2006 (Calendar No. 5). Decided July 19, 2006.

Lawrence Reed, personal representative of the estate of Lance N. Reed, deceased, and James D. Kuenner, personal representative of the estate of Adam W. Kuenner, deceased, separately brought dramshop and other actions in the Jackson Circuit Court against Frederick Breton, personal representative of the estate of Curtis J. Breton, deceased; Beach Bar, Inc.; and H.B. Resort Enterprises, Inc., after a vehicle driven by Curtis Breton crossed the center line of a highway and collided with a vehicle occupied by the plaintiffs' decedents, killing all three occupants of the vehicles. The court, Chad C. Schmucker, J., granted summary disposition in each action for Beach Bar, the second to the last establishment to serve Curtis Breton alcohol before the accident, on the basis that the plaintiffs failed to rebut the presumption of nonliability contained in MCL 436.1801(8) with "positive, unequivocal, strong and credible" evidence. The Court of Appeals, COOPER, P.J., and FITZGERALD and HOEKSTRA, JJ., granted each plaintiff's application for leave to appeal, consolidated the appeals, and reversed and remanded for a jury trial, holding that rebutting the statutory presumption does not require the heightened burden of proof imposed by the trial court. Rather, circumstantial evidence, such as the testimony of Breton's drinking companion and reports by the plaintiffs' toxicology experts concluding that Breton would have exhibited visible signs of intoxication when served, was competent and credible evidence to overcome the statutory presumption. 264 Mich App 363 (2004). The Supreme Court granted Beach Bar's application for leave to appeal. 474 Mich 886 (2005).

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

1. The Court of Appeals erred in failing to recognize that the usual standard required to overcome a rebuttable presumption, competent and credible evidence, cannot apply to the separate and novel presumption of MCL 436.1801(8). The plaintiffs already

bear the burden of establishing a prima facie case against any defendant in a dramshop action, including showing the element of serving alcohol to a visibly intoxicated person. Under MRE 301, demonstrating a prima facie case itself remains subject to the standard of competent and credible evidence. Thus, to give force to the statutory presumption of MCL 436.1801(8), the "proof by clear and convincing evidence" standard is the appropriate standard to rebut the presumption. The trial court essentially adopted this standard.

2. The evidence presented by the plaintiffs was insufficient to overcome the presumption of MCL 436.1801(8) because they failed to present evidence of Breton's actual visible intoxication at the time he was served at the Beach Bar. The trial court correctly granted summary disposition for Beach Bar. The judgment of the Court of Appeals must be reversed, and the trial court's grant of summary disposition in favor Beach Bar must be reinstated.

Court of Appeals judgment reversed; trial court grant of summary disposition for Beach Bar reinstated.

Justice KELLY, dissenting, stated that Michigan law provides that a rebuttable presumption can be rebutted by credible evidence in the absence of policy reasons or legislative language enhancing the standard. The majority errs in adopting a clear and convincing evidence standard to rebut the presumption created in MCL 436.1801(8). Here, the plaintiffs produced credible evidence that the Beach Bar served beer to Curtis Breton while he was visibly intoxicated. The circumstantial evidence on which the plaintiffs' experts' opinions were based sufficed by itself to rebut the statutory presumption and establish the plaintiffs' prima facie case. Circumstantial evidence, standing alone, is sufficient to establish and support a dramshop claim. The presumption of MCL 436.1801(8) can be rebutted by credible circumstantial evidence that does not include actually manifested signs of intoxication. The decision of the Court of Appeals should be affirmed, and the cases should be remanded for trial.

Justice CAVANAGH did not participate in the decision of these cases.

1. INTOXICATING LIQUORS — DRAMSHOP ACTIONS — PRESUMPTION OF NONLIABILITY — REBUTTAL.

The rebuttable presumption of nonliability for all but the last retail licensee that serves alcohol to a visibly intoxicated person created in MCL 436.1801(8) requires that a plaintiff, when opposing a defendant that invokes the presumption, show more than the

evidence required for a prima facie case under MCL 436.1801(3); the plaintiff must present clear and convincing evidence to rebut the presumption.

2. INTOXICATING LIQUORS — DRAMSHOP ACTIONS — EVIDENCE.

A plaintiff in a dramshop action must present evidence of actual visible intoxication to establish visible intoxication under MCL 436.1801(3).

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for the plaintiffs.

Dennis Hurst & Associates (by *Dennis Hurst* and *Michael S. Rosenthal*) for Lawrence Reed.

D'Agostini, Sable & Ruggeri, PLLC (by *John M. Ketzler*), for James D. Kuenner.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh* and *Kenneth V. Klaus*), for Beach Bar, Inc.

CORRIGAN, J. A vehicle driven by an intoxicated driver collided with an oncoming vehicle carrying two young men on US-127 near Jackson, killing all three individuals. The issues on appeal in this dramshop action involve (1) the presumption of nonliability under the dramshop act (DSA), MCL 436.1801(8); and (2) the adequacy of proofs regarding the driver's alleged visible intoxication under MCL 436.1801(3).

MCL 436.1801(8) creates a rebuttable presumption of nonliability for all but the last retail licensee that serves alcohol to a visibly intoxicated person. This novel presumption operates to require that a plaintiff, when opposing a defendant that invokes this presumption, must show more than the prima facie case required under MCL 436.1801(3). A plaintiff rebuts this presumption by showing not only the evidence required for a prima facie case, but clear and convincing evidence.

Because the Court of Appeals incorrectly held that plaintiffs satisfactorily rebutted the presumption of nonliability, we reverse the judgment of the Court of Appeals on this issue.

We further hold that to establish "visible intoxication" under MCL 436.1801(3), a plaintiff must present evidence of actual visible intoxication. Because the Court of Appeals held that plaintiffs established their claim without such evidence, relying instead on suppositions drawn from blood alcohol tests, the visible intoxication of another person, and the like, we reverse its judgment and reinstate the trial court's grant of summary disposition for defendant Beach Bar, Inc.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs, the personal representatives of the estates of Adam W. Kuenner and Lance N. Reed,[1] filed separate dramshop claims against defendant Beach Bar, Inc., alleging that Curtis J. Breton[2] was served alcohol at defendant's establishment. Plaintiffs contended that Breton was visibly intoxicated when he was served alcohol there, and his subsequent impaired driving resulted in the deaths of plaintiffs' decedents.

Breton had spent the day drinking with his friend, John Marsh. Around 7:30 p.m., they consumed two beers at the Beach Bar. Lindsay Mizerik, the server at defendant's establishment, had received training in identifying visibly intoxicated persons. She served Breton and did not observe him to exhibit slurred speech,

[1] The personal representatives of the estates, James D. Kuenner and Lawrence Reed, are the plaintiffs in these actions.

[2] Although not a party to this appeal, Frederick Breton, the personal representative of the estate of the intoxicated driver, Curtis Breton, deceased, was also named as a defendant.

an aggressive manner, a lack of coordination, or erratic behavior. She did not consider refusing him service.

Breton and Marsh next went to the Eagles Nest[3] where they split a pitcher of beer. There, they encountered their supervisor, Summit Township Fire Department Chief Carl Hendges, who did not think either man was intoxicated. Another witness at the Eagles Nest, Richard Potts,[4] who knew Breton and who himself owned a convenience store that sold alcoholic beverages, observed that Breton's eyes were not bloodshot or glassy and that he did not appear to be intoxicated. Similarly, Marsh did not notice any change in Breton's speech, in his ability to walk, or redness in his eyes over the course of the day.

Shortly before 10 p.m., Breton drove Marsh home. At approximately 10:11 p.m., Breton crossed the center line of US-127 at a high rate of speed. His vehicle collided head-on with a vehicle carrying plaintiffs' two decedents, taking the lives of all three men. An examination after the collision revealed that Breton's blood alcohol content was 0.215 grams per 100 milliliters of blood.

Defendant, as the second-to-the-last establishment to serve Breton, sought summary disposition under MCR 2.116(C)(10). Defendant relied on the rebuttable presumption of nonliability available to all but the last serving establishment under § 801(8). Defendant argued that plaintiffs failed to rebut the presumption available under § 801(8) because they failed to show that Breton was visibly intoxicated. Plaintiffs re-

[3] Plaintiffs also included HB Resort Enterprises, Inc., which owns the Eagles Nest, as a defendant. HB Resort Enterprises, Inc., is not a party to this appeal.

[4] Robert Potts's wife, who accompanied him that evening, also did not observe any loud or unusual behavior at Breton's table.

sponded that a factual issue remained regarding whether defendant's establishment was the last to serve alcohol to Breton and that, regardless, Breton was served alcohol when he was visibly intoxicated. Plaintiffs also offered the expert opinion reports of two toxicologists.

Both of those reports estimated the number of drinks that Breton had consumed and recited his age, weight, and the alcohol levels in his blood and urine after the collision. Given this amount of alcohol and Breton's physical makeup, the toxicologists opined that he must have been significantly impaired.[5] They listed several manifestations of impairment, such as disorientation and lack of coordination, and concluded that he must have exhibited some of these symptoms.

The trial court held that plaintiffs had shown Breton's visible intoxication by the experts' deductions from the data regarding how Breton must have appeared. The trial court concluded, however, that plaintiffs were required to offer more than circumstantial evidence from experts and so failed to rebut the presumption of nonliability with "positive, unequivocal, strong and credible" evidence in light of *Krisher v Duff*, 331 Mich 699; 50 NW2d 332 (1951). Thus, the court granted summary disposition to defendant.

The Court of Appeals granted each plaintiff's application for leave to appeal, consolidated the appeals, reversed the judgment of the trial court, and remanded the cases to the trial court.[6] It concluded that the trial court had impermissibly heightened plaintiffs' burden

[5] Notably, one expert's opinion focused on Breton's hypothesized behavior as of and after his departure from defendant's establishment, rather than on assessing his behavior at the time that he was served alcohol there.

[6] 264 Mich App 363; 691 NW2d 779 (2004).

of proof to overcome the presumption protecting the second-to-the-last bar. Plaintiffs' experts' testimony, predicated on Breton's physical build and the alcohol in his body at the time of the accident, and testimony about the level of intoxication of Marsh sufficed to create a genuine issue of material fact regarding whether Breton was visibly intoxicated when served at defendant's establishment. The Court of Appeals held that this evidence permitted plaintiffs to withstand summary disposition. We granted leave to appeal. 474 Mich 886 (2005).

II. STANDARD OF REVIEW

We review a grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. Further, we review a question of statutory interpretation de novo. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

III. ANALYSIS

By creating a remedy against retail liquor licensees for persons injured by intoxicated tortfeasors, the DSA abrogated the general common-law rule that no cause of action existed for the negligent selling or furnishing of alcohol to an able-bodied person. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183-184; 413 NW2d 17 (1987). The act provides a remedy for plaintiffs injured

by a visibly intoxicated person, allowing suit to be brought against a retail establishment that unlawfully sells alcohol to a minor or a visibly intoxicated person, if the unlawful sale is a proximate cause of the injury. MCL 436.1801(3) provides:

> Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

Although a plaintiff must establish the elements of § 801(3) with regard to each defendant in a dramshop claim, the Legislature also created a rebuttable presumption. This presumption affords an additional measure of protection for a retail licensee that was not the last licensee to serve alcohol to a visibly intoxicated person. MCL 436.1801(8) provides:

> There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

Thus, all establishments but the last to serve the person have the benefit of a rebuttable presumption that no unlawful service occurred. How to give meaning

to this presumption is the central issue of this case. As indicated, the trial court concluded that the presumption imposed a heightened burden on plaintiffs, requiring them to establish Breton's visible intoxication at defendant's bar by "positive, unequivocal, strong and credible evidence." The Court of Appeals found, however, that the trial court erred because the statute did not expressly provide for such a heightened burden. 264 Mich App at 374-375. Further, it held that the general rule regarding rebuttable presumptions found in MRE 301[7] controlled. The Court thus imposed the usual standard required to overcome a rebuttable presumption: competent and credible evidence. The Court of Appeals erred by failing to recognize that this general rule cannot apply to the separate and novel presumption of § 801(8). Plaintiffs already bear the burden of establishing a prima facie case against any defendant in a dramshop claim, including showing the element of serving alcohol to a visibly intoxicated person. Under MRE 301, demonstrating a prima facie case itself remains subject to the standard of competent and credible evidence. Accordingly, to merge the test for establishing the prima facie case with the test to rebut the presumption prevents defendant from receiving the protection that the Legislature granted in § 801(8).[8] Requiring the

[7] MRE 301 provides:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[8] In *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006), we stated that nothing in the act at issue there showed an intent to abrogate the common law. We did not extend that analysis to

same evidence to make out a dramshop claim and to rebut an additional presumption is tantamount to no test at all.

Because we are precluded from construing § 801(8) as having no meaning,[9] some difference must exist between the proofs required under § 801(8) and those required under § 801(3). Thus, in a lawsuit against a retail licensee that has the benefit of the presumption, plaintiffs must not only make out a prima face case under § 801(3) (among other things, that the drinker was visibly intoxicated), but must also rebut with additional evidence the presumption available to second-to-the-last (and earlier) establishments under § 801(8). Because the Legislature is held to be aware of this state's law, we assume, with regard to the presumption, that the Legislature considered the hierarchy of evidentiary standards available in our law. In that hierarchy, the most rigorous standard of proof is "proof beyond a reasonable doubt"; the least rigorous is "proof by a preponderance of the evidence"; and between these is "proof by clear and convincing evidence." *In re Martin*, 450 Mich 204, 225-227; 538 NW2d 399 (1995).

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conclude that the absence of language specifically abrogating the common law demonstrated that no abrogation occurred. Further, the dissent incorrectly asserts that the Legislature "strongly indicate[d]" an intent to incorporate a lower common-law standard to rebut the presumption. *Post* at 551. The dissent's position is inconsistent with the Legislature's purposeful differentiation between the last bar to serve a visibly intoxicated patron and a bar that served the patron earlier. Indeed, applying the dissent's standard, which would allow for rebutting the presumption by the same prima facie evidence that satisfies § 801(3), the presumption would have no force or effect. We cannot conclude that the legislative enactment of a rebuttable presumption favoring those bars that were not the last bar to serve a visibly intoxicated person "strongly indicates" a legislative intent to encompass a standard of proof that would render that presumption meaningless.

[9] See *Sweatt v Dep't of Corrections*, 468 Mich 172, 183; 661 NW2d 201 (2003).

The standard of "proof beyond a reasonable doubt" is not applied in civil cases but is applied in criminal matters. *Id.* The "proof by a preponderance of the evidence" standard is the standard normally associated with civil matters and indeed is the standard utilized to assess the evidence under § 801(3). This leaves "proof by clear and convincing evidence" as the enhanced standard to rebut the statutory presumption under § 801(8). Thus, in these cases a plaintiff, in addition to making out a prima facie case proven by a preponderance of the evidence under § 801(3), must also, when a defendant is not the last establishment to serve the allegedly intoxicated person, present clear and convincing evidence to rebut and thus overcome the presumption of § 801(8). That standard, while not precisely articulated by the trial court, was essentially the standard it adopted.[10] Accordingly, we affirm the trial court's ruling and reverse the judgment of the Court of Appeals in this regard.

As demonstrated by the dissent's interpretation, a lower threshold for rebutting the presumption would require a plaintiff only to show (1) that a retail licensee served alcohol to a patron (2) while the patron was visibly intoxicated. But a plaintiff must already demonstrate these same elements to make out a claim under § 801(3). Further, the Legislature expressly differentiated between the last retail licensee to sell, give, or furnish alcohol to a visibly intoxicated person and the prior retail licensees to do the same. The Legislature excepted the former class of licensees from the protection of the § 801(8) presumption but included the latter class of licensees in that protection. Failing to acknow-

[10] See 2 McCormick, Evidence (5th ed, Practitioner Treatise Series), § 340, pp 425, 427 n 24, citing *Krisher*, *supra,* as applying the "clear and convincing evidence" standard.

ledge the distinction between these licensees disregards the plain language of the statute. Accordingly, we give full effect to the language of the statute by recognizing the different burden necessitated when the Legislature granted a presumption to some retail licensees.

We next determine if plaintiffs' evidence sufficed to overcome the presumption. It did not, because the proofs presented could not even meet the competent and credible standard for rebutting the presumption to show service to a visibly intoxicated person.

This standard of "visible intoxication" focuses on the objective manifestations of intoxication. *Miller v Ochampaugh*, 191 Mich App 48, 59-60; 477 NW2d 105 (1991).[11] While circumstantial evidence may suffice to establish this element, it must be actual evidence of the *visible* intoxication of the allegedly intoxicated person.[12] Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was *visibly* intoxicated because it does not show what behavior, if any, the

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[11] See also SJI2d 75.02 ("A person is 'visibly intoxicated' when his or her intoxication would be apparent to an ordinary observer."). Indeed, even the dissent describes the importance of the statutory phrase "visibly intoxicated." See *post* at 552-556.

[12] See, e.g., *Dines v Henning*, 437 Mich 920 (1991), reversing the Court of Appeals judgment in that matter, 184 Mich App 534; 459 NW2d 305 (1990), and adopting the dissenting opinion of Judge MICHAEL J. KELLY, 184 Mich App at 540-541. Although Judge KELLY stated that "[e]yewitness testimony of visible intoxication [was] not required to establish a dramshop claim," he further stated that "visible intoxication may be proven by circumstantial evidence and the inferences drawn therefrom." *Id*. Thus, permissible inferences must have some basis in objectively observable behavior. Moreover, Judge KELLY's opinion relied not only on evidence of the amount of alcohol consumed and expert testimony, but on evidence (1) that the visibly intoxicated person drove wildly and maniacally both to and from the bar and (2) that that person behaved in a "loud and boisterous" manner. *Id*. at 541.

person *actually manifested* to a reasonable observer. These other indicia—amount consumed, blood alcohol content, and so forth—can, if otherwise admissible, reinforce the finding of visible intoxication, but they cannot substitute for showing visible intoxication in the first instance. While circumstantial evidence retains its value, such (and any other type of) evidence must demonstrate the elements required by § 801(3), including "visible intoxication."[13]

Plaintiffs here presented no evidence of Breton's visible intoxication at the time he was served at defendant's establishment in response to defendant's motion for summary disposition. The record reflects that all four eyewitnesses saw no signs that Breton was visibly intoxicated. Plaintiffs further relied on two expert toxicologists' expectations that Breton would have exhibited signs of intoxication. But reports discussing Breton's physical statistics and alcohol consumption, coupled with predictions of his impairment, offer only speculation about how alcohol consumption affected Breton that night. Expert post hoc analysis may demonstrate that Breton was *actually* intoxicated but does not establish that others witnessed his *visible* intoxication.[14] Consequently, no basis for a DSA claim against defendant existed. Because plaintiffs failed to establish a genuine issue of material fact that Breton was visibly intoxicated even under § 801(3), the trial court correctly granted summary disposition for defendant.

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[13] In 1972, the Legislature amended the statute (then MCL 436.22) to modify "intoxicated person" by adding the term "visibly." 1972 PA 196; compare 1961 PA 224.

[14] Indeed, even employing, for the sake of argument, the dissent's proffered definition of "capable of being seen" for "visibly intoxicated," the expert testimony still falls short of that standard. Plaintiffs' experts' reports demonstrated only their own expectation of Breton's visible intoxication, not that he actually was visibly intoxicated.

IV. CONCLUSION

We conclude that the Court of Appeals erred by reversing the trial court's grant of summary disposition to defendant. Plaintiffs failed to rebut the presumption of nonliability available to defendant under MCL 436.1801(8). We further hold that expert testimony regarding Breton's projected visible intoxication lacked any basis in actually manifested signs of intoxication and, thus, did not create a genuine issue of material fact under MCL 436.1801(3). Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition for defendant.

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

KELLY, J. (*dissenting*). We granted leave in these cases to address two questions. The first is what is the proper standard to rebut the statutory presumption in a dramshop case? MCL 436.1801(8) *et seq*. The second is what limitations did the Legislature intend, if any, on the type of evidence needed to show that a person was visibly intoxicated when served intoxicants by a dramshop? The majority holds that, to rebut the statutory presumption, a plaintiff must present clear and convincing evidence. It also holds that, to establish "visible intoxication" under the statute, a plaintiff must present actually manifested signs of intoxication. I disagree. The majority has erroneously given unintended meaning to the statute with respect to both issues. Hence, I must respectfully dissent.

UNDERLYING FACTS AND PROCEDURAL BACKGROUND

On April 20, 2001, at about 10:00 p.m., Curtis Breton drove his automobile while under the influence of more

than 20 beers and crossed the center line of US-127 at more than 100 miles per hour. His automobile slammed into a vehicle occupied by Adam Kuenner and Lance Reed, killing them and Breton and destroying both vehicles. At the time of the accident, Breton's blood alcohol level was 0.215 grams per 100 milliliters of blood.[1] Plaintiffs, the personal representatives of the estates of Kuenner and Reed, filed suit against the Beach Bar for negligently selling intoxicating liquor to Breton in violation of MCL 436.1801(3).

Deposition testimony indicated that Breton spent the day of the accident drinking with his friend John Marsh, a fellow firefighter. They started their binge in the morning at the Firehouse Pub, where they each consumed at least two to three beers. They continued it when another firefighter joined them after lunch. They purchased a 12-pack of beer and drank it while they repaired a collapsed boat dock at a family home. Each consumed at least two to three beers during the repair project.

About 4:45 p.m., Breton and Marsh went to the defendant Beach Bar where they split two pitchers of beer. On leaving the bar, they proceeded to Marsh's home and drank two beers each. They returned to the Beach Bar about a half an hour later and drank two more beers and split a pizza. At approximately 9:00 p.m. they left the bar. Marsh testified that he did not feel the effects of the alcohol until then. He also testified that, until they left the bar, Breton did not appear visibly intoxicated.

They left the Beach Bar and went to the Eagle's Nest bar where they shared yet another pitcher of beer. At 9:50 p.m., Breton drove Marsh home. Concerned,

[1] Legal intoxication is statutorily defined as 0.08 grams per 100 milliliters of blood. MCL 257.625(1)(b).

Marsh asked Breton if he was "alright to drive." Breton responded that he was. However, he died about 20 minutes later when he drove into oncoming traffic on the highway, killing himself, Kuenner, and Reed.

Before the fatal accident, Breton had returned to the Beach Bar where he attempted to get a date with Lindsay Mizerik, the waitress who had served him earlier in the evening. He did not drink during this return visit. Mizerik testified at deposition that she was trained in discerning intoxication and that Breton displayed no signs of intoxication while he was at the Beach Bar before the accident. Several others who saw Breton that evening testified that he did not appear intoxicated.

After the close of discovery, defendant Beach Bar filed a motion for summary disposition based on MCL 436.1801(8). Defendant argued that it was not the last establishment to serve alcoholic beverages to Breton, thus entitling it to a rebuttable presumption against liability under MCL 436.1801(8). Defendant argued that plaintiffs could not overcome the statutory presumption because they had no evidence that Breton was "visibly intoxicated" when he was served at defendant's bar.

In response, plaintiffs presented circumstantial evidence, including the reports of two toxicologists. Reed's expert estimated that Breton consumed 24 to 25 beers in the nine-hour period before the accident. He opined that this concentration of alcohol certainly affected Breton's central nervous system and certainly resulted in visible signs of intoxication at the time the Beach Bar served Breton.

The trial court granted summary disposition against both plaintiffs. In its opinion, it held that plaintiffs failed to present a genuine issue of material fact regard-

ing the last location to serve alcohol to Breton. Hence, the Beach Bar was entitled to the statutory presumption of nonliability. The court then held that, to overcome the presumption, plaintiffs had to present "positive, unequivocal, strong and credible evidence" that Breton was visibly intoxicated when he was served at defendant's bar. The court stated that the testimony of the expert witnesses was circumstantial, which by its nature is not unequivocal, strong, and credible.

Plaintiffs appealed, and the Court of Appeals reversed in a published opinion per curiam, remanding the cases for trial on the merits. 264 Mich App 363; 691 NW2d 779 (2004). The panel held that plaintiffs needed to present only competent and credible evidence that it is more probable than not that Breton was visibly intoxicated when served at defendant's bar. It found that plaintiffs' expert testimony met this standard.

THE DRAMSHOP ACT

At common law, no cause of action was available against a dramshop for negligently serving alcohol to a visibly intoxicated person who thereafter caused injury to another. Our Legislature changed the common law when it enacted the dramshop act. The act allows someone injured by an intoxicated person to bring suit against, among others, a retail establishment that served the person while he or she was visibly intoxicated. Specifically, MCL 436.1801(3) indicates in part:

> Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that

> individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death.

The act also provides a presumption of nonliability for all retail licensees that are not the last retailer to furnish alcohol to a visibly intoxicated person. The presumption is set forth in MCL 436.1801(8):

> There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

The first question presented in this case is what is the proper standard to rebut the statutory presumption of nonliability in MCL 436.1801(8). Initially, it is necessary to review the law of presumptions. In most civil cases, a party must satisfy its burden of proof by a preponderance of the evidence. It is generally recognized that the burden of proof is composed of two parts: the burden of persuasion and the burden of going forward with the evidence, commonly referred to as the burden of production. The burden of production may shift several times during the trial, but the burden of persuasion generally remains with the party who bears the risk of nonpersuasion. *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985).

Presumptions generally affect the burden of production. MRE 301 explains:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of

> proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

A presumption is best described as a procedural device. The function of a rebuttable presumption is solely to place the burden of producing evidence on the party opposing the presumption. It allows the party relying on it to avoid a directed verdict. It also aids that party in obtaining a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. *Widmayer, supra*; *Wojciechowski v Gen Motors Corp,* 151 Mich App 399; 390 NW2d 727 (1986). A presumption disappears when the burden of production is met. *Widmayer, supra* at 286. MRE 301 requires that the judge decide whether a presumption has been rebutted. *Widmayer, supra* at 288.

It is without contest that, normally, to cause a rebuttable presumption to disappear, the challenging party must produce credible evidence to the contrary. *Krisher v Duff,* 331 Mich 699, 705; 50 NW2d 332 (1951). *Krisher* states:

> It has been well settled in this State that the effect of a rebuttable presumption is to make out a prima facie case at the beginning of a trial. Having established the original prima facie case, the presumption then casts the burden of proof on the opposite party. Presumptions cannot be weighed against other credible evidence, for they have no value as evidence unless no other credible evidence whatsoever is introduced in regard to the presumed fact. As a rule they disappear if and when credible evidence is introduced from which the facts may be found. [*Id.*][2]

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[2] The Court in *Krisher* increased the weight given to the statutory presumption that the owner of an automobile gave permission to drive it to the party causing an injury. The Court found that "policy factors operate to make this a stronger presumption than the ordinary rebut-

THE REBUTTABLE PRESUMPTION IN MCL 436.1801(8)

The majority finds that "clear and convincing" proof should be required to rebut the presumption in MCL 436.1801(8). It concludes, in effect, that reading the statute as written would render the presumption meaningless or redundant. I disagree.

The interpretation offered by the majority contradicts well-established rules of statutory construction because it adds words to the statute that the Legislature did not put there. The words that the Court adds are, "The presumption may be overcome only by a showing of clear and convincing evidence to the contrary."

In interpreting statutory language, courts must determine and give effect to the intent of the Legislature. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). When ascertaining legislative intent, we look first at the words of the statute itself. *House Speaker v State Administrative Bd,* 441 Mich 547; 495 NW2d 539 (1993). There is no standard in MCL 436.1801(8) for determining how the presumption may be rebutted. The Legislature is presumed to know the law. *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006), citing *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Michigan law holds that a rebuttable presumption normally can be rebutted by credible evidence. *Krisher*, *supra.*

Hence, the majority creates a new "clear and convincing evidence" standard out of thin air in complete disregard of the text of MCL 436.1801 and of recognized

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table presumption." *Krisher, supra* at 707. The policy considerations present in *Krisher* do not apply in the instant case.

rules of statutory interpretation. It offers no policy considerations to justify this action, as the Court did in *Krisher*.

Interestingly, the Legislature has shown that it is quite capable of providing a heightened burden for rebutting a presumption when it chooses to do so. For example, it inserted into MCL 570.1203(2) a presumption that payment has been made to a contractor for improvements. It then added that the presumption may be overcome "only by a showing of clear and convincing evidence to the contrary."

The lack of the same or a similar addition to MCL 436.1801 strongly indicates that the Legislature intended the courts to apply our general common-law standard to the presumption in that statute. We should not alter this policy choice by the Legislature. This year, the Court held that the absence of evidence of specific legislative intent to change the common law shows that the Legislature meant to leave the common law untouched. See *Wold, supra*. Nothing in the statutory text at issue indicates that the Legislature intended any standard other than our common-law standard to apply.

I acknowledge that, in reviewing a statute's language, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001), citing *Altman v Meridian Twp,* 439 Mich 623; 487 NW2d 155 (1992). In these cases, I interpret the rebuttable presumption of MCL 436.1801(8) to give it full force and effect. My interpretation is that the presumption existed on defendant's behalf but disappeared when defendant's motion for summary disposition was heard. This is because plaintiffs produced

credible evidence that defendant served beer to Breton while he was visibly drunk.

Even if the standard were "clear and convincing," the presumption would have disappeared in these cases. However, I am convinced that the correct standard is "credible evidence," only. There is no valid legal justification to change the common-law standard or to manufacture a special enhanced standard for this statute. The Legislature chose not to do so, and no public policy reasons have been advanced to justify it. My interpretation renders the presumption neither surplusage nor nugatory.[3] And, unlike the interpretation of the majority, it adds no new and higher standard without justification and contrary to the intent of the Legislature.

PROOF OF ACTUAL VISUAL INTOXICATION

The second issue is whether the Legislature intended to restrict the type of circumstantial evidence that qualifies as proof that the drunk was visibly intoxicated when served by the dramshop. The statute refers to the tortfeasor repeatedly as a "visibly intoxicated person." MCL 436.1801(3), (6), (7), (8), and (9). As explained later in this opinion, a retail licensee may be liable under the statute when it serves an alcoholic beverage to a visibly intoxicated person.

The act does not define "visibly intoxicated." It is a well-settled rule of statutory construction in this state

[3] The majority justifies raising the standard to be used in rebutting the statutory presumption because otherwise, it reasons, the presumption would be meaningless. But this justification is misleading. The Court need do nothing to give meaning to the presumption. It stands on its own two feet without our help. What the majority is doing, in the name of preventing the presumption from becoming "meaningless," is giving it strength that the Legislature did not give it. It is judicially rewriting the statute. The majority's attack on my position offers no response to the fact that the majority is adding words and meaning to the statute that are not there. That is, of course, because no good response exists.

that, unless otherwise defined by law, statutory words or phrases are given their plain and ordinary meaning. MCL 8.3a. When appropriate, this Court often refers to dictionary definitions to interpret statutory language. "Visibly" is the adverbial form of "visible." The principal definition of "visible" is "capable of being seen." *Random House Webster's College Dictionary* (1997).

This definition indicates that the Legislature did not intend that a plaintiff is limited to producing a witness who actually saw signs that the intoxicated person exhibited intoxication. The statute does not require "actually manifested signs of intoxication." Rather, a plaintiff may show that indicators of the intoxication in the person were capable of being seen, that someone viewing the intoxicated person could have seen the indicators.[4] Had the Legislature intended to require at least some evidence that a witness actually saw signs that the person was intoxicated, it could have written:

> There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or person seen by an eyewitness to be visibly intoxicated, has not committed any act giving rise to a cause of action under subsection (3).

My rationale is supported not only by the actual language of the statute, but by case law as well. In *Dines v Henning*,[5] this Court reversed the Court of Appeals judgment and adopted Judge MICHAEL J. KELLY's dissenting opinion that stated, "Eyewitness testimony of

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[4] As the majority acknowledges (at its footnote 11 on page 542), the standard jury instructions define a "visibly intoxicated" person as one whose intoxication "would be apparent to an ordinary observer." SJI2d 75.02. Significantly, the jury instructions do not state, as the majority does, that the intoxication must "actually" have been seen by an ordinary observer.

[5] 437 Mich 920 (1991).

visible intoxication is not required to establish a dramshop claim; visible intoxication may be proven by circumstantial evidence and the inferences drawn therefrom."[6] *Dines v Henning,* 184 Mich App 534, 540-541; 459 NW2d 305 (1990) (KELLY, J., dissenting).

Judge KELLY based his decision on *Heyler v Dixon,* 160 Mich App 130; 408 NW2d 121 (1987). In that case, the Court of Appeals pointed out that the dramshop act was amended in 1972 to substitute "visibly intoxicated" for "intoxicated." *Id.* at 145. The Court noted that case law existing at the time required that the allegedly intoxicated person must be "visibly" intoxicated at the time of the sale. *Id.,* citing *Archer v Burton*, 91 Mich App 57; 282 NW2d 833 (1979); *McKnight v Carter*, 144 Mich App 623; 376 NW2d 170 (1985).

The *Heyler* Court then noted that the existing standard jury instructions defined a person as visibly intoxicated "when his or her intoxication would be apparent to an ordinary observer." SJI2d 75.02. The Court noted that the Court of Appeals has repeatedly held that claims brought under the dramshop act may be proven by circumstantial evidence and that, "if the combination of the circumstantial evidence and the permissible inferences drawn therefrom are sufficient to establish a prima facie case, a directed verdict is improper." *Heyler*, *supra* at 146. See *Villa v Golich*, 42 Mich App 86, 88; 201 NW2d 349 (1972); *Durbin v K-K-M Corp*, 54 Mich App 38, 56-57; 220 NW2d 110 (1974). The Court concluded by finding in that case that sufficient circum-

[6] Judge KELLY stated, and this Court adopted, the rule that eyewitness testimony is not essential. The majority now apparently requires actual eyewitness testimony of signs of intoxication in order to sustain a dramshop action. If a plaintiff's evidence lacks "actually manifested signs of intoxication," the majority removes the case from the jury. This has never been the law. It represents a drastic departure from existing law and it defies a reasonable construction of the text of the dramshop act.

stantial evidence existed to render summary disposition improper. No limitations were read into the type of circumstantial evidence that is permissible.

In making its determination in *Heyler,* the Court of Appeals stated that a jury could conclude that someone was a "visibly intoxicated person" from evidence showing that (1) the person admitted that he drank one or two beers an hour, (2) he stayed at the bar either 14 hours or nine hours, (3) he consumed somewhere between nine and 28 beers during his stay at the bar, (4) the accident occurred within minutes after the person left the bar, and (5) there was testimony from officers arriving at the scene of the accident that the person " 'smelled highly' " of alcohol. *Heyler, supra* at 147. In this case, there was similar testimony about how long and approximately how much Breton drank. There was similar evidence that Breton caused the accident and that he was highly intoxicated at the time.

The majority misreads *Dines* to conclude that expert testimony predicated on circumstantial evidence is insufficient to establish that a person was visibly intoxicated. *Dines* specifically adopted the long line of Court of Appeals cases holding that circumstantial evidence, standing alone, is sufficient to establish and support a dramshop claim. The majority opinion does not rely on *Dines* as it asserts; in fact, it limits the holding by restricting the circumstantial evidence that is admissible to that which was actually seen by a witness.

In these cases, the circumstantial evidence on which the expert opinions were based sufficed by itself to rebut the statutory presumption and establish plaintiffs' prima facie case. In *Heyler,* circumstantial evidence was found to be sufficient even though, unlike in these cases, it was not supported by strong expert testimony.

Here, plaintiffs had evidence that Breton's consumption of 24 to 25 beers in a nine-hour period had to have affected his central nervous system and resulted in visible signs of intoxication. While it is true that all of defendant's witnesses testified that Breton was not visibly intoxicated, that does not prevent the cases from going to the jury. It is not uncommon for a jury to disbelieve multiple eyewitnesses. See, e.g., *McKenzie v Taft Estate*, 434 Mich 858 (1990) (dissenting statement of LEVIN, J.).

The majority has erroneously changed the meaning this Court has given for the past 15 years to "visibly intoxicated person" in MCL 436.1801. Plaintiffs presented compelling circumstantial evidence and strong expert testimony that Breton was visibly intoxicated when defendant served him beer before the accident.

CONCLUSION

I find that the presumption of MCL 436.1801(8) can be rebutted by credible evidence. Credible evidence is the common-law standard that courts in Michigan have applied for years to rebuttable presumptions absent policy reasons or legislative language enhancing the standard. No policy reasons exist to enhance the standard applicable to MCL 436.1801. The majority has raised the standard without either policy reasons or statutory authorization to do so.

What has happened here is that the majority has taken upon itself to be helpful to the Legislature. The Legislature wrote a rebuttable presumption into the dramshop act, but failed to include a standard for rebuttal higher than the normal standard. The majority has reasoned that the Legislature must have intended a higher standard, so it has furnished one. However, especially given that our Legislature has shown itself

perfectly capable of supplying a higher standard itself, the Court should not rewrite the statute to its own liking. It is the Legislature's job to do that. My colleagues should willingly concede that the majority of legislators may not have been able to agree to give more teeth to the presumption by adding a higher rebuttal standard.

The majority has also increased the burden on an injured party to prove that a dramshop served intoxicants to a drunken patron. It has accomplished this by rewriting the statute to require actual signs of the intoxication, whereas, for decades, other circumstantial evidence has sufficed. The statute, by its terms, does not require a showing that someone testify to having actually seen signs that a drunk was intoxicated before the drunk was served at a bar.

It will now be more difficult for persons injured by a drunken driver to recover from a bar that served the drunk while that person was visibly intoxicated. The majority points to nothing in the dramshop act that suggests that it was the Legislature's intent to hinder, rather than facilitate, recovery from those serving drunks who injure others. This drastic change in the law defies both public policy and common sense.

Therefore I would affirm the decision of the Court of Appeals and remand the cases for trial.

CAVANAGH, J., did not participate in the decision of these cases.

COBLENTZ v CITY OF NOVI

Docket No. 127715. Argued March 8, 2006 (Calendar No. 7). Decided July 19, 2006. Rehearing denied 477 Mich 1201.

Ann Coblentz and others brought an action in the Oakland Circuit Court against the city of Novi, seeking to compel the production of documents not provided in response to plaintiffs' requests under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The plaintiffs' requests related to a settlement agreement the defendant had previously entered into with a limited partnership by which the defendant transferred a parcel of land to the limited partnership. The court, Fred M. Mester, J., entered an order granting the defendant's motion for summary disposition, determining that the global positioning satellite readings and site plans concerning the property that the plaintiffs requested did not exist and that the exhibits intentionally deleted from the settlement agreement were no longer relevant. The court also entered an order determining that the side letters between the defendant and the limited partnership that the plaintiffs requested were exempt from disclosure under MCL 15.243(1)(f). The plaintiffs moved for reconsideration of the orders. The court denied reconsideration and decided that the defendant properly charged the plaintiffs fees for the defendant's attorney's work in examining and separating from other material the two side letters that the defendant claimed were exempt. The plaintiffs appealed. The Court of Appeals, WILDER, P.J., and HOEKSTRA and OWENS, JJ., affirmed in an opinion per curiam. 264 Mich App 450 (2004). The Court of Appeals concluded that it was not appropriate for the trial court to grant summary disposition concerning the intentionally deleted exhibits on the basis of relevance, but affirmed the order on the basis that the exhibits were not a part of the final settlement agreement. The Court of Appeals determined that, with regard to the global readings and the site plans, summary disposition was appropriate despite the fact that discovery had not been concluded. The Court also determined that two of the side agreements were exempt from disclosure and that the fees charged for the defendant's attorney's work in examining and separating the material were appropriate. The Supreme Court granted the plaintiffs' application for leave to appeal. 474 Mich 886 (2005).

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

The Court of Appeals properly affirmed the grant of summary disposition to the defendant with regard to the request for site plans and global readings. That part of the Court's judgment must be affirmed. The Court of Appeals erred in affirming the grant of summary disposition to the defendant with regard to the request for all exhibits to the settlement agreement, including the intentionally deleted exhibits, and the request for disclosure of the side agreements. Those parts of the Court of Appeals judgment must be reversed. The Court of Appeals also erred in affirming the fees charged for the work of the defendant's attorney. That part of the judgment must be reversed. The matter must be remanded to the trial court for the entry of a judgment compelling disclosure as directed by the Supreme Court.

1. When the defendant denied the existence of the site plans and global readings and provided documentation supporting its position, the burden shifted to the plaintiffs to produce documentation to counter the defendant's documentation. The plaintiffs failed to offer the needed documentary evidence.

2. The plaintiffs cannot complain that discovery was ended prematurely because they did not counter the defendant's documentary evidence pursuant to the requirements of MCR 2.116(G)(4) and MCR 2.116(H).

3. The request by the plaintiffs for all exhibits to the agreement, including the intentionally deleted exhibits, sufficiently described the exhibits to enable the defendant to identify them. Those exhibits must be disclosed because the defendant failed to show an exemption from disclosure applicable to them.

4. The defendant failed to carry the burden of proving that the exemption in MCL 15.243(1)(f) for trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy applied to the side letters. The statute requires a public body to record a description of the material claimed to be exempt in a central location within a reasonable time of the receipt of the material. Defendant offered no legally relevant reason for the delay in this case. The fact that defendant negotiated with the limited partnership after submission was not relevant and could not justify any delay. The trial court abused its discretion in finding that defendant recorded a description of the side letters within a reasonable time after they were submitted to defendant. The side letters were not exempt from disclosure.

5. The attorney involved was not the defendant's employee, but was an independent contractor. The FOIA allows a public body to charge a requesting party only for its employee's labor.

Justice CAVANAGH, concurring, agreed with all parts of the majority opinion except for parts II and VI. With regard to part VI, he concurred only with its result. MCL 15.234(3) provides that a fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information unless the failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance. There was nothing about the nature of the request in this particular instance to warrant charging a fee.

Justice CORRIGAN, concurring in part and dissenting in part, concurred with the majority in all respects except for its holding that the Court of Appeals erred in affirming summary disposition for the defendant with regard to disclosure of the side agreements. The trial court properly ruled that those agreements were exempt from disclosure under MCL 15.243(1)(f). The agreements met all the requirements for exemption, and the trial court did not abuse its discretion in determining that the defendant recorded descriptions of the agreements within a reasonable time after they were submitted.

Affirmed in part, reversed in part, and remanded.

1. RECORDS — FREEDOM OF INFORMATION ACT.

The Freedom of Information Act requires a person who requests the disclosure of a public record to describe the public record sufficiently to enable the public body to identify the public record; a record must be disclosed where the request is sufficient to allow the public body to find the public record that is not clearly exempt from disclosure (MCL 15.233[1]).

2. RECORDS — FREEDOM OF INFORMATION ACT — COSTS OF PRODUCING RECORDS.

The Freedom of Information Act provides that a public body may charge a person who requests a public record the cost of producing the public record based on the rate of the lowest paid public body employee capable of retrieving the public record; the act allows the public body to charge for its employee's actions, but not for the actions of an independent contractor (MCL 15.243[1], [3]).

Law Offices of Bailey & Rossi, P.C. (by *Richard D. Wilson* and *Gary A. Rossi*), for the plaintiffs.

Secrest Wardle (by *Gerald A. Fisher* and *Thomas R. Schultz*) for the defendant.

KELLY, J. This case asks us to determine if the trial court appropriately found requested documents exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. We address also whether it was appropriate for defendant to charge fees to plaintiffs for the work of defendant's attorney in retrieving and separating documents plaintiffs sought under the act.

This case revolves around an underlying settlement agreement between defendant and a third party. Plaintiffs filed a FOIA request for documents associated with the agreement. Requested were "site plans" and "global readings" on real property, all exhibits to the agreement, including certain exhibits listed as intentionally deleted, and side agreements or letters related to the agreement.

The Court of Appeals affirmed the trial court's decision that the requested documents were exempt from disclosure. *Coblentz v Novi*, 264 Mich App 450; 691 NW2d 22 (2004). We affirm in part and reverse in part that decision. We conclude that the Court of Appeals appropriately affirmed the grant of summary disposition to defendant on plaintiffs' request for "site plans" and "global readings." But the Court of Appeals erred in affirming summary disposition regarding the request for all exhibits to the underlying settlement agreement, including the intentionally deleted exhibits. These exhibits were not exempt from disclosure and were sufficiently identified in the FOIA request.

The Court of Appeals also erred in affirming summary disposition for defendant on the requested "side agreements" to the settlement agreement. These items

were not exempt because defendant failed to comply with MCL 15.243(1)(f)(*iii*). Finally, the Court of Appeals erred in finding appropriate the fees that defendant charged for its attorney's work in separating documents. The attorney in question was not an employee of defendant. Therefore, we remand this case to the trial court for entry of a judgment compelling disclosure consistent with this opinion.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

In a separate civil action against defendant, Sandstone Associates Limited Partnership-A (Sandstone) obtained a judgment that totaled tens of millions of dollars, including costs, interest, and attorney fees. Sandstone and defendant then entered into an agreement in which defendant waived its appellate rights and Sandstone received real property rather than the money judgment. The major component of the agreement called for defendant to turn over 75 "net usable" acres to Sandstone for development.

The property had previously been set aside as parkland. It is adjacent to property owned by plaintiffs. Some of the property carried deed restrictions, including possible reciprocal negative easements.[1] Plaintiffs' properties contained the same deed restrictions. The

[1] This Court has provided the following definition and example of a reciprocal negative easement:

> There must have been a common owner of the related parcels of land, and in his various grants of the lots he must have included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated. Once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained. In this way those who have purchased in reliance upon this particular

settlement agreement required defendant to arrange for the removal of the deed restrictions on its property and on plaintiffs' property. It was agreed that, if defendant failed, it would convey additional property to Sandstone. In an effort to remove the restrictions, defendant contacted plaintiffs.

Plaintiffs retained counsel who filed a FOIA request with defendant, seeking:

> 1. All exhibits, including but not limited to exhibits G, T, U, V, W, AA, BB, GG, MM, NN, PP, for the Agreement for Entry of Consent Judgment dated June 25, 2002 between Sandstone and the City of Novi;
>
> 2. Any and all site plans for Sandstone regarding the 75 dedicated acres; and . . . .

Defendant's attorney responded to these requests by writing:

> 1. Exhibits G, T, U, V, W, AA, BB, GG, MM, NN, PP: I have advised you by phone and letter that there are no such exhibits. The reference in the index, indicating that they were intentionally deleted, is merely to clarify for the reader that such exhibits have not been lost or detached from the Agreement. These exhibits do not exist, and never existed.
>
> 2. Site Plan: I have also advised you by phone and letter that a site plan or concept plan for the 75 acres does not exist. It has never existed. I do not know how [to] provide any further explanation.

Plaintiffs then informally requested all side agreements to the Sandstone settlement agreement and the "global readings." Defendant's attorney responded that he did not know what "global" meant. With regard to the side agreements, he stated that he assumed that

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restriction will be assured that the plan will be *completely* achieved. [*Lanski v Montealegre*, 361 Mich 44, 47; 104 NW2d 772 (1960) (emphasis in original).]

this meant the "side letters" to the Sandstone agreement. He indicated that he was attempting to learn from Sandstone's counsel which of the side letters were submitted with an understanding of confidentiality.

Plaintiffs next filed a second FOIA request. Among the items sought were:

> 1. Any and all side agreements entered into between the City of Novi and Sandstone and/or its attorneys or representatives;
>
> 2. Global readings on "extra land"; global positioning satellite (GPS) readings on "extra land";
>
> 3. Settlement agreements, releases, copies of drafts in settlement of the insurance cases relating to this property[.]

After plaintiffs' second FOIA request, defendant began to negotiate with Sandstone for release of the side agreements. Sandstone initially stated that none could be released, but later agreed to release five of the seven side letters.

In response to this FOIA request, defendant told plaintiffs that global or GPS readings did not exist. It also refused to release the two remaining side agreements, stating:

> The request is denied with regard to two documents representing commercial and/or financial information voluntarily submitted to the City of Novi for use in developing governmental policy . . . as contemplated and required under MCL 15.243(g) [sic, (1)(f)].

Plaintiffs filed a complaint in the circuit court seeking production of all intentionally deleted exhibits. Plaintiffs claimed that they had located one of the exhibits, exhibit AA, despite the fact that defendant

contended that it never existed. They also asked the court to order production of global readings, site plans, and all side agreements.

Defendant filed a motion for summary disposition before the close of discovery. Attached was an affidavit from its mayor, Richard Clark. Clark stated that, as of the date of the affidavit, Sandstone had submitted no site plans for the 75 acres. He also affirmed that no "global readings" or GPS readings existed in connection with the Sandstone settlement agreement. Plaintiffs responded, but did not attach any documentary evidence rebutting Clark's affidavit.

The court granted defendant's motion in part. Regarding the site plans and global readings, it found, on the basis of Clark's affidavit, that none existed. It concluded that further depositions of other city officials on the topic would be duplicative. The circuit court denied defendant's request for summary disposition on the fee issue pending further hearings. It also deferred ruling on the side agreements until it could make an in camera review. With respect to the intentionally deleted exhibits, it found them irrelevant and granted summary disposition for defendant.

Following its review of the side agreements that defendant claimed were exempt, the court found that defendant properly complied with the requirements of MCL 15.243(1)(f). The side letters, it found, fell within the governmental policy exemption of FOIA because they helped to facilitate the Sandstone agreement. Thus, it granted summary disposition to defendant.

The trial court then turned to the appropriateness of the fees for its attorney that defendant charged to plaintiffs. Defendant contended that the fees were appropriate because defendant's attorney was the lowest paid employee who could separate the exempt side

letters from the nonexempt letters. The court granted summary disposition to defendant on this issue. It found that the attorney was defendant's employee and concluded that the fees were appropriate under MCL 15.234. In the same order, the court denied plaintiffs' motion for reconsideration.

On plaintiffs' appeal, the Court of Appeals concluded that it was not appropriate for the lower court to grant summary disposition concerning the intentionally deleted exhibits on the basis of relevance. But it affirmed the decision on alternative grounds, concluding that the intentionally deleted exhibits were not part of the final settlement agreement. It based its conclusion on the fact that these exhibits were listed in the agreement with the words "INTENTIONAL DELETION" written next to them. *Coblentz*, 264 Mich App 453-454.

Regarding the global readings and site plans, the Court of Appeals found that summary disposition was appropriate because of Clark's affidavit and plaintiffs' failure to offer factual support for their existence. It also concluded that summary disposition was appropriate despite the fact that discovery had not been concluded. The Court opined that it was unlikely that further discovery would provide the factual support necessary. *Id*. at 454-457.

It found that the two side agreements were exempt from disclosure. Specifically, it concluded that defendant adequately complied with FOIA's requirement that it place a description of the exempt material in a central location within a reasonable time. This is despite the fact that defendant did not file the description until after plaintiffs had made their FOIA requests and until five months after Sandstone had submitted the documents. The Court of Appeals found this reasonable

because negotiations had continued between defendant and Sandstone over the deed restrictions. *Id*. at 458-459.

Finally, the Court of Appeals found the fees charged for the work of defendant's attorney appropriate. It concluded that defendant's attorney met the dictionary definition of an employee. And it found that he was the lowest paid employee who could handle the FOIA request. *Id*. at 460-461.

Plaintiffs sought, and we subsequently granted, leave to appeal. 474 Mich 886 (2005).

II. STANDARD OF REVIEW

We review questions of statutory interpretation and the proper application of statutes using a de novo standard. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001). We review rulings on motions for summary disposition using the de novo standard as well. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition was granted here under MCR 2.116(C)(10).[2] In reviewing a ruling made under this court rule, a court tests the factual support by reviewing the documentary evidence submitted by the parties. *Spiek*, 456 Mich 337. We review the evidence and all legitimate inferences in the light most favorable

[2] MCR 2.116(C)(10) provides:

> Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

to the nonmoving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The standard of review for FOIA cases was clarified this term in *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006). The Court stated:

> We continue to hold that the clear error standard of review is appropriate where the parties challenge the *factual findings* of the trial court. However, where the parties do not dispute the underlying facts but rather challenge the trial court's exercise of discretion, we hold that an appellate court must review that determination for an abuse of discretion, which this Court now defines as a determination that is outside the principled range of outcomes. [*Id*. at 467 (emphasis in original).]

The determination whether a description of material claimed to be exempt under MCL 15.243(1)(f) was recorded in a central location within a reasonable time after submission is a discretionary one. Therefore, the trial court's decision on the defendant's compliance with the requirements of MCL 15.243(1)(f)(*iii*) is reviewed for an abuse of discretion.

III. SITE PLANS AND GLOBAL READINGS

In response to plaintiffs' request for site plans and global readings, defendant provided Clark's affidavit claiming that the documents did not exist. If a record does not exist, it cannot be produced. Given that defendant denied the existence of the records and that it provided supporting documentation for its position, the

burden shifted to plaintiffs to produce documentation to counter defendant's affidavit.

MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Under this court rule, a plaintiff cannot rest solely on its complaint. Affidavits, pleadings, depositions, admissions, or other documentary evidence must be offered to survive summary disposition. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In this case, plaintiffs failed to provide such documentary evidence.

Regarding the global readings, plaintiffs admit that they are unsure what they were seeking. They base their request on a handwritten note contained in one of the drafts of the Sandstone agreement. The note is in the margin and merely states "global." Plaintiffs concede that they were guessing at the meaning of the word. Plaintiffs offer no documentary evidence showing that their guess was well-founded. Therefore, the trial court properly granted summary disposition. MCR 2.116(G)(4).

The site plans present a similar situation. While everyone agrees that, eventually, site plans for the development must be filed with defendant, the question is whether they had been filed at the time of plaintiffs' FOIA request. Again, defendant provided Clark's affidavit to support its contention that site plans had not

been filed with the city, and plaintiffs offered nothing to contradict this point. They did not even demonstrate that a local ordinance required Sandstone to file a site plan by the date of the FOIA request.[3] Without factual support to contradict Clark's affidavit, the trial court properly granted summary disposition pursuant to MCR 2.116(C)(10).

Plaintiffs complain that summary disposition was premature because discovery had not been completed. They assert that they were unable to depose defendant's employees, including Clark, to obtain the information necessary to counter defendant's summary disposition motion. Such situations are controlled by MCR 2.116(H), which provides:

> Affidavits Unavailable.
>
> (1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must
>
> (a) name these persons and state why their testimony cannot be procured, and
>
> (b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.
>
> (2) When this kind of affidavit is filed, the court may enter an appropriate order, including an order
>
> (a) denying the motion, or
>
> (b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

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[3] Photographs suggested that Sandstone removed trees and graded the 75 acres at some point. But this is not evidence that defendant had site plans in its possession at the time of the FOIA request. Plaintiffs point to nothing to show that site plans were legally required to be filed before this activity could occur.

In this case, plaintiffs did not comply with MCR 2.116(H). They did not offer the required affidavits of probable testimony to support their contentions. Therefore, they cannot complain that discovery was prematurely ended.

Given that plaintiffs did not counter defendant's documentary evidence as required by MCR 2.116(G)(4) or MCR 2.116(H), the trial court appropriately granted summary disposition to defendant under MCR 2.116(C)(10). Accordingly, we affirm the Court of Appeals decision with regard to plaintiffs' request for global readings and site plans.

IV. THE INTENTIONALLY DELETED EXHIBITS

In the final draft of the Sandstone agreement, the table of contents listed and lettered the exhibits. Next to some of the letters, the words "INTENTIONAL DELETION" were inserted. In their FOIA request, plaintiffs asked for all exhibits to the Sandstone agreement, including the intentionally deleted exhibits. Defendant argues that the FOIA request was not sufficiently clear. Much of this argument is based on defendant's contention that there was only one final agreement and that plaintiffs requested the exhibits to that final agreement.

MCL 15.233(1) states, in relevant part:

> Except as expressly provided in section 13 [exemptions from disclosure], upon providing a public body's FOIA coordinator with a written request *that describes a public record sufficiently to enable the public body to find the public record*, a person has a right to inspect, copy, or receive copies of the requested public record of the public body. [Emphasis added.]

Defendant never claimed, and still does not claim, that it does not know what plaintiffs seek. But, focusing

on its view of what constituted the final agreement, it concludes that the requested exhibits either do not exist or that defendant is not required to produce them. It claims that only the final agreement is discoverable and that the requested exhibits were not part of it.

Even if the exhibits were not part of the final settlement agreement, defendant had to disclose them. The FOIA request sufficiently identified them. MCL 15.233(1). Defendant does not contend that it did not know what documents plaintiffs were requesting. Because plaintiffs' description was sufficient to enable defendant to identify the documents, MCL 15.233(1) required defendant to produce them regardless of whether they were part of the final agreement.

Defendant's restrictive reading of the FOIA request is not consistent with the language of the act. MCL 15.233(1). All that a request must accomplish is to describe the record "sufficiently" to enable the public body to identify it. Because defendant acknowledges that the FOIA request did that much, the request was adequate.

The Legislature chose not to require an exacting standard in MCL 15.233(1). It could have required a "written request that describes a public record precisely or fully." But, instead, the Legislature chose to use the lesser standard of "sufficiently." The words chosen by the Legislature are presumed intentional. We will not speculate that it used one word when it meant another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931).

Moreover, requiring only a description sufficient to permit identification of the requested items is consistent with the goals and intent of the Legislature in enacting FOIA. It is a prodisclosure act. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544; 475

NW2d 304 (1991). All public records are subject to full disclosure unless they are clearly exempt. *Id*. If a request is "sufficient" to allow the public body to find a nonexempt record, the record must be disclosed. MCL 15.233(1).

Plaintiffs' request satisfies this requirement. It specifically listed the intentionally deleted exhibits by letter, G, T, U, V, W, AA, BB, GG, MM, NN, and PP. Defendant's response demonstrates that plaintiffs' description was adequate because it also listed these exhibits by letter. It is irrelevant that defendant believed these exhibits not to be part of the final agreement. Plaintiffs' request provided defendant enough information for it to understand what documents plaintiffs wished to review.

A FOIA request must be fulfilled unless MCL 15.243 lists an applicable specific exemption. MCL 15.233(1). Defendant points to no exemption applicable to the intentionally deleted exhibits. Therefore, the trial court erred in granting summary disposition to defendant, and the Court of Appeals erred in affirming that decision. MCL 15.233(1) required the trial court to order defendant to turn over the intentionally deleted exhibits.

V. THE SIDE AGREEMENTS OR SIDE LETTERS

A. THE SIDE LETTERS ARE NOT EXEMPT FROM DISCLOSURE

The trial court and the Court of Appeals found two of the side letters exempt from disclosure pursuant to MCL 15.243(1)(f). That provision reads:

> A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *

> (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
>
> (*i*) The information is submitted upon a promise of confidentiality by the public body.
>
> (*ii*) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
>
> (*iii*) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

Because FOIA is a prodisclosure act,[4] the public agency bears the burden of proving that an exemption applies. MCL 15.240(4). In this case, defendant did not carry that burden. Because it failed to meet the requirements of MCL 15.243(1)(f)(*iii*), the side letters were not exempt.

B. DEFENDANT OFFERED NO LEGAL JUSTIFICATION FOR THE DELAY IN THIS CASE

We hold that the trial court abused its discretion in finding that defendant recorded a description of the side letters within a reasonable time after they were submitted to defendant. The proffered reason for the delay, ongoing negotiations between defendant and Sandstone to secure the public release of the letters, is a consideration irrelevant to the recording requirements of MCL 15.243(1)(f)(*iii*).

MCL 15.243(1)(f)(*iii*) requires a public body to record a description of material claimed to be exempt within a

[4] *Swickard*, 438 Mich 544.

reasonable time after its submission to the body. If it fails to comply with this requirement, the material is not exempt. MCL 15.243(1)(f). Whether the time the public body takes to record a description of the material is reasonable is measured from the date the material is submitted. It is not measured from the date the parties designate it as confidential. Because reasonableness is a discretionary determination, we review the trial court's finding for an abuse of discretion. A court abuses its discretion if its determination falls beyond the principled range of outcomes. *Herald*, 475 Mich 467.

In this case, the side letters were sent to defendant between June and July 2002. Defendant did not record a description of them until November 26, 2002, several weeks after plaintiffs' November 1, 2002, FOIA request. The question, then, is whether the trial court abused its discretion when it found that this four- to five-month interval was reasonable. Defendant argues that the delay was reasonable because, in the intervening months, defendant negotiated with Sandstone to determine which of the seven side letters it could publicly release. Defendant contends that, had it immediately recorded a description of the letters and asserted a FOIA exemption, Sandstone would have been discouraged from authorizing the letters' public disclosure later. It argues that negotiations with Sandstone to disclose the letters would have been rendered futile.

We reject the argument that defendant's negotiations with Sandstone made the delay reasonable and hold that the trial court abused its discretion when it found that defendant complied with MCL 15.243(1)(f)(*iii*). Defendant's proffered reason cannot justify *any* delay in meeting the filing requirement. However inconvenient the recording requirement may have been to

defendant and Sandstone, defendant was still required to comply with the provisions of MCL 15.243(1)(f). This exemption is intended to provide notice to the public that a public body possesses trade secrets, commercial information, or financial information submitted to it for use in developing governmental policy.

MCL 15.243(1)(f)(*iii*) describes how those documents must be made available for public inspection. Only by the fortuity of plaintiffs' ongoing negotiations with defendant regarding the removal of deed restrictions from plaintiffs' property did plaintiffs become aware of the side letters. Otherwise, plaintiffs would never have known or suspected that they existed. Defendant's rationale fails to explain how a requesting party could seek disclosure of a document of which it was unaware.

Were we to accept defendant's rationale, a public body could knowingly possess such confidential information for extended periods without providing any notice to the public that the information exists. This would defeat the purpose of the recording requirements expressed clearly in MCL 15.243(1)(f). Therefore, whether defendant could later secure Sandstone's permission to release the side letters is a consideration not legally relevant to its statutory obligation to record a description of the letters. It cannot be interpreted as a basis for finding that defendant filed a description within a "reasonable time."

Justice CORRIGAN's dissent argues that the unique facts of this case warranted the lengthy delay and that the trial court's discretionary determination fell within the principled range of outcomes. It misses the point that defendant's justification for the delay is legally irrelevant. Defendant bears the burden of qualifying the side letters as exempt under MCL 15.243(1)(f). Therefore, defendant must prove that the four- to

five-month delay in recording was a "reasonable time." It is true, as Justice CORRIGAN contends, that the permissible time period for filing can vary. However, we do not need to pinpoint a general rule concerning what length of time would have been reasonable in this appeal because no valid reason was offered for the delay. We conclude simply that defendant's justification for the four- to five-month delay is legally irrelevant in view of the notice requirements set forth in MCL 15.243(1)(f)(*iii*). Therefore, the trial court's finding that this interval was reasonable falls beyond the principled range of outcomes.

Accordingly, we hold that the trial court abused its discretion in finding that the delay was reasonable. Because defendant failed to comply with MCL 15.243(1)(f)(*iii*), the side letters are not exempt.[5]

VI. THE AVAILABILITY OF FEES FOR THE WORK OF DEFENDANT'S ATTORNEY

The lower courts erred in allowing defendant to charge plaintiffs for the work of defendant's attorney in locating the two allegedly exempt letters and separating them from the nonexempt material. MCL 15.234(1) provides, in part:

> A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search,

[5] We note that plaintiffs raised challenges in this case under the other two sections of this exemption, MCL 15.243(1)(f)(*i*) and (*ii*). Because defendant failed to comply with MCL 15.243(1)(f)(*iii*), we need not reach those claims. Therefore, we take no position on Justice CORRIGAN's discussion of "governmental policy."

> examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14.

MCL 15.234(3) describes how the public body may calculate the cost of producing FOIA documents. It provides, in part:

> In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act.

Pursuant to this statute, the public body may charge the rate of the lowest paid *public body employee* capable of retrieving the information. While the lower courts attempted to apply the language of the statute, they failed to distinguish between an employee and an independent contractor. MCL 15.234(3) allows the public body to charge for an employee's actions; it does not mention independent contractors. Therefore, to properly determine whether charges are appropriate, a court must resolve whether the person who examined the records is an employee or an independent contractor.

Although we have applied the economic realities test most often in the workers' compensation field, we conclude that it is instructive here. The test is a useful tool for discerning whether an employee-employer relationship exists. See *Clark v United Technologies Automotive Inc*, 459 Mich 681, 687; 594 NW2d 447 (1999). The test includes but is not limited to the following factors:

> "First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?

"Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?

"Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expenses?

"Fourth, does the employee furnish his own equipment and materials?

"Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?

"Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?

"Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.

"Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute." [*Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 568 n 6; 592 NW2d 360 (1999), quoting *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972); see also *Askew v Macomber*, 398 Mich 212, 217-218; 247 NW2d 288 (1976), and *Schulte v American Box Board Co*, 358 Mich 21, 32-32; 99 NW2d 367 (1959) (SMITH, J., concurring).]

No single factor is controlling when applying the test. *Clark,* 459 Mich 689.

In this case, defendant's attorney did not receive a paycheck or other employee benefits from defendant. The record reflects that the attorney was employed by a law firm that defendant retained as city attorney. The attorney acted as the lead attorney for the firm in that capacity. His social security and other employment benefits were paid by his law firm. Defendant did not

directly pay the attorney for his services. Rather, defendant paid the law firm, which, in turn, paid the attorney.

The law firm provided the material and equipment necessary for the attorney to perform services for defendant. The attorney did not work exclusively for defendant, but acted as the attorney for other municipalities as well. There was no indication that the attorney was at all dependent on defendant for his living expenses. It appears that the attorney's law firm maintained control over the attorney. Finally, defendant had no liability for the attorney in the event that his association with defendant was terminated

This is the classic example of an independent contractor. The attorney was the employee of the law firm. He and the law firm acted as independent contractors for defendant. Because MCL 15.234(3) does not mention independent contractors, defendant was not entitled to charge for the attorney's work.

FOIA allows public bodies to charge a requesting party only for employees' labor. MCL 15.234(3). Because the attorney who examined and separated the side letters was not defendant's employee, the lower courts erred in allowing defendant to charge plaintiffs under MCL 15.234(3) for the attorney's work.

VII. CONCLUSION

We affirm the part of the Court of Appeals decision that held that defendant was not required by FOIA to produce documents regarding global readings and site plans. Plaintiffs did not, as required by MCR 2.116(G)(4), counter defendant's affidavit, and they did not demonstrate, pursuant to MCR 2.116(H), that further discovery would disclose such documents. There-

fore, the trial court properly granted summary disposition to defendant on this issue.

We reverse the part of the Court of Appeals decision regarding the intentionally deleted exhibits. Plaintiffs' request provided defendant sufficient information for defendant to know which documents plaintiffs wished to review. Because no exemption from disclosure applied, MCL 15.233(1) required the trial court to order defendant to turn over the intentionally deleted exhibits.

We also reverse the part of the Court of Appeals decision regarding the two side letters that defendant claimed were exempt. Defendant failed to comply with MCL 15.243(1)(f)(*iii*). It did not place a description of the material in a central location within a reasonable time of submission. This failure eliminates the side letters from being exempt.

Finally, we reverse the part of the decision affirming the allowance of fees for the work of defendant's attorney. The attorney was an independent contractor. The lower courts erred in failing to note the legal distinction between employees and independent contractors. MCL 15.234(3) allows recovery for the costs associated only with employees.

We remand this case to the trial court for entry of a judgment compelling disclosure consistent with this opinion.

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

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with all parts of the majority opinion except for parts II and VI. While I agree with the result reached by the majority in part VI—that plaintiffs

should not have to pay defendant the requested fee—I believe the reason is simply that the failure to charge a fee for searching, examining, and reviewing the side agreements would not result in an unreasonably high cost to defendant. MCL 15.234(3) states, in relevant part:

> A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs.

Defendant charged $150 for the city attorney to search, examine, and review materials for the requested side agreements. But the nature of the request for the side agreements was a routine request under the Freedom of Information Act, MCL 15.231 *et seq*., and complying with the request would not result in an unreasonably high cost to defendant. Therefore, there was nothing about the nature of the request in this particular instance to warrant charging a fee to cover defendant's costs. Accordingly, I concur with all parts of the majority opinion, except for part II and part VI; with regard to part VI, I concur only with the result.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the majority in all respects but one. I dissent from its holding that the Court of Appeals erred in affirming summary disposition for defendant on plaintiffs' request for the "side letters" to the settlement agreement. I believe that the letters were properly ruled exempt from disclosure under the "trade secrets or commercial or financial information" exemption of the Freedom of Information Act (FOIA), MCL

15.243(1)(f). The trial court did not abuse its discretion in holding that defendant recorded a description of the side letters within a reasonable time after they were submitted. Nor did the trial court err in holding that defendant satisfied the remaining requirements of the exemption.

I. FACTS AND PROCEDURAL HISTORY

Sandstone Associates Limited Partnership-A (Sandstone) sent the two "side letters" at issue to defendant on June 25, 2002, and July 23, 2002.[1] When plaintiffs first informally requested the side letters on October 16, 2002, defendant's attorney responded on October 21, 2002, by saying that he was waiting for advice from Sandstone's lawyers regarding whether to disclose the side letters because some of them "were submitted with an understanding of confidentiality." Plaintiffs filed a formal FOIA request for the side letters on November 1, 2002, asking defendant to disclose "[a]ny and all side agreements entered into between the City of Novi and Sandstone and/or its attorneys or representatives[.]" On November 26, 2002, after negotiating with Sandstone, defendant produced five side letters, but denied plaintiffs' request in regard to

> two documents representing commercial and/or financial information voluntarily submitted to the City of Novi for use in developing governmental policy in connection with the settlement of Oakland County Circuit Court litigation entitled [*Sandstone Associates Limited Partnership-A v*

[1] Defendant and Sandstone entered their agreement settling Sandstone's multimillion dollar judgment against defendant on June 25, 2002. Sandstone dated and sent the first draft of the first side letter to defendant's attorney on the same day. Sandstone sent a revised version of this letter, along with the other side letter at issue, to defendant on July 23, 2002.

City of Novi, Oakland Circuit Court Docket No. 95-501532-CK], as contemplated and required under MCL 15.243[(1)(f)].

On the same day, defendant recorded and filed with the city clerk descriptions of the two side letters that it had refused to disclose. Both of these side letters had been written by Sandstone and sent to defendant's attorney and marked as confidential. In one letter, Sandstone named the prices it would pay to purchase plaintiffs' (and others') properties, assuming that the properties were free from deed restrictions (Letter 1). In the other letter, Sandstone identified which parcels of property (including plaintiffs') have deed restrictions that give their owners the enforceable right to prohibit commercial use (Letter 2).

Following an in camera review of the two side letters and two affidavits submitted by defendant, the trial court determined that the letters were exempt from disclosure under the "trade secrets or commercial or financial information" exemption of the FOIA:

> The court is satisfied that Defendant complied with each of the three listed requirements of MCL 15.243(1)(f) and thus disclosure of the two side letters would be inappropriate. The court finds that the two letters contain financial or commercial information of Sandstone's voluntarily provided to Defendant by Sandstone in confidence. Further, the letters fall within the policy-making potential contemplated by the Legislature in drafting this exemption to the FOIA. They were intended to facilitate the Settlement Agreement and Consent Judgment and assist Defendant in making the policy decisions with regard to that settlement. The court finds that the content of the letters relates to Defendant's deliberations on the selection of the best government policy for the potential expenditure of substantial sums of money and the retention of land for public use.

The Court of Appeals affirmed, holding that defendant had satisfied all the requirements of the exemption.

II. ANALYSIS

I cannot conclude that the lower courts erred in holding that the two side letters are exempt from disclosure under the "trade secrets or commercial or financial information" exemption. When reviewing the application of an FOIA exemption, an appellate court reviews legal determinations de novo, factual findings for clear error, and discretionary determinations for an abuse of discretion. *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). The "trade secrets or commercial or financial information" exemption provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (f) Trade secrets or commercial or financial information voluntarily provided to an agency *for use in developing governmental policy* if:
>
> (*i*) The information is *submitted upon a promise of confidentiality* by the public body.
>
> (*ii*) The promise of confidentiality is *authorized by the chief administrative officer of the public body or by an elected official* at the time the promise is made.
>
> (*iii*) *A description of the information is recorded by the public body within a reasonable time* after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit. [MCL 15.243(1)(f) (emphasis added).]

The burden is on the public body to demonstrate that the record is exempt from disclosure. MCL 15.240(4); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 108; 649 NW2d 383 (2002).

A. "A DESCRIPTION OF THE INFORMATION IS RECORDED BY THE PUBLIC BODY WITHIN A REASONABLE TIME"

What constitutes a "reasonable time" is a discretionary determination, as this Court described in *Federated Publications, Inc, supra* at 106-107. Thus, the trial court's determination is subject to review for an abuse of discretion. *Herald Co, supra* at 471-472. This Court "cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Id.* at 472. The trial court's decision that defendant recorded a description of the side letters within a reasonable time after their submission to defendant, MCL 15.243(1)(f)(*iii*), did fall within the principled range of outcomes.

Even after defendant and Sandstone agreed to settle Sandstone's multimillion dollar judgment against defendant, they continued to negotiate questions regarding deed restrictions on the subject property. Sandstone believed that certain of the seven side letters (including the two letters at issue) had been submitted upon defendant's promise of confidentiality and hence were exempt from disclosure under the FOIA. While defendant agreed that some of the letters had been submitted upon a promise of confidentiality, it kept open the possibility that the letters might not be exempt under the FOIA. Defendant thus negotiated with Sandstone to determine which of the letters might be voluntarily disclosed under the FOIA. These negotiations continued until Sandstone eventually agreed to disclose five of the seven letters on November 26, 2002, the same day

that defendant recorded the descriptions and filed them with the city clerk. Defendant did not know whether it was going to assert an FOIA exemption regarding these side letters until its negotiations with Sandstone ended. If defendant had recorded the information contained in all of these letters and asserted the "trade secrets or commercial or financial information" exemption earlier than it did, Sandstone might not have agreed to disclose five of the letters.

The majority's holding that defendant's delay in recording descriptions of the side letters was unreasonable is inconsistent with the statutory language. By using the phrase "*reasonable* time," the Legislature made clear that the permissible time period can vary. MCL 15.243(1)(f)(*iii*) does not define what constitutes a "reasonable time." But this Court has defined "reasonable time" as follows: "By reasonable time is to be understood such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay . . . ." *Maley-Thompson & Moffett Co v Thomas Forman Co*, 179 Mich 548, 555; 146 NW 95 (1914). Yet the majority disregards the word "reasonable" in the statute by holding that the circumstances surrounding defendant's recording of the descriptions, including the negotiations between defendant and Sandstone, are "irrelevant," *ante* at 574, and by concluding that the delay was unreasonable because, despite the circumstances, "defendant was still required to comply with the provisions of MCL 15.243(1)(f)," *ante* at 576. The majority holds that defendant was required to record descriptions earlier than it did "[h]owever inconvenient the recording requirement may have been to defendant and Sandstone," *ante* at 575-576, and despite "whether defendant could later secure Sandstone's permission to release the side letters," *ante* at 576. In so holding, the

majority consciously shifts the focus away from whether defendant's actions were *reasonable in this case*. To say, as the majority does, that the negotiations between defendant and Sandstone are irrelevant is to say that defendant was required to record the descriptions of the side letters within a certain unspecified time regardless of what time was reasonable under the circumstances. This is contrary to the text of the statute.

The majority holds that the negotiations between defendant and Sandstone were irrelevant to the statutory obligation to record descriptions of the side letters within a reasonable time because the statutory exemption's recording requirement is intended to provide notice to the public. In support of this holding, the majority states that plaintiffs would never have discovered the existence of the side letters if they had not accidentally happened on a reference to the side letters.[2] The majority's reasoning appears to be based on the faulty assumption that defendant never recorded the descriptions of the side letters. Defendant *did* give plaintiffs notice of the side letters when it recorded the descriptions on November 26, 2002. Thus, plaintiffs would have received notice within a reasonable time that defendant possessed the side letters even if plaintiffs had not discovered the letters before defendant recorded the descriptions. Further, the statute does not create a race between the requesting party and the public body. That plaintiffs discovered the existence of the side letters before defendant recorded the descriptions does not necessarily mean that defendant did not record the descriptions within a reasonable time. I do not question that the public body must record the

[2] Plaintiffs learned of the side letters upon examining a nonfinal draft of the agreement that was voluntarily disclosed by defendant.

descriptions and give notice to the public in order to comply with MCL 15.243(1)(f)(*iii*). But the issue is not whether defendant gave notice that it possessed the side letters before plaintiffs discovered the side letters, but whether defendant gave notice *within a reasonable time* that it possessed the side letters. This case does not involve the situation cited by the majority in which the "requesting party [is required to] seek disclosure of a document of which it was unaware." *Ante* at 576.

The majority believes that the four-month delay was unreasonable simply because it was too long. The majority effectively holds that whether the public body met the requirements of MCL 15.243(1)(f)(*iii*) depends only on the length of time the public body takes to record a description of the information, rather than whether that amount of time was reasonable under the circumstances. If the Legislature had not intended for the time to vary with the circumstances, it would have imposed a definite time limitation on the public body recording the description, rather than stating that the description must be recorded within a reasonable time.

Additionally, after having recited the appropriate standard of review, the majority nonetheless engages in a review de novo. Given the unusual situation presented by these facts, in which defendant waited to record the descriptions until negotiations regarding disclosure had concluded, the trial court accorded leeway in the recording process to defendant. There is good reason behind the abuse of discretion standard we articulated in *Herald Co, supra* at 471-472. The trial court is given the discretion to determine what amount of time is reasonable precisely so that it may take into account the public body's recording of the description in each case and examine why the recording took the amount of time it did under the circumstances. Allow-

ing the trial court the discretion to determine what amount of time is reasonable under the circumstances does not defeat the purpose of the recording requirements of the statute. Both the trial court and the Court of Appeals held that defendant recorded the description of the side letters within a reasonable time. This reasoned outcome accounts for defendant's decision to record the descriptions after the conclusion of successful negotiations between defendant and Sandstone. The trial court's determination fell within the principled range of outcomes. *Id.* at 472. The trial court did not abuse its discretion in determining that defendant recorded descriptions of the information within a reasonable time after they were submitted.

B. "SUBMITTED UPON A PROMISE OF CONFIDENTIALITY"

In one of the side letters (Letter 1), Sandstone stated that "[t]he terms of this letter are confidential under all respects, not subject to disclosure and would not be covered by any FOIA request." The other side letter (Letter 2) was submitted with and related to Letter 1. Thus, Sandstone expressly stated that the letters were confidential. But to satisfy the exemption, the information must be submitted upon a promise of confidentiality *by the public body*. Defendant satisfied this requirement by offering the unrebutted affidavit of Ronald Hughes, the Sandstone partner who had signed the side letters. Hughes stated that defendant promised to keep the letters confidential before Sandstone sent them to defendant. He averred that the letters "were expressly submitted and conditioned on their confidentiality contemporaneous with their execution . . . ." Plaintiffs failed to offer any evidence in rebuttal. In light of Hughes's uncontested affidavit, the trial court did not

err in finding no genuine issue of material fact that the letters were submitted upon defendant's promise of confidentiality.

C. "AUTHORIZED BY THE CHIEF ADMINISTRATIVE OFFICER OF THE PUBLIC BODY OR BY AN ELECTED OFFICIAL"

Hughes also stated in his affidavit that "Sandstone understood that the promise of confidentiality was both known and authorized by the Mayor and City Manager, at the time of the letters[']execution, and Sandstone would not have submitted the letters absent such a promise of confidentiality from the City of Novi." As noted, plaintiffs failed to rebut this affidavit. Thus, the trial court did not err in finding no genuine issue of material fact that the chief administrative officer or an elected official had promised confidentiality.

D. "FOR USE IN DEVELOPING GOVERNMENTAL POLICY"

Finally, I agree with the lower courts that the two side letters at issue contain financial or commercial information that was "for use in developing governmental policy." MCL 15.143(1)(f). The FOIA does not define "governmental policy." This Court has never interpreted this phrase in the context of the FOIA. Further, courts in other jurisdictions interpreting their own FOIAs have never defined this phrase.[3] It is thus difficult to form a precise definition of "governmental

[3] Other jurisdictions have interpreted their own versions of the "trade secrets or commercial or financial information" exemption. None of these jurisdictions has statutes that include the "governmental policy" language found in Michigan's exemption. For example, numerous federal courts have interpreted the federal FOIA provision that exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" 5 USC 552(b)(4). But the federal exemption does not require that the information be provided "for use in developing governmental policy."

policy." Governments claim authority and responsibility over large groups of individuals, and the methods they employ to decide how to carry out their numerous functions vary widely. Nonetheless, this Court has defined "policy" in the employment contract context as " 'a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions; . . . a projected program consisting of desired objectives and the means to achieve them . . . .' " *In re Certified Question (Bankey v Storer Broadcasting Co)*, 432 Mich 438, 455-456; 443 NW2d 112 (1989), quoting *Webster's Third New International Dictionary, Unabridged Edition* (1964); see also Silberman, Chevron —*The intersection of law & policy*, 58 Geo Wash L R 821, 822 (1990) (offering a similar definition).[4] This definition applies equally to the term "policy" in the

[4] I distinguish the phrase "governmental policy" from the phrase "public policy" because these phrases are generally used to convey different meanings. In *Terrien v Zwit*, 467 Mich 56, 68 n 13; 648 NW2d 602 (2002), this Court declined to define "public policy," but held that "public policy is defined by reference to the laws actually enacted into policy by the public and its representatives." As the Court observed in *Skutt v Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936), quoting *Pittsburgh, C, C & St L R Co v Kinney*, 95 Ohio St 64; 115 NE 505 (1918):

> "What is the meaning of 'public policy?' A correct definition, at once concise and comprehensive, of the words 'public policy', has not yet been formulated by our courts. . . . In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation."

Thus, "public policy" is used as a *basis* for governmental decisions, rather than being a "course or method of action" for making present or future decisions.

FOIA exemption at issue, and I would adopt it here. I emphasize that this definition does not encompass every decision regarding a course of action made by a governmental entity. Obviously, governmental bodies adopt many courses of action that do not guide present or future decisions. Such decisions may be categorized as "operational" decisions rather than "policy" decisions. Operational decisions concern routine, everyday matters and do not require evaluation of broad policy factors. See *Rogers v State*, 51 Hawaii 293, 296-298; 459 P2d 378 (1969) (interpreting a "discretionary function" exception to governmental immunity). Operational decisions may also be characterized as "the execution or implementation of previously formulated policy." *Hanson v Vigo Co Bd of Comm'rs*, 659 NE2d 1123, 1126 (Ind App, 1996) (also interpreting a "discretionary function" exception to governmental immunity).[5]

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[5] In interpreting the "discretionary function" exception to its governmental immunity statute, the Arizona Court of Appeals offered contrasting examples of operational, as opposed to policy, decisions:

> By way of illustration, a decision by the district board to construct a playground at a school and allocate funds for that purpose would be a policy decision protected by immunity. Deciding what specific pieces of equipment to have on the playground would not be a policy decision, but rather would be an operational level decision. *See, e.g.*, *Warrington v. Tempe Elementary Sch. Dist.*, [187 Ariz 249, 252; 928 P2d 673 (Ariz App, 1996)] (school district's decision regarding placement of bus stop is an operational level decision); *Evenstad* [*v State*], 178 Ariz. [578] at 582-84, 875 P.2d [811] at 815-17 (App. 1993) (issuance of driver's license by MVD is an operational level decision; prescribing rules for issuance is making of policy); *Rogers v. State*, 51 Haw. 293, 296-98, 459 P.2d 378, 381 (Haw. 1969) (operational level acts concern routine, everyday matters, not requiring evaluation of broad policy factors; operational acts include kinds of road signs to place and which center line stripes to repaint); *Stevenson v. State Dept. of Transp.*, 290 Or. 3, 9-12, 619 P.2d 247, 251-52 (Or. 1980) (decision to build a highway rather than a railroad track is exercise of governmental

Although the Court of Appeals correctly ruled that the side letters were provided to defendant for use in developing governmental policy, the panel's reasoning in reaching this conclusion was faulty. The panel stated that "[t]he information in the side letters clearly concerned public policy" because "[i]t related to how defendant intended to settle the Sandstone litigation, a situation with the potential to bankrupt defendant and seriously affect its residents." *Coblentz v Novi,* 264 Mich App 450, 458; 691 NW2d 22 (2004). The agreement was of overarching importance to defendant and the development of defendant's policy because it settled the Sandstone judgment against defendant, which could have bankrupted defendant and affected its residents by causing budget cuts and tax increases or assessments against each resident. Nonetheless, because the side letters were sent *after* defendant entered into the agreement with Sandstone, they did not affect whether defendant entered into the agreement, and accordingly did not affect whether defendant went bankrupt. The letters did not alter or void the agreement if defendant

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> discretion or policy judgment entitled to immunity; planning and design of the road does not involve use of discretion in the sense that a policy decision is required). [*Schabel v Deer Valley Unified School Dist No 97*, 186 Ariz 161, 166; 920 P2d 41 (Ariz App, 1996).]

See also *Gutbrod v Hennepin Co*, 529 NW2d 720, 723 (Minn App, 1995) (citations omitted) ("Planning level decisions . . . involve questions of public policy and the balancing of competing policy objectives. . . . [O]perational level decisions relate 'to the ordinary day-to-day operations of the government' and involve the exercise of scientific or professional judgment.").

I recognize that the FOIA exemption at issue is worded differently than, and applied differently from, the governmental immunity statutes in these cases. Nonetheless, I find persuasive the analyses of "policy" versus "operational" in these cases in interpreting what constitutes "policy" within the meaning of Michigan's "trade secrets or commercial or financial information" exemption.

was unable to clear the deed restrictions or convince plaintiffs to sell their properties. Because the agreement had already settled the Sandstone judgment when the side letters were sent, the danger of this judgment causing defendant to go bankrupt had abated. Thus, the side letters were not provided to defendant for use in developing its policy to discharge the Sandstone judgment and avoid bankruptcy.

Nonetheless, defendant did use the side letters in developing governmental policy. The agreement expressly provided that defendant would forfeit additional public land (either 4.8 or 9.6 acres at Sandstone's option) if it failed to purchase plaintiffs' properties or otherwise clear the deed restrictions on the properties. Thus, the agreement demonstrates that before the side letters were sent, defendant had already made the policy decision that it would agree either to find a way to remove the deed restrictions on plaintiffs' property or to relinquish additional parkland. But at the time defendant entered the agreement, it had not yet decided which of these two alternatives it would choose. The agreement itself contained no policy to assist in this decision. Because the decision whether to remove the deed restrictions or forfeit additional parkland was not a routine decision that merely required application of policy developed in the agreement, defendant had a remaining policy decision to make after it entered into the agreement. That defendant had already agreed on the two alternatives before the side letters were sent did not alter defendant's need to develop policy in order to choose between these two alternatives.

The side letters confirm the deed restrictions on the properties and the amount Sandstone would pay defendant for plaintiffs' properties once they were free from restrictions. By offering in the letters to advance all or

part of the money to defendant to purchase plaintiffs' properties, Sandstone sought to influence defendant's decision whether to purchase plaintiffs' properties, pay plaintiffs to waive the right to enforce their deed restrictions, or forfeit additional public land to Sandstone. Because disclosure of the letters would reveal to plaintiffs the amount Sandstone was willing to pay for their properties, it would also affect defendant's ability to purchase plaintiffs' properties. Defendant's decision regarding whether to attempt to purchase plaintiffs' properties or try to lift the deed restrictions on the properties not only directly affected plaintiffs individually, but it also affected the residents of the city because it determined whether defendant would be forced to forfeit several acres of property set aside for public use. If defendant decided to purchase plaintiffs' properties, it would result in large expenditures of public funds, which would affect defendant's budget and its residents. On the other hand, if defendant was unable to lift the deed restrictions or decided not to purchase plaintiffs' properties, defendant would forfeit additional public property to Sandstone. The loss of this additional land would affect all of defendant's residents.[6]

Regardless of defendant's ultimate decision, the information in the side letters was provided for use in guiding defendant's management of public affairs. The letters affected a budgetary decision concerning allocation and substantial expenditure of public funds to retain public land. Thus, the letters were provided to

[6] Thus, this case is distinguishable from *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 85; 669 NW2d 862 (2003), in which the Court of Appeals held that the "trade secrets or commercial or financial information" exemption did not apply because the *single* individual tax determination "lack[ed] the policy-making potential contemplated by the Legislature in drafting this exemption to the FOIA."

defendant to develop a course of action that would materially affect the future of its citizens. The letters did not involve a mere operational decision regarding a routine matter for which a policy was already in place. Defendant's decision on how to deliver its governmental functions within its budget obviously constituted a policy decision. Thus, the Court of Appeals did not err in holding that the side letters contained financial or commercial information provided to defendant for use in developing governmental policy.

III. CONCLUSION

I dissent from the majority's conclusion that plaintiffs were entitled to disclosure of the side letters. In my opinion, the trial court did not abuse its discretion in determining that defendant recorded descriptions of the side letters within a reasonable time after they were submitted. Because defendants met all of the other requirements of the "trade secrets or commercial or financial information" exemption of the FOIA, the side letters were exempt from disclosure.

RADELJAK v DAIMLERCHRYSLER CORPORATION

Docket No. 127679. Argued November 10, 2005 (Calendar No. 8). Decided July 19, 2006.

Josip Radeljak, individually, as personal representative of the estate of Ena Begovic, deceased, and as next friend of Lana Radeljak; Leo Radeljak; and Tereza Begovic brought an action in the Wayne Circuit Court against DaimlerChrysler Corporation, seeking damages arising from an automobile accident in Croatia involving an automobile manufactured in Michigan. The plaintiffs, who are citizens and residents of Croatia, alleged that a defect in the transmission of the vehicle caused the accident. The transmission was designed and manufactured in Japan and installed in the defendant's vehicle in Michigan. The vehicle was purchased in Italy and maintained and serviced in Italy and Croatia. The circuit court, John A. Murphy, J., dismissed the action on the basis of the doctrine of forum non conveniens. The plaintiffs appealed, and the Court of Appeals, CAVANAGH, P.J., and JANSEN and FORT HOOD, JJ., reversed, holding that the circuit court abused its discretion because Wayne County is not a "seriously inconvenient" forum. Unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 247781). The Supreme Court granted the defendant's application for leave to appeal, asking the parties to address whether the public interest factors of the forum non conveniens doctrine set forth in *Cray v Gen Motors Corp*, 389 Mich 382 (1973), should be revised or modified and whether, even if another more appropriate forum exists, a Michigan court may not resist jurisdiction unless its own forum is "seriously inconvenient." 472 Mich 924 (2005).

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

The circuit court did not abuse its discretion in dismissing the case on the basis of the forum non conveniens doctrine. The judgment of the Court of Appeals must be reversed and the order of the circuit court dismissing the case must be reinstated.

1. The following factors should be considered in determining whether a case should be dismissed on the basis of the forum non conveniens doctrine.

(1) The private interest of the litigant.

(a) The availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;

(b) ease of access to sources of proof;

(c) distance from the situs of the accident or incident that gave rise to the litigation;

(d) enforceability of any judgment obtained;

(e) possible harassment of either party;

(f) other practical problems that contribute to the ease, expense, and expedition of the trial; and

(g) possibility of viewing the premises.

(2) Matters of public interest.

(a) Administrative difficulties that may arise in an area that may not be present in the area of origin;

(b) consideration of the state law that must govern the case;

(c) people who are concerned by the proceeding;

(3) Reasonable promptness in raising the plea of forum non conveniens.

2. The overwhelming majority of the factors supports the trial court's decision that Croatia is the most appropriate forum for this case. The trial court's decision does not fall outside the principled range of outcomes and was not an abuse of discretion.

3. Dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to take advantage of favorable law.

4. When a foreign plaintiff chooses to file a lawsuit in Michigan the trial court should give the plaintiff's choice of forum less deference than that accorded to a domestic plaintiff's choice of forum.

5. The decision in *Robey v Ford Motor Co*, 155 Mich App 643 (1986), must be overruled to the extent that it held that a court cannot decline jurisdiction unless the exercise of such jurisdiction would be seriously inconvenient.

Justice MARKMAN, concurring, wrote separately to identify the following additional "public interest" factors that should be considered when determining whether a case should be dismissed on

the basis of the forum non conveniens doctrine: (1) the extent to which it is appropriate for the state to enable a foreign plaintiff to avail himself or herself of the more favorable substantive law and procedural rules afforded by state courts in comparison with those of the plaintiff's own jurisdiction; (2) the extent to which resolving a particular legal dispute in a state court may compromise principles of judicial comity and undermine respect for the judicial sovereignty of a foreign jurisdiction; (3) the interests of the state in establishing and enforcing standards that domestic businesses and manufacturers must satisfy in selling their products abroad as compared to the foreign jurisdiction's interest in establishing and enforcing standards that foreign businesses and manufacturers must satisfy in selling their products within its borders; (4) the interests of the state in shaping the law within a particular substantive realm as compared to the foreign jurisdiction's interest in shaping the law within a particular substantive realm; (5) the extent to which accommodating the instant lawsuit in this state will have consequences for the numbers and types of future lawsuits heard by state courts; and (6) the interests of the state in expending its limited judicial resources, and in requiring jury service of its citizens, in trying a case.

Justice CAVANAGH, concurring in part and dissenting in part, stated his agreement with the majority that the trial court's decision to dismiss the action on the basis of forum non conveniens was within the principled range of outcomes and that a so-called seriously inconvenient standard, to the extent that it is distinct from, or inconsistent with, the factors set forth in *Cray v Gen Motors Corp* is inappropriate. However, because this case can be decided solely by reference to *Cray*, the majority should not adopt the reasoning set forth in *Piper Aircraft Co v Reyno*, 454 US 235 (1981).

Court of Appeals judgment reversed and trial court order of dismissal reinstated.

Justice KELLY, dissenting, would affirm the judgment of the Court of Appeals and remand the matter to the trial court for a trial on the basis that the trial court abused its discretion in dismissing this case because of forum non conveniens. A defendant must be faced with strong or significant inconvenience, such as vexation, harassment, or oppression to warrant a dismissal based on forum non conveniens. Only when a forum is completely inappropriate and inconvenient so that it is better to stop, is forum non conveniens appropriate. The "seriously inconvenient" requirement recognized in *Robey v Ford Motor Co* assures that this

standard is met. This standard is not inconsistent with the balancing test of *Cray v Gen Motors Corp*. The seriously inconvenient standard is well founded in our law because the Michigan Supreme Court noted it with approval when first recognizing forum non conveniens in Michigan. The trial court did not determine that the Wayne Circuit Court was a seriously inconvenient forum. Therefore, it could not conclude that the balance tipped so strongly in favor of the defendant that the plaintiffs' choice of forum warrants disturbance.

The trial court did not properly conduct the *Cray* balancing test. When the factors are properly weighed, the Wayne Circuit Court is not a significantly inconvenient forum and neither forum is strongly favored, but rather the two are equally matched.

There is no need to add to the *Cray* factors. The majority should not adopt the statement in *Piper Aircraft Co v Reyno* that a foreign plaintiff's choice of forum should be accorded somewhat less deference. Such discrimination is inappropriate and unnecessary because application of the *Cray* factors would properly locate the correct forum. However, even under *Piper*, dismissal is not warranted under forum non conveniens because of the balance of conveniences and the fact that a foreign national's choice of forum is still accorded some deference.

1. COURTS — JURISDICTION — FORUM NON CONVENIENS.

A court may refuse to hear a case on the basis of the doctrine of forum non conveniens even though it otherwise may have jurisdiction; the application of the doctrine lies within the discretion of the trial court; the ultimate inquiry for the court is where trial will best serve the convenience of the parties and the ends of justice; Michigan does not follow a rule that a court may not decline jurisdiction under the doctrine unless its own forum is "seriously inconvenient."

2. COURTS — JURISDICTION — FORUM NON CONVENIENS.

Dismissal of an action on the basis of the forum non conveniens doctrine may be warranted where the plaintiff chose the forum not because it is convenient, but solely in order to take advantage of favorable law.

3. COURTS — JURISDICTION — FORUM NON CONVENIENS.

The trial court should give a foreign plaintiff's choice of forum less deference than that accorded to a domestic plaintiff's choice of forum.

Sommers Schwartz, P.C. (by *B. A. Tyler* and *James N. McNally*), for the plaintiffs.

Bush Seyferth Kethledge & Paige PLLC (by *Raymond M. Kethledge*) for the defendant.

Amici Curiae:

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

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

Donald M. Fulkerson for Michigan Trial Lawyers Association.

PER CURIAM. We granted leave to appeal to consider whether the Wayne Circuit Court abused its discretion in dismissing this case on the basis of the doctrine of forum non conveniens, where plaintiffs are residents and citizens of a foreign country and the lawsuit alleges product liability arising from a motor vehicle accident that occurred outside the United States. The Court of Appeals held that the circuit court abused its discretion in dismissing the case because Wayne County is not a "seriously inconvenient" forum. Because we conclude that the circuit court did not abuse its discretion in dismissing the case, we reverse the judgment of the Court of Appeals and reinstate the circuit court's order dismissing the case.

I. FACTS

Plaintiffs, who are residents and citizens of Croatia, were involved in a motor vehicle accident in Croatia. It is alleged that the Jeep Grand Cherokee in which they were seated somehow shifted from park into reverse

and went off the roadway and into a ravine. One of the passengers died and the driver and other passengers were injured. The vehicle was designed and manufactured in Michigan. The vehicle was purchased in Italy and maintained and serviced in Italy and Croatia. Plaintiffs argue that the transmission, designed and manufactured in Japan, spontaneously slipped. Plaintiffs filed their lawsuit in the Wayne Circuit Court.

Defendant moved for summary disposition on the basis of forum non conveniens. The circuit court granted the motion. Plaintiffs appealed and the Court of Appeals reversed.[1] We granted defendant's application for leave to appeal and asked the parties to address:

> (1) whether the public interest factors of the forum non conveniens doctrine set forth in *Cray v Gen Motors Corp*, 389 Mich 382, 396 [207 NW2d 393] (1973), should be revised or modified; and (2) whether, even if another more appropriate forum exists, a Michigan court may not resist jurisdiction unless its own forum is "seriously inconvenient." See *Robey v Ford Motor Co*, 155 Mich App 643, 645 (1986).[2]

II. STANDARD OF REVIEW

This Court reviews a trial court's decision to grant or deny a motion to dismiss a case on the basis of the doctrine of forum non conveniens for an abuse of discretion. *Cray, supra* at 397. An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *Herald Co v Eastern Michigan Univ Bd of Regents,* 475 Mich 463; 719 NW2d 19 (2006); *Novi v Robert Adell Children's*

[1] Unpublished opinion per curiam, issued December 14, 2004 (Docket No. 247781).

[2] 472 Mich 924, 925 (2005).

Funded Trust, 473 Mich 242, 254; 701 NW2d 144 (2005).

III. ANALYSIS

"Forum non conveniens" is defined as the "discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." Black's Law Dictionary (6th ed). The doctrine is not derived from statutes; rather, it is a common-law doctrine created by courts.[3] The United States Supreme Court adopted the forum non conveniens doctrine in 1947. *Gulf Oil Corp v Gilbert*, 330 US 501, 508-509; 67 S Ct 839; 91 L Ed 1055 (1947).[4] This Court first recognized this doctrine in 1973 in *Cray.* In *Cray, supra* at 395, we held that a court may refuse to hear a case on the basis of the doctrine of forum non conveniens even though it otherwise may have jurisdiction. "The principle of *forum non conveniens* establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked." *Id.* The application of forum non conveniens "lie[s] within the discretion of the trial judge." *Id.* A plaintiff's selection of a forum is ordinarily accorded deference. *Anderson v Great Lakes Dredge & Dock Co*,

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[3] Const 1963, art 3, § 7 provides:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

As noted in *Placek v Sterling Hts*, 405 Mich 638, 656-657; 275 NW2d 511 (1979), this Court may change the common law through its decisions.

[4] Superseded by statute on other grounds, as explained in *American Dredging Co v Miller*, 510 US 443, 449 n 2; 114 S Ct 981; 127 L Ed 2d 285 (1994).

411 Mich 619, 628-629; 309 NW2d 539 (1981). Although "a court can and must consider the residence of the parties in deciding whether to decline jurisdiction[,] . . . a party's Michigan residence does not automatically render the doctrine of *forum non conveniens* inapplicable." *Russell v Chrysler Corp*, 443 Mich 617, 624; 505 NW2d 263 (1993).[5] " '[T]he ultimate inquiry is where trial will best serve the convenience of the parties [and the ends] of justice.' " *Cray, supra* at 391, quoting *Koster v (American) Lumbermens Mut Cas Co*, 330 US 518, 527; 67 S Ct 828; 91 L Ed 1067 (1947). In *Cray* we held that the following factors should be considered in deciding a motion to dismiss on the basis of forum non conveniens:

1. The private interest of the litigant.

   a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;

   b. Ease of access to sources of proof;

   c. Distance from the situs of the accident or incident which gave rise to the litigation;

   d. Enforcibility [sic] of any judgment obtained;

   e. Possible harassment of either party;

   f. Other practical problems which contribute to the ease, expense and expedition of the trial;

   g. Possibility of viewing the premises.

2. Matters of public interest.

   a. Administrative difficulties which may arise in an area which may not be present in the area of origin;

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[5] "[The place] of corporate domicile . . . might be entitled to little consideration under the doctrine of *forum non conveniens*, which resists formalization and looks to the realities that make for doing justice." *Koster v (American) Lumbermens Mut Cas Co*, 330 US 518, 528; 67 S Ct 828; 91 L Ed 1067 (1947).

b. Consideration of the state law which must govern the case;

c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. [*Cray, supra* at 396.]

In the instant case, the trial court dismissed on the basis of forum non conveniens. The trial court determined that Croatia was a more convenient forum because this case involves a vehicular accident in Croatia in which Croatian citizens and residents were injured, where Croatian law will likely have to be applied, and the alleged cause of the accident was a transmission manufactured and designed in Japan. This conclusion does not fall outside "the principled range of outcomes," *Novi, supra* at 254, and was therefore not an abuse of discretion.

A review of the *Cray* factors reveals why the trial court's decision to dismiss was within "the principled range of outcomes." *Id.* We begin by noting that the requirement of reasonable promptness in bringing a plea of forum non conveniens has indisputably been satisfied in this case, because defendant moved for dismissal based on the doctrine of forum non conveniens in a timely manner. With that procedural predicate addressed, we now turn to the private and public interest factors that are in considerable dispute.

The first factor concerns the "private interest of the litigant." *Cray, supra* at 396. Subfactor 1(a) pertains to the "[a]vailability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses." *Id.* It is undisputed that Michigan courts lack powers of compulsory process over witnesses in Croatia.[6] If trial were held in Michigan,

[6] As the United States Supreme Court has explained, "[T]o fix the place of trial at a point where litigants cannot compel personal attendance [of

defendant would be forced to use "letters rogatory" in order to obtain testimony from any foreign witnesses who could not voluntarily travel to Michigan for trial.[7] The use of letters rogatory is acknowledged to be a very time consuming and cumbersome process.[8] However, this subfactor cuts the other way as well because it is also undisputed that Croatian courts lack powers of compulsory process over witnesses in Michigan. Further, even if all the witnesses are willing to travel in order to testify, the cost of obtaining the attendance of these witnesses will be high regardless of whether this case is tried in Croatia or in Michigan; obviously, if this case is tried in Croatia, all the Michigan witnesses will have to travel to Croatia to testify and if this case is tried in Michigan, all the Croatian witnesses will have to travel to Michigan to testify. Therefore, subfactor 1(a) does not clearly favor one forum over the other where the difficulties implicit in the travel arrangements would be identical. Subfactor 1(b) concerns the "[e]ase of access to sources of proof." *Cray, supra* at 396. The trial court concluded that, because the accident occurred in Croatia, a Croatian court will have easier access to sources of proof and it will be easier for defendant to obtain documents relating to the accident in Croatia. Although all the documentary evidence pertaining to the choice of transmission for the vehicle is in Michigan, it would be easier for plaintiffs to obtain

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witnesses] and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Gulf Oil Corp, supra* at 511.

[7] See the United States Department of State website at <http://travel.state.gov/law/info/judicial/judicial_695.html> (accessed April 26, 2006).

[8] *Illusorio v Illusorio-Bildner*, 103 F Supp 2d 672, 677 (SD NY, 2000); United States Department of State website at <http://travel.state.gov/law/info/judicial/judicial683.html> (accessed April 26, 2006).

these Michigan documents if the trial were held in Croatia than it would be for defendant to obtain the Croatian documents if trial were held in Michigan because MCR 2.305 authorizes subpoenas for document production in connection with an action pending in another country and we are aware of no similar Croatian provision, nor have plaintiffs cited any. Therefore, subfactor 1(b) favors the Croatian forum over the Michigan forum.

Subfactor 1(c) concerns the "[d]istance from the situs of the accident or incident which gave rise to the litigation." *Cray, supra* at 396. Michigan is a great distance from the situs of the accident, i.e., Croatia. However, plaintiffs argue that this is not controlling because the specific incident that gave rise to this litigation was defendant's choice of transmission, which occurred in Michigan. This subfactor does not favor one forum over the other.

Subfactor 1(d) concerns the "[e]nforcibility [sic] of any judgment obtained." *Cray, supra* at 396. It is uncontested that a judgment in this case would be enforceable whether rendered by a Michigan court or a Croatian court. Therefore, subfactor 1(d) does not favor one forum over the other.

Subfactor 1(e) concerns the "[p]ossible harassment of either party." *Id.* Neither party has argued harassment. Therefore, subfactor 1(e) does not favor one forum over the other.[9]

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[9] Justice KELLY argues in her dissent that the harassment factor favors Michigan as a forum. We disagree. Indeed, even after the Court of Appeals concluded that this factor favored Michigan as a forum, plaintiffs state as follows in their brief: "There is no cause for accusation of 'harassment of either party' herein." (Plaintiff's brief, p 15). Thus, with reference to this factor, Justice Kelly is advancing an argument the plaintiffs do not even make.

Subfactor 1(f) concerns "[o]ther practical problems which contribute to the ease, expense and expedition of the trial." *Id.* If this case is tried in Michigan, defendant will not be able to implead Croatian persons or entities that may be responsible for plaintiffs' injuries. As the United States Supreme Court has held, "the problems posed by the inability to implead potential third-party defendants" is "sufficient to support dismissal on grounds of *forum non conveniens*." *Piper Aircraft Co v Reyno*, 454 US 235, 259; 102 S Ct 252; 70 L Ed 2d 419 (1981). Therefore, subfactor 1(f) favors the Croatian forum over the Michigan forum.

Subfactor 1(g) concerns the "[p]ossibility of viewing the premises." *Cray, supra* at 396. If this case is tried in Michigan, it will not be possible for the trier of fact to view the scene of the accident because the accident occurred in Croatia. Therefore, subfactor 1(g) favors the Croatian forum over the Michigan forum.

In sum, three of the "private interest" subfactors favor the Croatian forum over the Michigan forum, and four of these subfactors do not favor one forum over the other. None of the "private interest" subfactors favors the Michigan forum over the Croatian forum. Therefore, "[t]he private interest[s] of the litigant," *Cray, supra* at 396, favor the Croatian forum over the Michigan forum.

Justice KELLY maintains, on the basis of statements by foreign witnesses that they are willing to travel to Michigan to testify, that defendants would have less trouble bringing reluctant Croatian witnesses to testify in Michigan than plaintiffs would have in bringing reluctant defense witnesses to Croatia. This belief, however, is merely speculative and without force. In weighing this factor, a trial court could not rely on the purported intention of foreign witnesses because, as Justice KELLY concedes, a trial court in Michigan cannot compel foreign witnesses to appear. Therefore, Justice KELLY is incorrect that this subfactor favors Wayne County as the proper forum.

The second broad *Cray* factor pertains to "[m]atters of public interest." *Id.* Subfactor 2(a) concerns "[a]dministrative difficulties which may arise in an area which may not be present in the area of origin." *Id.* As the United States Supreme Court has explained, "[a]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gilbert, supra* at 508. If every automotive design defect case against Michigan-based automobile manufacturers must be heard in Wayne County if a foreign plaintiff so desires, there will certainly be increased congestion in an already congested local court system. It can hardly be argued that Croatia would face increased court congestion. Unlike Michigan, Croatia is not a recognized center for automotive design, engineering, and manufacturing, or to our knowledge, a center for litigation concerning automotive design defects. Therefore, subfactor 2(a) generally favors the Croatian forum over the Michigan forum.

Subfactor 2(b) concerns "[c]onsideration of the state law which must govern the case." *Cray, supra* at 396. If this case is tried in Wayne County, the Wayne Circuit Court will most likely have to apply Croatian law. In order to determine whose laws apply, courts look to see which jurisdiction has a greater interest in the case. *Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274, 286; 562 NW2d 466 (1997). Croatia appears to have a greater interest in this case than does Michigan because it involves residents and citizens of Croatia who were injured in an accident in Croatia. Therefore, Croatian law would most likely apply in this case. See *Farrell v Ford Motor Co*, 199 Mich App 81; 501 NW2d 567 (1993) (holding that North Carolina law applies in a defective automobile action involving a North Carolina resident, a North Carolina accident, and a vehicle purchased in North Carolina). As the United States Supreme Court has explained, "[t]here is an appropri-

ateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gilbert, supra* at 509. Accordingly, "the need to apply foreign law favors dismissal." *Piper, supra* at 260 n 29. Therefore, subfactor 2(b) favors the Croatian forum over the Michigan forum.

Subfactor 2(c) concerns "[p]eople who are concerned by the proceeding." *Cray, supra* at 396. The people of Croatia obviously are concerned by this proceeding given that several Croatian citizens and residents were injured and one was killed in an accident that occurred in that country. As the United States Supreme Court has explained, "[t]here is a local interest in having localized controversies decided at home." *Gilbert, supra* at 509. The "localized controversy" involved in this case concerns whether defendant is liable for injuries suffered by Croatian citizens and residents in Croatia. Croatia obviously has a considerable "local interest" in determining the redress available to its citizens and residents who are injured in Croatia. That is, Croatia has a "local interest" in having this "localized controversy" decided by its own rules and procedures. On the other hand, there is no denying that Michigan citizens have an interest in products-liability lawsuits filed against Michigan manufacturers. On the whole, however, for the reasons we discussed concerning subfactor 2(b), we conclude that Croatia's interest is greater than Michigan's interest. Therefore, subfactor 2(c) favors a Croatian forum.

In sum, the three *Cray* "public interest" subfactors favor the Croatian forum over the Michigan forum. None of them favors a Michigan forum. Thus, the "[m]atters of public interest," *Cray, supra* at 396, favor

the Croation forum over the Michigan forum. Therefore, an analysis of both the "private interest" and "public interest" factors of *Cray* demonstrates that the trial court's decision that Croatia is the most appropriate forum for this case was within the principled range of outcomes.

In *Cray,* this Court held that the factors listed in its 1973 opinion were not the only factors that could ever be considered. *Id*. at 395. As we explained, " '[w]isely it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy' "; rather, " '[t]he doctrine leaves much to the discretion of the court to which the plaintiff resorts . . . .' " *Cray, supra* at 395, quoting *Gilbert, supra* at 508. In response to our invitation to brief whether the *Cray* public interest factors should be revised or modified, defendant argues that we should explicitly follow the United States Supreme Court's lead from *Piper, supra* at 257, in stating that a foreign plaintiff's choice of forum in entitled to "less deference" than would apply to a domestic plaintiff.

In *Piper* the United States Supreme Court expressed its concern regarding allowing foreign plaintiffs to sue American businesses and manufacturers in America on the basis that American law is more favorable to plaintiffs as a class than is foreign law. *Piper, supra* at 252. The Court explained, "American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive [if dismissal was barred whenever the law in the alternative forum were less favorable to the plaintiff].[10] The flow of litigation into the United States would increase and further congest

[10] The United States Supreme Court explained that the following factors make the United States "extremely attractive to foreign plaintiffs":

already crowded courts." *Id*. As the United States Supreme Court has held, "dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to . . . take advantage of favorable law." *Piper, supra* at 249 n 15.

In *Piper, supra* at 256, the United States Supreme Court held that in contrast to the presumption in favor of a domestic plaintiff's forum choice, "a foreign plaintiff's choice [of forum] deserves less deference." *Id*. at 256. This makes sense because, as the United States Supreme Court explained, when a plaintiff chooses to bring a lawsuit in another country thousands of miles away from home and where the underlying accident occurred, there is no basis to presume that this faraway

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First, all but 6 of the 50 American States—Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming—offer strict liability. 1 CCH Prod. Liability Rep. § 4016 (1981). Rules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg. West Germany and Japan have a strict liability statute for pharmaceuticals. However, strict liability remains primarily an American innovation. Second, the tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States. Each of these jurisdictions applies its own set of malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. G. Gloss, Comparative Law 12 (1979); J. Merryman, The Civil Law Tradition 121 (1969). Even in the United Kingdom, most civil actions are not tried before a jury. 1 G. Keeton, The United Kingdom: The Development of its Laws and Constitutions 309 (1955). Fourth, unlike most foreign jurisdictions, American courts allow contingent attorney's fees, and do not tax losing parties with their opponents' attorney's fees. R. Schlesinger, Comparative Law: Cases, Text, Materials 275-277 (3d ed. 1970); Orban, Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive, 8 Ga. J. Int'l & Comp. L. 342, 393 (1978). Fifth, discovery is more extensive in American than in foreign courts. *Schlesinger*, *supra*, at 307, 310, and n. 33. [*Piper, supra* at 252 n 18.]

forum will be more convenient to the parties and to the court, and, thus, there is no basis to defer to the plaintiff's choice in forum. *Id.* Thus, we modify our statement in *Anderson, supra,* that a plaintiff's selection of a forum is ordinarily accorded deference to indicate that a foreign plaintiff's choice of forum is entitled to less deference than that accorded to a domestic plaintiff's choice of forum.

In the instant case, plaintiffs are residents and citizens of Croatia who were injured in an accident in Croatia and plaintiffs have chosen to file their lawsuit in Michigan. Given that plaintiffs live in Croatia and that the underlying accident occurred in Croatia, there is no basis to presume that plaintiffs chose to file this lawsuit in Michigan out of convenience. Further, while there is no direct evidence that the primary reason why plaintiffs chose to file this lawsuit in Michigan was to take advantage of Michigan's favorable laws and to avoid Croatia's less favorable laws, no other reasonable explanation has been presented. It is important to consider the foreign jurisdiction's interest in the case and the effect that a Michigan court's resolution of the case will have in that jurisdiction. In this case, a Michigan court is being asked to apply Croatian law to Croatian plaintiffs in a lawsuit pertaining to an accident that occurred in Croatia. Certainly, a Croatian court would be better equipped at handling a matter of this sort than a Michigan court. We find it appropriate, in light of the continuing globalization of our economy, to follow *Piper* and indicate that a foreign plaintiff's choice of venue is entitled to less deference than a domestic plaintiff's choice of venue.

Although a majority of the *Cray* private and public interest factors supports the trial court's decision that Croatia is the more appropriate forum to hear this case,

the Court of Appeals held that the trial court abused its discretion in so concluding. More specifically, the Court of Appeals held that the trial court abused its discretion in dismissing this action on the basis of the forum non conveniens doctrine because Michigan is not a "seriously inconvenient" forum, relying upon *Robey v Ford Motor Co*, 155 Mich App 643, 645; 400 NW2d 610 (1986).

In *Robey, supra* at 645, the Court of Appeals held that "the court . . . may not decline jurisdiction unless its own forum is seriously inconvenient." The Court of Appeals in the instant case relied heavily on *Robey's* "seriously inconvenient" requirement, stating:

> [T]he trial court did not make a finding that Wayne County was a seriously inconvenient forum. Even if another more appropriate forum exists, the court still may not resist jurisdiction unless its own forum is seriously inconvenient. . . . Without a determination that Wayne County is a seriously inconvenient forum, the trial court could not resist jurisdiction. It therefore abused its discretion in granting the dismissal. [Slip op at 2-3.]

The "seriously inconvenient" language appears traceable to the Restatement Conflict of Laws, 2d, which was cited in footnote 2 of the *Cray* decision. 389 Mich 394 n 2. While this language from the Restatement was cited in a footnote of *Cray*, this "seriously inconvenient" language was not part of the test adopted in *Cray* and in subsequent forum non conveniens decisions from this Court we did not cite or utilize a "seriously inconvenient" test. See, e.g., *Anderson v Great Lakes Dredge & Dock Co*, *supra,* and *Russell v Chrysler Corp*, *supra*. Indeed, imposing a "seriously inconvenient" requirement is inconsistent with this Court's holding, in *Cray, supra* at 396, that it is "within the discretion of the trial judge to decline jurisdiction in

such cases as the convenience of the parties and the ends of justice dictate." Therefore, we reject the "seriously inconvenient" standard and overrule *Robey, supra,* to the extent that it held that a court cannot decline jurisdiction unless the exercise of such jurisdiction would be "seriously inconvenient."

Because there is no requirement that a trial court can only dismiss a case on the basis of the forum non conveniens doctrine if the forum is "seriously inconvenient," the Court of Appeals erred in concluding that the trial court abused its discretion in dismissing this case on the basis of the forum non conveniens doctrine without concluding that the forum is "seriously inconvenient."

Finally, we note the similarities this case has with *Piper, supra*. In *Piper*, the plaintiffs were residents of Scotland who were involved in an airplane crash in Scotland. The plaintiffs sued a company that manufactured the airplane in Pennsylvania and a company that manufactured the airplane's propellers in Ohio. The suit was brought in the United States District Court for the Central District of California, but was transferred to the United States District Court for the Central District of Pennsylvania.[11] The federal district court dismissed the suit on the basis of the forum non conveniens doctrine and the United States Court of Appeals for the Third Circuit reversed. The United States Supreme Court reversed, concluding that the district court did not abuse its discretion in concluding that Scotland was the appropriate forum. Just as the district court in *Piper, supra,* did not abuse its discre-

[11] The action, which was originally filed in California, was transferred to Pennsylvania because one of the defendants was not subject to personal jurisdiction in California, but was subject to personal jurisdiction in Pennsylvania.

tion in dismissing the action involving Scottish residents and a Scottish accident on the basis of the forum non conveniens doctrine, the trial court in this case did not abuse its discretion in dismissing this action involving Croatian residents and a Croatian accident on the basis of the forum non conveniens doctrine. "The burden on our courts and upon the defendant's ability to prepare a defense greatly outweighs the remote interest the plaintiff has shown in behalf of conducting this trial in Michigan." *Anderson, supra* at 631.

IV. RESPONSE TO THE DISSENT

The dissent pays lip service to the abuse of discretion standard, but does not apply it. There are ten subfactors to be considered in evaluating a motion to dismiss on the basis of forum non conveniens. According to the dissent, five of the seven private factors are a draw, i.e., do not favor one forum over the other, and one favors Croatia as a forum and one favors Michigan. (But, as noted in footnote 9, the one that Justice KELLY says favors Michigan is a conclusion that even plaintiffs do not claim.) With reference to the public interest factors, the dissent finds that two are a draw and one favors Michigan. Given that a foreign plaintiff's choice of forum deserves less deference, even using Justice KELLY's analysis of the *Cray* factors, one would be hard-pressed to conclude that a trial court's conclusion, whichever way it would have gone, was not within the principled range of outcomes.

Justice KELLY asserts that the trial court abused its discretion, citing language from *Gulf Oil Corp*, *supra,* to the effect that unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should

rarely be disturbed. 330 US 508.[12] But, " 'the ultimate inquiry is where trial will best serve the convenience of the parties and the end of justice.' " *Cray, supra* at 391 (citation omitted). The trial court's conclusion that a Croatian forum will best serve the convenience of the parties and the end of justice was not an abuse of discretion.

V. CONCLUSION

Because we conclude that the Wayne Circuit Court did not abuse its discretion in dismissing this case on the basis of the forum non conveniens doctrine, we reverse the judgment of the Court of Appeals and reinstate the circuit court's order dismissing the case. We also take this opportunity to hold that a trial court should afford a foreign plaintiff's choice of forum less deference than it would accord a domestic plaintiff.

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

MARKMAN, J. (*concurring*). I concur with the majority's analysis and with its conclusion that the trial court did not abuse its discretion in dismissing this case on the basis of the doctrine of forum non conveniens. I write separately to identify additional "public interest" factors that I believe have become increasingly important for courts to consider in light of contemporary economic and legal realities in determining whether a

[12] As previously explained, the United States Supreme Court no longer follows this rule with reference to foreign plaintiffs because it is inconsistent with *Piper Aircraft*. Justice Kelly, however, does not agree with, nor would she follow *Piper Aircraft.* Unlike Justice Kelly, we find the animating reasons undergirding *Piper Aircraft* persuasive and certainly not xenophobic.

case should be dismissed on the basis of the doctrine of forum non conveniens.[1]

The first of these additional factors is the extent to which it is appropriate for the state of Michigan to

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[1] These contemporary realities include the growth of multinational corporations, the expanding realm of international free trade, and the increasing attractiveness of American courts to plaintiffs. Because an increasing number of American companies are doing business, and an increasing number of American products are being sold and used, throughout the world, an increasing number of foreign citizens are being injured by, and bringing lawsuits against, these companies. Such globalization is also reflected in the evolving nature of the legal profession and the growing presence of American law firms throughout the world. As one commentator has explained:

> This century has seen the development of the large-scale multinational corporation ("MNC"), an entity whose transactions can span several continents and establish contacts with many nations. The growth of these businesses, along with procedural innovations in jurisdiction, has created an environment easily exploited by forum shopping plaintiffs seeking to recover large awards against MNCs. Generous in personam jurisdiction provisions often permit plaintiffs to sue defendant MNCs in several different state or federal courts, thereby providing plaintiffs with a broad choice of fora. This flexibility in choice of forum, coupled with significant pro-plaintiff elements in U.S. courts, has made the United States a particularly attractive forum for plaintiffs seeking to recover against MNCs.
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> As forum shopping in the United States has become more feasible and desirable, technological advances in transportation and an increase in transnational activity have increased the potential number of international suits that plaintiffs can bring in the United States. The result has been a dramatic increase in the number of international or foreign disputes brought in the United States against MNCs. American courts have responded, through certain procedural reforms and refinements, to the increase in forum shopping involving foreign plaintiffs. The most notable of these is an expansion of the old doctrine of forum non conveniens. [Comment, *The forum non conveniens doctrine and the judicial protection of multinational corporations from forum shopping plaintiffs*, 19 U Pa J Int'l Econ L 141, 141-142 (1998).]

enable a foreign plaintiff to avail himself of the more favorable substantive law and procedural rules afforded by Michigan courts in comparison with those of the plaintiff's own jurisdiction. As one commentary has explained:

> American courts have become, in the words of the Supreme Court, "extremely attractive"[2] to foreign plaintiffs because of the availability of jury trials, liberal discovery rules,[3] malleable choice-of-law rules, contingency fees[4] and potentially large compensatory and punitive damage awards.[5] [Dunham & Gladbach, *Forum non conveniens and foreign plaintiffs in the 1990s*, 24 Brook J Int'l L 665, 666 (1999) (internal citation omitted).][6]

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[2] As Lord Denning, former Master of the Rolls (the senior civil judge in the Court of Appeal of England and Wales), has said:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. [*Smith Kline & French Laboratories Ltd v Block,* 2 All ER 72, 74 (1983).]

[3] "Sometimes, a plaintiff engaged in litigation in a civil-law country will go so far as to institute a second action here, without intending to bring the case to trial in our courts, but merely for the purpose of obtaining the advantage of American-style discovery." Schlesinger, Comparative Law: Cases—Text—Materials, p 400 (4th ed, 1980).

[4] "[F]or the indigent foreign plaintiff whose access to local courts is impeded by prohibitive filing fees and the absence of any viable legal aid program, representation on a contingency fee basis constitutes a genuine advantage, sufficient in itself to direct the plaintiff toward the courts of the United States." Note, *Foreign plaintiffs and forum non conveniens: Going beyond* Reyno, 64 Tex L R 193, 199 (1985).

[5] "Outside the United States and Canada, recovery of punitive damages in wrongful death cases is uncommon, if not unknown." Note, *Foreign plaintiffs and forum non conveniens: Going beyond* Reyno, 64 Tex L R 193, 203 (1985).

[6] These commentators noted:

> In the 1990s, foreign plaintiffs have commenced product liability actions in the United States with increasing frequency. Citizens of the

And, as another commentary has explained:

> United Kingdom have filed suit in New York against American and British tampon manufacturers alleging that design defects in the product caused toxic shock syndrome and resulted in the death of a family member. Nurseries located in Jamaica and Costa Rica have brought strict products liability claims in Florida against the American manufacturers and sellers of a pesticide that allegedly had damaged or destroyed their crops. An Irish citizen brought suit in New York against several U.S. manufacturers claiming that he contracted HIV [human immunodeficiency virus] due to contaminated blood clotting products caused by defective manufacturing and processing. Numerous women from Australia, Canada, and England brought actions in Alabama alleging, inter alia, strict products liability against American corporate defendants for design and manufacturing defects related to breast implants. [*Id.* at 665.]

Another commentator, writing about the litigation involving Union Carbide and the Bhopal, India, gas leak disaster, has written:

> The United States continues to attract the international forum-shopping plaintiff. The trend is readily discernible in the field of personal injury. If the plaintiff can name an American defendant over whom jurisdiction can be constitutionally asserted in the United States, litigation in the American forum almost inevitably ensues. Examples abound: Victims of air crashes in Scotland, Taiwan, India, and Saudi Arabia elect to vindicate their rights in the federal courthouses of the United States. *E.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 104 S. Ct. 549 (1983); *In re Disaster at Riyadh Airport, Saudi Arabia*, 540 F. Supp. 1141 (D.D.C. 1982); *In re Air Crash Disaster Near Bombay, India*, 531 F. Supp. 1175 (W.D. Wash. 1982). The daughters of British citizens who ingested drugs made, marketed, and sold by the British subsidiary of an American pharmaceutical company sued the latter in the Southern District of Ohio. *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130 (S.D. Ohio 1982), *aff'd sub nom. Dowing v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984). The representatives of a Nigerian citizen injured off the coast of Nigeria while working on a drilling rig operated by the Nigerian subsidiary of a Delaware-owned Bahamian corporation filed suit in the Eastern District of Louisiana. *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir.), *cert. denied*, 455 U.S. 1019 (1981).
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> What these and similar cases have in common is the presence of foreign plaintiffs, presumably unfamiliar with the laws of this

Certain procedural features of the U.S. courts encourage plaintiffs in international disputes to bring their cases in the United States. First, the Seventh and Fourteenth Amendments give plaintiffs the right to trial by jury in most civil suits. Jury trials present several advantages to individual plaintiffs in civil suits against large businesses. American jurors have very different backgrounds and economic sympathies compared to those of the professional judges and career bureaucrats who decide disputes in most foreign courts. Consequently, these juries are more likely to award judgment to individual plaintiffs suing large [multinational corporations]. U.S. juries also award more generous damages than do foreign tribunals, particularly in instances of plaintiffs alleging injury by a corporate entity.[7] For example, in the infamous litigation stemming from an industrial accident in Bhopal, India, the estimated value of the suit in India was no more than $75 million. In contrast, experts estimated that an American jury would award compensatory damages of $235 million, with an even greater amount for punitive damages. [Comment, *The forum non conveniens doctrine and the judicial protection*

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country, injured abroad by the allegedly tortious conduct of American defendants, choosing to forego their own nations' court systems in favor of ours. Bhopal is merely the latest example of this phenomenon. [Note, *Foreign plaintiffs and forum non conveniens: Going beyond* Reyno, 64 Tex L R 193, n 14 (1985).]

[7] As one commentator has observed:

> [T]he United States has no equal with regard to the size of a possible recovery. One British judge observed that "in the United States the scale of damages for injuries of the magnitude sustained by the plaintiff is something in the region of ten times what is regarded as appropriate by . . . the courts of [England]." A comparative legal scholar writing more than ten years ago made a rather detailed comparison of the maximum awards of damages reported by countries throughout the northern hemisphere and concluded, "[T]he USA . . . is in a class of its own." The difference becomes even more dramatic if one compares the United States with a Third World country. [Note, *Foreign plaintiffs and forum non conveniens: Going beyond* Reyno, 64 Tex L R 193, 203-204 (1985) (internal citations omitted).]

of multinational corporations from forum shopping plaintiffs, 19 U Pa J Int'l Econ L 141, 146-147 (1998).][8]

The United States Supreme Court has expressed its concern regarding foreign plaintiffs being allowed to sue American businesses and manufacturers in America on the basis that American law is more favorable to plaintiffs as a class than is foreign law. *Piper, supra* at 252. The Court has explained, "American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive [if dismissal was barred whenever the law in the alternative forum were less favorable to the plaintiff].[9] The

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[8] This commentator noted additional reasons why the United States constitutes an attractive forum: (1) "contingency fees make litigation more accessible to indigent plaintiffs and provide risk averse plaintiffs with a form of insurance"; (2) "[t]he so-called 'American system' in which the losing party does not have to pay the expenses of the winner also reduces plaintiffs' risks in litigation and encourages risk averse plaintiffs to sue in the United States"; (3) "[l]iberal pleading rules used by most courts in the United States allow plaintiffs to enter court with vague claims"; (4) "[e]xtensive pre-trial discovery benefits plaintiffs by allowing them to initiate proceedings with little evidence and to acquire evidence that might otherwise be unavailable" and "discovery greatly increases defendants' litigation costs and improves plaintiffs' bargaining positions in settlement negotiations"; (5) "class actions and other procedures allowed in U.S. courts decrease the economic costs of large-scale litigation and subsequently allow large groups of individual plaintiffs, each with little monetary interest in the dispute, to bring suit against a defendant." *Id.* at 148-149.

[9] The United States Supreme Court explained that the following factors make the United States "extremely attractive to foreign plaintiffs":

> First, all but 6 of the 50 American States— Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming— offer strict liability. 1 CCH Prod. Liability Rep. § 4016 (1981). Rules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg. West Germany and Japan have a strict liability statute for pharmaceuticals. However, strict liability remains primarily an American innovation. Second, the

flow of litigation into the United States would increase and further congest already crowded courts." *Id.* I believe that if a plaintiff's primary reason for filing a suit in Michigan is to take advantage of Michigan's favorable laws and procedures and to avoid a foreign court's less favorable laws and procedures, this should be a relevant factor to be considered by courts in deciding whether to expend the state's limited resources on a lawsuit. As the United States Supreme

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> tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States. Each of these jurisdictions applies its own set of malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. G. Gloss, Comparative Law 12 (1979); J. Merryman, The Civil Law Tradition 121 (1969). Even in the United Kingdom, most civil actions are not tried before a jury. 1 G. Keeton, The United Kingdom: The Development of its Laws and Constitutions 309 (1955). Fourth, unlike most foreign jurisdictions, American courts allow contingent attorney's fees, and do not tax losing parties with their opponents' attorney's fees. R. Schlesinger, Comparative Law: Cases, Text, Materials 275-277 (3d ed, 1970); Orban, Product Liability: A Comparative Legal Restatement — Foreign National Law and the EEC Directive, 8 Ga. J. Int'l & Comp. L. 342, 393 (1978). Fifth, discovery is more extensive in American than in foreign courts. R. Schlesinger, *supra*, at 307, 310, and n. 33. [*Piper, supra* at 252 n 18.]

One commentator has stated:

> Commentators generally agree that the following factors encourage plaintiffs to sue in the United States: the availability of contingency fees, absence of fee shifting, jury trials and the tendency of American juries to award high damages, extensive pre-trial discovery, choice of different state forums with differing choice of law rules, and favorable American substantive law, including strict liability and possibility of punitive damages, possibility of class action suits, low court filing fees, and the sophistication of American lawyers and courts. [Comment, *The forum non conveniens doctrine and the judicial protection of multinational corporations from forum shopping plaintiffs*, 19 U Pa J Int'l Econ L 141, n 37 (1998).]

Court has held, "dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to . . . take advantage of favorable law." *Piper, supra* at 249 n 15. As the majority opinion states:

> In the instant case, plaintiffs are residents and citizens of Croatia who were injured in an accident in Croatia and plaintiffs have chosen to file their lawsuit in Michigan. Given that plaintiffs live in Croatia and that the underlying accident occurred in Croatia, there is no basis to presume that plaintiffs chose to file this lawsuit in Michigan out of convenience. Further, while there is no direct evidence that the primary reason why plaintiffs chose to file this lawsuit in Michigan was to take advantage of Michigan's favorable laws and to avoid Croatia's less favorable laws, no other reasonable explanation has been presented. [*Ante* at 614.]

A second additional "public interest" factor concerns the extent to which resolving a particular legal dispute in a Michigan court would compromise principles of judicial comity and undermine respect for the judicial sovereignty of a foreign jurisdiction. "[P]rinciples of judicial comity support the dismissal of controversies whose adjudication is a matter of vital interest to the alternative, foreign forum." Note, *Foreign plaintiffs and forum non conveniens: Going beyond* Reyno, 64 Tex L R 193, 195 (1985). "[T]olerance of international forum shopping creates . . . conflicts with basic notions of comity and respect for foreign sovereignty." Comment, *The forum non conveniens doctrine and the judicial protection of multinational corporations from forum shopping plaintiffs*, 19 U Pa J Int'l Econ L 141, 142 (1998). As one commentator has explained:

> In cases involving foreign litigants and alternative foreign forums, a shift in the focus of forum non conveniens analysis is needed, away from the convenience of the litigants and toward the appropriateness of the forum,

> viewed from the perspective of judicial comity. The degree of local interest of each forum is a basis for comparison, and the determination of the applicable law, to the extent that it reflects each forum's interests, should be a vital consideration as well.
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> Courts should recognize that the application of an American Forum's law to controversies in which other countries have a vital interest is likely to offend the sovereignty or frustrate the public policies of those countries. [Note, *Foreign plaintiffs and forum non conveniens: Going beyond* Reyno, 64 Tex L R 193, 222-223 (1985).]

It is important to consider the foreign jurisdiction's interest in the case and the effect that a Michigan court's resolution of the case would have upon that jurisdiction.

In this case, a Michigan court is being asked to apply Croatian law to Croatian plaintiffs in a lawsuit arising from an accident that occurred in Croatia. Certainly, a Croatian court would be better equipped at handling a matter of this sort than a Michigan court.

A third additional "public interest" factor concerns the interests of the state of Michigan in establishing and enforcing standards that domestic businesses and manufacturers must satisfy in selling their products abroad as compared to the foreign jurisdiction's interest in establishing and enforcing standards that foreign businesses and manufacturers must satisfy in selling their products within its borders. As one commentator has explained:

> Imposing our legal solutions on other nations, however beneficial when viewed from the perspective of individual litigants, impedes the opportunity for other legal systems to craft local solutions to their citizens' legal problems. If a foreign forum proves adequate and has the greater interest

> in the controversy, an American court can best serve the interest of justice by permitting justice to be done elsewhere. [*Id.* at 223.]

As another commentator has explained:

> Allowing forum shoppers to sue in U.S. courts not only hinders foreign relations, but also hurts foreign nations by undermining their development of legal remedies to handle legal controversies in their own courts. Other countries can better assess their own localized needs and set appropriate standards for local conditions. For example, U.S. courts are "ill-equipped to set a standard of product safety for drugs sold in other countries." [Comment, *The forum non conveniens doctrine and the judicial protection of multinational corporations from forum shopping plaintiffs*, 19 U Pa J Int'l Econ L 141, 155-156 (1998), quoting *Harrison v Wyeth Laboratories Div of American Home Products Corp,* 510 F Supp 1, 4 (ED Pa, 1980) (holding "[t]he United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country").]

And, as yet other commentators have explained:

> Foreign plaintiffs will almost certainly continue to file products liability actions in American courts, instead of their local fora, in order to take advantage of the more favorable substantive law and procedural rules available in the United States. In response, American courts will likely continue to dismiss most such actions based on the flexible doctrine of forum non conveniens. . . . Private interest factors will often militate in favor of dismissal of suits brought by foreign plaintiffs because the bulk of the witnesses and physical evidence is likely to be located abroad. In addition, public interest factors will tend to warrant dismissal given that foreign fora plainly have a substantial interest in establishing and enforcing the standards that manufacturers must satisfy in selling products there, whereas American courts will often have only a marginal interest in such matters. Accordingly, in dismiss-

> ing these actions, American courts will promote the fundamental goals of best serving the convenience of the parties and the ends of justice. [Dunham & Gladbach, *Forum non conveniens and foreign plaintiffs in the 1990s*, 24 Brook J Int'l L 665, 703-704 (1999).]

"An important factor that courts have looked to in deciding whether to dismiss an action is the relative importance of the foreign jurisdiction's public interest in controlling the marketing and sale of products within its borders." *Id.* at 686.

In *Doe v Hyland Therapeutics Div,* 807 F Supp 1117, 1130 (SD NY, 1992), the United States District Court for the Southern District of New York concluded that where Irish plaintiffs brought suit in New York against United States manufacturers, claiming that they contracted the human immunodeficiency virus (HIV) from contaminated blood clotting products supplied by the defendants, "our 'generalized interest' in regulating the flow of dangerously defective American pharmaceutical products into the stream of world commerce cannot transcend Ireland's 'intensely local interest' in adjudicating a controversy that profoundly affects its citizens." As that court explained:

> The forum whose market consumes the product must make its own determination as to the levels of safety and care required. That forum has a distinctive interest in explicating the controlling standards of behavior, and in enforcing its regulatory scheme. The standards of conduct implemented, and the level of damages assessed, will reflect the unique balance struck between the benefit each market derives from the product's use and the risks associated with that use; between the community's particular need for the product and its desire to protect its citizens from what it deems unreasonable risk. The forum's assessment will affect not merely the quality of the product, but also the price, quantity, and availability to its public. Such an assessment must remain the prerogative of

> the forum in which the product is used; each community faces distinct demands, and has unique concerns that make it peculiarly suited to make this judgment. We are ill-equipped to enunciate the optimal standards of safety or care for products sold in distant markets, and thus choose to refrain from imposing our determination of what constitutes appropriate behavior to circumstances with which we are not familiar. While imposing our presumably more stringent standards to deter tortious conduct within our borders could afford a higher degree of protection to the world community, such an approach would also ignore the unique significance of the foreign forum's interest in implementing its own risk-benefit analysis, informed by its knowledge of its community's competing needs, values, and concerns. [*Id.* at 1129-1130.][10]

Courts should consider which jurisdiction has the greatest interest in establishing the legal standards that will be applied in the case.

In this case, Croatia has a stronger interest in determining whether the Croatian plaintiffs are entitled to relief as a result of an accident that occurred in Croatia than does Michigan. Croatia has a considerable interest in protecting its citizens from unsafe products. Michigan concomitantly has an interest in protecting its businesses and manufacturers from unwarranted liability.[11] However, given that the manufacturer in this

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[10] The Sixth Circuit Court of Appeals has likewise held that "the country where the injury occurred has a greater interest in the ensuing products liability litigation than the country where the product was manufactured." *Kryvicky v Scandinavian Airlines Sys,* 807 F2d 514, 517 (CA 6, 1986).

[11] As one observer has explained:

> The . . . problem of regulating the conduct of U.S. MNCs in foreign countries is that the United States would, in effect, be exporting its laws, policies, and social mores and imposing them on sovereign foreign nations. While the Court in Piper recognized that the United States has an interest in regulating its companies'

case does not want Michigan's protection,[12] Michigan's interest in providing such protection seems significantly lessened. If defendant in these circumstances is amenable to subjecting itself to a Croatian court, it is not immediately apparent why a Michigan court should interfere with this result.

Fourth, on a related note, courts should also consider the sovereign interests of the state of Michigan in shaping the law within a particular substantive realm as compared to the foreign jurisdiction's interests in this same regard. In this case, Michigan does have an interest in shaping the law with regard to automobile design defect cases given the importance of the automotive industry to the state of Michigan. However, Croatia has an interest in shaping the law with regard to automobile design defect cases as well, given the significant risks posed to its citizens from the use of defectively designed automobiles within its borders. Just as the United States should not, for example, impose its own standards regarding the safety of drugs onto foreign countries, the United States should not impose its standards regarding the safety of automobiles onto

conduct abroad, the Court declined to give significant weight to this interest. [Comment, *International forum non conveniens: "Section 1404.5"—A proposal in the interest of sovereignty, comity, and individual justice,* 45 Am U L R 415, 456 (1995).]

[12] It seems worthy of comment that here, as in *Davidson v Daimler-Chrysler Motors Co*, a case being held in abeyance for this case, unpublished order of the Supreme Court, entered June 10, 2005 (Docket No. 126556), a company that was born in this state, that has grown to worldwide influence from within this state, that has been a part of the community of this state for more than three-quarters of a century, that has participated actively in the civic affairs of this state, that has given employment to hundreds of thousands of workers within this state, and that in countless ways has enriched the economy and social environment of this state, should prefer to have its disputes decided in Croatian (or Canadian) courts rather than in Michigan courts.

foreign countries. *Harrison*, *supra*; *Doe*, *supra*. Michigan's " 'generalized interest' in regulating the flow of dangerously defective [Michigan automotive] products into the stream of world commerce cannot transcend [Croatia's] 'intensely local interest' in adjudicating a controversy that profoundly affects its citizens." *Doe, supra* at 1130.

Fifth, courts should consider the interests of the state of Michigan in either encouraging or discouraging future lawsuits in which the forum non conveniens doctrine may potentially be invoked.[13] That is, courts should consider the extent to which accommodating the instant lawsuit in Michigan will have consequences for the numbers and types of future lawsuits heard by Michigan courts.

In this case, Croatian plaintiffs are asking a Michigan court to determine whether, under Croatian law, they are entitled to any relief as a result of an accident that occurred in Croatia. If the trial court in this case abused its discretion by refusing to exercise its jurisdiction, one must consider whether every case involving an automobile designed or assembled in Michigan must be tried in Michigan if so desired by the plaintiff. If a Michigan court cannot refuse to exercise jurisdiction in cases brought by foreign plaintiffs for injuries arising out of automobile accidents occurring outside the United

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[13] One commentator has noted:

> Courts not only consider the actual effect on the docket of shouldering the foreign plaintiff's claim, they also tend to be swayed by "floodgates" arguments. Proponents of the doctrine assert that not exercising forum non conveniens would constitute an open invitation to make U.S. courthouses a "dumping ground" for international claims. [Comment, *International forum non conveniens: "Section 1404.5"— A proposal in the interest of sovereignty, comity, and individual justice,* 45 Am U L R 415, 448 (1995).]

States, Michigan will likely become the world's automobile design defect courthouse. Because the Michigan judiciary is not equipped to handle all the world's automobile design defect lawsuits along with all its other responsibilities, the trial court's decision to dismiss this action on the basis of the forum non conveniens doctrine should be affirmed.

Sixth, courts should consider the interests of the state of Michigan in expending limited judicial and other resources in trying a case. As commentators have explained:

> Courts that have granted forum non conveniens dismissals of actions brought by foreign plaintiffs have often cited to the burden that would be imposed on the American judicial system if it heard such actions. One primary justification for dismissing these actions is the view that it would be fundamentally unfair to permit foreign plaintiffs to use already backlogged American courts that are "paid for by U.S. taxpayers and whose juries are composed of U.S. citizens who are asked to drop their everyday activities to" help adjudicate an action. [Dunham & Gladbach, *Forum non conveniens and foreign plaintiffs in the 1990s*, 24 Brook J Int'l L 665, 689 (1999) (internal citation omitted).]

The United States Supreme Court has explained, "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp v Gilbert,* 330 US 501, 508-509; 67 S Ct 839; 91 L Ed 1055 (1947). That is, the people of Michigan have a civic obligation to serve as jurors, but it is an obligation that is predicated upon the idea that the people are serving the obligations of their own community. Jurors are being asked to inconvenience themselves, and divert time and attention from their families, their businesses, and their personal affairs in order to serve the larger community of which they are a part. This rationale for the juror obligation

becomes sharply attenuated where this state increasingly takes cognizance of lawsuits that cannot fairly be said to have arisen from within the community. It is not to be parochial to suggest that the people of Michigan have a primary interest in "Michigan cases," cases that implicate the interests of Michigan and its people, cases in which there is a significant element of "Michiganness." This indeed is the primary reason why the people of Michigan "earnestly desiring to secure these blessings undiminished to ourselves and our posterity," Const of 1963, Preamble, have ordained our Constitution and established a court system to exercise the judicial power of their state. It is also to accord respect to the taxpayers of this state to recognize that their taxes should be employed only in support of a judicial system that primarily hears disputes arising from within this state.

In the instant case, plaintiffs are asking the Wayne Circuit Court to expend considerable time and resources to ascertain whether, under Croatian law, defendant is liable for the injuries that these Croatian plaintiffs suffered in an accident that occurred in Croatia. As in *Piper, supra* at 261, "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."

In summary, I believe that the following "public interest" factors (including the new factors, Nos. 4 through 9) should be considered when determining whether a case should be dismissed on the basis of the forum non conveniens doctrine:

1. Administrative difficulties that may arise in an area that may not be present in the area of origin;

2. Consideration of the state law that must govern the case;

3. People who are concerned by the proceeding;

4. The extent to which it is appropriate for the state to enable a foreign plaintiff to avail himself or herself of the more favorable substantive law and procedural rules afforded by state courts in comparison with those of the plaintiff's own jurisdiction;

5. The extent to which resolving a particular legal dispute in a state court may compromise principles of judicial comity and undermine respect for the judicial sovereignty of a foreign jurisdiction;

6. The interests of the state in establishing and enforcing standards that domestic businesses and manufacturers must satisfy in selling their products abroad as compared to the foreign jurisdiction's interest in establishing and enforcing standards that foreign businesses and manufacturers must satisfy in selling their products within its borders;

7. The interests of the state in shaping the law within a particular substantive realm as compared to the foreign jurisdiction's interest in shaping the law within a particular substantive realm;

8. The extent to which accommodating the instant lawsuit in this state will have consequences for the numbers and types of future lawsuits heard by state courts;

9. The interests of the state in expending its limited judicial and other resources in trying a case.

This case is similar to *Jemaa v MacGregor Athletic Products*, 151 Mich App 273; 390 NW2d 180 (1986), in which the plaintiff was injured in Ohio while playing football. The plaintiff sued the defendant in Michigan, claiming that his injury was due to a defect in the

football helmet worn by the plaintiff. Although the defendant did business in Michigan, its design and manufacture of football helmets was done elsewhere. The trial court dismissed the case on the basis of the forum non conveniens doctrine. The Court of Appeals affirmed, explaining, "[N]either the plaintiff nor, apparently, the witnesses to the football accident reside in Michigan and the accident occurred in Ohio" and "[a]lthough MacGregor does business in Michigan, . . . its Michigan business is not connected to the manufacturing of the football helmets." *Id.* at 280. Likewise, in the instant case, plaintiffs do not reside in Michigan and the accident occurred in Croatia, and although defendant does business in Michigan, its Michigan business is not connected to the manufacturing of the transmission.

In *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 631; 309 NW2d 539 (1981), a Florida plaintiff brought an action in Michigan pertaining to an incident that occurred in Florida. We held that "[t]he fact that virtually all the witnesses to the incident are apparently residents of Florida or nearby southern states reveals a likelihood that the defendant will suffer considerable difficulty in preparing any defense and is sufficient to overcome plaintiff's slight interest in having a trial in Michigan." The vehicular accident at issue in this case occurred in Croatia, and, thus, the witnesses more than likely are residents of Croatia. It certainly would not be any easier to travel to Croatia to obtain witnesses than it would be to travel to Florida to obtain witnesses.

Plaintiffs argue that there were no witnesses to the accident in Croatia. However, as the trial court held, defendant should have an opportunity to confirm plaintiffs' assertions. Defendant should not have to blindly rely on plaintiffs' account of the accident. As the trial

court explained, "Plaintiffs want Defendant to accept Plaintiffs' good faith on many matters, such as the lack of witnesses to the accident other than the vehicle's occupants and the willingness of Plaintiffs to supply relevant documents, but Defendant will no doubt want to assess these matters itself and obtain the necessary documents first-hand, matters more easily done in Croatia."

Plaintiffs argue that defendant has not established that a Michigan forum will be inconvenient because it has not established that there are any witnesses in Croatia that it will be deprived of if this case is tried in Michigan. In other words, plaintiffs argue that "any inconvenience to the defendant is speculative." *Anderson, supra* at 630. However, as we held in *Anderson, supra* at 630-631, "[w]here, as here, there is little nexus between the litigation and the forum, there is no need for the defendant to prepare extensively for trial in order to show exactly how inconvenient a trial in Michigan would prove to be."

For the reasons expressed both in the majority opinion and in this opinion, I concur in the majority's conclusion that the trial court did not abuse its discretion in dismissing this case on the basis of the doctrine of forum non conveniens. I also submit that the "public interest" factors in the forum non conveniens test of this state should be expanded upon as suggested in this opinion.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with the majority that the trial court did not abuse its discretion in dismissing this case on the basis of forum non conveniens. In this particular case, a review of the factors set forth by this Court in *Cray v Gen Motors Corp*, 389 Mich 382; 207 NW2d 393 (1973),

reveals that the trial court's decision to dismiss was within the principled range of outcomes. I further agree with the majority that a so-called seriously inconvenient "standard" is inappropriate, but only to the extent that this "standard" is distinct from or inconsistent with *Cray*. Rather, the seriously inconvenient "standard" is simply a shorthand reference for the principles announced and factors set forth in *Cray*. In other words, *Cray* is the test for courts to apply, and the *Cray* test clearly encompasses the principles that a plaintiff's choice of forum is accorded deference and that a state will not exercise jurisdiction only if the forum is seriously inconvenient. Further, because this case can be decided solely by reference to *Cray*, I disagree with the majority's decision to adopt the reasoning set forth in *Piper Aircraft Co v Reyno*, 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1981).

KELLY, J. (*dissenting*). I agree with the Court of Appeals that the trial court abused its discretion in dismissing this case on the basis of forum non conveniens.[1] Therefore, I respectfully dissent from the majority's decision to reinstate the circuit court's dismissal. I would affirm the Court of Appeals judgment and remand the case for trial.

RELEVANT FACTUAL BACKGROUND

In the interest of clarity, it is necessary to give a brief statement of the facts of this case. Forum non conveniens involves fact-driven analyses. Plaintiffs and decedent, Ena Begovic, were Croatian citizens. They were using a 1993 Jeep Grand Cherokee (hereinafter the

[1] A Latin term meaning " 'an unsuitable court.' " Black's Law Dictionary (7th ed).

Jeep) on the Island of Brac on the Dalmatian coast of the Republic of Croatia. Allegedly, when the Jeep was stationary and its transmission in park, the transmission slipped into reverse gear although no one touched the controls. This caused the Jeep to roll over the lip of a promontory and into a ravine. Ena Begovic died, and the other plaintiffs suffered serious injury.

It is undisputed that all decisions regarding the designing of the Jeep were made in Michigan. This includes the decision that a transmission manufactured in Japan would be built into the Jeep. The vehicle was manufactured in Wayne County, Michigan, before being shipped to Italy where it was purchased. Maintenance on the Jeep occurred in both Italy and Croatia.

Because the Jeep had been designed and manufactured in Michigan, plaintiffs chose to file this products-liability lawsuit here. Although Michigan is its home state, defendant took the position that it is not a convenient forum and moved for summary disposition. The circuit court agreed and dismissed the case on the basis of forum non conveniens. The Court of Appeals reversed, finding that the trial court had improperly avoided acknowledging its jurisdiction. It decided that Wayne County was not a seriously inconvenient forum. *Radeljak v DaimlerChrysler Corp*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 247781). We granted leave to appeal and directed the parties to address two questions:

> (1) whether the public interest factors of the forum non conveniens doctrine set forth in *Cray v Gen Motors Corp,* 389 Mich 382, 396 (1973), should be revised or modified; and (2) whether, even if another more appropriate forum exists, a Michigan court may not resist jurisdiction unless its own forum is "seriously inconvenient." [472 Mich 924 (2005).]

THE BACKGROUND OF FORUM NON CONVENIENS

When a judge applies the doctrine of forum non conveniens, he or she seeks to determine whether the court where the plaintiff filed suit is inconvenient for the litigants and witnesses. Also, the judge determines whether there is another more convenient forum where the action should have been brought.[2]

The central goal of forum non conveniens is to provide a fair trial for all parties involved. In the case in which the United States Supreme Court first adopted the doctrine, *Gulf Oil Corp v Gilbert,* the Court stated:

> The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. [*Gulf Oil Corp v Gilbert*, 330 US 501, 508; 67 S Ct 839; 91 L Ed 1055 (1947).]

The Supreme Court elaborated on this point in its discussion of the difference between the doctrine of forum non conveniens and the statute that governs change of venue, 28 USC 1404. *Norwood v Kirkpatrick*, 349 US 29; 75 S Ct 544; 99 L Ed 789 (1955). The Court noted the limitations of forum non conveniens:

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[2] Forum non conveniens is

> the doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appear that the action should proceed in another forum in which the action might originally have been brought. [Black's Law Dictionary (7th ed).]

> "The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate." [*Id*. at 31, quoting *All States Freight, Inc v Modarelli*, 196 F2d 1010, 1011 (CA 3, 1952).]

Earlier, the Court had stated the central goal of the doctrine: "[T]he ultimate inquiry is whether trial will best serve the convenience of the parties and the ends of justice." *Koster v (American) Lumbermens Mut Cas Co*, 330 US 518, 527; 67 S Ct 828; 91 L Ed 1067 (1947).

It is on this ground that the Michigan Supreme Court built its forum non conveniens precedent. In *Cray*, the Court decided that the doctrine should apply in Michigan. *Cray*, 389 Mich 395. The Court enumerated several factors and subfactors that a trial court should weigh and balance in its decision on a motion based on forum non conveniens.

> A balancing out and weighing of factors to be considered in rejecting or accepting jurisdiction in such cases should include:
>
> 1. The private interest of the litigant.
>
> a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
>
> b. Ease of access to sources of proof;
>
> c. Distance from the situs of the accident or incident which gave rise to the litigation;
>
> d. Enforcibility [sic] of any judgment obtained;

e. Possible harrassment [sic] of either party;

f. Other practical problems which contribute to the ease, expense and expedition of the trial;

g. Possibility of viewing the premises.

2. Matters of public interest.

a. Administrative difficulties which may arise in an area which may not be present in the area of origin;

b. Consideration of the state law which must govern the case;

c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. [*Id*. at 395-396.]

In Michigan, these factors are often referred to as the *Cray* factors. *Cray* made clear that their application was intended to function as a balancing test with the object of comparing the advantages of two possible courts. "The courts are charged to consider the plaintiff's choice of forum and to weigh carefully the relative advantages and disadvantages of jurisdiction and the ease of and obstacles to a fair trial in this state." *Id*. at 396.

This Court also made clear in *Cray* that the balancing test is intended to be an instrument used to avoid the injustice of forcing a party to litigate in a forum that is fundamentally unfair. It stated:

[F]*orum non conveniens* "was designed as an instrument of justice to avoid the unfairness, vexatiousness and oppressiveness of a trial away from the domicile of a defendant." . . . The basic standards are said to be "convenience, efficiency and justice." Moore and Fink in *Moore's Federal Practice* indicate *forum non conveniens* is applied when trial would be "unduly burdensome upon the defendant". [*Id*. at 391-392, quoting Barron and Holtzoff, Federal Practice and Procedure, p 443.]

The *Cray* Court also quoted the Supreme Court of New Jersey:

> "It is only in those exceptional cases where a weighing of all the many relevant factors, of which residence is but a part, decisively establishes that there is available another forum where trial will best serve the convenience of the parties and the ends of justice, that the doctrine is ever invoked." [*Id*. at 392, quoting *Gore v United States Steel Corp,* 15 NJ 301, 311; 104 A2d 670 (1954).]

Finally, *Cray* quoted the Restatement Conflict of Laws, 2d, with approval:

> "A state will not exercise jurisdiction if it is a *seriously inconvenient forum* for the trial of the action provided that a more appropriate forum is available to the plaintiff." [*Id*. at 394 n 2, quoting 1 Restatement Conflict of Laws, 2d, § 84, p 251 (emphasis added).]

In referencing this, the *Cray* Court took special note of the comment on the quoted section of the Restatement:

> In the commentary, the most important rules are said to be honoring plaintiff's choice *except in unusual circumstances* and never dismissing an action if there is no alternative forum. Appropriate forums are the site of the incident, *a corporation's state of incorporation or principal place of business* and the state of plaintiff's domicile. [*Id*. (emphasis added).]

THE "SERIOUSLY INCONVENIENT" STANDARD

It is in light of this background and history of the forum non conveniens doctrine that we must assess the judgment of the circuit court in this case. The Court of Appeals panel concluded that the trial court abused its discretion by resisting jurisdiction without determining that Wayne County was a seriously inconvenient forum. The panel reached this conclusion on the basis of the

Court of Appeals past decisions in *Robey v Ford Motor Co*[3] and *Manfredi v Johnson Controls, Inc*.[4] *Robey* stated:

> When a party requests that a court decline jurisdiction based on the doctrine of forum non conveniens, there are two inquiries for the court to make: whether the forum is inconvenient and whether there is a more appropriate forum available. If there is not a more appropriate forum elsewhere, the inquiry ends and the court may not resist imposition of jurisdiction. If there is a more appropriate forum, the court still may not decline jurisdiction unless its own forum is seriously inconvenient. [*Robey*, 155 Mich App 645.]

The majority contends that the "seriously inconvenient" standard is inconsistent with *Cray*. Therefore, it overturns *Robey* and eliminates the seriously inconvenient standard. As one can see from the earlier discussion of the foundation of the forum non conveniens doctrine, *Robey* was far from inconsistent with *Cray*. In fact, the seriously inconvenient standard is well grounded in the precedents of this Court and the United States Supreme Court in the area. Rather, it is the decision of this majority that is inconsistent with *Cray*.

The basic concept undergirding the forum non conveniens doctrine is that a case should be dismissed if the plaintiff brought it in a completely inappropriate forum. *Norwood*, 349 US 31. But the doctrine has limited application, and the plaintiff's choice of forum is accorded significant deference. "[U]nless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp*, 330 US 508 (emphasis added). The balance swings strongly

[3] 155 Mich App 643; 400 NW2d 610 (1986).

[4] 194 Mich App 519; 487 NW2d 475 (1992).

in favor of the defendant when the plaintiff chooses a forum to " 'vex,' " " 'harass,' " or " 'oppress' " the defendant. *Id*. (citation omitted).

The seriously inconvenient standard falls directly in line with this precedent. It assures that a court does not force a plaintiff to run the risk of losing, or the expense of refiling, his or her claim because of a mere trifle. To warrant a dismissal based on forum non conveniens, the defendant must be faced with strong or significant inconvenience such as vexation, harassment, or oppression. *Id*. Only when a forum is " 'completely inappropriate and inconvenient [so] that it is better to stop' " is forum non conveniens appropriate. *Norwood*, 349 US 31 (citation omitted). The seriously inconvenient requirement recognized in *Robey* assures that this standard is met.

It stretches the imagination to hold that the seriously inconvenient standard is inconsistent with *Cray*. As has been noted already, *Cray* cited the Restatement Second with approval. The section it cited applies the very same standard:

> A state will not exercise jurisdiction if it is a *seriously inconvenient forum* for the trial of the action provided that a more appropriate forum is available to the plaintiff. [1 Restatement Conflict of Laws, 2d, § 84, p 251 (emphasis added).]

Nothing else in *Cray* contradicts this standard and the Court did not distinguish it elsewhere in the opinion or in subsequent cases. Instead, the Court articulated a consistent standard of forum non conveniens review.[5]

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[5] See *Anderson v Great Lakes Dredge & Dock Co,* 411 Mich 619, 628; 309 NW2d 539 (1981):

> A plaintiff's selection of a forum is ordinarily accorded deference. The United States Supreme Court, describing this deference

Given that this Court noted with approval the seriously inconvenient standard when first recognizing forum non conveniens in this state, the standard is well founded in our law. It appears rash for the majority to overturn this properly recognized minimum standard for determining that a forum is sufficiently inconvenient.

In this case, the trial court did not make a finding that Wayne County was a seriously inconvenient forum. Hence, it failed to recognize the " 'careful limitations' " that have applied to the forum non conveniens doctrine. *Norwood*, 349 US 31 (citation omitted). Because the court did not make this finding, it did not conclude that the balance weighed so strongly in favor of defendant that plaintiffs' choice of forum warrants disturbance. *Gulf Oil Corp*, 330 US 508. As the Court of Appeals noted, the failure of the trial court to meet this minimal standard was an abuse of discretion.

THE FAILURE TO FULLY BALANCE THE *CRAY* FACTORS

While the trial court reviewed the *Cray* factors in its written opinion, it did not properly weigh the two forums one against the other. The trial court focused on the difficulties presented in retaining jurisdiction in

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> in [*Gulf Oil v*] *Gilbert*, stated, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". [*Gulf Oil Corp*] 330 US 508. Various factors, such as those outlined in *Cray, supra*, 396-397, are to be considered in determining whether the balance *strongly* favors the defendant. [Emphasis added.]

Although *Anderson* did not use the wording "seriously inconvenient," it used a standard that is consistent, "strongly in favor of defendant." *Id*. Both *Anderson* and *Cray* fall in line with the seriously inconvenient standard. The majority tries in vain to meaningfully distinguish the standard in these cases from that cited in *Cray*.

Michigan. But it did not give equal consideration to the difficulties that a Croatian court would face if it had jurisdiction over the case.

For instance, the trial court considered the burden on defendant to obtain evidence remaining in Croatia. But it ignored that plaintiffs would face a similar, if not greater, burden in obtaining documents that remained in Michigan relating to the manufacture of the Jeep. The failure to take this into consideration in a products-liability case is not excusable.

The trial court also considered, as a major factor disfavoring Wayne County as the proper forum, that the transmission defendant chose to place in the Jeep was designed and manufactured in Japan. However, this fact is irrelevant because a Croatian court is in no better position to obtain documents or witnesses from Japan than is a Michigan court.[6]

Also, the trial court assumed that Croatian law would apply, an impermissible assumption. To properly apply the *Cray* factors, a court should first determine which forum's law should apply. See *Manfredi*, 194 Mich App 525-526. This failure is yet another sign that the trial court neglected to conduct an actual balancing test in deciding defendant's forum non conveniens motion.

Cray requires such a balancing test. "The courts are charged to consider the plaintiff's choice of forum and to weigh carefully the relative advantages and disadvantages of jurisdiction and the ease of and obstacles to

[6] Plaintiffs make the argument also that it was not the design of the transmission that caused the accident. They argue that it was the particular transmission that was placed in the Jeep that caused the accident. This makes the involvement of Japan even more of a red herring.

a fair trial in this state." *Cray*, 389 Mich 396. The failure to conduct such a balancing test is an abuse of the trial court's discretion.

THE *CRAY* FACTORS DO NOT STRONGLY OR SIGNIFICANTLY FAVOR CROATIA AS THE PROPER FORUM

The majority opines that the *Cray* factors support Croatia as the more appropriate forum. I agree with the Court of Appeals assessment that, once the factors are properly weighed, Wayne County is not a significantly inconvenient forum.

1. PRIVATE INTERESTS

a. AVAILABILITY OF COMPULSORY PROCESS FOR ATTENDANCE OF UNWILLING AND THE COST OF OBTAINING ATTENDANCE OF WILLING WITNESSES

The trial court focused on the ease with which a Croatian court could compel the attendance of Croatian witnesses. But this is a products-liability case involving the need for numerous documents. A great many of the necessary documents are located within this state, given that the Jeep was designed and manufactured here. Moreover, some witnesses are located in the United States. Hence, difficulties will arise in obtaining witnesses and documents in both locations. Also, it appears that neither forum would have the benefit of compulsory process in the other forum. Thus, this subfactor favors neither forum.

b. EASE OF ACCESS TO SOURCES OF PROOF

The trial court abused its discretion by focusing only on the problems existing if Michigan remained the forum for this litigation. No matter in which country this case is tried, one of the parties will be obliged to

obtain documents from the other country. Given the nature of the case, a primary concern will be the design and manufacture of the Jeep. It seems likely that the majority of the documents needed will be in Michigan. Moreover, they will be in English. Therefore, if the case is tried in Croatia, the parties likely will be obliged to have thousands of highly technical documents translated into another language. Accordingly, this subfactor arguably tends to favor Wayne County as the proper forum.

The majority points out that MCR 2.305 provides that documents located in Michigan can be subpoenaed for trials outside the state. It is unknown if Croatian law has a similar provision. Therefore, this fact tends to support Croatia as the proper forum.

Given that there is support for both sides, this subfactor evenly favors both forums.

c. DISTANCE FROM THE SITUS OF THE ACCIDENT OR INCIDENT THAT GAVE RISE TO THE LITIGATION

Again, this subfactor weighs evenly between the two forums. Whereas the accident occurred in Croatia, the Jeep was manufactured and designed in Michigan. Manufacture and design are incidents that give rise to the litigation, and Wayne County is much closer to these incidents.

d. ENFORCEABILITY OF ANY JUDGMENT OBTAINED

There is no indication that the judgment would be unenforceable in either forum. This subfactor favors neither forum.

e. POSSIBLE HARASSMENT OF EITHER PARTY

This factor weighs in favor of Wayne County as the proper forum. Defendant claims that some Croatian

witnesses may be reluctant to testify. There is evidence to the contrary. Plaintiffs offer statements by the deceased's family doctor, the mechanic who serviced the Jeep, and the person who investigated the accident for the Croatian authorities. They stated that they will be willing to travel to and testify in Wayne County. There is no countervailing evidence that witnesses located within the United States will be willing to travel to Croatia. Therefore, it is more likely that plaintiffs would have difficulty bringing reluctant witnesses related to defendant to testify in Croatia than that defendant could not bring Croatian witnesses to Michigan. Hence, this subfactor should favor Wayne County as the proper forum.[7]

f. OTHER PRACTICAL PROBLEMS THAT CONTRIBUTE TO THE EASE, EXPENSE, AND EXPEDITION OF THE TRIAL

Defendant and the majority discuss defendant's need to implead third parties in this case. But it remains unknown whether the Croatian courts allow impleading. Defendant asks this Court to conclude that they do, without providing legal and factual support for the conclusion. A party may not simply announce a position and leave it to this Court to find support for it. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). "The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

[7] The majority contends that my analysis of this subfactor is incorrect because the trial judge cannot compel foreign witnesses to attend trial in Wayne County. The Wayne County judge would have no need to resort to compulsory process with respect to the witnesses in question. Contrary to the majority's assertion, it is not mere speculation that these witnesses will attend without being subpoenaed. They have stated that they would be willing to travel to Michigan of their own free will. Given that they are the only witnesses who have clearly made this statement, this subfactor favors Wayne County as the appropriate forum.

Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, defendant names no parties it wishes to implead. There is no way to know in which forum they could be impleaded inasmuch as they are not identified.

Even if it is assumed that there are parties in Croatia that defendant needs to implead and that Croatia allows impleading, Croatia is not strongly favored as a forum. This is because, if the trial were held in Wayne County and if defendant could not implead third parties, defendant would face no greater liability. MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Defendant points to no provision in Croatian law similar to this one. Hence, it could be argued that Wayne County is the more appropriate forum because a proper allocation of liability is assumed there. At the very least, considering the totality of the circumstance existing under this subfactor, it does not clearly favor either Croatia or Wayne County.

g. POSSIBILITY OF VIEWING THE PREMISES

This subfactor favors Croatia as the forum because the accident occurred there.

In summary, most of the subfactors under "private interest" weigh evenly between the two forums. The possibility of viewing the premises favors Croatia. But

the possibility of witness harassment favors Wayne County. In any event, the "private interests" factor assuredly does not favor Croatia, as the majority asserts.

2. MATTERS OF PUBLIC INTEREST

a. ADMINISTRATIVE DIFFICULTIES THAT MAY ARISE IN AN AREA WHICH MAY NOT BE PRESENT IN THE AREA OF ORIGIN

Again, defendant provided the trial court no information about the legal conditions in Croatia. The majority argues that the Wayne County docket would be congested if every automotive design case arising abroad were brought there. But we have no reason to believe that would occur. Instead, the evidence suggests that, despite the existence for the past two decades of the *Robey* "seriously inconvenient" standard, Wayne County has suffered no flood of automobile product liability cases. The majority's reasoning under this subfactor borders on fear-mongering.

Because we have no idea how busy the Croatian courts are, we cannot conclude in any event that the Wayne County docket would be more congested than a Croatian court docket. The *Cray* factors are intended as a balancing test. *Cray*, 389 Mich 396. The record in this case does not permit a proper balancing of this subfactor. Therefore, it should not be concluded that it favors either forum.

b. CONSIDERATION OF THE STATE LAW THAT MUST GOVERN THE CASE

As previously discussed in my opinion, the trial court abused its discretion by failing to analyze this subfactor. It merely assumed inappropriately that Croatian law would apply to the case.

I agree with the Court of Appeals that Croatian law may not apply. The ancient rule in the field of choice of law was *lex loci delicti*. It required that a court always apply the law of the place where the tort or wrong occurred. *Sutherland v Kennington Truck Service Ltd*, 454 Mich 274, 278; 562 NW2d 466 (1997). But Michigan long ago abandoned this rule. *Id*. at 283-284. *Sutherland* articulated the proper test for determining if Michigan law should apply:

> [W]e will apply Michigan law unless a "rational reason" to do otherwise exists. In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests. [*Id*. at 286.]

It is undisputed that Croatia has an interest in this case. When another state has a significant interest and Michigan's interest is minimal, Michigan courts should defer to the foreign state's law. *Hall v Gen Motors Corp*, 229 Mich App 580, 585; 582 NW2d 866 (1998). But, in this case, I believe that Michigan has more than a minimal interest.

The Jeep was designed and manufactured in this state. Michigan has easily as much interest in the safe design and manufacture of its goods as does any other state or country. Its interest may be greater because the state's good name stands to be diminished if its products are branded dangerous or deadly.

In addition, Michigan has an interest in protecting its manufacturers, given that they provide a large percentage of the state's job base. Michigan has an interest in

having known products-liability laws applied to ensure fair determinations of liability. The Michigan Legislature has implemented laws to protect consumers against faulty products and to protect manufacturers against Draconian liability determinations. Michigan has a legitimate interest in applying those laws.[8]

The majority points to the Court of Appeals decision in *Farrell v Ford Motor Co*,[9] to support the argument that it is more likely that Croatian law applies than Michigan law. *Farrell* can be distinguished. In *Farrell,* the plaintiff's argument was that Ford's headquarters are in Michigan. *Farrell*, 199 Mich App 93-94. There was no evidence in the record regarding where the car in that case was manufactured or designed. *Id*. at 94 n 3. And the Court of Appeals paid special attention to the major connection Ford had to North Carolina:

> Ford unquestionably generates substantial commerce within the State of North Carolina. In connection with its motion for summary disposition, Ford submitted substantial documentary evidence in the form of affidavits that reveal that Ford directly employs seventy employees at its Charlotte, North Carolina, facility and purchased nearly $ 591 million worth of materials from North Carolina suppliers in 1989. In addition, Ford and Lincoln-Mercury vehicles accounted for 27.4 percent of all new cars and 30 percent of new trucks sold in North Carolina in 1989. It is obviously in North Carolina's economic interest to encourage manufacturers, such as Ford, to do business in North

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[8] Defendant wants this Court to assume that products-liability law in Croatia does not favor plaintiffs. Defendant argues that plaintiffs are shopping for a better forum. Again, defendant refers to nothing in the record to support this assumption. We have no reason to assume that Michigan's laws are less favorable to a defendant than Croatia's. Given that defendant offers no support for its argument on this point, this Court will not furnish support for it. *Goolsby*, 419 Mich 655 n 1.

[9] 199 Mich App 81; 501 NW2d 567 (1993).

> Carolina. The sales taxes collected, salaries paid, and materials purchased all contribute to North Carolina's economy. [*Id*. at 93.]

Defendant fails to document such significant economic connections with the Island of Brac, the Dalmatian Coast, or the Republic of Croatia. Given this, we have no way of knowing what economic connections defendant has with the alternate forum. The lack of a record in this regard clearly distinguishes this case from *Farrell*. Because of it, I believe that Michigan may apply its own law to this case.

Given that there is strong support for Michigan applying its own law, this subfactor favors retaining jurisdiction in Wayne County.

c. PEOPLE WHO ARE CONCERNED BY THE PROCEEDING

Parties from both forums have an interest in this case. Citizens of Croatia were injured in the crash. Ena Begovic had the distinction of being a famous actress.[10] On the other hand, as discussed earlier regarding subfactor b, Michigan has more than an incidental interest in this case. Therefore, this subfactor does not clearly favor either forum.

Synthesizing the subfactors under the "matters of public interest" factor, neither forum is strongly favored. But the consideration of state law slightly favors Michigan as the forum. At the very least, the public interest factor does not strongly favor Croatia as the proper forum, as the majority implies.

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[10] See Wikipedia, <http://en.wikipedia.org/wiki/Ena_Begovi%C4%87> (accessed May 10, 2006), and the Internet Movie Database, <http://www.imdb.com/name/nm0066807/> (accessed May 10, 2006).

3. REASONABLE PROMPTNESS IN RAISING FORUM NON CONVENIENS

No assertion is made that defendant failed to promptly raise forum non conveniens.

In summary, considering all the *Cray* factors, neither forum is strongly favored. Instead, it appears that the two forums are rather equally matched. And a strong argument could be made that the factors favor Michigan as a forum.

The factors assuredly do not strongly favor Croatia. Unless the "balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp*, 330 US 508. Because the reviewed factors do not strongly weigh in favor of defendant, this is not one of those " 'exceptional cases' " where it is decisively established that there is another forum where " 'trial will best serve the convenience of the parties and the ends of justice . . . .' " *Cray*, 389 Mich 392, quoting *Gore,* 15 NJ 301.

There is no evidence that plaintiffs brought this case to vex, harass, or oppress defendant. Therefore, the principles undergirding the doctrine are not implicated, and Wayne County is not a completely inappropriate forum. *Norwood*, 349 US 31. In such situations, Wayne County should not avoid its jurisdiction.

The trial court abused its discretion by dismissing the case without finding that Wayne County is a seriously inconvenient forum. *Cray*, 389 Mich 394 n 2; *Robey*, 155 Mich App 645. I would affirm the decision of the Court of Appeals.

THERE IS NO NEED TO ADD TO THE *CRAY* FACTORS

We specifically asked the parties to address whether *Cray's* public interest factor should be revised or modi-

fied. Justice MARKMAN notes several "contemporary realities" that support adding public interest subfactors such as the globalization of American companies, the expansion of free trade, and the attractiveness of American courts. Justice MARKMAN's additional factors would strongly disfavor foreign plaintiffs.[11] I feel that such additions are not necessary.

Despite the authority discussing the attractiveness of American courts, there is little to demonstrate that Michigan has become an especially attractive forum. There is no evidence that foreign nationals are rushing to file products-liability or other tort cases in Michigan. When specifically asked about the number of such cases in Michigan, defendant's attorney could point to only a handful, and he could specifically name just two. There is simply no evidence that Michigan's courts are flooded with cases brought by foreign nationals. And there is no indication that a sudden influx will occur if the law is not immediately altered.

Without a disease, there is no need for a cure. Courts have proven well equipped to apply *Cray* as it stands. And the *Cray* factors have proven eminently capable of handling the issue of forum non conveniens. Therefore, I would not add to the public interest factors.

Similarly, I must dissent from the majority's decision to adopt the United States Supreme Court's statement in *Piper Aircraft Co v Reyno*[12] that a foreign plaintiff's choice of forum should be accorded less deference. The Supreme Court stated:

> The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's

[11] By use of the term "foreign plaintiffs," Justice MARKMAN means nonresidents of the United States.

[12] 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1981).

> choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign.
>
> The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. 330 U.S., at 524. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. [*Piper*, 454 US 255-256.]

Piper went on to provide:

> Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper. [*Id*. at 255 n 23.]

I do not believe that we should adopt *Piper*. The reason that the *Piper* Court is giving less deference to a foreign national's choice of forum is because the foreign national is foreign. Basing access to our courts on such a status is highly suspect and smacks of xenophobia. As the Washington Supreme Court noted:

> The Court's logic [in *Piper*] does not withstand scrutiny. The Court is comparing apples and oranges. Foreigners, by definition, can never choose the United States as their home forum. . . . [I]t is not necessarily less reasonable to assume that a foreign plaintiff's choice of forum is convenient. Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has

> chosen a less convenient forum than a plaintiff from Florida bringing the same suit? [*Myers v Boeing Co*, 115 Wash 2d 123, 138; 794 P2d 1272 (1990) (emphasis in original).]

Treating foreign nationals differently in every case simply does not make logical sense. To offer a Michigan example, person A is a resident of Windsor, Canada, but crosses the Ambassador Bridge each workday to work in Detroit. While driving a vehicle designed, manufactured, bought, and maintained in Michigan before crossing from Canada one day, person A is involved in an accident caused by an automobile design defect. Person B is a resident of California. He drives a DaimlerChrysler vehicle that was designed in Germany and manufactured outside Michigan. He is also involved in an automobile accident caused by a design defect, but it occurs in Nevada.

Under *Piper*, the circuit court must accord considerable deference to person B's choice of Michigan as a forum, but person A's choice of Michigan would not warrant such deference. This is despite the fact that person A has significantly greater contact and connection to Michigan than person B. There is no reason for this distinction aside from the desire to discriminate against person A because of A's status as a foreign national. I find such discrimination inappropriate and unnecessary. The discrimination is needless in light of the fact that application of the *Cray* factors would properly locate the correct forum.

Much of the 1981 *Piper* decision is based on the notion that American courts are particularly attractive to foreign plaintiffs. Its rule was apparently created with the object of preventing a flood of foreign cases into American courts. But again, there is no real evidence of a threatened influx into Michigan. And there is

no evidence that the existing *Cray* factors are ill-equipped to prevent an influx should it arise.

Moreover, *Piper* makes forum-shopping easier for corporations headquartered in the United States. Foreign nationals often bring cases in the home forum of the defendant corporation. But *Piper* enables a corporation based in the United States not to defend the case on its home turf in a court minutes away from home. Instead, the corporation can decide to fly halfway around the globe to defend the case in an unfamiliar court and often in a language other than English. The motivation for this is to find a forum more conducive to its victory. *Piper* facilitates forum-shopping for these corporations by lowering the standard necessary to escape the original forum's jurisdiction. Forum-shopping in general is inappropriate. And I would not encourage it by adopting the language cited earlier from *Piper*.

But even under *Piper*, this case does not warrant dismissal based on forum non conveniens. A foreign national's choice of forum is still accorded deference. "Citizens or residents deserve *somewhat more deference* than foreign plaintiffs . . . ." *Piper*, 454 US 255 n 23 (emphasis added). Somewhat less deference is a far cry from no deference at all. In fact, considering the statements made in *Gulf Oil Corp*, a fair amount of deference for the plaintiff's choice remains under *Piper*. *Gulf Oil Corp*, 330 US 508. As was discussed earlier in this opinion, there is an even balance between the convenience of the forums when the *Cray* factors are applied. Hence, giving any deference at all to the plaintiffs' choice of forum would result in Wayne County retaining jurisdiction.

The majority contends that the only reasonable explanation for plaintiffs' decision to sue in Michigan was

to take advantage of Michigan's favorable laws and to avoid Croatia's less favorable laws. This simply is not true. There is a legitimate argument that plaintiffs filed this case in Michigan as a matter of convenience. As noted earlier, there are likely thousands of documents in Michigan relating to the design and manufacture of the Jeep. Also there are likely numerous witnesses in the United States who could be called to testify regarding the choices made in designing and manufacturing the Jeep. This is not to mention the thousands of pages of documents that likely exist in Washington, D.C., involving a National Highway Safety Administration investigation of the problems with this kind of Jeep. All these documents are in English, and few, if any, of the witnesses speak Croatian. The choice of forum was appropriately influenced by these considerations.

Rather than merely shopping for a favorably disposed forum, plaintiffs came to defendant's home state to facilitate calling witnesses and obtaining documents that will form the foundation of their case. This choice seems more than reasonable. It is defendant that is hard-pressed to argue that its reason for opposing Wayne County's jurisdiction is not forum-shopping. It seeks to close the doors to a court in its backyard, so that it could fly halfway around the world to defend the case in a foreign country. Given that all identified Croatian witnesses will come to this county, the sole remaining reason for defendant's resistance to the Wayne Circuit Court must be to find a more friendly forum.

Defendant has not and cannot demonstrate that plaintiffs' choice is unnecessarily burdensome for it or for the court. Even under *Piper*, the balancing of the conveniences is decisive when deciding whether to dismiss a case. *Piper*, 454 US 255 n 23. Because the

Wayne Circuit Court is not an unsuitable court, the forum non conveniens doctrine does not permit the circuit court to avoid jurisdiction.

CONCLUSION

The *Cray* factors do not strongly favor Croatia as the proper forum in this case. And Wayne County is not a seriously inconvenient forum. Therefore, the trial court abused its discretion by dismissing this case on the basis of the doctrine of forum non conveniens. I would affirm the decision of the Court of Appeals.

The majority contends that I pay only lip service to the "abuse of discretion" standard. It reaches this conclusion because I would decide the case differently than it does. The majority misses the fact that I am applying the correct standard, the seriously inconvenient standard, to this forum non conveniens case. When this standard is applied, the trial court's decision is *not* within the principled range of outcomes because it pays no respect to plaintiffs' choice of forum. The decision that Wayne County can avoid its jurisdiction is an abuse of discretion because the *Cray* factors do not strongly weigh in favor of Croatia as a forum. *Gulf Oil Corp*, 330 US 508.

As noted elsewhere in this opinion, the trial court abused its discretion in other ways as well. First, it failed to balance the *Cray* factors between the two forums. *Cray*, 389 Mich 396. Next, it failed to determine which forum's law to apply. To properly use the *Cray* factors, a court must first make such a determination. See *Manfredi*, 194 Mich App 525-526. It is because of these failures that I conclude that the trial court's decision is not within the principled range of outcomes. Hence it constitutes an abuse of discretion.

Also, there is no basis for adopting the *Piper* standard according less deference to foreign plaintiffs' choice of forum. Therefore, I oppose embracing the United States Supreme Court's reasoning in that case. Because the *Cray* factors have served us well for many years, I would continue to use them without amendment.

FEYZ v MERCY MEMORIAL HOSPITAL

Docket No. 128059. Argued May 2, 2006 (Calendar No. 5). Decided July 24, 2006.

Bruce B. Feyz, M.D., brought an action in the Monroe Circuit Court against Mercy Memorial Hospital, a private hospital, and members of its staff, seeking injunctive relief and damages relating to his placement on indefinite probation by the defendants. The plaintiff's complaint included civil rights, contract, and tort claims. The court, Joseph A. Costello, Jr., J., granted summary disposition for the defendants, citing the doctrine of judicial nonintervention in the staffing decisions of private hospitals, as well as statutory immunity arising from the peer review committee referral of the plaintiff for psychological evaluation. The plaintiff appealed. The Court of Appeals, SAWYER and SMOLENSKI, JJ. (MURRAY, P.J., concurring in part and dissenting in part), affirmed in part, reversed in part, and remanded the matter to the trial court for further proceedings. 264 Mich App 699 (2005). The Court of Appeals concluded that peer review immunity does not apply to statutory civil rights claims, that an alleged civil rights violation was not within the scope of peer review, and that an alleged civil rights violation was "a malicious act." The Court also held that the nonintervention doctrine did not prevent the plaintiff from pursuing his civil rights claims, nor did the doctrine generally preclude the plaintiff's contract and tort claims. Finally, the Court held that a private hospital's staffing decisions are subject to the same level of judicial review as would apply to the actions of any other private entity. The Supreme Court granted the defendants' application for leave to appeal. 474 Mich 957 (2005).

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

1. The doctrine of judicial nonintervention cannot supplement or supplant the statutory immunity granted by the Legislature through the peer review immunity statute. There is no basis to justify the application of a nonintervention doctrine to general staffing decisions of a private hospital.

2. The statutorily prescribed scope of judicial review over the peer review process is narrow. The Legislature codified limited

judicial review of the peer review process, permitting judicial review only when peer review participants act with malice.

3. Malice, for purposes of MCL 331.531(4), can be established when a person supplying information or data to a peer review entity does so with knowledge of its falsity or with reckless disregard of its truth or falsity. A review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data that it communicates or upon which it acts.

4. A hospital is not a protected review entity under the peer review immunity statute. The immunity granted by the peer review immunity statute extends only to the communications made, and the participants who make them, in the peer review process, as well as to the communicative acts taken by a statutorily protected peer review entity acting within its scope, not to the hospital that makes the ultimate decision on staffing credential questions.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, concurring in part and dissenting in part, agreed that no justification exists in this state for recognizing the judicial nonintervention doctrine and that the doctrine should not be applied to a private hospital's general staffing decisions, but dissented from the majority's definition of "malice" as used in MCL 331.531. "Malice" should not be defined under the principles of "actual malice" used in defamation law. Rather, the term should be defined to mean the "intent, without justification or excuse, to commit a wrongful act" or "reckless disregard of the law or of a person's legal rights." To define the term otherwise ignores the statutory language. The trial court should be directed on remand to apply the appropriate legal definition of "malice."

Court of Appeals judgment vacated; case remanded to the trial court for further proceedings.

1. HOSPITALS — STAFFING DECISIONS — JUDICIAL NONINTERVENTION DOCTRINE.

The doctrine of judicial nonintervention, which suggests that the staffing decisions of a private hospital are generally beyond the scope of judicial review, is inconsistent with the statutory peer review process established by MCL 331.531 and is repudiated.

2. HOSPITALS — PEER REVIEW IMMUNITY — EXCEPTIONS — MALICE.

Malice, for purposes of the statutory hospital peer review process, exists when a person supplying information or data to a peer review entity does so with knowledge of its falsity or with reckless disregard of its truth or falsity; a peer review entity is not immune

from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of the information or data that it communicates or upon which it acts (MCL 331.531[4]).

3. HOSPITALS — PEER REVIEW IMMUNITY — PEER REVIEW ENTITIES.

A hospital is not a protected review entity under the peer review immunity statute; the immunity granted by the peer review immunity statute extends only to the communications made, and the participants who make them, in the peer review process, as well as to the communicative acts taken by a statutorily protected peer review entity acting within its scope, not to the hospital that makes the ultimate decision on staffing credential questions.

Jeffrey L. Herron for the plaintiff.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Karen B. Berkery*) for the defendants.

Amici Curiae:

Clark Hill PLC (by *Robert L. Weyhing* and *Paul C. Smith*) for Michigan Osteopathic Association.

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

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Ron D. Robinson*, Assistant Attorney General, for the Michigan Civil Rights Commission and the Michigan Department of Civil Rights.

Hall, Render, Killian, Heath & Lyman, PLLC (by *Michael J. Philbrick*), for Michigan Health & Hospital Association.

YOUNG, J. Plaintiff is a physician with staff privileges at defendant Mercy Memorial Hospital. This lawsuit arises from an internecine dispute over nursing orders

for patient intake at the defendant hospital. Plaintiff's insistence on requiring the nursing staff to use his special standing orders instead of defendant hospital's standing orders eventually led to a conflict with defendant hospital and a peer review of plaintiff's professional practices as well as disciplinary action.

Plaintiff's challenge of the peer review conducted by some of the defendants and the resulting disciplinary action taken against him requires that we consider the scope of immunity provided for peer review. In order to promote effective patient care in hospitals, the Legislature enacted MCL 331.531, commonly referred to as Michigan's peer review immunity statute. The purpose of statutory peer review immunity is to foster the free exchange of information in investigations of hospital practices and practitioners, and thereby reduce patient mortality and improve patient care within hospitals. The Legislature obviously intended to protect peer review participants from liability for participation in this communicative and evaluative process. In order to create an environment in which such candid explorations of the quality of hospital patient care can occur, among other protections, the Legislature prohibited the discovery of communications made within the peer review process and granted immunity from liability to all who participate in peer review without "malice."

The primary question posed in this appeal is the scope of judicial review of peer review permitted under MCL 331.531. A secondary question is whether the judicially created "doctrine of nonintervention"—a doctrine suggesting that staffing decisions of private hospitals are generally beyond the scope of judicial review—is compatible with the peer review immunity statute. Finally, we must also construe the undefined peer review statutory term "malice."

Because the peer review immunity statute establishes qualified immunity from liability for peer review communication and participants who provide such communications, we conclude that there is no justification for recognizing the nonintervention doctrine that the lower courts in this state have applied in considering claims arising from peer review. We therefore hold that this doctrine cannot supplement or supplant the statutory immunity granted by our Legislature. Furthermore, there is no basis, statutory or otherwise, to justify the application of a nonintervention doctrine to general staffing decisions of a private hospital. We also hold that, consistent with the objects of the peer review immunity statute, malice should be defined as set forth by the Court of Appeals in *Veldhuis v Allan*.[1] Thus, we hold that malice can be established when a "person supplying information or data [to a peer review entity] does so with knowledge of its falsity or with reckless disregard of its truth or falsity. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts."[2]

Accordingly, we vacate the judgment of the Court of Appeals and remand this case to the Monroe Circuit Court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY[3]

Plaintiff is a physician with staff privileges at defendant Mercy Memorial Hospital.[4] Plaintiff was dissatis-

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[1] 164 Mich App 131; 416 NW2d 347 (1987).

[2] *Id.* at 136-137 (citation omitted).

[3] Because this case was dismissed pursuant to MCR 2.116(C)(8), all material facts are taken from plaintiff's complaint.

[4] According to plaintiff's complaint, the individual defendants hold various administrative positions at defendant hospital. Defendant Medi-

fied with defendant hospital's standard nursing policy requiring nurses to document patients' prescribed medications and dosages by either copying the label on their prescription containers or copying a list of medications carried by patients. As a consequence, plaintiff created his own specialized orders directing the nursing staff to obtain very specific information from plaintiff's incoming patients about their prescription drug use. Plaintiff's orders directed the nursing staff, as part of the admissions process for his patients, to assume a far more aggressive investigative role regarding patient medication.[5]

Defendants disapproved plaintiff's standing orders, and instructed the nursing staff to ignore them. In several cases where the nurses disregarded plaintiff's special orders and followed defendant hospital's nursing directives, plaintiff prepared "incident reports" referring such cases to peer review committees for investigation of "potential medical errors." Further, plaintiff began making notations in patient records that

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cal Staff of Mercy Memorial Hospital is "the organization of health care providers who provide health care to patients" at defendant Mercy Memorial Hospital.

[5] According to plaintiff's complaint, plaintiff's standing orders required nurses to do the following:

> A. Have the family bring in home medications.
>
> B. Ask the patient (if alert) if the containers belong to the medications. If not, send the container(s) to the pharmacy for identification.
>
> C. Ask the patient to look at his/her medications inside the container and tell how he/she has been taking them at home.
>
> D. List the dose and frequency of medications taken on the nursing assessment form as the patient is actually taking them at home.

his disregarded orders were intended to "[p]revent serious medication errors in the past."

Defendants initiated peer review proceedings against plaintiff based on plaintiff's failure to complete medical records[6] and his insistence that the nursing staff follow his standing orders rather than comply with hospital policy. An ad hoc investigatory committee reviewed plaintiff's conduct and released its findings to the executive committee of defendant medical staff.[7] Relying on the ad hoc committee's report, the executive committee referred plaintiff to the Health Professionals Recovery Program (HPRP) for a psychiatric examination.[8] Plaintiff was placed on temporary probation.

Plaintiff alleges that he ceased writing his standard orders because, in compromise, defendant hospital gave plaintiff use of the pharmacy consult service to implement plaintiff's special orders. It appears that plaintiff's orders regarding patient medication overburdened the staff of the pharmacy consult service, so the hospital eventually discontinued this arrangement. Thereafter, plaintiff resumed placing his specialized orders in patients' medical charts. As a consequence, defendants took further action and placed plaintiff on indefinite probation. Plaintiff continues to practice medicine and retains privileges at defendant hospital, but is restricted from using defendant hospital's pharmacy consult service or insisting on compliance with his special orders.

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[6] Plaintiff admits that he refused to comply with hospital policy requiring physicians to sign transcriptions of their verbal orders.

[7] Because this case was decided on motion solely on the basis of plaintiff's pleadings, it is not clear whether the ad hoc investigatory committee and the executive committee were duly authorized "peer review" entities. It is not necessary to the resolution of this appeal that we determine their status. We therefore express no opinion on this issue.

[8] See MCL 333.16223.

Plaintiff filed a complaint alleging violations of the Persons with Disabilities Civil Rights Act,[9] the Americans with Disabilities Act,[10] the Rehabilitation Act of 1973,[11] and 42 USC 1983 and 1985; invasion of privacy; breach of fiduciary and public duties; and breach of contract. The trial court granted summary disposition to defendants, concluding that all of defendants' actions arose out of the peer review process and therefore defendants were immune from liability under MCL 331.531. The court, as an alternative basis for granting summary disposition, relied on the doctrine of judicial nonintervention, which provides that courts will not review private hospitals' staffing decisions.

The Court of Appeals, in a split decision, partially reversed the trial court's award of summary disposition in favor of defendants,[12] concluding that peer review immunity did not apply to statutory civil rights claims. The majority concluded that an alleged civil rights violation was not within the scope of peer review and that an alleged civil rights violation was "a malicious act."[13] Furthermore, the majority held that the nonin-

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[9] MCL 37.1101 *et seq*.

[10] 42 USC 12101 *et seq*.

[11] 29 USC 794.

[12] 264 Mich App 699; 692 NW2d 416 (2005). The Court of Appeals affirmed the dismissal of plaintiff's breach of fiduciary duty claim against all defendants on the basis of the nonintervention doctrine, because such a claim went to the heart of the majority's interpretation of the doctrine—that private hospitals are not subject to greater judicial scrutiny than any other private entity. Furthermore, the Court of Appeals affirmed summary disposition of plaintiff's nonstatutory claims against the members of the ad hoc committee, to the extent those claims were based on the actions of the ad hoc committee while acting in its role as a peer review committee. Plaintiff did not appeal these adverse holdings, and they are not before us.

[13] *Id*. at 704. The Court of Appeals majority used the following definition of malice: " 'Malice in law is not necessarily personal hate or ill

tervention doctrine did not prevent plaintiff from pursuing his civil rights claims, nor did the doctrine generally preclude plaintiff's contract and tort claims. The majority held that the doctrine stands for the limited proposition that a private hospital's staffing decisions are not subject to constitutional due process challenges. The majority concluded that the nonintervention doctrine did not create any greater insulation from judicial scrutiny than that enjoyed by any other private entity. In other words, the majority held that a private hospital's staffing decisions are subject to the same level of judicial review as would apply to the actions of any other private entity.

The Court of Appeals dissent agreed that an unlawful act of discrimination constituted malice,[14] but disagreed that an unlawful discriminatory act was per se outside the scope of a peer review committee.[15] The dissent would have affirmed the trial court's dismissal of plaintiff's tort and contract counts. The dissent also concluded that the majority improperly limited the scope of the nonintervention doctrine. The dissent opined that the nonintervention doctrine precluded judicial review of contract and contract-related tort claims

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will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.' " *Id.* at 704-705, quoting Black's Law Dictionary (5th ed).

[14] The dissent relied in part on the following legal definition of "malice": " 'The intent, without justification or excuse, to commit a wrongful act.' " *Feyz*, *supra* at 728 (MURRAY, P.J., concurring in part and dissenting in part), quoting Black's Law Dictionary (7th ed). The dissent agreed with the majority that MCL 331.531 would not bar valid discrimination claims. However, somewhat inconsistently, the dissent criticized the majority's abandonment of the defamation definition of malice, adopted in *Veldhuis*, *supra*, and stated that the majority offered no justification or explanation for the abandonment.

[15] Although unstated, given the dissent's preferred definition of malice, it appears that its rejection of a per se application of discriminatory claims as an exception to peer review immunity derives from the fact that not all discriminatory claims require proof of intent. See, e.g., *Raytheon Co v Hernandez*, 540 US 44, 52-53; 124 S Ct 513; 157 L Ed 2d 357 (2003).

arising from hospital staffing decisions with regard to all defendants.

This Court granted defendants' application for leave to appeal.[16]

STANDARD OF REVIEW

The trial court granted defendants summary disposition under MCR 2.116(C)(8). A trial court's grant of summary disposition is reviewed de novo.[17] A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone.[18] When a challenge to a complaint is made, the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery.[19]

Questions of statutory interpretation, such as the proper construction of the peer review immunity statute, are reviewed de novo.[20] Our role is to give effect to the intent of the Legislature, as expressed by the language of the statute.[21] We apply clear and unambiguous statutes as written, under the assumption that the Legislature intended the meaning of the words it has used in the statute.[22] In defining statutory words, we must consider the "plain meaning of the critical word or

[16] 474 Mich 957 (2005).

[17] *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001).

[18] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[19] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[20] *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006).

[21] *Grimes v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006).

[22] *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

phrase as well as 'its placement and purpose in the statutory scheme.' "[23] While words are construed according to their plain and ordinary meaning, words that have acquired a peculiar and appropriate meaning in the law are construed according to that peculiar and appropriate meaning.[24]

ANALYSIS

In Michigan, the Legislature has commanded hospitals to establish peer review committees to review "professional practices" in order to "reduc[e] morbidity and mortality and improv[e] the care provided in the hospital for patients."[25] That review must "include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital."[26] In turn, hospitals use peer review evaluations when making staffing decisions.[27]

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[23] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1999).

[24] MCL 8.3a.

[25] MCL 333.21513 provides, in pertinent part:

> The owner, operator, and governing body of a hospital licensed under this article:
>
> * * *
>
> (d) Shall assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. The review shall include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital.

[26] *Id*.

[27] See *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985). "Hospitals are required to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care. Included

A. THE JUDICIAL NONINTERVENTION DOCTRINE AND THE SCOPE OF JUDICIAL REVIEW OF PEER REVIEW

The judicial nonintervention doctrine is a judicially created common-law doctrine providing that courts will not intervene in a private hospital's staffing decisions. The concerns that gave rise to this doctrine are twofold. The doctrine is premised, in part, on the distinction between public and private hospitals. While public hospitals are state actors implicating adherence to constitutional requirements, such as affording due process to physicians, private hospitals are not similarly constrained because they are not state actors.[28] Therefore, it was posited that a private hospital's staffing decisions merit less judicial scrutiny.

The doctrine is also founded on the belief that courts are ill-equipped to review hospital staffing decisions because courts lack the specialized knowledge and skills required to adjudicate hospital staffing disputes. The judicial nonintervention doctrine, therefore, is a prudential doctrine not grounded in statutory or constitutional provisions that courts have invoked to resist adjudicating claims involving hospital staffing decisions and the decision-making process.[29]

In *Shulman v Washington Hosp Ctr*,[30] a seminal case describing the doctrine, the United States District

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in their duties is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications." *Id*. at 169 (internal citations omitted).

[28] *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 376-377; 689 NW2d 145 (2004), lv den 474 Mich 955 (2005).

[29] See *id*. The judicial nonintervention doctrine does not deprive a court of subject-matter jurisdiction as some Court of Appeals panels have erroneously concluded. *Id*. at 377 n 5, citing *Veldhuis v Central Michigan Community Hosp*, 142 Mich App 243; 369 NW2d 478 (1985), and *Bhogaonker v Metro Hosp*, 164 Mich App 563; 417 NW2d 501 (1987). Rather, the doctrine is one of self-restraint where courts decline to exercise jurisdiction.

[30] 222 F Supp 59, 64 (D DC, 1963).

Court for the District of Columbia explained its foundational premises as follows:

> Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these the courts are not in a position to substitute their judgment for that of professional groups.

Relying on *Shulman*, the Michigan Court of Appeals adopted the doctrine of judicial nonintervention in *Hoffman v Garden City Hosp*.[31] The plaintiff in *Hoffman* sued a private hospital for denying him staff privileges, claiming, in part, that the hospital's decision to deny privileges was "arbitrary, capricious and unrea-

[31] 115 Mich App 773; 321 NW2d 810 (1982).

sonable . . . ."[32] The defendant prevailed in the trial court on its motion for summary disposition. On appeal, the plaintiff urged the Court of Appeals to adopt the position that a private hospital holds a fiduciary duty to make its staffing decisions reasonably and for the public good.[33] The plaintiff argued that the defendant hospital's decision was "so 'affected with a public interest' " that it should be subject to judicial review.[34] The *Hoffman* panel rejected this argument and, in affirming the trial court, adopted the position articulated in *Shulman* that a private "hospital's reasons for denying staff privileges" and "the decisions of the governing bodies of private hospitals are not subject to judicial review."[35]

In subsequent cases, the Court of Appeals relied on, as well as expanded, the judicial nonintervention doctrine set forth in *Hoffman*.[36] For example, in *Sarin v Samaritan Health Ctr*,[37] the Court of Appeals affirmed summary disposition of the plaintiff doctor's breach of contract and tort claims arising out of an alleged breach of the hospital's bylaws. *Sarin* held that the doctrine precluded judicial review not only of a private hospital's decision on staff privileges, but also " 'the method by which the hospital personnel reached that decision,' "[38] because judicial review of those claims would require

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[32] *Id*. at 776.

[33] See *Greisman v Newcomb Hosp*, 40 NJ 389; 192 A2d 817 (1963).

[34] *Hoffman*, *supra* at 777.

[35] *Id*. at 778, 779, citing *Shulman*, *supra*.

[36] See *Regualos v Community Hosp*, 140 Mich App 455, 460-461; 364 NW2d 723 (1985); *Veldhuis Central Michigan Community Hosp*, *supra*; *Dutka v Sinai Hosp of Detroit*, 143 Mich App 170; 371 NW2d 901 (1985); *Bhogaonker*, *supra*.

[37] 176 Mich App 790, 793-794; 440 NW2d 80 (1989).

[38] *Id*. at 794, quoting *Veldhuis v Central Michigan Community Hosp*, *supra* at 247.

courts to "interven[e] in the hospital's [staffing] decision and interfer[e] with the peer review process." [39]

More recently, in *Long v Chelsea Community Hosp*,[40] the Court of Appeals refined the scope of the nonintervention doctrine, and opined that the doctrine could not bar judicial review of *all* legal claims related to staffing decisions. The panel stated that the doctrine

> is limited to disputes that are contractual in nature. We decline to articulate a broad principle that a private hospital's staffing decisions may *never* be judicially reviewed. Indeed, in doing so, we reiterate the proposition from *Sarin* that, under some circumstances, a court may consider a hospital's decisions without violating the nonintervention principle. Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim. In this case, however, plaintiff did not assert a violation of civil rights or a violation of a state statute.[41]

Long confined the scope of the judicial nonintervention doctrine to disputes arising out of those decisions that are "contractual in nature."[42]

In this case, the Court of Appeals majority largely abandoned the *Hoffman* rule that a private hospital's staffing decisions are simply not subject to judicial review. Instead, it concluded that the judicial nonintervention doctrine only stood for the "modest proposition that a private hospital is subject only to the legal

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[39] *Sarin*, *supra* at 795.

[40] 219 Mich App 578; 557 NW2d 157 (1997). The issue in *Long* was whether MCL 331.531 created a private cause of action for malice. The Court of Appeals concluded that the statute created no such private cause of action. The Court also dismissed the plaintiff's breach of contract claim on the basis of the judicial nonintervention doctrine.

[41] *Long*, *supra* at 586-587 (citation omitted).

[42] *Id*. at 586.

obligations of a private entity, not to the greater scrutiny of a public institution."[43] Fundamental to the majority's reinterpretation of the doctrine and retreat from earlier case law was the fact that only *Long* was binding precedent.[44] Therefore, it embraced *Long's* suggestion that private hospitals might be subject to statutory civil rights claims. With regard to breach of contract claims, the *Feyz* majority held that liability may be imposed as long as the breach of contract claim would not subject a private hospital to greater liability than what another private entity would face.

While Court of Appeals panels have utilized variants of the doctrine of nonintervention for some years, this Court has never recognized or adopted the doctrine. Defendants urge this Court to adopt the doctrine and hold that the trial court properly dismissed plaintiff's nonstatutory claims because those claims require a review of the hospital's staffing decisions and the methods employed in reaching those decisions. We decline to do so because this judicially created nonintervention doctrine is inconsistent with the statutory regime governing the peer review process enacted by the Legislature.

The statutorily prescribed scope of judicial review over the peer review process is very narrow. The Legislature codified limited judicial review of the peer review process, permitting judicial review only when peer review participants act with malice.[45] Contrary to the outcomes of cases such as *Hoffman, Sarin,* and *Long,*

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[43] *Feyz*, *supra* at 723.

[44] *Id.*; see MCR 7.215(J)(1).

[45] MCL 331.531. However, as the Court of Appeals stated in *Long*, *supra*, MCL 331.531 does not create a private cause of action for malice. Malice is an exception to peer review immunity. Once a defendant has stated sufficient facts constituting peer review immunity, MCR 2.111(F)(3), a plaintiff has to put forward sufficient evidence of malice to

which afforded common-law immunity to hospitals, the hospital itself is not a protected review entity under the legislatively enacted peer review immunity statute.[46] The Legislature could have permitted unqualified peer review immunity or extended it beyond the participants in the peer review process, but did not do so. Our courts must respect this policy choice. The nonintervention doctrine, which, in some formulations,[47] precludes all judicial review of contract and tort claims that might have some relationship to peer review, is inconsistent with the legislative mandate that covers protection of the peer review communicative process only. The doctrine permits courts to supplant the policy choice made by the Legislature. Because " ' "[c]ourts cannot substitute their opinions for that of the legislative body on questions of policy," ' "[48] we decline to recognize the judicial nonintervention doctrine.[49]

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invoke the exception to immunity. This burden is separate from the plaintiff's burden to state a viable legal claim.

[46] MCL 331.531(2) specifically delineates which groups qualify as "review entities" entitled to peer review immunity. While a duly appointed peer review committee of a hospital is a designated review entity under MCL 331.531(2)(a)(iii), the hospital is not. Therefore, the hospital cannot take advantage of the immunity granted under MCL 331.531(3)(b), which grants immunity only to review entities for acts or communications within their scope.

[47] See, e.g., *Sarin*, *supra* at 795.

[48] *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999), quoting the dissenting opinion of YOUNG, P.J., in the Court of Appeals in that case quoting *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939). See also *Beaudrie*, *supra* at 140, where this Court refused to expand the judicially created public duty doctrine because such an expansion would have undermined the public policy choice of the Legislature, as expressed in the governmental tort liability act, which allows public employees to be subject to tort liability in limited circumstances.

[49] We note that the Legislature provided for the qualified immunity found in MCL 331.531 in 1975, *seven years* before the Court of Appeals adopted the judicial nonintervention doctrine.

Additionally, we are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute. This is not to say that hospital staffing decisions, which involve specialized medical and business knowledge and considerations, are not entitled to some measure of deference. However, when those staffing decisions violate the legal rights of others, the judiciary must exercise its obligation to adjudicate legal disputes, except to the extent that the citizens of this state, through their elected representatives, have made a policy choice to shield such decisions from liability.

B. PEER REVIEW IMMUNITY

Peer review is " ' "essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care." ' "[50] In order to promote "the willingness of hospital staff to provide their candid assessment" in peer review proceedings,[51] the Legislature has enacted two primary measures to protect peer review activities from intrusive public involvement and from litigation. First, the Legislature

[50] *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 42; 594 NW2d 455 (1999), quoting *Attorney General*, *supra* at 169, quoting *Bredice v Doctors Hosp, Inc*, 50 FRD 249, 250 (D DC, 1970), aff'd without opinion 156 US App DC 199; 479 F2d 920 (1973).

[51] *Dorris*, *supra,* at 42; *Attorney General*, *supra* at 169.

has provided that the records, data, and knowledge collected for or by peer review entities are confidential and not discoverable.[52] Furthermore, and relevant to this case, the Legislature has granted immunity to persons, organizations, and entities that provide information to peer review groups or perform protected peer review communicative functions.[53]

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[52] MCL 333.21515, MCL 333.20175(8), and MCL 331.533. Peer review records have thus been fully protected from disclosure even to the Attorney General when conducting a criminal investigation. *Attorney General*, *supra* at 168-170; *In re Investigation of Lieberman*, 250 Mich App 381; 646 NW2d 199 (2002). Moreover, these nondisclosure protections apply regardless of the nature of the claim asserted by the party seeking the records. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 715; 683 NW2d 699 (2004).

[53] MCL 331.531 provides in pertinent part:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
>
> (2) As used in this section, "review entity" means 1 of the following:
>
> (a) A duly appointed peer review committee of 1 of the following:
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> * * *
>
> (iii) A health facility or agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.
>
> * * *
>
> (3) A person, organization, or entity is not civilly or criminally liable:
>
> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.

The peer review immunity statute protects a person, organization, or entity from civil and criminal liability when carrying out three types of protected peer review tasks. First, immunity protects those that provide information or data to a review entity pursuant to MCL 331.531(1). Second, it protects specific "review entities," such as a duly appointed peer review committee of a hospital,[54] for those acts or communications within its scope as a review entity. Finally, subject to MCL 331.532[55] and MCL 331.533,[56] immunity applies to those who release or publish a record of peer review proceedings, or the reports, findings, or conclusions of a review entity.

However, peer review immunity is not absolute. A person, organization, or entity that has acted with

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(c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

(4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

[54] MCL 331.531(2)(a)*(iii)*. As noted earlier, hospitals themselves are not listed protected review entities.

[55] MCL 331.532 provides that the release or publication of peer review records, reports, findings, and conclusions shall be only for the following purposes: (1) advancing health care research or education, (2) maintaining the standards of health care professions, (3) protecting the financial integrity of any governmentally funded program, (4) providing evidence relating to the ethics or discipline of a health care provider, entity, or practitioner, (5) reviewing the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the professional to a health facility's medical staff, and (6) complying with § 20175 of the Public Health Code, MCL 333.20175.

[56] MCL 331.533 provides that "the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity . . . are confidential, are not public records, and are not discoverable and *shall not be used as evidence in a civil action or administrative proceeding*." (Emphasis added.)

malice when engaging in a peer review function is not protected from liability.[57] Because the Legislature did not define "malice," we must determine what constitutes malice for purposes of peer review immunity. We are guided by the Legislature's directive that words that have acquired a peculiar and appropriate meaning in the law shall be construed according to that peculiar and appropriate meaning.[58] "Malice" is clearly a word that has acquired a peculiar meaning in the law. Indeed, reference to any legal dictionary confirms that "malice" has acquired *several* peculiar meanings, depending on the context in which it is used. Our task in this case is to discern which peculiar meaning of "malice" is the most appropriate for purposes of the peer review immunity statute.

The proper definition of "malice" for purposes of peer review immunity is an issue of first impression in this Court. Over the years, Court of Appeals panels have employed several divergent definitions. For instance, in *Veldhuis v Allan*, *supra*, the Court of Appeals adopted the defamation definition of "actual malice."[59] The panel in *Veldhuis v Allan* held that the statutory

[57] MCL 331.531(4). The immunity provided under MCL 331.531 is separate and distinct from the immunity provided by MCL 333.16244 for a person who acts in good faith in making a report to the HPRP. MCL 333.16244 establishes a presumption that a person who makes such a report acted in good faith. This reporting immunity is not predicated on participation in peer review.

[58] MCL 8.3a.

[59] See *New York Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964); *J & J Constr Co v Bricklayers & Allied Craftsmen*, 468 Mich 722, 731; 664 NW2d 728 (2003); *Lins v Evening News Ass'n*, 129 Mich App 419; 342 NW2d 573 (1983). It bears noting that the peer review immunity statute was amended to include the malice exception to immunity after the seminal *New York Times v Sullivan* case was decided. It is fair to say that *Sullivan* made a seismic change in the law concerning defamatory communications.

immunity accorded to peer review activities does not apply "if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts."[60]

In this case, the Court of Appeals majority and dissent each adopted a different definition of "malice." The majority quoted Black's Law Dictionary (5th ed) for the proposition that " '[m]alice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.' "[61] Using this definition, the Court of Appeals concluded that because civil rights acts establish citizens' legal rights, acting in disregard of those rights represents a malicious act outside the scope of immunity granted under MCL 331.531.

Defendants contend that the defamation definition of "malice" utilized in *Veldhuis v Allan* is the appropriate standard for defining malice under MCL 331.531. We agree.[62] In defining malice for purposes of MCL

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[60] *Veldhuis v Allan*, *supra* at 136-137 (citation omitted).

[61] *Feyz*, *supra* at 704-705.

[62] Justice CAVANAGH concludes, largely by referencing a legal dictionary, that the Legislature intended a different definition of "malice" than we adopt today. Indeed, as the dissent correctly contends, reference to dictionaries may be "helpful" in ascertaining legislative intent. *Post* at 692, citing *Ford Motor Co v Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006). However, because a word can have many different meanings depending on the context in which it is used, and because dictionaries frequently contain multiple definitions of a given word, in light of this fact, it is important to determine the most pertinent definition of a word in light of its context. See, e.g., *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). That the definition of "malice" we adopt today has been termed "actual malice" is not dispositive. We readily

331.531(4), it is our duty "to discern and give effect to the intent of the Legislature."[63] To give such effect we must consider the "plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[64] Peer review is a communicative process, designed to foster an environment where participating physicians can freely exchange and evaluate information without fear of liability if the hospital ultimately relies on peer review evaluations and adversely affects the reviewed physician's hospital privileges. It is obvious that peer review immunity is designed to promote free communications about patient care practices, as both the furnishing of information to the peer review entity and the proper publication of peer review materials are acts which are granted immunity. All the protected activities relate to the exchange and evaluation of such information. Moreover, the peer review statutory regime protects peer review from intrusive general public scrutiny. All the peer review communications are protected from discovery and use in any form of legal proceeding.

The proper definition of "malice" for purposes of the exception to peer review immunity must be gleaned

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acknowledge that the word "malice" has a number of definitions; "actual malice" is simply one of the many terms that fall under the general umbrella of "malice." See Black's Law Dictionary (8th ed). However, what is critical to our analysis is that "[w]ords are given meaning by context or setting." *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 163 n 10; 596 NW2d 126 (1999), citing *Tyler v Livonia Pub Schools*, 459 Mich 382, 391; 590 NW2d 560 (1999). Peer review is a communicative process seeking to improve patient care through internal self-regulation. Given this context, we believe that the defamation definition of "malice" most appropriately furthers the Legislature's intent in providing immunity to peer review participants. It is unclear to us why Justice CAVANAGH selects—from among all the available definitions of "malice"—the definition he has chosen.

[63] *Sun Valley Foods*, *supra* at 236.

[64] *Id*. at 237, quoting *Bailey v United States*, *supra* at 145.

from this communicative context.[65] The defamation definition of "malice" first used by the panel in *Veldhuis v Allan* most clearly comports with the statutory process established by the Legislature, because it is the one definition that specifically concerns and promotes honest communication. Moreover, the purpose of the malice exception is to keep physicians focused on performing honest and candid peer review, while protecting peer review participants from liability for every negative outcome that may be a by-product of such communication. The defamation definition of "malice" is uniquely addressed to communications and most effectively furthers this primary function of peer review.

Under the "malice" definition used by the *Feyz* Court of Appeals majority, every potential invasion of a physician's legal rights committed during peer review, regardless of the triviality of the act or the absence of knowledge of the inaccuracy of the information relied upon, would abrogate immunity. Such a definition of

[65] We note that MCL 331.531(3)(b) provides immunity to a review entity for all non-malicious *acts or communications within its scope* as a review entity. Indeed, it is difficult to conceive of an "act" that a properly functioning hospital peer review entity could perform that is not communicative in nature. The gathering and evaluating of information, as well as making recommendations based on that evaluation, are indeed "acts." But these "acts" certainly also have a fundamental communicative aspect. Indeed, these acts are so inherently communicative that were a peer review entity to perform them in such a manner as to interfere with the purpose of keeping physicians focused on performing honest and candid peer review—to distort the peer review process without regard to the truth or falsity of the information it gathers or uses—such actions would also necessarily be communicative in nature and subject to the malice standard we adopt today. Moreover, if a hospital peer review entity were performing non-communicative, non-evaluative "acts"—namely acts that do not advance the goal of the statute to improve delivery of hospital care—such "acts" are arguably not afforded immunity because they presumably would not be within the scope of the hospital peer review entity's function.

"malice" would undermine the peer review process by transforming it into a legalistic, rights-driven process rather than its proper statutory mission—honest professional medical evaluation of information about hospital patient practices.[66] This result is inconsistent with the statutory goals of the peer review process and the stringent protections afforded to communicators and communications made in peer review. In providing the extensive immunity for peer review, the Legislature was obviously aware that such protections might insulate from review and sanction the participants' liability for some adverse outcomes for physicians ultimately found by a credentialing hospital to lack the requisite professional skills or standards. Such adverse outcomes equally obviously were not, in and of themselves, deemed by the Legislature to be cause for liability for those participating in the peer review process. However, making unfavorable evaluations, determinations, and recommendations based on negative information the peer review entity knows to be false would satisfy the malice standard we adopt.[67] We conclude, based on the language and structure of this statute, that utilizing and acting on information known to be false is the type of activity that the Legislature intended to prevent by including the malice exception to immunity. The defa-

[66] It is noteworthy that the Legislature chose the unusual term "*malice*" rather than a more common term such as "intent" as an exception to the immunity granted. As stated, we believe that this is because the focus of the peer review process narrowly concerns communications and the defamation definition of "malice" is inexorably tied to communications. Equally significant, this definition became widely known following the publication of *New York Times v Sullivan*, *supra*.

[67] This is especially true because any disciplinary action taken against the physician on the basis of peer review findings would have to be disclosed upon request to any other hospital from which the physician is seeking staff privileges, credentials, or employment. See MCL 331.531(6) and MCL 333.20175(6).

mation definition of "malice" promotes the goals of peer review because peer review participants are not protected if they are not performing evaluations with a focus on improving patient care, but rather on the basis of false extraneous factors unrelated to patient care.

C. HOSPITAL STAFFING DECISIONS ARE NOT IMMUNE FROM LIABILITY

Our lower courts have made broad use of the now-repudiated nonintervention doctrine that provided, in some formulations, blanket immunity for any staffing decision associated with peer review. We believe that the widespread use of this doctrine has caused some confusion concerning the relationship between the immunity granted to participants in the peer review process and the nature of liability imposed on the actual decision maker in hospital staffing questions, namely, the hospital itself. As stated, decisions such as *Hoffman, Sarin,* and *Long* applied the common-law immunity provided by the nonintervention doctrine to hospitals without regard to the fact that the statute itself grants immunity only to enumerated peer review participants and their communications. Hospitals are not similarly covered by the peer review statute. It appears that judicial reliance on the sweeping nonintervention doctrine obviated the necessity of examining whether a hospital, as decision maker, was entitled to the immunity provided by the statute.

In this case, defendants clearly assume and argue that an expansive construction of the peer review immunity statute will insulate the *hospital* defendant from liability. Contrarily, the Court of Appeals majority and dissent sought to construe the peer review immunity statute in a way to avoid insulating the hospital

from liability for civil rights claims.[68] None of these positions comports with a reasonable construction of the statute before us, and both misapprehend the scope of its protection. It is for this reason that both the majority and dissenting opinions of the Court of Appeals panel in this case strain to impose on the statutory term "malice" a construction that has little to do with the communicative function of the peer review process.

Because of the confusion on this point illustrated by the published peer review Court of Appeals cases, we take this opportunity to clarify that the peer review immunity statute extends only to the communications made, and the participants who make them, in the peer review process, not to the hospital that makes the ultimate decision on staffing credential questions.

Our conclusion is rooted in the language of the immunity statute itself. Nothing in the peer review immunity statute suggests that it applies to any person or entity except those involved in the *communicative* concern of gathering data and evaluating hospital medical practices, as well as those who publish peer review information for the listed proper statutory purposes. It does not apply to the hospital decision maker that might rely upon the work product of a peer review committee. Moreover, MCL 333.21513(a) and (c) designate that the hospital is the statutory decision maker concerning staffing privileges. In other words, the peer review process may assemble and assess data about a physician's competence, and it may even make a recom-

[68] It is also important to note that, until the decision in this case, none of the published peer review immunity statute cases involved a civil rights claim or an existing statutory claim. See, e.g., *Long*, *supra*; *Veldhuis v Allan*, *supra*; *Regualos*, *supra*. Indeed, as noted in footnote 40, at least one case involved an effort to create an independent cause of action for malice based on the peer review immunity statute itself.

mendation to the hospital leadership bearing on a staffing issue, but it is the *hospital* that remains ultimately and legally responsible for deciding issues relating to staffing privileges.

Thus, the hospital does not fit within the protections afforded by the peer review immunity statute when it makes the ultimate staffing decision. Consequently, if the defendant hospital here is covered by one or more of the several state and federal civil rights acts plaintiff has sued under, and if staffing privileges are an activity protected from discrimination by such state and federal acts, then the hospital is required to defend its decision.[69] What plaintiff may not do in suing the hospital defendant is invade the protections afforded to participants in the peer review process without establishing malice as we have defined it in this opinion.

CONCLUSION

We repudiate the doctrine of judicial nonintervention because it is inconsistent with the statutory peer review process established in MCL 331.531. Furthermore, we hold that malice exists when a person supplying information or data to a peer review entity does so with knowledge of its falsity or with reckless disregard of its truth or falsity. Similarly, a peer review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data that it communicates or upon which it acts. Although this definition originated in the context of defamation, this definition is uniquely appropriate to Michigan's peer review scheme, as peer review immunity is based on the communication of informa-

[69] As stated earlier, this case was decided on motion. The merits of plaintiff's statutory claims have not been decided. We express no opinion on the validity of any of plaintiff's claims.

tion about professional activities and standards. Moreover, this definition furthers the purpose of peer review immunity in that it allows those who engage in the peer review process to candidly and honestly evaluate a physician's competence without fear of exposure to liability.

Accordingly, the judgment of the Court of Appeals is vacated, and we remand this case to the Monroe Circuit Court for further proceedings consistent with this opinion.

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

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with many of the results reached by the majority opinion. Specifically, I agree that, because MCL 331.531[1] establishes qualified immunity for peer

[1] MCL 331.531 provides in relevant part:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
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> * * *
>
> (3) A person, organization, or entity is not civilly or criminally liable:
>
> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.
>
> (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

review entities and participants, there is no justification in this state for recognizing the judicial nonintervention doctrine. I also agree that the judicial nonintervention doctrine should not be applied to a private hospital's general staffing decisions. I disagree, however, with the majority's conclusion that the term "malice," as used in MCL 331.531, should be defined under the principles of "actual malice" in accordance with defamation law.

Notably, the Legislature did not define "malice" in MCL 331.531. Like the majority, I agree that "malice" is a term that has acquired a peculiar and appropriate meaning in the law. Therefore, this Court must construe the term "malice" according to its peculiar and appropriate legal meaning. *Ford Motor Co v Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006); MCL 8.3a. Thus, because "malice" is a legal term, resort to a legal dictionary is helpful. *Ford Motor Co*, *supra* at 440. Reference to a legal dictionary confirms that "malice" is defined as follows: "The intent, without justification or excuse, to commit a wrongful act" or "[r]eckless disregard of the law or of a person's legal rights." Black's Law Dictionary (7th ed).[2] Because there is no indication that the Legislature intended to alter the meaning of the legal term "malice" or to use any variation of that

(4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

[2] Notably, the Court of Appeals majority concluded that " '[m]alice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.' " 264 Mich App 699, 704-705; 692 NW2d 416 (2005), quoting Black's Law Dictionary (5th ed). Further, the Court of Appeals partial dissent would have applied the defamation definition of "malice." *Id*. at 726-727 (MURRAY, P.J., concurring in part and dissenting in part).

term that may apply in unrelated contexts,[3] "malice," as used in MCL 331.531 should be interpreted consistently with its legal definition and should not be defined, as the majority does, solely by reference to "actual malice" under defamation law.

Simply stated, the Legislature used the term "malice," not "actual malice." As noted by this Court in *J & J Constr Co v Bricklayers & Allied Craftsmen*, 468 Mich 722, 731; 664 NW2d 728 (2003):

> Under long-settled constitutional principles concerning the First Amendment rights of freedom of speech and freedom of the press, a *public*-figure plaintiff must establish that a defendant made defamatory statements with "*actual malice*" in order to prevail in a defamation action. *New York Times*[*Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964)] (establishing the "*actual malice*" standard for liability for defamation of public officials); *Curtis Publishing Co v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) (extending the "*actual malice*" standard to public figures). "*Actual malice*" exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth. [Emphasis added.]

Further, and as noted earlier, Black's Law Dictionary (7th ed) defines "actual malice" in the context of defamation as "[k]nowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true." Accordingly, reference to a legal dictionary and this Court's case law confirms that the term "actual malice" pertains in defamation law. And be-

[3] Significantly, "actual malice" is defined as "1. The deliberate intent to commit an injury, as evidenced by external circumstances . . . . 2. *Defamation*. Knowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true." Black's Law Dictionary (7th ed), p 968.

cause the Legislature used the term "malice" in MCL 331.531, not "actual malice," there is no reason to suspect that the Legislature intended principles of defamation law to apply under the peer review statute.

Additionally, interpreting "malice" as "actual malice" in accordance with defamation law would read the term "act" out of MCL 331.531. MCL 331.531 provides that immunity will be provided for "an *act or communication* within its scope as a review entity" as long as the person, organization, or entity does not act with malice. Accordingly, it appears as if the Legislature had a broader understanding of immunity under MCL 331.531 than that contemplated by the majority. In other words, while the defamation definition of "actual malice" might arguably be warranted if MCL 331.531 used that term and the statute dealt only with a communication, the legal definition of "malice" must apply because MCL 331.531 specifically deals with "act[s] or communication[s]."

Further, I am also unpersuaded by the majority's theory that the defamation law definition of "actual malice" must pertain to MCL 331.531 because the Legislature amended the statute to include a malice exception sometime after *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), was decided. The Legislature added the malice exception roughly 11 years after *Sullivan*, and the majority has not pointed to any other evidence apart from an 11-year gap suggesting that the amendment was a direct response to *Sullivan*, particularly where *Sullivan* uses the term "actual malice" and MCL 331.531 does not. Nor am I persuaded by the majority's rationale that "act," as used in MCL 331.531, must have a "fundamental communicative aspect" and that any act that is "non-communicative, non-evaluative" is outside

the scope of peer review. *Ante* at 686 n 65. There is simply no reason to suspect that the Legislature intended to create such a redundancy in MCL 331.531—i.e., immunity is provided for communicative acts or communications within the scope of peer review. Again, MCL 331.531 provides immunity for "act[s] or communication[s]." Nor am I persuaded by the majority's rationale that the legal meaning of the term "malice" would circumvent the entire peer review process. Rather, a peer review participant is still provided immunity for a nonmalicious "act or communication within its scope as a review entity" as directed by the Legislature.

In sum, I agree with the majority's decision to remand this case to the circuit court. On remand, however, I would instead direct the circuit court to apply the legal definition of the term "malice" because there is no indication in MCL 331.531 that the Legislature intended any other meaning.

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

BARNES v JEUDEVINE

Docket No. 129606. Decided July 26, 2006. On application by the defendant for leave to appeal, the Supreme Court directed the clerk to schedule oral argument on whether to grant the application or take other peremptory action. Following oral argument, the Supreme Court issued an opinion reversing the judgment of the Court of Appeals and remanding the matter to the circuit court for the entry of an order of summary disposition in favor of the defendant. Rehearing denied 477 Mich 1201.

Michael J. Barnes, Jr., brought an action in the Kalamazoo Circuit Court, Family Division, against Kim K. Jeudevine, seeking a determination of paternity for a child conceived while the defendant was married to another man and born four months after the defendant was divorced from that man pursuant to a default judgment of divorce that stated that "no children were born of this marriage and none are expected." The plaintiff alleged that he is the biological father of the child. The defendant admitted signing an affidavit of parentage and a birth certificate identifying the plaintiff as the father of the child, but claimed that she did so under duress. The court, Carolyn H. Williams, J., granted the defendant's motion for summary disposition on the basis that the plaintiff did not have standing to bring the action under the Paternity Act, MCL 722.711 *et seq.*, because the child was conceived during the marriage and there was no court determination that the child is not the issue of that marriage. The plaintiff appealed, and the Court of Appeals, ZAHRA, P.J., and GAGE and MURRAY, JJ., reversed the order of the circuit court and remanded the matter to the circuit court for the reinstatement of the plaintiff's claim. Unpublished opinion per curiam, issued August 23, 2005 (Docket No. 252840). The Court of Appeals held that the plaintiff had standing because the statement in the default judgment of divorce that it appears that "no children were born of this marriage and none are expected" was a determination by a court that the child was not an issue of the marriage. The Supreme Court heard oral argument on whether to grant the defendant's application for leave to appeal or take other peremptory action. 474 Mich 1056 (2006).

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

The circuit court properly found that the plaintiff lacks standing to bring this action. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the circuit court for the entry of an order of summary disposition in favor of the defendant.

1. The plaintiff, to establish that the child was "born out of wedlock," must prove that either the child was not born or conceived during the mother's marriage or, though the child was born or conceived during the marriage, a court has determined that the child was not the issue of the marriage. MCL 722.711(a).

2. It is undisputed that the defendant was married to another man when the child was conceived.

3. The presumption that children born or conceived during a marriage are the issue of that marriage may be overcome only by a showing of clear and convincing evidence.

4. A "court determination" under MCL 722.711(a) that a child is not "the issue of the marriage" requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father. Here, no legal actions addressed the subject child's paternity. The court that granted the divorce did not make a finding that there was a child born or conceived during the marriage that was not an issue of the marriage. The statement in the judgment of divorce regarding there being no children of the marriage was not a sufficient court determination that there was a child conceived during the marriage that was not an issue of the marriage.

5. There is no clear and convincing evidence to rebut the presumption that the child was an issue of the marriage. The affidavit of parentage and the birth certificate, neither of which is a court determination, do not rebut the presumption.

Reversed and remanded to the circuit court.

Justice KELLY, dissenting, stated that the Court of Appeals did not err in finding that the defendant's default judgment of divorce contains a legally sufficient judicial determination that the child in question is not the issue of the defendant's marriage. The plaintiff can properly rely on that determination to assert standing to pursue his paternity action in the absence of an amendment of the judgment. The defendant should not be permitted to rely on the presumption of legitimacy to defeat the plaintiff's standing in the paternity action without reopening the divorce case. The Court of

Appeals correctly reversed the judgment of the circuit court and remanded the matter for the reinstatement of the plaintiff's claim. In this case, the majority again evidences a rigid adherence to wooden strictures such as the presumption of legitimacy even where, as here, the purposes of the presumption are not served. The majority has exhibited a consistent pattern of ruling against putative fathers who seek to exercise their due process rights with respect to the children they claim as their own. Leave to appeal should be denied in this case and the matter should be remanded to the circuit court for a full hearing of the plaintiff's paternity claim.

Justice MARKMAN, joined by Justice CAVANAGH, dissenting, disagreed that the plaintiff had not rebutted the presumption of the child's legitimacy by clear and convincing evidence. In her divorce proceeding, the defendant never appeared or challenged her ex-husband's allegations and testimony that she was not pregnant and that no children were born of the marriage. The resulting default judgment of divorce should be considered determinative of that issue, and it gives the plaintiff standing to bring his paternity action. The decision of the Court of Appeals should be affirmed. To hold otherwise renders the default judgment meaningless, sanctions legal gamesmanship at the expense of the child's well-being, and permits a party to prevail in this case because of that party's delinquency in failing to participate in the earlier divorce proceeding.

1. PARENT AND CHILD — LEGITIMACY PRESUMPTION — REBUTTAL.

The presumption that a child born or conceived during a marriage is the issue of that marriage may be overcome only by a showing of clear and convincing evidence.

2. PARENT AND CHILD — COURT DETERMINATIONS — CHILD NOT THE ISSUE OF THE MARRIAGE.

A court determination under MCL 722.711(a) that a child is not "the issue of the marriage" requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father.

Jeffrey M. Gagie for the plaintiff.

Butler, Durham & Toweson, PLLC (by *Sidney D. Durham*, *Leslie L. Payseno*, and *George T. Perrett*), for the defendant.

WEAVER, J. Plaintiff filed this action seeking a determination of paternity for a child conceived while the child's mother was married to another man. Plaintiff alleges that the child was not an issue of the marriage, because he is the child's biological father. The question presented is whether plaintiff has standing under the Paternity Act, MCL 722.711 *et seq.,* to seek a determination of paternity. To resolve this question in this case, we must decide whether a default judgment of divorce that states it appears that "no children were born of this marriage and none are expected" is a sufficient judicial determination that the subject child was not the issue of the marriage.

We reverse the judgment of the Court of Appeals and hold that plaintiff does not have standing under the Paternity Act because the default judgment is not clear and convincing evidence that the child was not an issue of the marriage. We remand this case to the circuit court for the entry of an order of summary disposition for the defendant.

I

Defendant-appellant Kim K. Jeudevine married James V. Charles III on July 11, 1996. Sometime before Charles filed for divorce and before defendant was served with the divorce complaint on August 12, 1998, defendant learned that she was pregnant. Defendant did not inform her husband that she was pregnant. Plaintiff Michael J. Barnes, Jr., alleges that he is the child's biological father.

Defendant did not respond to the complaint for divorce and did not appear at the divorce hearing. A default judgment of divorce was entered on November 2, 1998. The default judgment provides:

> [I]t satisfactorily appears to this Court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved; it further appearing that no children were born of this marriage and none are expected.

On February 26, 1999, four months after the divorce was final, defendant gave birth. A birth certificate identifies plaintiff as the child's father and an affidavit of parentage signed by plaintiff and defendant the day after the child's birth states that plaintiff is the father.[1] Plaintiff and defendant lived together and raised the child for over four years, until the summer of 2003, when plaintiff and defendant ended their relationship. Defendant has not allowed plaintiff to see the child since they stopped living together.

On September 30, 2003, plaintiff filed a paternity action against defendant, alleging that he was the father of defendant's child. To support his contention, plaintiff cites the judgment of divorce between Charles and defendant that states "that no children were born of this marriage and none are expected." Plaintiff also cites the affidavit of parentage and the birth certificate identifying plaintiff as the father of the child.

Defendant answered plaintiff's paternity action on October 22, 2003. She neither admitted nor denied plaintiff's claimed paternity. However, defendant denied that the child was born "out of wedlock," because the child had been conceived while she was legally married to Charles. Defendant admitted signing the

[1] The affidavit of parentage states that by signing the document, the mother of the child admits that "she was not married when this child was born or conceived; or that this child, though born or conceived during a marriage, is not an issue of that marriage as determined by a court of law."

affidavit of parentage and the birth certificate, but claimed that she did so under duress.

On November 10, 2003, a hearing was held in the Family Division of the Kalamazoo Circuit Court. The court granted defendant's motion for summary disposition, concluding that plaintiff did not have standing to sue under the Paternity Act. The court found (1) that the child was conceived during the marriage and (2) that there was no court determination that the child was a child born or conceived during the marriage but is not the issue of that marriage.

Plaintiff appealed, and the Court of Appeals reversed the order of the circuit court and remanded the matter to the circuit court for the reinstatement of plaintiff's claim.[2] The Court of Appeals held that the statement in the default judgment of divorce that "no children were born of this marriage and none are expected" was a determination by a court that the child was not an issue of the marriage. Therefore, the Court of Appeals held that plaintiff had standing to sue under the Paternity Act.

Defendant sought leave to appeal in this Court, and we ordered the clerk to schedule oral argument pursuant to MCR 7.302(G)(1) to determine whether to grant the defendant's application.[3] We asked the parties to include among the issues to be addressed:

> (1) [W]hether plaintiff lacked standing to proceed under the Paternity Act, MCL 722.711 *et seq.*, where the subject child's mother was married at the time of the child's conception, see *Girard v Wagenmaker*, 437 Mich 231 (1991); and (2) whether the default judgment of divorce

[2] Unpublished opinion per curiam, issued August 23, 2005 (Docket No. 252840).

[3] 474 Mich 1056 (2006).

> amounted to a judicial determination that the child was born or conceived during the marriage but was not the issue of the marriage.

II

We review a trial court's decision to grant summary disposition de novo. *Wilson v Alpena Co Rd Comm,* 474 Mich 161; 713 NW2d 717 (2006). Whether plaintiff has standing to bring a paternity action is a question of law that we also review de novo. *In re KH*, 469 Mich 621; 677 NW2d 800 (2004).

III

The Paternity Act, MCL 722.711 *et seq.,* confers on the circuit court jurisdiction over proceedings involving the determination of a child's paternity. One purpose of the act relevant to this case is to assure, for the sake of the child, that the child's legitimacy will not be decided by mere casual inference, but only after specific statutory procedures are followed. To this end, the act provides that a mother, a father, or in certain circumstances, the Department of Human Services, may bring an action in circuit court to establish paternity of a child, if that child is alleged to have been "born out of wedlock." MCL 722.714.

The Paternity Act defines "[c]hild born out of wedlock" as

> a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage. [MCL 722.711(a).]

Thus, to establish that the child was born out of wedlock, plaintiff must prove that either (1) the child

was not born or conceived during the mother's marriage, or (2) though the child was born or conceived during a marriage, a court has determined that the child was not the issue of the marriage.

Plaintiff filed this action alleging that he is the biological father of the defendant's child. However, it is undisputed that defendant was married to another man when the child was conceived. Plaintiff gave birth just four months after her divorce was final. Therefore, to have standing to seek a determination of paternity, it is necessary for plaintiff to establish that a court "has determined" that there was a child born or conceived during the marriage and that the child was not an issue of the marriage. We recently reemphasized that "[t]he presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law." *In re KH, supra* at 634. The presumption of legitimacy can be overcome only by a showing of clear and convincing evidence. *Id.* at 634 & n 24.

In *Girard v Wagenmaker, supra* at 243, this Court held that in order for a biological father to establish standing under the Paternity Act, there must be a "prior court determination that a child is born out of wedlock." The requirement that there be a prior court determination is consistent with the language of the statute, MCL 722.711(a). As analyzed in *Girard, supra* at 242 (citations omitted):

> "[H]as determined" is the present perfect tense of the verb "determine." The present perfect tense generally "indicates action that was started in the past and has recently been completed or is continuing up to the present time," or shows "that a current action is logically subsequent to a previous recent action."

Girard noted that requiring a prior determination that a child is not an issue of a marriage comports with Michigan's longstanding presumption that children born or conceived during a marriage are legitimate issue of the marriage. *Girard, supra* at 246 (citing *Serafin v Serafin,* 401 Mich 629, 636; 258 NW2d 461 [1977]).

In this case, the question is whether the circuit court's statement in the judgment of divorce that there appeared to be no children born of or expected from the marriage was a court determination of sufficient specificity to lead to the conclusion that this child was not an issue of the marriage. Plaintiff asserts that this statement in the judgment of divorce qualifies as a court determination that the child was born out of wedlock and is not an issue of the marriage. We disagree. A "determination" is that which sets the limits to or the bounds of something. *Webster's New World Dictionary* (3d ed), p 375. In its legal sense, a "determination" is that which "implies an ending or finality of a controversy or suit." Black's Law Dictionary (6th ed), p 450. To overcome the strong presumption of the legitimacy of a child born or conceived during a marriage, a court determination must settle with finality a controversy regarding the child's legitimacy.

This Court held as much in *Girard, supra* at 243, by concluding that where there was "[n]o previous action . . . undertaken to determine the child's paternity [and] no ongoing actions . . . to determine the child's paternity," there was no prior court determination that a child was not the issue of a marriage. Because there had been no previous action to determine that the child was born out of wedlock, *Girard* held that a putative father did not have standing to seek paternity under the Paternity Act. Similarly, we stated in *In re KH*:

> By requiring a previous determination that a child is born out of wedlock, the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of addressing the issue in a prior proceeding—the mother and the legal father . . . . If the mother or legal father does not rebut the presumption of legitimacy, the presumption remains intact, and the child is conclusively considered to be the issue of the marriage despite lacking a biological relationship with the father. [*In re KH, supra* at 635.]

Consistent with *Girard* and *In re KH*, we hold that a court determination under MCL 722.711(a) that a child is not "the issue of the marriage" requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father.

In this case, the dissents assert that the legal findings necessary to meet the "prior adjudication" requirement for a paternity suit are established by the default judgment. The Court of Appeals correctly recognized that "[a] default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co, Inc v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). However, we disagree with the Court of Appeals conclusion and the dissents' assertion that the judgment of divorce in this case constitutes a "court determination" that the child was not an issue of the marriage under MCL 722.711(a). The holding in the default judgment that there were no children of the marriage simply does not address the similar but distinct question whether there was a child born or conceived during the marriage, and whether it was the issue of the marriage.

In short, there have been no legal actions addressing the subject child's paternity. The circuit court stated in the judgment of divorce merely that it appeared no children were born or expected of the marriage. The court's statement does not support a conclusion that "the court has determined [the child] to be a child born or conceived during a marriage but not the issue of the marriage." MCL 722.711(a). This conclusion is underscored by the requirement that a court find clear and convincing evidence that a child is not the issue of a marriage to overcome the presumed legitimacy of a child born or conceived during a marriage. *In re KH, supra* at 634 n 24. The circuit court did not make a finding that there was a child born or conceived during the marriage that was not an issue of the marriage. It, therefore, cannot be reasonably asserted that there was clear and convincing evidence of such a finding. For these reasons also, the court's statement that it appeared that no children were born or expected of the marriage is not a sufficient court determination that there was a child conceived during the marriage that was not an issue of the marriage.

Plaintiff also argues that the affidavit of parentage and the birth certificate assist him in his claim. Plaintiff argues that even if the judgment alone is insufficient, he should prevail because of the admissions inherent in these documents. We disagree. It was acknowledged in the affidavit of parentage and in the birth certificate that plaintiff was the biological father of the child. Yet, despite these documents, the child is still presumed to be a legitimate issue of the marriage. An affidavit of parentage is a stipulation by a woman of a man's paternity under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*. This is not a court determination that the child was born out of wedlock, as is required under either the Paternity Act or the Acknowledgment

of Parentage Act. Both acts provide that a child is born out of wedlock only when (1) the woman was not married at the time of the conception and birth, or (2) a court previously determined that the child was not an issue of the marriage. Further, a birth certificate is also not a court determination that the child was not an issue of the marriage. For these reasons, the affidavit of parentage and the birth certificate do not rebut the presumption that the child was an issue of defendant's marriage to Charles. Charles is and remains the child's legal father, and it is incorrect to suggest our decision leaves this child without a father.

In this case, the subject child is presumed to be the issue of the marriage because the child was conceived during the marriage. The presumption remains until rebutted by clear and convincing evidence to the contrary. Consequently, the party wishing to overcome the presumption must present evidence that the child, despite the date of its conception, is not the issue of the marriage and a court must so hold. The circuit court's statement in the judgment of divorce that it appeared that there would be no children does not rebut that presumption. Further, the legal father, Charles, never renounced the presumption of legitimacy. Because the child was not conceived outside of marriage, and because there is no prior court determination that the child is not an issue of the marriage, we hold that plaintiff does not have standing under the Paternity Act.

For these reasons, we reverse the judgment of the Court of Appeals and remand to the circuit court for entry of an order of summary disposition for defendant.

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

KELLY, J. (*dissenting*). I would deny leave to appeal in this case. I believe that plaintiff has standing to pursue his action under the Paternity Act, MCL 722.711 *et seq*. The Court of Appeals did not err in finding that defendant's default judgment of divorce contains a legally sufficient judicial determination that the child in question is not the issue of defendant's marriage.

THE UNDERLYING FACTS

Plaintiff had a sexual relationship with defendant while she was separated from her husband. It appears that she was four months pregnant with plaintiff's child when her husband, who did not know she was pregnant, was granted a default judgment of divorce. In it, the court stated, "it further appearing that no children were born of this marriage and none are expected . . . ."

This statement from the judgment appears to be accurate. Plaintiff and defendant signed an affidavit of parentage agreeing that plaintiff was the child's natural father. He was shown to be the father on the child's birth certificate. Plaintiff, defendant, and the child lived together as a family for nearly $4\frac{1}{2}$ years before the parties separated. The child has always believed that plaintiff is his father.

Plaintiff filed this claim for recognition of his paternity so he could continue fathering the child. In response, defendant neither admitted nor denied that plaintiff is the boy's father. Instead, she argued that plaintiff lacks standing to bring a paternity claim under applicable case law. *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991); *Aichele v Hodge*, 259 Mich App 146; 673 NW2d 452 (2003); *Kaiser v Schreiber,* 469 Mich 944 (2003). The circuit court agreed with her. Plaintiff appealed.

The Court of Appeals reversed the circuit court decision. It concluded that the language in the divorce judgment that there were no children "born of this marriage and none are expected" was a judicial determination that the defendant's former husband is not the child's legal father. The majority rejects this conclusion, observing that a child's legitimacy should not be "decided by mere casual inference . . . ." *Ante* at 702.

THE MAJORITY'S ERROR

This is not a case of mere casual inferences. Defendant was personally served with the complaint for divorce that affirmatively alleged that she was not pregnant. She did not answer the complaint. Nor did she contest entry of the default judgment of divorce. Had she done so, her son's paternity could have been, and presumably would have been, thoroughly litigated and scientifically determined. Her former husband's testimony under oath that he and defendant had no children and expected none provided legally sufficient support for the court's determination that "no children were born of this marriage and none are expected." In its ruling today, this Court rewards defendant for her refusal to reveal the fact of her pregnancy and the identity of her child's father while the divorce was pending.

Courts speak through their orders and judgments.[1] Default judgments are not lesser judgments by any

[1] MCL 600.2106 provides, "A . . . judgment . . . of any court of record in this state . . . shall be prima facie evidence of . . . all facts recited therein . . . ." The default judgment of divorce at issue here resolved the fact that Charles did not father any children with defendant. Until and unless it is reopened and amended, it is res judicata with respect to the findings therein.

means. Like other judgments, a default judgment of divorce operates as a final statement of fact and law to the world.

In the matter that is before us, the paternity action, the majority appears to go behind the divorce judgment to nullify one of its findings. The finding is that defendant's husband did not father any of defendant's children. The majority does this despite the fact that the finality of the judgment is central to the orderly administration of justice. Plaintiff, like any other nonparty to a judgment, is entitled to rely on the judgment's recitation of facts and on the finality of its rulings.

The judgment in this case says that no children were born of the marriage. It follows that defendant's son is not an issue of defendant's marriage. It happens that the judge did not know that defendant became pregnant during the marriage. However, the judge's ruling that no children were born of the marriage is likely correct. There is no evidence, and no one is asserting, that defendant's son is an issue of the marriage. There is strong evidence that plaintiff is his biological father. In short, there is nothing to support a finding that the divorce judge's statement regarding the issue of the marriage was not accurate.

Under the circumstances of this case, the Court of Appeals panel was correct to reverse the judgment of the circuit court and remand the case for reinstatement of plaintiff's claim. Plaintiff properly relies on the default judgment of divorce to assert his standing to bring this paternity action. He should have the opportunity to assert his paternity. The availability of blood and DNA (deoxyribonucleic acid) testing makes a determination on the question relatively easy and accurate.

In this case, the majority again evidences a rigid adherence to wooden strictures such as the presump-

tion of legitimacy even where, as here, the purposes of the presumption are not served. The majority has exhibited a consistent pattern of ruling against putative fathers who seek to exercise their due process rights with respect to children they claim as their own.[2] Once again, the majority relies on the presumption of legitimacy despite strong evidence that the fact presumed to be true is false. In finding that defendant's former husband is the child's legal father, the Court is throwing into question part of the findings of the divorce judgment even though (1) the presumption of legitimacy has never been tested, and (2) the findings in the judgment are prima facie evidence that the child in question is not an issue of the marriage.

A presumption is a procedural device. *Widmayer v Leonard*, 422 Mich 280, 286; 373 NW2d 538 (1985). It operates during a legal proceeding. A rebuttable presumption is subject to being overcome, in the case of the presumption of legitimacy, by clear and convincing evidence. Unless the divorce proceeding is reopened and the judgment amended under circumstances where both parties have notice and the opportunity to respond, the judgment's current findings are the dominant legal facts. And plaintiff can properly rely on them to assert his standing to pursue his paternity action.

Surely, the presumption of legitimacy was not created to render children fatherless. Yet, that is precisely

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[2] Recent cases in which the majority has denied standing or refused to consider granting standing to putative biological fathers for the avowed purpose of protecting the presumption are: *McNamara v Farmer,* 474 Mich 877 (2005); *Numerick v Krull*, 265 Mich App 232; 694 NW2d 552 (2005), lv den 474 Mich 877 (2005); *In re KH*, 469 Mich 621; 677 NW2d 800 (2004); *Aichele v Hodge*, 259 Mich App 146; 673 NW2d 452 (2003), lv den 469 Mich 994 (2004); *Kaiser v Schreiber,* 469 Mich 944 (2003); *Pniewski v Morlock*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003, (Docket No. 238767), lv den 469 Mich 904 (2003); *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003).

what the majority's application of it does in this case. As a practical matter, defendant's former husband will almost certainly never provide financial support for defendant's son. I am uncertain that the majority's statement that he is the child's legal father is correct. It is not clear what status the presumption of legitimacy has in light of the findings of the divorce judgment.

What is clear is that, as a practical matter, the child can expect to have no father in defendant's former husband. In the unlikely event that defendant should ever try to assert that her former spouse is the child's legal father, the consequences are predictable. If defendant sought to and succeeded in reopening the divorce proceedings to obtain support for the child from her former spouse, he would object. Presumably he would prove through a DNA or blood test that he is not the biological father. The test results would provide the clear and convincing evidence that would rebut the presumption of legitimacy.

For this reason, it is not to be anticipated that defendant will ever attempt to obtain a court order finding that her former spouse is the child's father. And plaintiff cannot seek to reopen the divorce case. *Killingbeck v Killingbeck*, 269 Mich App 132; 711 NW2d 759 (2005).[3] In effect, the majority has blocked plaintiff from ever having the legal right to father and support the child. As our Court observed 29 years ago, without dissent:

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[3] In *Killingbeck*, a child's biological father moved to intervene in the plaintiff's divorce case concerning custody issues. He was not the plaintiff's husband. The Court of Appeals noted that the trial court erred in granting his motion to intervene, saying, "Domestic relations actions are strictly statutory. The only parties to a divorce action are the two people seeking dissolution of their marriage. . . . [The biological father's] sole recourse on any issue involving his son was in the paternity action, not in the divorce action." *Id.* at 140 n 1.

> "If the function of a court is to find the truth of a matter so that justice might be done, then a rule which absolutely excludes the best possible evidence of a matter in issue rather than allow it to be weighed by the trier of fact must necessarily lead to injustice. Further, when a court voluntarily blindfolds itself to what every citizen can see, the public must justifiably question the administration of law to just that extent." [*Serafin v Serafin*, 401 Mich 629, 635-636; 258 NW2d 461 (1977), quoting the Texas Court of Civil Appeals in *Davis v Davis*, 507 SW2d 841, 847 (Tex Civ App, 1974).]

CONCLUSION

I would deny leave to appeal and remand this case to the trial court for a full hearing of plaintiff's paternity claim. Plaintiff should be accorded standing there. I would hold that defendant's judgment of divorce contains an effective finding by the divorce court that defendant's son was not an issue of her marriage. The judgment's failure to be more specific was caused solely by defendant's deception in keeping secret the fact that she was pregnant. There is strong, unrefuted evidence that any presumption that plaintiff's son was the issue of defendant's marriage would be rebutted if tested. Defendant has not chosen to test it; plaintiff cannot.

Defendant should not be heard now to rely on a presumption that she should have asserted in the divorce court. The majority apparently concludes that the presumption arose when her child was born and has force and effect outside and despite the language of the divorce judgment. Even if that were true, and I question it, defendant should not be permitted to rely on the presumption to defeat plaintiff's standing in his paternity action. If she wishes to assert it, defendant should seek to reopen the divorce case. For this Court to place the presumption of legitimacy over the judgment of

divorce is to allow defendant to defeat plaintiff's standing in the paternity action. This is despite the fact that the presumption that defendant relies on likely would have been rebutted already but for her deception of her husband and of the divorce court. The result is ill-reasoned and unjust.

MARKMAN, J. (*dissenting*). I respectfully dissent. I cannot join the majority's opinion, which would reverse the Court of Appeals, and which would deny plaintiff—who no one disputes is the biological father of the child at issue— the right to be the father of the child he has raised for over four years. Instead, the majority would leave this child without a father. In the process, the majority would render a default judgment in this case meaningless; it would condone and encourage gamesmanship by a party to a child custody proceeding; and it would allow a party to prevail, in significant part because of that party's own delinquency in failing to participate in an earlier judicial proceeding.

BACKGROUND

Plaintiff alleges that he and defendant had a sexual relationship while defendant was still married to her ex-husband, James Charles. A child was conceived before defendant's divorce from Charles, but born four months after the divorce. Charles, who had filed for divorce, had no knowledge of the pregnancy because defendant did not appear in the divorce action, and the default divorce judgment stated that "it further appear[ed] that no children were born of this marriage and none are expected . . . ." Plaintiff and defendant lived together with the child for nearly 4½ years after the divorce and before their separation; thereafter, defendant apparently denied plaintiff access to the

child. Plaintiff claims that it has now been about 2½ years since he has seen his son.

Plaintiff filed a paternity action, but the circuit court granted summary disposition to defendant, ruling that the default divorce judgment did not amount to the prior judicial determination that Charles was not the father of the child conceived during the marriage, as required by *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), and, therefore, that plaintiff lacked standing to bring a paternity action. The Court of Appeals reversed, holding that the default divorce judgment did, in fact, constitute such a prior judicial determination.

ANALYSIS

The presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and has been consistently recognized throughout our jurisprudence. See *In re KH*, 469 Mich 621, 634-635; 677 NW2d 800 (2004). This presumption vindicates a number of interests, not the least of which include the interest of the child in not having his or her legitimacy called into question, the interest of the state in ensuring that children are properly supported, and the interest of both in assuring the effective operation of intestate succession. The presumption also reflects the recognition that " '[t]here is no area of law more requiring finality and stability than family law.' " *Id.* at 635 n 27 (citation omitted). For this reason, we have held that "clear and convincing evidence" is required in order to overcome the presumption of legitimacy. *Id.* at 634.

The title of the Paternity Act, MCL 722.711 *et seq.*, states that the act is intended "to confer upon circuit courts jurisdiction over proceedings to compel and

provide support of children born out of wedlock . . . .” See also *Van Laar v Rozema*, 94 Mich App 619, 622; 288 NW2d 667 (1980) (“intent behind this statute is to provide support for illegitimate children”). The act confers standing on the father of a child born out of wedlock to sue to establish paternity. *In re KH*, *supra* at 631-632. Section 1 of the act provides the relevant definition:

> (a) “Child born out of wedlock” means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, *or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.* [MCL 722.711 (emphasis added).]

Thus, there are two ways to satisfy the definition of “child born out of wedlock” for purposes of the Paternity Act: (1) a showing that the child was neither born nor conceived during the mother’s marriage or (2) a judicial determination that the child was not the issue of the marriage.

In *Girard,* we stated that the judicial determination referred to in the statute was a *prior* determination: “For a putative father to be able to file a proper complaint in a circuit court, . . . a circuit court must have made a determination that the child was not the issue of the *marriage at the time of filing the complaint*.” *Girard, supra* at 242-243 (emphasis in original). The requirement of a prior determination that a child is born out of wedlock reflects a legislative recognition that paternity claims generally arise during divorce or custody disputes. *In re KH, supra* at 635. We have observed that this requirement suggests that the Legislature contemplated “ ‘situations where a court in a prior divorce or support proceeding determined that the legal husband of the mother was not the biological

father of the child.' " *Id.* (citation omitted). Such a prior determination is exactly what occurred in this case.

Defendant failed to respond to the complaint for divorce filed by her (now-ex) husband, and a default judgment of divorce ultimately was entered. It has long been the rule in this state that the entry of a default judgment has the legal effect of admitting all well-pleaded allegations. See, e.g., *Lesisko v Stafford*, 293 Mich 479, 481; 292 NW 376 (1940); *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982); *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000). In paragraphs 5 and 6 of his complaint for divorce, Charles alleged that defendant was not pregnant and that no children were born during the marriage. Because defendant never appeared, she was defaulted, the legal effect of which was her admission that she was not pregnant and that no children were born during the marriage. Although it was clearly factually incorrect that defendant was not pregnant on the date of the entry of the default divorce judgment, the legal effect of her default was an admission that she was not pregnant on the date of the divorce. Because defendant never sought to set aside the default judgment and never appealed the judgment, it continues to stand for the proposition that no issue resulted from her marriage to Charles, that is, necessarily, that any child born after the date of the divorce was a "child born out of wedlock" for purposes of the Paternity Act, MCL 722.711(a).

Moreover, the default judgment states, in pertinent part:

> [I]t satisfactorily appears to this Court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed, and there remains no reasonable likelihood that the mar-

> riage can be preserved; it further appearing that *no children were born of this marriage and none are expected . . . .*" [Emphasis added.]

The majority suggests that this statement did not constitute an "affirmative finding regarding the child's paternity," *ante* at 705. I respectfully disagree. The plain language of the judgment could hardly be clearer: "no children were born of this marriage and none are expected[.]" Once more, "no children were born of this marriage and none are expected[.]" The trial court thus concluded, not unreasonably, that no children were born of the marriage of Charles and defendant. As such, the child later born to defendant must, for purposes of the Paternity Act, MCL 722.711(a), have necessarily been a "child born out of wedlock."

The majority further suggests that it "cannot be reasonably asserted that there was clear and convincing evidence" to support the language in the default judgment. *Ante* at 706. Again, I must disagree. The proofs submitted at the hearing consisted entirely of Charles's testimony. Charles testified under oath, among other things, that "my wife is not pregnant at this time to the best of my knowledge." After hearing the testimony, the trial court stated:

> I find *from the proofs submitted* there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable opportunity for the marriage to be preserved. *Accordingly, the Court hereby has signed the judgment as prepared and presented*. [Emphasis added.]

In other words, the trial court considered the evidence presented at the hearing and issued its judgment on the basis of that evidence. Among the evidence presented was Charles's express testimony that defendant was not pregnant. The language used in the default judgment is

a function of this evidence; there is no requirement that a pregnancy test be administered before a trial court may rely on the uncontradicted statement of the husband that his wife is not pregnant. The trial court's order and its statement on the record are both quite clear, and completely contradict the majority's suggestion that the judgment was not supported by clear and convincing evidence.

"The rule is well established that courts speak through their judgments and decrees . . . ." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); see also *Newbold v Stewart*, 15 Mich 155 (1866). With respect to default judgments, the instant Court of Appeals panel observed:

> "A default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). See also *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Respecting defaults, in their factual as well as legal components, is a function of the policy of respecting the finality of judicial judgments. See, e.g., *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994). If the trial court's equivocation about there merely "appearing" to be no children of the marriage did indeed reflect the court's lack of opportunity to consider the factual matter fully, it nonetheless reflected no lack of legal authority behind the substance implicit in that unchallenged ruling. [Unpublished opinion per curiam of the Court of Appeals, issued August 23, 2005 (Docket No. 252840), slip op at 2.]

The Court of Appeals analysis regarding the force and effect of default judgments was entirely correct. Defendant's ex-husband testified in the divorce action that there were no children produced as a result of the marriage, and defendant did not appear to contest that

representation, which was the legal equivalent of her admission of its truth. The judgment of divorce recognized that no children resulted from the marriage, i.e., that Charles was not the father of any children. It is difficult to imagine evidence more "clear and convincing" of a fact than one party's assertion of that fact under oath and the opposing party's admission of that fact. Accordingly, the legal presumption that a child is factually the offspring of the mother's husband was addressed and fully repudiated in this case by the default judgment of divorce. The Court of Appeals, therefore, did not err in concluding that plaintiff had standing to bring this paternity action.[1]

Moreover, I note that a finding that defendant was not pregnant with Charles's child was, in fact, necessary for the trial court to have entered the default judgment of divorce. MCL 552.9f sets forth certain procedural requirements in an action for divorce and provides, in pertinent part:

> No proofs or testimony shall be taken in any case for divorce until the expiration of 60 days from the time of filing the bill of complaint, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony. *In every case where there are dependent minor children under the age of 18 years, no proofs or testimony shall be taken in such cases for divorce until the expiration of 6 months from the day the bill of complaint is filed.* [Emphasis added.]

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[1] The majority views as significant the fact that, along with the finding that no children were born to or conceived by the parties during their marriage, the circuit court did not also make an explicit finding that a child was conceived during the marriage. *Ante* at 706. However, given the determination of the trial court— that "no children were born of this marriage and none are expected"— it is nothing more than a matter of logic that the child here was "conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

Under this provision, no proofs or testimony can be heard in a divorce action in which children are involved until at least six months from the time of the filing of the complaint.[2] Charles filed the divorce action on June 23, 1998, and the judgment of divorce was entered on November 2, 1998. Thus, the judgment of divorce granted to Charles and defendant was entered just over four months from the time of the filing of the complaint for divorce. Because a court may grant a divorce after only 60 days have elapsed when no minor children are involved, but may not grant a divorce until six months have elapsed when minor children are involved, the trial court *necessarily* must have concluded from the evidence presented, i.e., Charles's testimony, that defendant was not pregnant and, therefore, that no issue resulted from the marriage.[3] While later events subse-

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[2] MCL 552.9f does provide an exception:

> In cases of unusual hardship or such compelling necessity as shall appeal to the conscience of the court, upon petition and proper showing, it may take testimony at any time after the expiration of 60 days from the time of filing the bill of complaint.

However, there is no indication whatsoever that this exception was invoked in the instant divorce.

[3] The majority recognizes that a " 'default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest,' " *ante* at 705, quoting *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). However, the majority proceeds promptly to disregard this basic principle by suggesting that the judgment of divorce was not a sufficient "court determination." *Ante* at 705. Yet, as noted above, under MCL 552.9f, the finding that the parties produced no issue was "essential to support the judgment." *Perry, supra* at 620. Moreover, had defendant appeared at the divorce proceeding, an answer to the question whether it had been shown by clear and convincing evidence that Charles fathered no children would have been "rendered following answer and contest." *Id.* Because *defendant* did not appear in that action, the question was decided against her. As such, the fact that Charles did not father a child with defendant was

quently proved this conclusion incorrect, they do not alter the fact that the trial court did, in fact, enter this finding. A court issuing a default judgment can only work with the information actually presented to it, but this does not alter the legal effect of its factual conclusions.

In reaching its conclusion, the majority renders the default judgment in this case essentially meaningless. The majority suggests, in effect, that a judicial determination requires that the court, in its decision-making, be fully aware of all the facts. However, in a default setting, where one party has failed to appear, it is obviously not always possible for the court to be fully aware of all the pertinent facts. After all, one side has chosen to deprive the court of the facts of which its witnesses presumably are aware. However, this has never been thought to relieve the trial court of its obligation to render a "determination" in such a case on the basis of as many facts as have been made available to the court. This is simply in the nature of default judgments. It is for this reason, among others, that parties to judicial proceedings would be prudent to show up for such proceedings.

The majority, wrongly in my view, characterizes the trial court's order as an equivocation because of its references in its order to "it satisfactorily *appears*" and "it further *appearing* . . . ." Quite apart from the fact that such language is entirely unremarkable in judicial orders, and has never before been thought to evidence "equivocation," the reality is that a prudent court could well choose to employ such language in virtually every order given that it is not omniscient and can only render decisions on the basis of evidence properly

definitively resolved by the default judgment of divorce. The question of what legal standard should have been used to resolve the underlying question, in the absence of an appeal of that issue, is irrelevant to the fact that the judgment resolves the question.

before it. The majority would transform entirely innocuous and customary language, routinely employed by courts, probably from time immemorial, into language pregnant with meaning, showing hesitation and uncertainty on the part of the court. Better apparently for the court to affect an all-knowing certainty of facts than to reveal the ordinary cautiousness of a person who understands the fallibilities of the judicial process. The majority's deconstruction of court orders notwithstanding,[4] whether a court states that something "appears to be," rather than that it "is," does not deprive an order of the full force of judicial authority.[5] Rather, a judgment— a default judgment no less than any other— represents to the world a binding determination concerning the issues pertinent to the judgment, and persons may not avoid the legal effect of such a judgment by attempting to relitigate the facts that underlie it.[6]

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[4] One wonders whether orders in which courts "believe" or "find" a particular fact satisfies the requirements of certitude established today by the majority. Moreover, it is noteworthy that the standard language this Court employs in denying a motion for reconsideration asserts that the motion is being denied because "it does not appear" that the initial order was entered erroneously. See, e.g., *McDanield v Hemker*, 714 NW2d 301 (2006). In light of this Court's obvious "equivocation" in such circumstances, one wonders whether parties who have received such orders are entitled to successive motions for reconsideration until we are certain enough to deny such motions unequivocally.

[5] The practical consequences of the majority's approach would be that default judgments would effectively always be in suspense pending additional information being made available to the judicial system, most typically, perhaps, from the defaulting party itself. While default judgments rarely constitute the ideal means of rendering a judicial "determination," such a procedure nevertheless is necessary to the orderly administration of justice, and the factual determinations made in accord with a default are just as binding as facts determined in judgments entered with the benefit of advocacy on both sides.

[6] In arguing that the pertinent language of the divorce judgment does not constitute a sufficient determination that Charles was not the father

Here, defendant failed to appear in the divorce action. Had she done so, she could have contested the trial court's conclusion that "no children were born of this marriage and none are expected[.]" Yet, by failing to appear, she failed to contest that conclusion, and the court entered a judgment based on the best information available to it at the time. Because the power to correct this determination rested at all times solely in defendant, she *in particular* should now be bound by that determination, rather than being allowed to profit from her own dereliction, as the majority permits— if, indeed, denying her son the right to a father he has known since birth can be considered "profiting." The majority thus allows a party to prevail in this case in significant part because of that party's own delinquency in failing to participate in an earlier judicial proceeding.

As already noted, one of the Legislature's stated purposes in enacting the Paternity Act was "to compel and provide support of children born out of wedlock . . . ." Title of 1956 PA 205, MCL 722.711 *et seq*. The majority's decision today frustrates that purpose in the case of this child. In reversing the Court of Appeals, the majority ensures that plaintiff has no legal obligation to provide support for this child. Moreover, because it seems clear that defendant has no intention of bringing a claim for support against her ex-husband, and if she ever did, could not prevail in that claim because Charles is obviously not the child's father, the majority also ensures by its decision today that this child will not receive support from *any* father. In other words, were defendant to seek support from her ex-

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of her child, plaintiff is essentially mounting a collateral attack on the divorce judgment. Because defendant did not seek leave to appeal the trial court's order in the divorce proceeding (or even participate in the proceeding), she should not be allowed to collaterally attack that order in this case. See *People v Sessions*, 474 Mich 1120 (2006).

husband, her child would almost certainly become— even under the majority's holding— a "child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage," MCL 722.711(a), affording plaintiff unquestionable standing to bring a paternity action. Clearly, as shown by the facts of this case, defendant has no interest in that outcome. As such, the majority provides defendant with its blessing to neglect to seek the support to which her child is entitled, solely for reasons of legal strategy. Thus, the majority sanctions defendant's legal gamesmanship at the expense of the well-being of her child.

This result is especially troubling in light of the continuing concern on the part of both the public and the members of this Court about fathers unwilling to financially support their children. The majority here rejects a father who welcomes the opportunity to take responsibility for his child, and who has acted as a father for more than four years, in favor of no father at all.[7]

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[7] The majority argues that I am incorrect to suggest that its decision leaves this child without a father, and instead asserts that *Charles* is the child's legal father. *Ante* at 707. However, it is the majority that is, tragically, incorrect. The plain language of the judgment states that Charles is not the father of any children borne by defendant. Because this judgment is res judicata of the issue as between Charles and defendant, defendant would have to take *additional action* (for instance, bringing a motion to revise or alter the judgment under MCL 552.17[1]) in order for the status quo to be altered and Charles to be declared the child's father. Charles doubtlessly would be shocked to learn that the majority believes he is the father. He is not, either biologically or legally.

Moreover, as I have pointed out elsewhere, there is no chance that this status quo will ever be altered because: (a) defendant almost certainly will never bring a motion to revise or alter, knowing that it would be successfully challenged by Charles and that this would allow plaintiff to relitigate his paternity, something that defendant is plainly not prepared to allow; and (b) it is clear to everyone, the majority excepted, that the

Although I believe strongly in the importance of the presumption of legitimacy, that presumption has been rebutted by clear and convincing evidence in this case. Defendant's ex-husband alleged that there were no children produced as a result of the marriage, and he testified to that effect at the divorce hearing. Defendant failed to appear at the hearing, which constituted a legal admission that there were no children of the marriage. The divorce judgment asserted that no children resulted from the marriage and, therefore, that Charles was not the father of any children. After the child was born, a birth certificate was prepared identifying plaintiff as the father. An affidavit of parentage was signed by the parties.[8] The parties lived together with the child as a family for over four years. And defendant has never denied that plaintiff is the father of her child. Plaintiff was a father to a little boy— a little boy who stands to suffer greatly from the majority's decision today, both financially and emotionally. Yet the majority finds that there is no "clear and convincing" evidence that *Charles* was not the father of defendant's child. I could not disagree more strongly.

CONCLUSION

In adopting defendant's position that the divorce judgment was insufficient to establish that her child was born out of wedlock, the majority renders a default

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status quo accurately reflects the truth of the situation, namely that Charles is not the father of the child.

[8] The affidavit provides that the parties "consent that the name of the natural father may be included on the certificate of birth for the child" and that "the mother states that she was not married when this child was born or conceived; or that this child though born or conceived during marriage, is not an issue of that marriage as determined by a court of law."

judgment in this case meaningless; it condones and encourages gamesmanship by a party to a child custody proceeding; and it allows a party to prevail, in significant part, because of that party's own delinquency in failing to participate in an earlier judicial proceeding. For the foregoing reasons, I would affirm the decision of the Court of Appeals and hold that plaintiff has standing to pursue a paternity action.

CAVANAGH, J., concurred with MARKMAN, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal May 12, 2006:

PEOPLE v KROON-HARRIS, No. 129689. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument whether a claimant who elects to challenge a long-term disability benefits decision by the Office of State Employer must do so in circuit court or, in contrast, in the Court of Claims. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments in their application papers. Reported below: 267 Mich App 353.

Summary Disposition May 12, 2006:

CARSON FISCHER, PLC v MICHIGAN NAT'L BANK, No. 128689. Plaintiff's motion to file supplemental brief and defendant's motion to include Argument II in its postargument brief are granted. Leave to appeal having been granted, 474 Mich 986 (2005), and the briefs and oral argument of the parties having been considered by the Court, we reverse in part the February 8, 2005, judgment of the Court of Appeals and reinstate the November 27, 2002, order of the Oakland Circuit Court granting defendant Michigan National Bank's motion for partial summary disposition. Pursuant to MCL 440.4406(6), as modified by the parties' account agreement, Michigan National Bank's liability is limited to those checks listed in plaintiff Carson Fischer, PLC's postnotification bank statements after September 1, 2000. We remand this case to the circuit court for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 248167.

Leave to Appeal Denied May 12, 2006:

LINSELL v APPLIED HANDLING, INC, No. 128273. The application for leave to appeal the February 8, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 266 Mich App 1.

KELLY, J. (*concurring*). The Court of Appeals was correct in holding that the $100,000 cap on damages is an aggregate, rather than a per commission, maximum. It was also correct in holding that MCL 600.2961(5)(b) is ambiguous.

MARKMAN, J. (*concurring*). Although the Court of Appeals correctly held that the $100,000 cap on damages is an aggregate maximum, rather

than a per commission maximum, the Court of Appeals erred in holding that MCL 600.2961(5)(b) is ambiguous. As this Court held in *In re Certified Question (Kenneth Henes Special Projects v Continental Biomass Industries, Inc),* 468 Mich 109, 118 (2003), MCL 600.2961(5)(b) is unambiguous. MCL 600.2961(5)(b) unambiguously provides that the principal must pay the sales representative, "[i]f the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due but not paid as required by this section or $100,000.00, whichever is less." That is, MCL 600.2961(5)(b) unambiguously provides for a $100,000 cap on damages as a whole.

PUGH v DEPARTMENT OF CORRECTIONS, No. 128447; Court of Appeals No. 260183.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal. In response to Justice KELLY's dissenting statement, I would note that plaintiff waited until the very last minute to mail his application for leave to appeal. Plaintiff placed the document in the prison mail *only one business day before the filing deadline*. There is no indication whatsoever that the Michigan Department of Corrections delayed the filing of plaintiff's application. Rather, it was plaintiff's own belated mailing that caused him to miss the filing deadline. Therefore, contrary to Justice KELLY's view, this is not a case that calls for the adoption of a prison mailbox rule.

KELLY, J. (*dissenting*). Defendant lost his right to seek an appeal because his petition arrived at the court one day late. Defendant placed his petition in the prison mailbox on January 7. The deadline for filing was January 10. Prison officials put the petition in the United States mail on January 10, and it was delivered on January 11. Because it was one day late, plaintiff lost his right to seek an appeal.

Justice CORRIGAN suggests that, because defendant waited until the last day to mail his application, he is no longer entitled to his appeal as of right. I believe that defendant is given no less time within which to file than is someone who is not incarcerated. It would be fundamentally unfair to conclude otherwise.

In order to remedy the wrong done in this case, the Court should adopt a prison mailbox rule. It could make filing of appeals effective as of the date a prisoner puts his petition in the hands of prison authorities. This would compensate for the fact that the prisoner cannot go to the court to file his petition and cannot even get to a United States Postal Service mailbox, as others can.

Approximately 18 states have adopted a prison mailbox rule. Eighteen years ago, the United States Supreme Court in *Houston v Lack*[1] wrote, "[T]he *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities when he cannot control or supervise and we may have every incentive to delay."

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[1] 487 US 266, 271; 108 S Ct 2379; 101 L Ed 2d 245 (1988).

Federal appellate courts have adopted a formal prison mailbox rule. FRAP 4(c). Michigan should accord prisoners the same access to the courts.

L & R HOMES, INC v JACK CHRISTENSON ROCHESTER, INC, No. 128719; Court of Appeals No. 250483.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal to articulate clear standards for piercing the corporate veil and settle the confused state of Michigan jurisprudence regarding this problem.

Defendant Rochester, Inc., a "corporation to be formed," leased commercial property from plaintiff L & R Homes, Inc. The property was to be used for a real estate office. Defendant Jack Christenson, the president of Rochester and Jack Christenson Rochester, Inc. (JCI), signed the lease on Rochester's behalf. Rochester eventually defaulted on the lease.

Plaintiff thereafter sued Rochester, JCI, and Christenson personally for nonpayment of the rent. Plaintiff asserted that Rochester was a mere instrumentality of Christenson and JCI, and requested the court to pierce Rochester's corporate veil and hold JCI and Christenson liable for Rochester's unpaid lease payments. The trial court granted summary disposition for Christenson and JCI, finding no basis to pierce the corporate veil because no evidence was proffered that these defendants had committed any fraud or engaged in any illegality.

The Court of Appeals affirmed in regard to Christenson, reversed in regard to JCI, and remanded for trial in regard to JCI. The Court of Appeals explained that the trial court erred when it required plaintiff to prove fraud to pierce the corporate veil. Instead, the panel held that plaintiff could pierce Rochester's corporate veil if it showed that Rochester was "defendants' 'agent,' 'mere instrumentality,' 'device to avoid legal obligations,' 'legal entity . . . used to defeat public convenience,' or a similar capacity." Slip op at 2, citing *Kline v Kline*, 104 Mich App 700, 702-703 (1981).

Following a bench trial, the trial court ruled in favor of JCI, holding that plaintiff could not pierce the corporate veil because it had failed to establish that defendants committed a fraud or wrong against plaintiff, or that Rochester was a sham corporation or a mere instrumentality of JCI or Christenson. Plaintiff appealed again.

In a split decision, the Court of Appeals reversed the judgment of the trial court. The majority held that this case was analogous to *Herman v Mobile Homes Corp*, 317 Mich 233 (1947), and *Pfaffenberger v Pavilion Restaurant Co*, 352 Mich 1 (1958), where this Court allowed the corporate veil to be pierced without a showing of fraud. The majority held that because the evidence revealed that Rochester was a mere instrumentality of JCI, the corporate veil should be pierced.

The dissenting judge would have affirmed the trial court because no evidence was adduced that "plaintiff, a sophisticated business entity which freely entered into a contractual relationship with Rochester, Inc., was wronged or suffered any unjust loss when another corporate entity discontinued making rent payments that it was never obligated to make to plaintiff on Rochester's behalf." Slip op at 2 (BANDSTRA, J., dissenting).

The dissenting judge opined that the corporate veil cannot be pierced absent some finding of fraud or wrong.

The inconsistency in governing standards for piercing the corporate veil poses a problem of major jurisprudential significance to the people of Michigan. The decisions in this case illustrate our confused standards for piercing the corporate veil. Can the corporate form be disregarded where a defendant has not behaved fraudulently? Now, the answer depends on the Court of Appeals panel that a litigant draws and the lines of this Court's authority that the panel identifies. As I explained in my dissenting statement in *Daymon v Fuhrman*, 474 Mich 920 (2005), I would grant leave to appeal to address this problem:

> This Court has never adopted clear standards for determining when the corporate veil should be pierced. The most recent comprehensive discussion of piercing a corporate veil appeared in [*Foodland Distributors v Al-Naimi,* 220 Mich App 453 (1996)]. In that case, the Court of Appeals stated that "[t]here is no single rule delineating when the corporate entity may be disregarded." *Foodland Distributors, supra* at 456. Nonetheless, the Court adopted a three-pronged standard for piercing the corporate veil. *Id.* at 457. This standard has been followed in a number of other Court of Appeals cases involving piercing a corporate veil. It has never been accepted or rejected by this Court. This Court should review the prevailing Court of Appeals standard for piercing the corporate veil and delineate a clear legal standard for our courts to follow.

TAYLOR, C.J., and YOUNG, J. We join the statement of Justice CORRIGAN.

VEGA v LAKELAND HOSPITALS AT NILES AND ST JOSEPH, INC, No. 129436; reported below: 267 Mich App 565.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal in conjunction with *Pappas v Bortz* (Docket No. 128864), 475 Mich 855 (2006), to consider whether the Court of Appeals was correct in concluding that MCL 600.5851(1) does not apply to medical malpractice actions. 267 Mich App 565 (2005). The Court of Appeals dissent concluded that, "although MCL 600.5851(7) may limit a claim for malpractice that accrued before the age of eight, its plain language does not limit those plaintiffs whose claims accrued after the age of ten—as in the present case." *Id.* at 577 (JANSEN, J., dissenting).

MCL 600.5851(1) states that the one-year saving provision applies to those who are mentally disabled "[e]xcept as otherwise provided in subsections (7) and (8) . . . ." Subsection 7 states that if a medical malpractice claimant is eight years of age or older, as in this case, the period of limitations set forth in § 5838a applies. A saving provision is not a period of limitations. *Waltz v Wyse*, 469 Mich 642, 650 (2004). Subsection 7 says that the period of limitations in 5838a applies; however, it does not say that the saving provision of 5851(1) does not apply.

Therefore, I would grant leave to appeal to further consider the argument of the Court of Appeals dissent.

LIBERTY MUTUAL FIRE INSURANCE COMPANY v CITY OF GRAND RAPIDS, Nos. 130009, 130010; Court of Appeals Nos. 262934, 262985.

CAVANAGH, J. I would grant leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the majority's denial of plaintiffs' application for leave to appeal the October 25, 2005, judgment of the Court of Appeals.

I would grant leave to appeal to consider whether the prospective holding in *Pohutski v City of Allen Park,* 465 Mich 675 (2002), should be extended to preserve trespass-nuisance claims that accrued before the effective date of 2001 PA 222 and were timely filed after April 2, 2002.

KELLY, J. I join the statement of Justice WEAVER.

Interlocutory Appeal

Leave to Appeal Denied May 12, 2006:

PAPPAS v BORTZ HEALTH CARE FACILITIES, INC, No. 128864; Court of Appeals No. 251144.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). For the reasons set forth in my statement in *Vega v Lakeland Hosps at Niles & St Joseph, Inc* (Docket No. 129436), 475 Mich 854 (2006), I would grant leave to appeal in this case along with *Vega* to consider whether MCL 600.5851(1) applies to medical malpractice actions.

Summary Dispositions May 17, 2006:

SNEIDERAITIS v BURROWS, No. 129178. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and the Oakland Circuit Court and remand this case to the Oakland Circuit Court for further proceedings. Defendants claim that plaintiffs purchased the property at a foreclosure sale after fraudulently misrepresenting to defendants that if defendants removed the property from the market, plaintiff would act as defendants' attorney in dealing with the mortgage company and would purchase the property before foreclosure. Summary disposition was improper because genuine issues of material fact exist on defendants' claim that plaintiffs secured title to the property by means of fraudulent misrepresentations. *McKie v Oakland Mortgage Co*, 277 Mich 292, 294-295 (1936); *Gates v Sutherland*, 76 Mich 231, 233 (1889); *Cleland v Taylor*, 3 Mich 201 (1854). We do not retain jurisdiction. Court of Appeals No. 252059.

TRIANGLE EXCAVATING COMPANY, INC v COVERT TOWNSHIP, No. 130422. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment affirming the Van Buren Circuit Court's grant of summary disposition to defendant. Plaintiff presented sufficient evidence to raise a material issue of fact whether defendant intentionally and voluntarily relinquished its right to enforce the con-

tractual requirement of written notification of unforeseen site conditions. *A J Smith Constr Co v Marine City*, 267 Mich 367 (1934). We remand this case to the Van Buren Circuit Court for further proceedings not inconsistent with this order. Court of Appeals No. 255507.

BLACK v DAIMLERCHRYSLER SERVICES NORTH AMERICA, LLC, No. 130998. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for clarification of its order. Specifically, the Court of Appeals shall state whether it intended to vacate the Oakland Circuit Court's order denying defendant's motion to strike and to order the trial court to engage in an MRE 702 inquiry regarding plaintiffs' proposed expert testimony before issuing a new ruling on defendant's motion to strike. On the Court's own motion, we further order that the proceedings in the Oakland Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction. Court of Appeals No. 268350.

Leave to Appeal Denied May 17, 2006:

K & K CONSTRUCTION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 129761; reported below: 267 Mich App 523.

TAYLOR, C.J., did not participate.

KELLY, J. I would grant leave to appeal.

MARKMAN, J. I would grant leave to appeal in order to further consider the Court of Appeals application of the "average reciprocity of advantage" factor from *Penn Central Transportation Co v City of New York*, 438 US 104 (1978).

CHAMBERS v LEHMANN, No. 129775; Court of Appeals No. 262502.

CAVANAGH, J. I would grant leave to appeal.

MASTEN v ROBERTS, No. 129879. The application for leave to appeal the August 16, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 255050.

CAPCO 1998-D7 PIPESTONE, LLC v MILTON VENTURES LIMITED PARTNERSHIP, No. 129920; Court of Appeals No. 262098.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted the question whether a cover letter signed by a party's attorney, accompanying a settlement agreement drafted by that attorney, satisfies the signature requirement of MCR 2.507(H).

BELOTE v STRANGE, No. 129928; Court of Appeals No. 262591.

KELLY, J. I would grant leave to appeal.

DIEHL v R L COOLSAET CONSTRUCTION COMPANY, No. 130095; Court of Appeals No. 253596.

KELLY, J. I would grant leave to appeal.

BRADLEY v GENERAL MOTORS CORPORATION, No. 130123; Court of Appeals No. 263960.

THE CINCINNATI INSURANCE COMPANY v BOTT, No. 130139; Court of Appeals No. 254333.

KELLY, J. I would grant leave to appeal.

MACARTHUR v LINDLE, No. 130248; Court of Appeals No. 265462.

KELLY, J. I would grant leave to appeal.

MARTEL v ALLEN, No. 130749. The motion for immediate consideration is granted. Court of Appeals No. 260790.

Summary Dispositions May 19, 2006:

VILLADSEN v MASON COUNTY ROAD COMMISSION, No. 129672. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the decisions of the Court of Appeals and the Mason Circuit Court, but do so for reasons other than those stated by the Court of Appeals. The evidence shows that the strip of land at issue was, and is, one portion of a road that was an established public road by the 1930s. There is no dispute that the road had long existed by then. There is evidence of township ownership as early as the early 1900s. The road runs in a fairly straight fashion for approximately 20 miles, and runs along a section line for the approximately one mile that it traverses or crosses plaintiffs' properties. An aerial photograph from the 1930s shows the course of the road, and there is evidence of a 1915 deed conveying to the township, "for highway purposes," approximately one-half of the strip of road presently in dispute. The parties and the lower courts were unnecessarily concerned with evidence regarding use and maintenance of the road *after* the time when it is clear a public road had already been established. The highway-by-user statute, MCL 221.20, allows public highways to be *established* under a theory of implied dedication. *City of Kentwood v Sommerdyke Estate,* 458 Mich 642, 650-656 (1998). The evidence pertaining to the use and partial disrepair of the road after the public road was established was irrelevant to whether a highway by user was established. Reported below: 268 Mich App 287.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

BLACK v BLACK, No. 130429. The application for leave to appeal the December 20, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portions of the Court of Appeals decision holding that the Manistee cabin was part of the marital estate and that plaintiff was not entitled to any portion of defendant's pension. The property division has now been reversed in its entirety. We remand this case to the Manistee Circuit Court for further

proceedings, and direct the trial court to address the issues for which the Court of Appeals remanded the case and to also determine: (1) whether, in light of the antenuptial agreement, defendant intended to transfer his separate ownership interest in the Manistee cabin into the marital estate, and (2) whether defendant gifted plaintiff with an interest in his pension. In all other respects, the applications are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 257650.

Leave to Appeal Denied May 19, 2006:

In re THOMPKINS (DEPARTMENT OF HUMAN SERVICES v STAFFORD), No. 131024; Court of Appeals No. 263087.

Summary Dispositions May 24, 2006:

PEOPLE v OLSON, No. 129257. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court for resentencing. The circuit court determined that the defendant's sentencing guidelines were misscored and that the applicable guidelines range was lower than the one within which the defendant was originally sentenced. Under these circumstances, resentencing is required. *People v Francisco*, 474 Mich 82 (2006). On remand, the court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). In all other respects, leave to appeal is denied, 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. 259872

WEAVER, J. (*dissenting*). For the reasons set forth in the dissenting opinion that I joined in *People v Francisco*, 474 Mich 82, 93-95 (2006), I would deny leave to appeal rather than remand for resentencing.

PEOPLE v HURLEY, No. 130097. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate defendant's sentence and remand this case to the Wayne Circuit Court for resentencing. Defendant has demonstrated both good cause and actual prejudice, entitling him to relief under MCR 6.508(D). The sentence imposed was invalid. MCR 6.508(D)(3)(b)(iv). The sentencing guidelines placed defendant in an intermediate cell that required the imposition of a jail term, unless there was a substantial and compelling reason for a departure. MCL 769.34(4)(a). No substantial and compelling reason was offered to permit the imposition of a prison sentence. On remand, the circuit court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). We do not retain jurisdiction. Court of Appeals No. 261967.

NORTHERN WAREHOUSING, INC v DEPARTMENT OF EDUCATION, No. 130689. The motion for leave to file brief amicus curiae is granted. By order of April 12, 2006, this Court directed the parties to file supplemental briefs stating whether the contract between plaintiff and the state of Michigan was renewed for the 2005-2006 school year or beyond. The briefs having been filed, the application for leave to appeal the March 7, 2006, judgment of the Court of Appeals 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. In order to justify the extraordinary remedy of a preliminary injunction, the moving party must show a likelihood that it will succeed on the merits of the claim. *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158 (1984). The Court of Appeals erred in finding that evidence supported a likelihood of success on plaintiff's claim for promissory estoppel. Promissory estoppel requires reasonable reliance on the part of the party asserting estoppel. The contract between the parties contains an integration clause. Reliance on precontractual representations is unreasonable as a matter of law when the contract contains an integration clause. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504 (1998). We remand this case to the Court of Appeals for expedited consideration of the likelihood of success of plaintiff's other causes of action. The motion to stay the Court of Claims injunction is granted pending the completion of this appeal. We do not retain jurisdiction. Court of Appeals No. 260598.

WEAVER, J. I would deny leave to appeal.

Leave to Appeal Denied May 24, 2006:

HARBOUR v CORRECTIONAL MEDICAL SERVICES, INC, No. 129153; reported below: 266 Mich App 452.

PEOPLE v DUNN, No. 129597; Court of Appeals No. 262875.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v STEINER, No. 129952. The motion for immediate consideration is granted. The application for leave to appeal the October 14, 2005, order of the Court of Appeals is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263217.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted defendant's claim of ineffective assistance of appellate counsel.

PEOPLE v WILSON, No. 130049; Court of Appeals No. 265311.

KELLY, J. I would remand this case for resentencing.

PEOPLE v SZYMANSKI, No. 130152; Court of Appeals No. 265035.

SMITH v PARENTS & TEACHERS TOGETHER, No. 130202; Court of Appeals No. 254876.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v CARICO, No. 130232. The denial is without prejudice to defendant raising the issue of counselless convictions in a motion for relief from judgment pursuant to MCR 6.500 *et seq*. Court of Appeals No. 265877.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

SHAW v SHAW, No. 130317; Court of Appeals No. 265502.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v DEVINE, No. 130328; Court of Appeals No. 256185.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

DETROIT FREE PRESS, INC v CITY OF SOUTHFIELD, Nos. 130438-130441; reported below: 269 Mich App 275.

CAVANAGH, J. I would grant leave to appeal.

CITY OF ROCHESTER HILLS v FISHER, No. 130841. The motion for immediate consideration is granted. The application for leave to appeal the March 14, 2005, order of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for stay is also denied. Court of Appeals No. 268164.

KELLY, J. I would remand this case to the district court with instructions to vacate the fine imposed.

Summary Disposition May 25, 2006:

MOXON v MOXON, No. 130592. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for its consideration of whether MCR 2.612(C)(1)(f) authorizes the court to grant plaintiff's request to modify the parties' consent judgment of divorce to provide that the parties' children "shall be allowed to be enrolled in the school district which [sic] plaintiff resides, which is currently St. Clair Shores school district." We direct the circuit court to make the following specific findings regarding the requirements for relief to be granted under MCR 2.612(C)(1)(f) within 60 days of the date of this order:

(1) whether the reasons for modifying the parties' consent judgment of divorce do not fall under subsections (a) through (e) of MCR 2.612(C)(1);

(2) whether the substantial rights of defendant will be detrimentally affected if the consent judgment of divorce is modified as plaintiff has requested;

(3) whether extraordinary circumstances exist that mandate modifying the consent judgment of divorce in order to achieve justice;

(4) whether the provision of the consent divorce judgment that plaintiff seeks to modify was obtained by the improper conduct of defendant; and

(5) whether plaintiff requested modification of the consent judgment of divorce within a reasonable time after its entry. *Heugel v Heugel*, 237 Mich App 471, 478-479, 482 (1999).

The Macomb Circuit Court may conduct additional proceedings or evidentiary hearings, if necessary. Should the circuit court determine that modification of the consent judgment of divorce was not appropriate under MCR 2.612, and that the parties' children should be enrolled in the Grosse Pointe Farms School District, the current school enrollment of the parties' children shall nonetheless remain undisturbed through the remainder of the 2005-2006 school year. We do not retain jurisdiction. Court of Appeals No. 264841.

WEAVER and CORRIGAN, JJ. We would deny leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 26, 2006:

SAFFIAN v SIMMONS, No. 129263. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether the default and default judgment should be vacated and the case remanded for an evidentiary hearing on the issue whether defendant's claim of clerical error to establish good cause for the failure to timely respond to the complaint was fraudulent or, if not fraudulent, was otherwise insufficient to constitute good cause for setting aside the default; (2) whether plaintiff's defective affidavit of merit was sufficient to commence a cause of action; and (3) if not, whether defendant was nevertheless required to file a timely answer or other response to the complaint under the circumstances of this case. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 267 Mich App 297.

AL-SHIMMARI v THE DETROIT MEDICAL CENTER, No. 130078. The application for leave to appeal the November 1, 2005, judgment of the Court of Appeals, the application for leave to appeal as cross-appellant, and the motion to strike are considered. The motion to strike is denied. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether the Court of Appeals correctly granted a jury trial on the service of process issue; (2) whether the Court of Appeals correctly determined that defendants' attorney's participation in an evidentiary stipulation did not constitute a "general appearance" sufficient to waive defendant physician's ability to challenge service of process, in reliance on *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178 (1993); and (3) whether *Penny* is consistent with MCR 2.117(A) and (B). The parties may file supplemental briefs within 42 days of the date of this order, but they

should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 262655.

Summary Dispositions May 26, 2006:

PEOPLE V BOATMAN, No. 129999. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether defendant's plea was understanding when defendant was not informed of the maximum possible sentence as an habitual offender. MCR 6.302(B)(2). We do not retain jurisdiction. Court of Appeals No. 265657.

YOUNG, J. (*dissenting*). I respectfully dissent from the majority's decision to remand this case to the Court of Appeals for consideration as on leave granted. I believe that defendant's plea was "understanding" for purposes of MCR 6.302(B).

MCR 6.302(B) only requires that a court inform a defendant of the maximum possible prison sentence *for the offense* to which the defendant pleads guilty. Nothing in the language of MCR 6.302(B) requires the trial court to inform defendants of the possible sentencing *enhancement* they face as a result of their status as habitual offenders. Although defendant faced a possible sentence of 15 years imprisonment because of his status as a fourth habitual offender, the status of being a habitual offender is not an *offense*.[2] Rather, Michigan's habitual offender statutes provide a " 'sentence-enhancement procedure with a deterrent and punitive purpose.' "[3] Consequently, MCR 6.302(B) does not require a trial court to inform a defendant about the maximum sentence he faces based on habitual offender enhancement. It only requires the defendant to be informed of the "maximum possible prison sentence for the offense" to which he pled guilty. Indeed, the trial court complied with this rule by informing defendant that the charge of resisting arrest carries a two-year statutory maximum sentence.

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[2] *People v Doyle*, 451 Mich 93, 102 (1996); *People v Bewersdorf*, 438 Mich 55, 67 (1991); *People v Zinn*, 217 Mich App 340, 345 (1996); *People v Anderson*, 210 Mich App 295, 297-298 (1995); *People v Oswald (*AFTER REMAND), 188 Mich App 1, 12 (1991).

[3] *Anderson, supra* at 298, quoting *Oswald, supra* at 12. See also MCL 769.13, which was amended in 1994 to eliminate the need for a separate trial regarding whether the defendant was a repeat felony offender. MCL 769.13 currently assigns the issue regarding defendant's prior convictions to the sentencing judge. Moreover, MCL 769.13, as amended, requires the prosecutor to file a habitual offender notice not more than 21 days after the defendant's arraignment on the underlying or new felony charges. Because defendant was presumably aware that he could be sentenced as a habitual offender, no need existed for the sentencing judge to again inform defendant of this possibility.

Moreover, a reviewing court will not set aside a defendant's plea for lack of "understanding" when the trial court has substantially complied with MCR 6.302(B).[4] A violation of MCR 6.302(B) only requires reversal when the trial court fails to inform the defendant of one of the following three constitutional rights: (1) the right to trial by jury; (2) the right to confront one's accusers; or (3) the privilege against self-incrimination.[5] Otherwise, an appellate court must determine whether "the defendant was informed of such constitutional rights and incidents of a trial as is reasonable to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents."[6] Substantial compliance with MCR 6.302(B) is sufficient.[7] The trial court substantially complied with the court rule by stating that the sentence it imposed would be within the correctly scored guidelines, and then imposing a minimum sentence that fell within the guidelines. Defendant made no objection that the minimum sentence exceeded the two year maximum for resisting arrest.

There is no " 'talismanic chant' " that must be uttered by the trial court during plea proceedings.[8] It is not necessary for the trial judge to personally impart all of the required information contained in MCR 6.302(B), as long as the information is imparted to defendant "*in the hearing of the judge and defendant*."[9] In this case, the prosecution stated on the record that it calculated the minimum guidelines range to be five to 46 months. Defendant pleaded guilty pursuant to an agreement that his minimum sentence would be within the guidelines. Assuming arguendo that the trial court failed to inform defendant of the maximum possible prison sentence for the offense, defendant was put on notice that he faced the possibility of a sentence greater than two years when the prosecutor stated on the record in defendant's presence that defendant's recommended minimum guidelines range was five to 46 months. Consequently, defendant has failed to show that he was not made aware of the "rights and incidents" of trial that he was waiving by pleading guilty, or that the trial court failed to substantially comply with MCR 6.302(B).

Accordingly, I would deny leave to appeal.

CORRIGAN, J. I join the statement of Justice YOUNG.

Leave to Appeal Denied May 26, 2006:

FOREMAN v FOREMAN, No. 128874. The motion to strike plaintiff-appellee's reply brief is denied as moot. Reported below: 266 Mich App 132.

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[4] *People v Saffold*, 465 Mich 268, 273 (2001).

[5] *Saffold, supra* at 273.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 280, quoting *People v Willsie*, 96 Mich App 350, 353 (1980).

[9] *Id.* at 278, quoting *Guilty Plea Cases*, 395 Mich 96, 114-115 (emphasis in *Guilty Plea Cases*).

TAYLOR, C.J. I would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal. Plaintiff and defendant were divorced in July 2000. After mediation, the parties reached a property settlement that was incorporated, but not merged, into the judgment of divorce. More than two years after the judgment was entered, plaintiff brought the instant action claiming that defendant fraudulently induced her to enter into the property settlement. In *Nederlander v Nederlander*, 205 Mich App 123, 127 (1994), the Court of Appeals held that a party who suspects that the other party has committed fraud during a divorce proceeding must seek relief under MCR 2.612(C)(1)(c) and (2) within one year after the judgment. However, in *Grace v Grace,* unpublished opinion per curiam of the Court of Appeals, issued May 23, 1995 (Docket No. 163344), the Court of Appeals distinguished *Nederlander* from those cases in which the underlying property settlement had only been incorporated, but not merged, into the judgment of divorce. The Court held that the property settlement constituted a separate contract to which the fraud claim could properly apply. I would grant leave to appeal to determine whether the *Grace* exception to *Nederlander*, vitiating the requirement in MCR 2.612 that a claim of fraud in a divorce action be asserted within one year of judgment, should be adopted by this Court.

PEOPLE V ARABO, No. 131162. The motion for immediate consideration is granted. Court of Appeals No. 270016.

Leave to Appeal Granted May 30, 2006:

PEOPLE V BOBBY SMITH, No. 130353. The parties are directed to include among the issues to be briefed: (1) whether *Blockburger v United States*, 284 US 299, 304 (1932), or *People v Robideau*, 419 Mich 458 (1984), sets forth the proper test to determine when "multiple punishments" are barred on double jeopardy grounds pursuant to Const 1963, art 1, § 15, taking into consideration this Court's prior precedent in "multiple punishment" claims and the common understanding of "same offense" as it relates to the "multiple punishments" prong of double jeopardy. Cf. *People v Nutt*, 469 Mich 565 (2004), and (2) whether defendant's convictions of armed robbery and felony-murder based on a predicate felony of larceny violated double jeopardy protections under either the *Blockburger* or *Robideau* test. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 257353.

Summary Dispositions May 30, 2006:

PEOPLE V KURODA, No. 128493. By order of October 27, 2005, the application for leave to appeal the February 22, 2005, judgment of the

Court of Appeals was held in abeyance pending the decision in *People v Johnson* (Docket No. 127525). On order of the Court, the opinion having been issued on March 23, 2006, 474 Mich 96 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for resentencing. The circuit court erred by assessing defendant 50 points under offense variable 11 on each conviction for penetrations that did not arise out of the particular sentencing offense. On resentencing, the circuit court shall assess defendant zero points for each conviction under offense variable 11. We do not retain jurisdiction. Court of Appeals No. 251019.

WEAVER, J. I would grant leave to appeal.

PEOPLE v MINTER, No. 129264. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Macomb Circuit Court for the resentencing of defendant on all of his criminal sexual conduct convictions. The circuit court erred by assessing defendant 50 points under offense variable 11 for penetrations that did not arise out of the particular sentencing offense. *People v Johnson*, 474 Mich 96 (2006). On resentencing, the circuit court shall assess defendant zero points on each conviction under offense variable 11. We do not retain jurisdiction. Court of Appeals No. 253684.

WEAVER, J. I would grant leave to appeal.

PEOPLE v CHURCH, No. 130677. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentences of the Genesee Circuit Court and remand this case to that court for resentencing. The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is seven to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart. In all other respects, the application is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 267735.

Reconsideration Denied May 30, 2006:

PEOPLE v SALYERS, No. 128170. Leave to appeal denied at 474 Mich 1067. Court of Appeals No. 248540.

PEOPLE v TIERNEY, No. 128949. Leave to appeal denied at 474 Mich 1068. Reported below: 266 Mich App 687.

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER v DIRECTOR, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, No. 129384. Leave to appeal denied at 474 Mich 1068. Reported below: 267 Mich App 386.

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN SELF-INSURED WORKERS COMPENSATION FUND v ACKER STEEL ERECTORS, INC, No. 129459. Leave to appeal denied at 474 Mich 1092. Court of Appeals No. 250973.

BEATTY v BEATTY, No. 129558. Leave to appeal denied at 474 Mich 1069. Court of Appeals No. 261568.

In re DENIAL OF PETITIONER VJT, INC (VJT, INC v MICHIGAN GAMING CONTROL BOARD), No. 129691. Leave to appeal denied at 474 Mich 1070. Court of Appeals No. 260937.

PEOPLE v JAMES ROBINSON, No. 129821. Leave to appeal denied at 474 Mich 1093. Court of Appeals No. 265452.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MCDANIELD v HEMKER, No. 129843. Leave to appeal denied at 474 Mich 1075. Court of Appeals No. 263150.

SLOAN v CITY OF MADISON HEIGHTS, No. 130027. Summary disposition entered at 474 Mich 1085. Court of Appeals No. 254371.

MACARTHUR v RAMSEY HAVENWYCK, INC, No. 130029. Leave to appeal denied at 474 Mich 1071. Court of Appeals No. 262600.

PEOPLE v CRISMAN, No. 130119. Leave to appeal denied at 474 Mich 1095. Court of Appeals No. 264027.

FRITZ v YELLOW TRANSPORTATION, INC, No. 130122. Leave to appeal denied at 474 Mich 1095. Court of Appeals No. 264378.

Leave to Appeal Denied May 30, 2006:

PEOPLE v SEABROOKS, No. 128806; Court of Appeals No. 252736.

PIONEER STATE MUTUAL INSURANCE COMPANY v GENERAL MOTORS CORPORATION, No. 128860; Court of Appeals No. 249713.

CLARK HILL, PLC v KATZ, No. 129815; Court of Appeals No. 261480.

PONTI v SPIEGEL, No. 129827; Court of Appeals No. 261888.

PEOPLE v HOROWITZ, No. 129980. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261829.

HIGGINS LAKE PROPERTY OWNERS ASSOCIATION v GERRISH TOWNSHIP, No. 129987; Court of Appeals No. 262717.

PEOPLE v ABDOUSH, No. 129996; Court of Appeals No. 256015.

PEOPLE v HOLTZER, No. 130003. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261940.

PEOPLE v MERKEL, No. 130012. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261755.

PEOPLE v HITCHCOCK, No. 130026. The motion to file late reply brief is granted. The application for leave to appeal the August 16, 2005, order of the Court of Appeals is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259351.

PEOPLE v HAWKE, No. 130053. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260334.

KIMBLE v DEPARTMENT OF CORRECTIONS, No. 130070; Court of Appeals No. 264457.

PEOPLE v MOX, No. 130088. By order of April 28, 2006, the motion to remand and the application for leave to appeal the October 20, 2005, order of the Court of Appeals were denied. On order of the Court, defendant's motion to object is also denied. Court of Appeals No. 261954.

KELLY, J., did not participate.

PEOPLE v DORTCH, No. 130115; Court of Appeals No. 265871.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v RODRIGUEZ, No. 130116. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261956.

PEOPLE v DRANGINIS, No. 130120. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261951.

PEOPLE v RODEBACH, No. 130168; Court of Appeals No. 261821.

PEOPLE v SANDERS, No. 130181; Court of Appeals No. 266192.

PEOPLE v CARLOS DAVIS, No. 130186; Court of Appeals No. 256495.

PEOPLE v RIGGINS, No. 130201; Court of Appeals No. 265334.

PEOPLE v GREEN, No. 130206; Court of Appeals No. 264968.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KRAYTUAN HALL, No. 130208; Court of Appeals No. 255640.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WARNSLEY, No. 130219; Court of Appeals No. 255082.

PEOPLE v DEAN CLARK, No. 130239. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 262389.

PEOPLE v SCHEITLER, No. 130241; Court of Appeals No. 266244.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KUCHCIAK, No. 130242. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 265655.

DEPARTMENT OF TRANSPORTATION v THE LUBIENSKI REVOCABLE LIVING TRUST, No. 130275; Court of Appeals No. 263922.

PEOPLE v KOEWERS, No. 130286; Court of Appeals No. 266410.

PEOPLE v BERRINGTON, No. 130293; Court of Appeals No. 266124.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WOLFE, No. 130294; Court of Appeals No. 256441.

SHEFMAN v KUTHY, No. 130296. The motion to adjourn is denied as moot. Court of Appeals No. 255889.

PEOPLE v CERNEY, No. 130298; Court of Appeals No. 256569.

PEOPLE v WARREN BROWN, No. 130305. The miscellaneous motion is granted. Court of Appeals No. 245177.

PEOPLE v CHAMBERS, No. 130307; Court of Appeals No. 254861.

PEOPLE v RASHAD, No. 130323; Court of Appeals No. 255819.

PEOPLE v COREY HARRIS, No. 130327; Court of Appeals No. 261232.

PEOPLE v ARTIS, No. 130330. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262232.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LANNING, No. 130334; Court of Appeals No. 254238.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DARRYL ROBINSON, No. 130336. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266626.

PEOPLE v ROBERTSON, No. 130364; Court of Appeals No. 265874.

PEOPLE v SHORTRIDGE, No. 130366; Court of Appeals No. 266696.

PEOPLE v PEETE, No. 130367. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261454.

PEOPLE v JEROME WILLIAMS, No. 130368; Court of Appeals No. 256437.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v GARRIDO, No. 130369. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263096.

PEOPLE v BAUM, No. 130370. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266451.

PEOPLE v MACLIN, No. 130371. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266522.

PEOPLE v MEYERS, No. 130374. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262270.

PEOPLE v VIVIAN BROWN, No. 130381; Court of Appeals No. 257107.

PEOPLE v DUNBAR, No. 130382; Court of Appeals No. 266813.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BOTELLO, No. 130386; Court of Appeals No. 266187.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v ZYGAJ, No. 130387; Court of Appeals No. 266285.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

JONES v WOLVERINE MACHINE PRODUCTS COMPANY, No. 130388; Court of Appeals No. 264735.

PEOPLE v JETT, No. 130389. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262229.

PEOPLE v GERALD CLARK, No. 130394; Court of Appeals No. 266059.

PEOPLE v WALLACE, No. 130395; Court of Appeals No. 256303.

PEOPLE v ADAMS, No. 130398; Court of Appeals No. 257313.

PEOPLE v MCKELLER, No. 130405. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262394.

PEOPLE v LORENTZEN, No. 130411. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262863.

PEOPLE v BRUEGGEMAN, No. 130412. The application for leave to appeal the December 6, 2005, order of the Court of Appeals is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. The motion to hold application for leave to appeal in abeyance is denied as moot. Court of Appeals No. 262847.

PEOPLE v ANDERSON, No. 130417; Court of Appeals No. 267030.

PEOPLE v MARDENLI, No. 130424; Court of Appeals No. 262766.

PEOPLE v NEWBERRY, No. 130428; Court of Appeals No. 256567.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CENSKE, No. 130432. The motion for immediate consideration is denied. Court of Appeals No. 254237.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CHRISTOPHER URBAN, No. 130433; Court of Appeals No. 257265.

VISION INFORMATION SERVICES, LLC v TOCCO, No. 130437; Court of Appeals No. 258422.

MOSZYK v CITY OF BAY CITY, No. 130444; Court of Appeals No. 252273 (on remand).

PEOPLE v FARRELL HALL, No. 130445; Court of Appeals No. 255817.

PEOPLE v NANCE, No. 130446; Court of Appeals No. 257266.

WOLTERS REALTY, LTD v SAUGATUCK TOWNSHIP, No. 130454; Court of Appeals No. 247228 (on remand).

SPINK v MACSTEEL MICHIGAN, No. 130458; Court of Appeals No. 263140.

PEOPLE v ODOM, No. 130462; Court of Appeals No. 258566.

PEOPLE v ROCAFORT, No. 130468; Court of Appeals No. 257031.

PEOPLE v MCLAURIN, No. 130470; Court of Appeals No. 255744.

PEOPLE v CURTIS RICHARDSON, Nos. 130473, 130478; Court of Appeals Nos. 265984, 265981.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WEBB, No. 130474; Court of Appeals No. 253605.

PEOPLE v SIMMONS, No. 130479; Court of Appeals No. 265444.

EASTERDAY v SECREST WARDLE LYNCH HAMPTON TRUEX & MORLEY, PC, No. 130492; Court of Appeals No. 262650.

CLAY TOWNSHIP v STONE, No. 130495; Court of Appeals No. 256326.

PEOPLE v BURGESS, No. 130497. The motion to remand is denied. Court of Appeals No. 256840.

PEOPLE v BLACKMAN, No. 130502. The motions for remand and appointment of counsel are also denied. Court of Appeals No. 257197.

PEOPLE v MILBOURN, No. 130505; Court of Appeals No. 267065.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LAUTNER, No. 130507; Court of Appeals No. 257355.

ENVIRONMENTAL DISPOSAL SYSTEMS, INC v FITCH NO 1, Nos. 130508, 130509. The motion to file brief amicus curiae is granted. Court of Appeals Nos. 256671, 256820.

ZAHRAIE v ZAHRAIE, No. 130510; Court of Appeals No. 256862.

PEOPLE v BAEZ, No. 130514; Court of Appeals No. 256121.

PEOPLE v HERNDON, No. 130515. The motion for miscellaneous relief is granted. Court of Appeals No. 256120.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

ENVIRONMENTAL DISPOSAL SYSTEMS, INC v FITCH NO 2, Nos. 130518, 130519; Court of Appeals Nos. 256671, 256820.

PEOPLE v TODD HARRIS, No. 130520. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262775.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JOEY JACKSON, No. 130521; Court of Appeals No. 257101.

MAYER v DON SOMMER, LLC, No. 130528; Court of Appeals No. 263432.

PEOPLE v BOBBY SMITH, No. 130533; Court of Appeals No. 257353.

PEOPLE v HOLLAND, No. 130536. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262267.

DYER v TRACHTMAN, No. 130565; Court of Appeals No. 264681.

PEOPLE v DANIELS, No. 130566. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263160.

PRUETT v FLAGSTAR BANK, No. 130569; Court of Appeals No. 256080.

HADDAD v TSOUKALAS, No. 130570. We are not persuaded that the question presented should be reviewed by this Court before the completion of proceedings ordered by the Court of Appeals. Court of Appeals No. 256659.

PEOPLE v MCMILLAN, No. 130577. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263574.

PEOPLE v RAFAEL FINLEY, No. 130579. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263515.

PEOPLE v PARKER, No. 130582. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is denied. Court of Appeals No. 263178.

MANION v GRAPHIC PACKAGING CORPORATION, No. 130584; Court of Appeals No. 265987.

PEOPLE v JENKINS, No. 130588; Court of Appeals No. 266917.

PEOPLE v WATSON, No. 130593; Court of Appeals No. 267310.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v AKSAMIT, No. 130595; Court of Appeals No. 266982.

B & P LARSON FAMILY LIMITED PARTNERSHIP v IOSCO COUNTY ROAD COMMISSION, No. 130601; Court of Appeals No. 263619.

WOODBY v VEMCO, INC, No. 130603; Court of Appeals No. 264887.

PEOPLE v HUNLEY, No. 130611. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262945.

PEOPLE v NOEL, No. 130612; Court of Appeals No. 266880.

WELLS v BAY COUNTY, No. 130613; Court of Appeals No. 257610.

PEOPLE v GORDON, No. 130617. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263326.

PEOPLE v BRYANT, No. 130622. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263473.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

FEJEDELEM v DIMMER, No. 130633; reported below: 269 Mich App 499.

PEOPLE v QUADERER, No. 130636. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263825.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BRUCE, No. 130638; Court of Appeals No. 265872.

PEOPLE v DUNLAP, No. 130640; Court of Appeals No. 266254.

PEOPLE v LANE, No. 130645. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to remand is denied. Court of Appeals No. 266877.

PEOPLE v PAGE, No. 130653; Court of Appeals No. 253185.

PEOPLE v WOOD, No. 130655; Court of Appeals No. 257598.

SODEN v LAKES OF THE NORTH ASSOCIATION, No. 130656; Court of Appeals No. 263459.

BAILEY v FOREST PARK APARTMENTS, No. 130660; Court of Appeals No. 267318.

DIETRICH FAMILY IRREVOCABLE TRUST v S E MICHIGAN LAW ASSOCIATES, PLLC, No. 130665; Court of Appeals No. 261238.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v HOUGHTALING, No. 130695; Court of Appeals No. 256815.

ELKINS v LEF, Inc, No. 130709; Court of Appeals No. 265438.

PEOPLE v MCGINN, No. 130739; Court of Appeals No. 256407.

CLANTON v WAYNE CIRCUIT JUDGE, No. 130768; Court of Appeals No. 266447.

BLACKBURN v DEBELISO, No. 130775. The motion to strike is denied as moot. Plaintiff failed to seek leave to appeal the termination of his parental rights within 28 days of the Court of Appeals opinion, as required by MCR 7.302(C)(2). His application was, therefore, docketed only for purposes of appealing the paternity action. Court of Appeals No. 263474.

In re MOLNAR (DEPARTMENT OF HUMAN SERVICES v MOLNAR), No. 130783; Court of Appeals No. 267465.

Interlocutory Appeals

Leave to Appeal Denied May 30, 2006:

RIHANI v L D'AGOSTINI & SONS, INC, Nos. 130400, 130401. The application for leave to appeal as cross-appellant is also denied. Court of Appeals Nos. 256921, 256941.

YOUNG v NATIONWIDE INSURANCE COMPANY OF AMERICA, No. 130907; Court of Appeals No. 269187.

Summary Dispositions May 31, 2006:

BHAMA v CIVIL SERVICE COMMISSION, Nos. 129532, 129534. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals Nos. 260359, 260360.

HALLMAN v HOLY CROSS HOSPITAL OF DETROIT, No. 130301. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and remand this case to that Court for reconsideration on the original record or, if filed, consideration of a motion to expand the record. The panel erred in allowing defendants to expand the record without first having moved to do so. MCR 7.210(A)(1). We do not retain jurisdiction. Court of Appeals No. 262527.

Leave to Appeal Denied May 31, 2006:

PEOPLE v ANDRE JACKSON, No. 126934; Court of Appeals No. 247079.

KELLY, J. I would grant leave to appeal.

LAPEER COUNTY ABSTRACT & TITLE COMPANY v LAPEER COUNTY REGISTER OF DEEDS, No. 127849. The motions to file brief amicus curiae are granted. Reported below: 264 Mich App 167.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

WASHINGTON MUTUAL BANK, FA v SHOREBANK CORPORATION, No. 129523. The motion to file brief amicus curiae is granted. Court of Appeals No. 254338.

KELLY, J. I would grant leave to appeal.

FARM BUREAU INSURANCE v CITY OF DETROIT, No. 129631; Court of Appeals No. 261291.

MARKMAN, J. (*concurring*). For the reasons articulated in my concurring statement in *Reid v Detroit* (Docket No. 129884), lv den 474 Mich 1116 (2006), I concur in the decision to deny leave to appeal, but I again urge the Legislature to consider whether further legal remedies are warranted for property owners in these circumstances.

KELLY, J. I would grant leave to appeal.

PEOPLE v SAVOY, No. 129840; Court of Appeals No. 264148.

KELLY, J. I would hold this case in abeyance for *People v McCuller* (Docket No. 128161).

PEOPLE v KEITH DAVIS, No. 129908; Court of Appeals No. 255254.

PEOPLE v BEARDSLEY, No. 129934; Court of Appeals No. 264975.

KELLY, J. I would hold this case in abeyance for *People v Houlihan* (Docket No. 128340).

PEOPLE v ANTAWAN HARRIS, No. 130033; Court of Appeals No. 265110.

KELLY, J. I would remand this case for resentencing.

CLARK v DAIMLERCHRYSLER CORPORATION, No. 130043; reported below: 268 Mich App 138.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BRAVO, No. 130044; Court of Appeals No. 265496.

KELLY, J. I would grant leave to appeal.

PEOPLE v HOLLISTER, No. 130144; Court of Appeals No. 265298.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DAMON HUDSON, No. 130166. The application for leave to appeal the December 6, 2005, order of the Court of Appeals is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 262284.

KELLY, J. I would, in lieu of this Court's order denying the application for leave to appeal, direct the defendant to provide this Court with a complete copy of his Presentence Investigation Report.

PEOPLE v CHRISTOPHER JOHNSON, No. 130170; Court of Appeals No. 265948.

KELLY, J. I would remand this case for resentencing.

ZELENKO v STITES, No. 130203; Court of Appeals No. 254691.

PEOPLE v ARTLEY, No. 130270; Court of Appeals No. 265867.

KELLY, J. I would remand this case for resentencing.

PEOPLE v KEYS, No. 130341; Court of Appeals No. 254642.

KELLY, J. I would remand this case for resentencing.

PEOPLE v BULGER, No. 130413; Court of Appeals No. 266397.

WHITE v CRIME PREVENTION SECURITY SPECIALISTS, No. 130414; Court of Appeals No. 264622.

CAVANAGH, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, J. I would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied June 1, 2006:

STOKES v DAIMLERCHRYSLER CORPORATION, No. 130667. The motions for leave to file briefs amicus curiae are granted. The application for leave to appeal prior to decision by the Court of Appeals 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. On the Court's own motion, pursuant to MCR 7.302(H) and 7.209(D), we order that the decision of the Workers' Compensation Appellate Commission in

this case is stayed pending resolution of the appellate proceedings, and note that *Boggetta v Burroughs Corp*, 368 Mich 600 (1962), remains controlling authority until reversed by this Court. We direct the Court of Appeals to grant the application for leave to appeal in this case and issue a decision on the appeal before October 1, 2006. We do not retain jurisdiction. Court of Appeals No. 268544

CAVANAGH, J. (*dissenting*). I do not agree with this Court's order stating that *Boggetta v Burroughs Corp,* 368 Mich 600 (1962), is still controlling authority without an appeal and an analysis from the parties of whether *Boggetta* is indeed still controlling authority. The Workers' Compensation Appellate Commission (WCAC) explains somewhat convincingly why the Legislature's actions may have rendered *Boggetta* no longer controlling authority, and I am reluctant to sign an order that states otherwise without full briefing.

Thus, I prefer a straight denial of leave to appeal. The Court of Appeals is more than capable of assessing the importance of a case and managing its docket. I do not believe that this case warrants this Court's arbitrary deadline. I also note that defendant has not moved for immediate consideration in the Court of Appeals, which undermines the necessity of mandating a deadline for an opinion. More importantly, the vast majority of workers' compensation cases will not be affected by the WCAC's decision. The only cases that *may* be affected are limited in number, for example cases in which a magistrate may decide whether it is necessary to order the employee to meet with the employer's vocational rehabilitation expert or those involving interrogatories from a defendant. Notably, the effect on these cases is also minimal because a defendant can still present the testimony of vocational experts to rebut the causal connection between wage loss and disability.

For those reasons, I see no need to intervene at this juncture and would simply deny leave.

WEAVER, J. I would deny leave to appeal.

KELLY, J. I join the statement of Justice CAVANAGH.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal June 2, 2006:

KUSMIERZ v SCHMITT, Nos. 130187, 130574. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether the trial court erred by considering its posttrial grant of injunctive relief as a basis for awarding case evaluation sanctions; (2) whether the Court of Appeals erred by comparing the case evaluation award and jury verdict for each individual plaintiff as against each individual defendant; (3) whether the Court of Appeals erred by dividing the $25,000 case evaluation award equally among the five plaintiffs who were parties at the time of case evaluation; and (4) whether the Court of Appeals erred by finding that plaintiffs JoAnn Kusmierz and Kerry Kusmierz are liable to Diane Rankin for case evaluation sanctions when defendant Rankin never filed or served a request for costs in compliance with MCR 2.403(O)(8). The

parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The motion for extension of time to file a reply brief in Docket No. 130574 is granted. Reported below: 268 Mich App 731.

MUCI v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 129388. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 56 days of the date of this order addressing the following issues: (1) whether there is a conflict between MCL 500.3151 and MCR 2.311; (2) whether, if there is a conflict, the court rule is controlling; (3) whether a trial court may impose reasonable conditions as part of the examination process; (4) whether a plaintiff must establish misconduct specifically directed at the plaintiff by the examiner before reasonable conditions are imposed; and (5) whether the conditions imposed in this case were reasonable. The Michigan Trial Lawyers Association and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae on these issues. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 267 Mich App 431.

DAIMLERCHRYSLER CORPORATION v DEPARTMENT OF TREASURY, No. 130106. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether the Legislature's use of the word "an" before "end user" in MCL 207.1039 was intended to be used only to describe the ultimate end user and, if not, whether other "end users" such as a "bulk end user" should be included; (2) whether the "irrebuttable presumption" of MCL 207.1026(1) or the "rebuttable presumption" of MCL 207.1026(2) applies to this case; (3) whether petitioner is a "bulk end user" as defined in MCL 207.1002(f) or an "industrial end user" as it was defined in MCL 207.1003(o); (4) whether the transfer of the fuel from petitioner's self-storage tank to the vehicles constitutes "consumption" of the fuel or whether the fuel must be burned before it is "consumed"; (5) whether, if the transfer of the fuel is "consumption," petitioner then becomes "an" end user because it is a "bulk end user;" (6) whether placing fuel in the tanks of vehicles destined for other states is a "nontaxable purpose" that would allow for a refund under MCL 207.1008(5); and (7) whether MCL 207.1047 was intended to be a "catch-all" provision for entities such as petitioner that do not fit within other provisions of the act. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers.

SPITZLEY v SPITZLEY, No. 130585. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether any of the Michigan authority defendants asserted below supported their position that they were

entitled to the disputed 40-acre parcel of farmland; (2) whether the non-Michigan authority on which defendants relied in their counter-complaint presented a good-faith argument for the extension, modification, or reversal of existing law, MCR 2.114(D); (3) whether the circuit court correctly ruled that "Defendants have not presented . . . any documentary evidence that supports their position"; and (4) whether sanctions were properly awarded against defendants pursuant to MCR 2.114(E). The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 255345.

Leave to Appeal Denied June 2, 2006:

In re WANKEL (DEPARTMENT OF HUMAN SERVICES V WANKEL), No. 131134; Court of Appeals No. 262788.

Summary Dispositions June 7, 2006:

PEOPLE V BELL, No. 127634. 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, vacate defendant's sentence, and remand this case to the Oakland Circuit Court for resentencing in accordance with *People v Johnson*, 474 Mich 96 (2006), and *People v Babcock*, 469 Mich 247 (2003). We do not retain jurisdiction. Court of Appeals No. 248958.

BECKES V DETROIT DIESEL CORPORATION, No. 129944. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals No. 262375.

KELLY, J., did not participate.

MALLISON V SCRIBNER, No. 130225. The motion to strike the application for leave to appeal is denied. The application for leave to appeal the November 17, 2005, judgment of the Court of Appeals is 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 Gogebic Circuit Court for further proceedings. The Court of Appeals and the Gogebic Circuit Court erred in finding, as a matter of law, that, as a result of plaintiff's impaired ability to function due to the influence of intoxicating liquor, she was 50 percent or more the cause of the accident that resulted in her injuries and that she is barred from recovery under MCL 600.2955a(1). Reported below: 269 Mich App 1.

LONG V BRIDGEWOOD APARTMENTS, LLC, No. 130657. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we modify the judgment of the Court of Appeals to remove the reference to MCL 554.139(1), which plaintiff did not raise, and to clarify that the trial court must determine whether plaintiff was an invitee, a licensee, or a trespasser. In all other

respects, the application is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 256593.

Leave to Appeal Denied June 7, 2006:

SMITH v RANDOLPH, No. 128601. By order of July 8, 2005, this Court granted immediate consideration and stayed the trial court's June 22, 2005, order and all trial court proceedings. On order of the Court, the application for leave to appeal the March 24, 2005, judgment of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Pursuant to MCR 7.302(G)(1), we vacate the Wayne Circuit Court's April 14, 2005, default and default judgment and June 3, 2005, order denying defendant's motion to set aside the default. Under MCR 7.302(C)(5)(a), an appeal to this Court from a judgment of the Court of Appeals remanding for further proceedings stays proceedings on remand, unless the Court of Appeals or this Court orders otherwise. Accordingly, the trial court had no authority to conduct a settlement conference or otherwise prepare for trial, and its actions were directly contrary to the Court of Appeals holding that defendant is entitled to a jury trial on the issue of damages. The July 8, 2005, stay of trial court proceedings is dissolved. We remand this case to the Wayne Circuit Court for trial on the issue of damages. Court of Appeals No. 251066.

HEPFINGER v WHITE, No. 129937; Court of Appeals No. 253065.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals as on reconsideration granted.

HOOL v WILLIAM A KIBBE & ASSOCIATES, INC, No. 130224; Court of Appeals No. 255371.

PEOPLE v GREGORY WASHINGTON, No. 130326; Court of Appeals No. 257149.

KELLY, J. I would grant leave to appeal.

PEOPLE v UJVARI, No. 130393; Court of Appeals No. 265236.

PEOPLE v EUGENE BROWN, No. 130443; Court of Appeals No. 256215.

PEOPLE v NALI, No. 130459; Court of Appeals No. 247843.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal June 9, 2006:

PEOPLE v WILLIAM CARTER, No. 129614. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 42 days of the date of this order addressing: (1) whether defendant is entitled to resentencing, and (2) whether this Court's statement in *People v Francisco*, 474 Mich 82, 89 n 8 (2006), that resentencing is not required where the trial court clearly indicates that it

would have imposed the same sentence regardless of the scoring error, applies to situations where the trial court so concludes only after the original sentencing proceeding. Court of Appeals No. 260369.

CARRIER CREEK DRAINAGE DISTRICT v LAND ONE, LLC and CARRIER CREEK DRAINAGE DISTRICT v ECHO 45, LLC, Nos. 130125-130127. The motion to file brief amicus curiae is granted. The application for leave to appeal the November 3, 2005, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall limit the issues to be addressed at oral argument to whether a landowner is required, under MCL 213.55(3), to provide written notice to the condemning authority of the landowner's claim of compensation for the "possibility of rezoning" of the condemned property. The parties and amicus curiae may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals Nos. 255609-255611.

NICKE v MILLER, No. 130666. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument whether the Court of Appeals erred by remanding the case to the trial court for consideration of whether plaintiff suffered a temporary serious impairment of body function. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 263929.

Leave to Appeal Denied June 9, 2006:

MATZINGER v THREE R'S FOREST PRODUCTS, No. 128427; Court of Appeals No. 249612.

KELLY, J. (*dissenting*). The issue presented is whether a question of material fact exists, making summary disposition improper. Plaintiff alleges that defendants' trucks blocked both shoulders and the travel lanes of M-66 at the foot of a hill in early morning darkness of December 19, 2001.

Some time before, Clay Phillip Spindler and Thomas Kaszubowski had driven their semitrailers to the area and parked on the northbound shoulder of M-66, engaging their four-way flashers. At approximately 6:30 a.m, Spindler put his truck in motion and began slowly turning left across M-66 while Kaszubowski remained on the shoulder. Both Spindler and Kaszubowski testified that they saw no oncoming traffic when Spindler started his turn.

Simultaneously, plaintiff, driving his vehicle north on M-66, reached the crest of the hill and was first able to see Spindler's truck, 708 to 722 feet away. M-66 is a "no pass zone" in the area because drivers cannot see over the hill until reaching its crest. Plaintiff testified that he "almost

immediately" noticed the blocked roadway and slammed on his brakes, but could not stop in time to avoid colliding with Spindler's truck. While trapped in his vehicle, plaintiff thought that he heard someone yell, "I knew we should have put somebody at the top of that hill. I knew something was going to happen."

Plaintiff filed a complaint alleging that Spindler and Kaszubowski acted negligently in blocking the roadway. The trial court granted summary disposition to defendants because plaintiff did not present expert testimony regarding the appropriate standard of care. The Court of Appeals held that expert testimony was not required, but nonetheless affirmed, finding no question of material fact. I agree with the Court of Appeals that expert testimony is not required in this case, but I disagree that no question of material fact exists.

It is well settled that, in reviewing a decision on a motion for summary disposition, we must consider the evidence presented in the light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc* (*After Remand*), 463 Mich 534, 538-539 (2001). Here, although it is uncontested that defendants complied with all appropriate regulations, defendants provide no authority showing that their actions were reasonable. Reliance on industry standards does not foreclose evaluation of whether reliance was reasonable under specific circumstances. See, e.g., *The T J Hooper,* 60 F2d 737 (CA 2, 1932).

The accident in this case happened in the winter when it was dark. Defendants blocked both shoulders and the roadway at the foot of hill in a location that may have been visible to approaching traffic from only a short distance. In viewing the evidence in the light most favorable to plaintiff, I am left with a firm conviction that summary disposition was inappropriate. Whether defendants' actions were reasonable should be left for a jury to decide.

CAVANAGH, J. I join the statement of Justice KELLY.

PEOPLE v THOMAS URBAN, No. 131038. The motion for immediate consideration is granted. Court of Appeals No. 257728.

In re ROSS (DEPARTMENT OF HUMAN SERVICES v WILLIAMS), No. 131176; Court of Appeals No. 265277.

Leave to Appeal Denied June 16, 2006:

In re GOSS (DEPARTMENT OF HUMAN SERVICES v GOSS), No. 131271; Court of Appeals No. 265412.

Summary Dispositions June 21, 2006:

DEVAULT ESTATE v PORNPICHIT, No. 126714. By order of April 1, 2005, we directed the Wayne Circuit Court to issue findings of fact and conclusions of law. On order of the Court, the supplemental opinion having been filed, the application for leave to appeal the June 22, 2004, order of the Court of Appeals is again considered and, pursuant to MCR 7.302(G)(1), in lieu

of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals No. 256163.

PEOPLE v NANTELLE, No. 130333. The application for leave to appeal the October 11, 2005, judgment of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is also considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse, in part, the judgment of the Court of Appeals and remand this case to the Dickinson Circuit Court for reinstatement of defendant's conviction of unlawfully driving away an automobile, MCL 750.413. At the time the police discovered the keys, they had probable cause to arrest defendant for operating a vehicle while under the influence of intoxicating liquor. The search was lawful as incident to a legal arrest. *People v Arterberry*, 431 Mich 381, 382-385 (1988). Court of Appeals No. 253407.

SIDUN v WAYNE COUNTY TREASURER, No. 130516. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of *Jones v Flowers*, 547 US ___; 126 S Ct 1708; 163 L Ed 2d 415 (2006). We do not retain jurisdiction. Court of Appeals No. 264581.

KELLY, J. I would grant leave to appeal.

PEOPLE v SWAIN, No. 130627. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Ottawa Circuit Court for a determination of whether defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the circuit court's order appointing counsel, as, at the time defendant was denied counsel, he was entitled to file pleadings within 12 months of sentencing rather than six. See the former versions of MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. Counsel may include among the issues raised, but is not required to include, those issues raised by defendant in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 264522.

GALINDO v MOLITOR, No. 130718. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and reinstate the Muskegon Circuit Court's June 21, 2004, judgment, for the reasons stated in that court's May 5, 2004, opinion. Court of Appeals No. 256489.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

JACKSON v LONE STAR STEAKHOUSE & SALOON OF MICHIGAN, INC, No. 130745. 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 summary disposition order of the Saginaw Circuit Court for the reasons stated in the Court of Appeals dissenting opinion. Court of Appeals No. 256332.

ROMERO v BURT MOEKE HARDWOODS, INC, No. 130788. Pursuant to MCR 7.302(G)(1), we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 264909.

Leave to Appeal Denied June 21, 2006:

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v KOCH, No. 129324; Court of Appeals No. 252659.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 130246. The motion for leave to file brief amicus curiae is granted. Reported below: 269 Mich App 473.

PEOPLE v FISHER, No. 130403; Court of Appeals No. 256027.

KELLY, J. I would grant leave to appeal.

PEOPLE v HENNING, No. 130448; Court of Appeals No. 265331.

KELLY, J. I would hold this case in abeyance for *People v Houlihan* (Docket No. 128340).

PEOPLE v DENARD, No. 130583; Court of Appeals No. 262770.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied June 21, 2006:

BAKER v TRUSS TECHNOLOGIES, INC, No. 129194; Court of Appeals No. 260133.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 23, 2006:

LAURENCE G WOLF CAPITAL MANAGEMENT TRUST v CITY OF FERNDALE, No. 130748. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument whether the phrase "property damage" in the exception to governmental immunity for proprietary functions, MCL 691.1413, encompasses damage caused by tortious interference with a business relationship or, more generally, encompasses damage other than damage to physical property. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The

Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Counties are invited to file briefs amicus curiae on the issue set forth above. Other persons or groups interested in the determination of that issue may move the Court for permission to file briefs amicus curiae. Reported below: 269 Mich App 265.

Leave to Appeal Denied June 23, 2006:

In re REX (DEPARTMENT OF HUMAN SERVICES V FRANK), No. 131356; Court of Appeals No. 262434.

In re CLIFFORD (DEPARTMENT OF HUMAN SERVICES V CLIFFORD), No. 131382; Court of Appeals No. 266606.

Leave to Appeal Denied June 26, 2006:

BAYATI V BAYATI, No. 128148; reported below: 264 Mich App 595.

MOORE V MOORE, No. 128825. By order of September 29, 2005, the application for leave to appeal was held in abeyance pending the decision in *Sweebe v Sweebe* (Docket No. 126913). On order of the Court, the opinion having been issued on April 26, 2006, 474 Mich 151 (2006), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The stay of proceedings ordered on September 29, 2005, is dissolved. Reported below: 266 Mich App 96.

FERGUSON V DEPARTMENT OF CORRECTIONS, No. 129926; Court of Appeals No. 261948.

PEOPLE V ABRAMCZYK, No. 130019; Court of Appeals No. 253449.

KELSO V SOUTHFIELD PUBLIC SCHOOLS BOARD OF EDUCATION, No. 130023; Court of Appeals No. 256161.

PEOPLE V WELLS, No. 130038; Court of Appeals No. 254766.

PEOPLE V BENORE, No. 130137; Court of Appeals No. 256299.

BEHM V CROSS, No. 130143; Court of Appeals Nos. 252711, 253844.

PEOPLE V CHARLES CARTER, No. 130164; Court of Appeals No. 265310.

PEOPLE V SYED, No. 130198; Court of Appeals No. 265345.

PEOPLE V WRIGHT, No. 130269. The motions to remand are denied. Court of Appeals No. 254004.

PEOPLE V MCDOWELL, No. 130282; Court of Appeals No. 255813.

PEOPLE V JARDINE, No. 130284; Court of Appeals No. 254264.

PEOPLE V MOTTEN, No. 130304; Court of Appeals No. 263886.

PEOPLE v DOUGLAS, No. 130312. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262395.

PEOPLE v BINSFELD, No. 130320; Court of Appeals No. 257263.

PEOPLE v GRAY, Nos. 130337, 130338; Court of Appeals Nos. 257139; 257140.

PEOPLE v BENNERMAN, No. 130354. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262481.

MOFFAT v WISELEY, No. 130361; Court of Appeals No. 256775.

PEOPLE v FLOYD, No. 130363; Court of Appeals No. 265960.

PEOPLE v NOLAN HALL, No. 130365; Court of Appeals No. 253627.

PEOPLE v MARLON WILLIAMS II, No. 130380; Court of Appeals No. 256123.

PEOPLE v CHATMAN, No. 130383; Court of Appeals No. 256615.

WILLIAMS v CITY OF TROY, No. 130385; Court of Appeals No. 263366.

PEOPLE v DYSON, No. 130390; Court of Appeals No. 256300.

PEOPLE v DAHLSTROM, No. 130392; Court of Appeals No. 255875.

PEOPLE v ASKEW, No. 130402; Court of Appeals No. 256366.

PEOPLE v GARRETT, No. 130408. The miscellaneous motion is granted. Court of Appeals No. 257103.

PEOPLE v ADISA, No. 130410; Court of Appeals No. 257164.

PEOPLE v DONALDSON, No. 130416; Court of Appeals No. 255721.

PEOPLE v KUE, No. 130419. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263246.

PEOPLE v CHRISTIAN, No. 130420. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262947.

PEOPLE v BAKER, No. 130421; Court of Appeals No. 257440.

PEOPLE v CHANDLER, No. 130434. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266918.

PEOPLE v SHEPPARD, No. 130461. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263097.

REMA VILLAGE MOBILE HOME PARK v ONTWA TOWNSHIP, No. 130464; Court of Appeals No. 256295.

PEOPLE v COUTURIER, No. 130466; Court of Appeals No. 252175.

TAYLOR, C.J. I would grant leave to appeal.

PEOPLE v NASEMAN, No. 130469; Court of Appeals No. 266539.

PEOPLE v CORY HUDSON, No. 130482; Court of Appeals No. 255237.

PEOPLE v KIRBY, No. 130485. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand for appointment of counsel and the motion to conduct an evidentiary hearing are also denied. Court of Appeals No. 263355.

PEOPLE v ALVAREZ, No. 130498; Court of Appeals No. 257984.

PEOPLE v SHERMAN, No. 130499. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263544.

PEOPLE v WADIE, No. 130503; Court of Appeals No. 255803.

PEOPLE v HAMILTON, No. 130506; Court of Appeals No. 255449.

MURRAY v BLACK, No. 130524; Court of Appeals No. 264861.

PEOPLE v JIMMY MOORE, No. 130531; Court of Appeals No. 267055.

PEOPLE v DEAN JOHNSON, No. 130532; Court of Appeals No. 266873.

PEOPLE v KOPKE, No. 130535; Court of Appeals No. 266594.

PEOPLE v REISCHAUER, No. 130537. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is denied. Court of Appeals No. 262880.

PEOPLE v MOON, No. 130538; Court of Appeals No. 266904.

PEOPLE v DEBORAH FINLEY, No. 130544; Court of Appeals No. 266811.

PEOPLE v EATON, No. 130545; Court of Appeals No. 266903.

PEOPLE v ADKINS, No. 130547; Court of Appeals No. 257845.

PEOPLE v KEVIN WASHINGTON, No. 130549; Court of Appeals No. 267279.

PEOPLE v BOLTON, No. 130552; Court of Appeals No. 266989.

PEOPLE v JARRETT, No. 130553; Court of Appeals No. 267560.

GREAT OAKS REAL ESTATE, LLC v B & B GROUP, LLP, No. 130554; Court of Appeals No. 254731.

PEOPLE v MOLYNEAUX, No. 130555; Court of Appeals No. 265796.

PEOPLE v WORLEY, No. 130560; Court of Appeals No. 266624.

PEOPLE v CALKINS, No. 130561; Court of Appeals No. 266839.

PEOPLE v GRANT, No. 130568. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263295.

PEOPLE v DAVID WILLIAMS, No. 130575; Court of Appeals No. 255162.

PEOPLE v THURMOND, No. 130580. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 264626.

PEOPLE v HAYNES, No. 130587; Court of Appeals No. 256745.

PEOPLE v GENTRY, No. 130597; Court of Appeals No. 267556.

PEOPLE v SPENCER, No. 130600; Court of Appeals No. 267254.

PEOPLE v BUGGS, No. 130605; Court of Appeals No. 258347.

PEOPLE v ERDMAN, No. 130607; Court of Appeals No. 266993.

PEOPLE v BERRYMAN, No. 130608. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262187.

PEOPLE v CHARLES WILLIAMS, No. 130618. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262577.

BURTON v ELKINS, No. 130623; Court of Appeals No. 262438.

PEOPLE v MCCULLAR, No. 130625; Court of Appeals No. 256309.

PEOPLE v PARTAKA, No. 130626; Court of Appeals No. 267429.

PEOPLE v PFISTER, No. 130629; Court of Appeals No. 267063.

PEOPLE v DONYELL JOHNSON, No. 130630; Court of Appeals No. 258101.

MIMS v DEPARTMENT OF CORRECTIONS, No. 130631; Court of Appeals No. 267252.

PEOPLE v ALFRED, No. 130639. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262812.

PEOPLE v KATHLEEN CARTER, No. 130643; Court of Appeals No. 262217.

PEOPLE v WALKER, No. 130644; Court of Appeals No. 255234.

PEOPLE v ROSS, No. 130646; Court of Appeals No. 258028.

PEOPLE v CARVIN, No. 130647; Court of Appeals No. 258796.

PEOPLE v ARTHUR HALL, No. 130649; Court of Appeals No. 267406.

PEOPLE v JONES, No. 130652; Court of Appeals No. 267328.

PEOPLE v ERIC JACKSON, No. 130663; Court of Appeals No. 266476.

BAKER v ABRAMSON, No. 130668; Court of Appeals No. 262272.

PEOPLE v RUFUS JOHNSON, No. 130674. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263751.

PEOPLE v IRVIN, No. 130675; Court of Appeals No. 266996.

PEOPLE v CHU, No. 130678. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264524.

PEOPLE v JACK HALL, No. 130679. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263457.

PEOPLE v HANNAH, No. 130680. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263677.

PEOPLE v ELLIOTT, No. 130681; Court of Appeals No. 266816.

PEOPLE v HANN, No. 130683; Court of Appeals No. 267027.

PEOPLE v RONALD RICHARDSON, No. 130684; Court of Appeals No. 267383.

PEOPLE v TATE, No. 130685. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263358.

ELLIS v DEPARTMENT OF CORRECTIONS, No. 130686; Court of Appeals No. 266248.

PEOPLE v KEITH BROWN, No. 130690; Court of Appeals No. 267701.

PEOPLE v HOPE, No. 130691; Court of Appeals No. 265949.

L D'AGOSTINI & SONS v DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, No. 130697; Court of Appeals No. 263994.

In re KIRCHER (KIRCHER v WASHTENAW CIRCUIT JUDGE), Nos. 130703, 130754. The motion for immediate consideration is granted. The motion to consolidate is denied. Court of Appeals Nos. 262153, 265315

PEOPLE v SIVLEY, No. 130704; Court of Appeals No. 265116.

PEOPLE v LEE, No. 130705; Court of Appeals No. 258077.

PEOPLE v ECKERT, No. 130713; Court of Appeals No. 267411.

PEOPLE v LEBLANC, No. 130715; Court of Appeals No. 256983.

KELLER v BRACKNEY, No. 130726; Court of Appeals No. 265963.

PEOPLE v SISCO, No. 130733; Court of Appeals No. 266474.

PEOPLE v GUINN, No. 130736; Court of Appeals No. 266953.

CITIBANK, NA v MONTGOMERY, No. 130751. The motion to consolidate and the motion for sanctions are denied. Court of Appeals No. 264952.

DILORENZO v STATE OF MICHIGAN, No. 130757; Court of Appeals No. 255432.

ROBINS v EPI PRINTERS, INC, No. 130762; Court of Appeals No. 258270.

SALOKA v SHELBY NURSING CENTER JOINT VENTURE, No. 130769; Court of Appeals No. 255954.

PEOPLE v FREDERICK, No. 130770; Court of Appeals No. 258398.

PEOPLE v REYNOLDS, No. 130772; Court of Appeals No. 257105.

RACHMANINOFF v SVM DEVELOPMENT CORPORATION, No. 130773; Court of Appeals No. 257394.

CLARK v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 130789; Court of Appeals No. 256472.

CHARTIER v AUTOMOBILE CLUB INSURANCE ASSOCIATION, No. 130790; Court of Appeals No. 257301.

PEOPLE v DELAVERN, No. 130794; Court of Appeals No. 267798.

DILORENZO v KIRKPATRICK, No. 130800; Court of Appeals No. 261748.

MORGAN v LIFEWAYS, No. 130804; Court of Appeals No. 264254.

SCHWEGMAN v SCHWEGMAN, No. 130807; Court of Appeals No. 264942.

PEOPLE v WOJTUSIK, No. 130809; Court of Appeals No. 266062.

LABELLE MANAGEMENT, INC v LIBERTY MUTUAL INSURANCE COMPANY, No. 130823; Court of Appeals No. 262072.

JAAKKOLA v AUTO-OWNERS INSURANCE COMPANY, No. 130827; Court of Appeals No. 265539.

PEOPLE v WIDEMAN, No. 130852; Court of Appeals No. 257143.

PUTNEY v GREAT LAKES ORTHOPEDIC, INC, No. 130857; Court of Appeals No. 265751.

PEOPLE v RUSSELL, No. 130875; Court of Appeals No. 267221.

PEOPLE v LYONS, No. 130876; Court of Appeals No. 257518.

PEOPLE v ANDRES, No. 130973; Court of Appeals No. 258280.

Interlocutory Appeals

Leave to Appeal Denied June 26, 2006:

PEOPLE v MONTGOMERY, No. 130624; Court of Appeals No. 265463.

WEST BLOOMFIELD CHARTER TOWNSHIP v MONTGOMERY, No. 130753. The motion to consolidate is denied as moot. Court of Appeals No. 264500.

Reconsiderations Denied June 26, 2006:

PEOPLE v CARROLL, No. 129114. Leave to appeal denied at 474 Mich 1102. Court of Appeals No. 259113.

PEOPLE v SUTTON, No. 129377. Leave to appeal denied at 474 Mich 1085. Court of Appeals No. 252932.

CAVANAGH, J. I would grant the motion for reconsideration.

PEOPLE v ROGALSKI, No. 129975. The miscellaneous motions are denied. Leave to appeal denied at 474 Mich 1125. Court of Appeals No. 264011.

MCGUIRE v SANDERS, No. 130076. Summary disposition entered at 474 Mich 1098. Reported below: 268 Mich App 719.

KELLY, J. I would grant reconsideration and, on reconsideration, would deny leave to appeal.

PEOPLE v CHRISTOPHER MOORE, No. 130080. Leave to appeal denied at 474 Mich 1126. Court of Appeals No. 256302.

PEOPLE v FREEMAN, No. 130103. Leave to appeal denied at 474 Mich 1119. Court of Appeals No. 253553.

THOMAS v HAWKINS, No. 130108. Leave to appeal denied at 474 Mich 1101. Court of Appeals No. 266779.

PEOPLE v HART, No. 130162. Leave to appeal denied at 474 Mich 1127. Court of Appeals No. 263219.

PEOPLE v NORTHINGTON, No. 130175. Leave to appeal denied at 474 Mich 1127. Court of Appeals No. 266115.

PEOPLE v SPRATT, No. 130197. Leave to appeal denied at 474 Mich 1116. Court of Appeals No. 254767.

KELLY, J. I would grant the motion for reconsideration.

FAWCETT v ESTATE OF MEYER, No. 130251. Leave to appeal denied at 474 Mich 1128. Court of Appeals No. 253819.

PEOPLE v MARCUS WILLIAMS, No. 130261. Leave to appeal denied at 474 Mich 1128. Court of Appeals No. 255876.

PEOPLE v LYLE, No. 130348. Leave to appeal denied at 474 Mich 1130. Court of Appeals No. 266915.

PEOPLE v JAMES, No. 130391. Leave to appeal denied at 474 Mich 1130. Court of Appeals No. 257585.

TERRY v DAIMLERCHRYSLER CORPORATION, No. 130404. Leave to appeal denied at 474 Mich 1130. Court of Appeals No. 263339.

CITY OF EAST LANSING v DEPARTMENT OF STATE POLICE, No. 130423. Leave to appeal denied at 474 Mich 1130. Reported below: 269 Mich App 333.

In re CONTEMPT OF MURDOCK (AMERICAN AXLE & MANUFACTURING, INC v MURDOCK), No. 130559. Leave to appeal denied at 474 Mich 1131. Court of Appeals No. 262786.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 30, 2006:

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC v MARION TOWNSHIP, No. 130698. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) the manner in which a property owner subject to special assessment for a planned improvement may seek relief when there is a subsequent change to the plan that materially affects the benefit to the owner's property, (2) whether respondent's May 13, 2004, resolution ratifying certain plan changes is tantamount to a resolution approving plan changes under MCL 41.725(1)(b), and (3) if so, whether petitioner is entitled to seek relief under MCL 41.726(3). The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The Michigan Townships Association is invited to file a brief amicus curiae on the issues set forth above. Other persons or groups interested in the determination of those questions may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 262437.

Summary Dispositions June 30, 2006:

PEOPLE v RHASIAON SMITH, No. 129841. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for resentencing in light of *People v Francisco*, 474 Mich 82 (2006). On remand, offense variable 13 should be scored at zero. In all other respects, leave to appeal is denied. Court of Appeals No. 264238.

CORRIGAN, J. (*concurring*). I concur in our Court's order to remand for resentencing in light of *People v Francisco*, 474 Mich 82 (2006). I write separately to note an apparent split at the Court of Appeals regarding the number of sentencing information reports that trial courts must prepare when a defendant has multiple convictions. In an appropriate case and in the absence of legislative action, this Court may need to consider this issue. Because defendant did not preserve the question, I would not address it in this case.

In *People v Mack*, 265 Mich App 122, 128 (2005), relying on MCL 771.14,[1] the Court of Appeals stated that "for sentencing on multiple concurrent convictions, a [presentence information report] would only be prepared for the highest crime class felony conviction and would [not] be prepared for each of the defendant's multiple convictions." But in *People v Johnigan*, 265 Mich App 463, 472 (2005), relying on MCL 777.21(2),[2] the Court of Appeals stated that, despite the requirement for the *probation department* to score the guidelines only for the highest crime class, "the *sentencing court* must score the guidelines for the remaining crimes as well." (Emphasis added.) Thus, these two decisions may impose competing obligations with respect to the number of sentencing investigation reports when a defendant has multiple convictions. We do not, however, reach the issue here because defendant has not preserved it.

SINICROPI V MAZUREK, No. 131268. On order of the Court, the application for leave to appeal the February 16, 2006, order of the Court of

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[1] MCL 771.14 provides in part:

> (2) A presentence investigation report prepared under subsection (1) shall include all of the following:
>
> * * *
>
> (e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII, all of the following:
>
> (i) For each conviction for which a consecutive sentence is authorized or required, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.
>
> (ii) Unless otherwise provided in subparagraph (i), for each crime having the highest crime class, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.
>
> (iii) Unless otherwise provided in subparagraph (i), the computation that determines the recommended minimum sentence range for the crime having the highest crime class.
>
> (iv) A specific statement as to the applicability of intermediate sanctions, as defined in section 31 of chapter IX.
>
> (v) The recommended sentence.

[2] MCL 777.21(2) provides:

> If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part.

Appeals and the application for leave to appeal as cross-appellant are considered, and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the February 16, 2006, order of the Court of Appeals and the April 16, 2006, order denying reconsideration, and we remand this case to the Court of Appeals for plenary consideration. The trial court's October 10, 2005, order was a postjudgment order affecting the custody of a minor because it was entered after the April 2001 stipulation and order regarding custody in the consolidated case. Thus, it was a final order appealable as of right under MCR 7.203(A) and MCR 7.202(6)(a)(iii). We do not retain jurisdiction. Court of Appeals No. 268000.

Leave to Appeal Denied June 30, 2006:

JOBA CONSTRUCTION COMPANY, INC v V & Y CONSTRUCTION SERVICES, INC, No. 130227; Court of Appeals No. 263258.

MARKMAN, J. (*dissenting*). Plaintiff contracted with defendant V & Y to provide site preparation work. After defendant V & Y failed to pay plaintiff, plaintiff filed a claim with defendant Flora, the general contractor, and defendant AMCO, the surety posting the payment bond. When they refused to pay, plaintiff instituted this action against defendants. A default judgment was entered against V & Y and the trial court granted plaintiff's motion for summary disposition against Flora and AMCO, and the Court of Appeals affirmed.

The public works bond act, MCL 129.207, provides, in pertinent part:

> A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

Although the payment bond issued by AMCO included the 90-day notice of claim provision, it did not include the 30-day notice of commencement provision. Plaintiff complied with the 90-day notice of claim

provision, but not the 30-day notice of commencement provision. Paragraph 13 of AMCO's payment bond provides:

> When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

In my judgment, paragraph 13 of the payment bond evidences an intent to mirror the statutory requirements. One of the statutory requirements is the 30-day notice of commencement requirement. Given that the payment bond does not state that the parties intended to exclude the 30-day notice of commencement requirement, and that it does state that the parties intended the bond to be construed as a statutory bond, I believe that the statutory 30-day notice of commencement requirement may be applicable here. I would grant leave to appeal to consider this issue.

PEOPLE v BAILEY, No. 130467; Court of Appeals No. 253706.

KELLY, J. (*dissenting*). I would vacate one of defendant's convictions of armed robbery. A jury convicted defendant of two counts of armed robbery[1] and possession of a firearm during the commission of a felony,[2] felony-firearm. I believe that defendant raises a legitimate objection to the sufficiency of the evidence for one of the armed robbery convictions.

The prosecution claims that defendant and a codefendant robbed a hair-braiding salon. In the process, they allegedly took money from the two complainants' purses. But only one of the complainants testified at trial. She did not see defendant or the codefendant take anything from the second complainant's purse and did not know whether anything was missing from the second complainant's purse. The entire conviction rested on a confusing statement overheard by the testifying complainant that "she don't got the money she just have."

This statement is hearsay because it is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Although defendant did not object to the statement, I believe that its admission rises to the level of plain error. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763 (1999). If a

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[1] MCL 750.529.

[2] MCL 750.227b.

defendant meets these requirements, reversal is required if the error resulted in the conviction of an innocent defendant or seriously affected the fairness or integrity of the proceedings. *Id*., quoting *United States v Olano*, 507 US 725, 736-737 (1993).

In this case, the fact that the error occurred and the fact that this statement is hearsay are clear and obvious. This error affected defendant's substantial right to a fair trial free from inadmissible evidence. And, given that this was the only evidence connecting defendant to the second robbery, there is a fair chance that defendant is actually innocent. Beyond this, convicting a defendant solely on the basis of inadmissible hearsay calls into question the fairness and integrity of the proceedings. Therefore, I would find that admission of the hearsay statement amounts to plain error requiring reversal. Because defendant's conviction for the second armed robbery was based solely on plain error, the evidence against him was not sufficient to convict.

I would vacate one of defendant's convictions for armed robbery.

PEOPLE V FERWORN, No. 130490; Court of Appeals No. 266592.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). This case presents an important issue regarding the application of *Blakely v Washington*[1] to the Michigan sentencing guidelines, MCL 777.1 *et seq*.[2] Although this Court recently decided two cases[3] concerning the applicability of *Blakely*, they do not control this appeal.

Defendant pleaded nolo contendere to a charge of embezzlement by an agent or trustee of more than $20,000. MCL 750.174(5)(a). The sentencing guidelines make this a class D offense. MCL 777.16i. The trial court scored defendant's prior record variable (PRV) level at zero points and her offense variable (OV) level at ten points. In the class D sentencing grid of the guidelines, a PRV level of zero points and an OV level of ten points placed defendant in the A-II cell. This cell provides a minimum sentence range of zero to nine months. MCL 777.65. Because its upper limit is under 18 months, the A-II cell is referred to as an "intermediate sanction cell." 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 department of corrections. An

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[1] 542 US 296 (2004).

[2] For a full discussion of *Blakely's* impact on the sentencing guidelines, please review my dissenting opinion in *People v McCuller*, 475 Mich 176 (2006).

[3] *McCuller* and *People v Drohan*, 475 Mich 140 (2006).

> 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.

Under MCL 769.34(4)(a), the guidelines set the maximum sentence to which the defendant may be sentenced. The guidelines statutes do not permit a court to sentence to prison a defendant who falls within an intermediate sanction cell. The court is required to impose a maximum term of 12 months or less, unless it can state substantial and compelling reasons for a longer sentence. MCL 769.34(4)(a).

In this case, the trial court departed from the sentencing guidelines recommendation on the basis of several factors that it found to be substantial and compelling. At the time of sentencing, the facts underlying the reasons for departure had not been admitted by defendant or proven to a jury beyond a reasonable doubt. Instead, they were found by the trial court using a preponderance of the evidence standard.

This process raises serious Sixth Amendment concerns. In *Blakely*, the United States Supreme Court stated:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi*[4] purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. [*Blakely,* 542 US 303-304 (emphasis in original; citations omitted).]

In this case, the trial judge rendered a sentence not allowed by defendant's criminal history or her admissions. Instead, he imposed the sentence after making additional fact-finding. This exceeded his constitutional authority. *Id*. Therefore, defendant's sentence is clearly called into question by *Blakely*.

This constitutional problem must be resolved. Under *McCuller*, a defendant is legally entitled to an intermediate sanction if, after the OVs and the PRVs have been scored, the guidelines' maximum sentence is 18 months or less. *McCuller*, 475 Mich 176; slip op, p 5. McCuller was not entitled to the statutory maximum sentence set by the intermediate sanction cell because his score was outside the intermediate sanction cell after the OVs were scored. But, in this case, defendant's score was not outside the intermediate sanction cell after the OVs were scored. Therefore, following the majority's reasoning in *McCuller*, she was *legally entitled* to an intermediate sanction.

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[4] *Apprendi v New Jersey*, 530 US 466 (2000).

The majority refuses to examine the ramifications of this legal entitlement to an intermediate sanction cell sentence in light of *Blakely*. Instead, it ignores the issue and denies leave to appeal. I believe that defendant should have a full review of the serious constitutional issue raised by her sentence. Accordingly, I would grant leave to appeal. I call on the majority to explain why it would not.

PEOPLE v TYROSH BROWN, No. 130493; Court of Appeals No. 257547.

KELLY, J. (*dissenting*). This Court should grant leave to appeal to consider whether defendant was subjected to abuse of authority by the police and, if so, whether it rendered unlawful his arrest for disorderly conduct. In addition, the Court should consider overruling the Court of Appeals decision in *People v Ventura,* 262 Mich App 370 (2004).

Two police officers went to defendant's home with an arrest warrant for Eddie Lee Smith for alleged domestic violence. The officers did not have a warrant to search the home. On arriving, they approached defendant's mother, who was on the porch, and asked her if she knew Smith's whereabouts. Defendant came out of the house and told the officers to leave and that his mother did not have to talk to them. There is no evidence that defendant's mother had anything to say to the police.

The officers told him they would leave after they asked a few questions. Defendant again told them to get out of his house and that he and his mother knew nothing about Smith's whereabouts. What followed was an unfortunate escalation of defendant's anger at the officers' refusal to leave his property. A melee ensued when the officers tried to arrest defendant for "disorderly creating."[1] In the end, several officers were injured and other members of defendant's family were arrested.

I believe that this Court should grant leave to appeal on the question whether the attempted arrest for disorderly conduct was unlawful. Defendant asserts that any disorderly conduct on his part was initiated by the officers' refusal to vacate the premises after he told them to leave. The question is whether they were trespassing under MCL 750.552.

Because of *Ventura, supra,* the lower courts were obligated to rule against defendant. *Ventura* holds that, under MCL 750.81d, the validity

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[1] "Disorderly creating" is Grand Rapids Ordinance § 9.137, which provides in part that:

> No person shall:
>
> (1) Create or engage in any disturbance, fight or quarrel in a public place.
>
> (2) Create or engage in any disturbance, fight, or quarrel that causes or tends to cause a breach of the peace.
>
> (3) Disturb the peace and quiet by loud or boisterous conduct.

of the arrest is not a defense to resisting arrest. MCR 7.215(J)(1). I believe that serious questions exist about the validity of *Ventura*. Therefore, I would grant leave to appeal in this case to consider overruling *Ventura*.

WALTZ v STOREY, No. 130634; Court of Appeals No. 265145.

KELLY, J. (*dissenting*). This is a personal injury case in which the plaintiff has evidence of having developed a bulging disc at L4-5 as a consequence of a head-on automobile accident. He also claims to have developed significant aggravation of preexisting pain, requiring him now to walk with a cane and to walk only short distances. He now requires assistance with household tasks and with some personal care. He is able to engage in less shopping and recreational activity, and he has difficulty sleeping.

Hence, there are material factual disputes regarding the exact nature and extent of plaintiff's injuries and the effect they have had on his life. I believe that, under *Kreiner v Fischer*, 471 Mich 109 (2004), his allegations, if proven, would show a significant impairment of an important body function that affects his ability to lead a normal life.

It is true that, before the accident, plaintiff was on social security disability and had taken a disability retirement because of severe scoliosis and degenerative arthritis of the lumbar spine. However, the Court should not interpret *Kreiner* to mean that someone like plaintiff cannot suffer a serious impairment of body function merely because he or she was disabled before the accident.

Given the evidence that plaintiff has produced, he appears to satisfy the *Kreiner* threshold. It is for the finder of fact to determine the extent and effect of plaintiff's additional injuries and how they may have affected his general ability to lead his normal life. The judgment of the Court of Appeals should be reversed and the case should be remanded to the trial court for further proceedings.

CAVANAGH, J. I join the statement of Justice KELLY.

CASTELLON v DELPHI AUTOMOTIVE SYSTEMS CORPORATION, No. 130700; Court of Appeals No. 265650.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

KELLY, J. (*dissenting*). A magistrate found that plaintiff suffered from work-related carpal tunnel syndrome. But the magistrate also found that plaintiff was off work because of a Bell's Palsy condition that was not work-related. Therefore, he concluded that plaintiff had not proven a compensable disability but would be entitled to benefits if she recovered from Bell's Palsy. Because of this, the magistrate entered a contingent award of continuing benefits.

Later, plaintiff claimed that she had recovered from Bell's Palsy and was entitled to benefits. Defendant refused to pay. A new magistrate denied benefits. The Workers' Compensation Appellate Commission (WCAC) affirmed, and the Court of Appeals denied leave.

I agree with the WCAC that the first magistrate had no authority to enter a contingent future award. Such an award would be based on facts not before the magistrate. He lacked the authority to enter it. Interven-

ing facts could alter plaintiff's condition. For instance, plaintiff could develop another condition that is not work-related before her Bell's Palsy subsided. In such a situation, plaintiff would not be entitled to benefits because she still would not be out of work due to a work-related condition.

But I think that the WCAC was too harsh on plaintiff's current claim. Plaintiff's physical condition, which is subject to change, may have changed. *Estate of Beckwith v Spooner*, 183 Mich 323, 329 (1914). Plaintiff offered the testimony of two doctors who stated that she is not disabled by Bell's Palsy at this time. That should be sufficient to reopen the proofs. Essentially, the magistrate and the WCAC required that the doctor who found Bell's Palsy now conclude that it is gone. This is too rigid a standard. It was defendant's expert who stated that plaintiff was disabled because of Bell's Palsy at the time of the first hearing. Therefore, the standard set by the WCAC is that plaintiff must get defendant's expert to change his testimony. This is unfair to plaintiff.

Because the first magistrate ruled that plaintiff had Bell's Palsy and plaintiff presents expert evidence that she does not have Bell's Palsy now, she has offered evidence of a change in condition. It requires a new hearing. I would remand the case to the magistrate for a hearing on plaintiff's current disability.

In re CHURCH (DEPARTMENT OF HUMAN SERVICES v CHURCH), No. 131190; Court of Appeals No. 263541.

Reconsideration Denied June 30, 2006:

PEOPLE v WILKENS, No. 129706. Leave to appeal denied at 474 Mich 1099. Reported below: 267 Mich App 728.

KELLY, J. (*dissenting*). I would grant reconsideration and, on reconsideration, I would grant leave to appeal. Defendant raises several very serious issues that this Court should consider. Because of the issues' importance and because defendant shows a palpable error and a likelihood of success on the merits, he has demonstrated manifest injustice warranting reconsideration. Reconsideration is also appropriate because defendant raises several constitutional questions.

Defendant argues that certain evidence admitted at trial should be suppressed as fruit of the poisonous tree because it stemmed from an illegal search and seizure. The police went to defendant's home searching for a gun or a knife. Defendant consented to a search for these items. An officer searching a bathroom noticed some electronic equipment that he thought to be odd. Despite the fact that he knew there was no gun or knife in the bathroom, the officer continued his inspection of the room. In the shower, the officer noticed a 1/4 inch hole below a motion sensor. On closer inspection of the tiny hole, the officer concluded it covered a camera. When asked, defendant stated that it was an inoperable camera. On the basis of the discovery of this camera, the officer obtained a new search warrant. The fruit of this search warrant was the evidence in question.

The close inspection by the officer may have constituted an unwarranted separate search. Merely inspecting something during a search is legal. But taking further actions unrelated to the object of the search is not acceptable. "[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry." *Arizona v Hicks*, 480 US 321, 325 (1987). In this case, the gun or knife that the police were searching for could not have been located in the tiny hole. Therefore, the officer had no authority to make a more searching inquiry into the hole.

The officer's actions are also not justified by the plain view doctrine. In order to satisfy this doctrine, the officer must have reason to believe that a crime is being committed. *Id*. at 326-327. In this case, there was no reason to believe that defendant was committing a crime by having a camera in his shower, and there was no probable cause to seize the evidence. In fact, the officer could not know that there was a camera in the hole, much less that any camera there was functional or used to tape someone other than defendant. Nor could he know that, if it were used to tape someone else, that person did not consent to the taping. In all, there was no real evidence of a crime, just suspicion, and certainly not the probable cause necessary to seize the property. Therefore, the plain view doctrine is not satisfied. The evidence should not have been admitted against defendant at trial. I would grant leave to consider vacating defendant's convictions.

Defendant also raises a legitimate argument that the trial court impermissibly denied him an independent polygraph examination. MCL 776.21(5) states that certain defendants "shall be given a polygraph examination or lie detector test if the defendant requests it." The trial court denied defendant's request as untimely. There is no timing requirement contained in MCL 776.21. Therefore, this ruling was in error. I would grant leave to consider if this error requires a reversal.

Defendant also argues that the trial court inappropriately denied a jury instruction on consent with respect to the first-degree criminal sexual conduct charges. In this case, the criminal sexual conduct charges were raised to first degree pursuant to MCL 750.520b(1)(c), "[s]exual penetration occurs under circumstances involving the commission of any other felony." The underlying felony charged in this case was producing child sexually abusive material, MCL 750.145c(2). The taped sexual activity involved alleged consensual contact with a 16-year-old. It is undisputed that the age of consent in Michigan is 16, but a person under the age of 18 cannot give consent to the making of child sexually abusive material. MCL 750.145c(1)(b). Therefore, there is a conflict in these statutes. Defendant makes a legitimate argument that simply videotaping a consensual act should not change that act into criminal sexual conduct. I would grant leave to consider the statutory conflict and any First Amendment consideration that might be involved.

Next, defendant raises a legitimate double jeopardy argument. He argues that his convictions for both first-degree criminal sexual conduct and producing child sexually abusive material violated double jeopardy.

The Court of Appeals based its decision on a past determination that these statutes protect distinct social norms. *People v Ward*, 206 Mich App 38, 42-43 (1994). The Court of Appeals decided that this demonstrated that the Legislature intended separate punishments for these crimes. *Id*. But *Ward* did not consider the ramifications of the first-degree criminal sexual conduct conviction being based on the commission of the underlying crime of producing child sexually abusive material. There is a legitimate argument that the underlying crime becomes an element of first-degree criminal sexual conduct pursuant to MCL 750.520b(1)(c). There could be no first-degree criminal sexual conduct conviction without a conviction for producing child sexual abusive material. I believe that this Court should grant leave to appeal to address this situation, which neither this Court nor the Court of Appeals has addressed.

Finally, defendant raises several challenges to the scoring of various offense variables (OV). I would grant leave to review the scoring of OVs 4, 9, and 10. Defendant strongly argues that these OVs were scored as if the 16-year-old girl did not consent. I think that his arguments are worthy of review.

Because of the number of significant issues raised in this case, I think that it is necessary to grant reconsideration and grant leave to appeal. It is especially important given that defendant raises legitimate constitutional challenges to his convictions.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal July 7, 2006:

SMITH v VANLANDINGHAM and RAMOS v VANLANDINGHAM, Nos. 127440, 127441. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we direct the clerk to schedule oral argument for 9:30 a.m. on September 7, 2006, on whether to grant the applications or take other peremptory action. The parties shall submit supplemental briefs no later than August 7, 2006, addressing whether plaintiffs were required, in order to proceed on their claim that defendant Karen VanLandingham was acting within the scope of her employment when she failed to notify the authorities of the sexual abuse committed by her husband, to either (1) produce documentary evidence that the Salvation Army had a policy discouraging employees from notifying the police about allegations of sexual abuse, see MCR 2.116(G)(4), or (2) file an affidavit showing that the facts necessary to support their claim could not be presented because they were only known to persons whose affidavits plaintiffs could not procure, see MCR 2.116(H). Court of Appeals Nos. 255488, 258006.

Summary Disposition July 7, 2006:

COMBEN v STATE OF MICHIGAN, No. 127212. On order of the Court, leave to appeal having been granted, 474 Mich 893 (2005), and the briefs and oral argument of the parties having been considered by the Court, we

hereby vacate the August 31, 2004, judgment of the Court of Appeals. MCR 7.302(G)(1). The court lacked jurisdiction where the appellants were not aggrieved by the trial court's decision, which fully protected appellants' ownership interests in the subject properties at issue. MCR 7.203(A). Reported below: 263 Mich App 474.

TAYLOR, C.J. (*concurring*). I concur in the majority order but write separately to emphasize that it is in accord with the majority opinion in *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286 (2006). Justice WEAVER's dissent is premised on her disagreement with *Federated*. Her view, however, is not controlling. Rather, the majority's opinion in *Federated* speaks for itself.

WEAVER, J. (*dissenting*). I dissent from the peremptory order because in this complicated case I cannot join the majority's conclusion that the state of Michigan is not an "aggrieved party" under MCR 7.203(A). Contrary to the order's assertion, it is not clear that the trial court decision fully protected appellant state of Michigan's ownership interests in the subject properties.

The same majority has also redefined who is an "aggrieved party" under MCR 7.203(A), and has made it more difficult to invoke the jurisdiction of the Court of Appeals. In *Federated Ins Co v Oakland Co Rd Comm,* 475 Mich 286 (2006), the majority (without the benefit of briefing or argument and without the issue having been raised by the parties) redefined "aggrieved party" to require a "concrete and particularized injury." This new law imposes a higher threshold than this Court's previous articulations of "aggrieved party," which simply required that a party have some interest, "pecuniary or otherwise," in the subject matter of a case. See *In re Critchell Estate,* 361 Mich 432, 450 (1960). The majority's new "aggrieved party" test heightens the burden of all parties who pursue an appeal in the Court of Appeals.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

Leave to Appeal Denied July 7, 2006:

PEOPLE v MCQUILLEN, No. 130154; Court of Appeals No. 265710.

Summary Disposition July 10, 2006:

PEOPLE v MCBRIDE, No. 131580. The motion for immediate consideration is granted. The application for leave to appeal the June 27, 2006, order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion to stay trial proceedings is also considered, and it is granted. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction. Court of Appeals No. 269376.

KELLY, J. (*dissenting*). We should deny leave to appeal. At the hearing conducted pursuant to *People v Walker* (*On Rehearing*), 374 Mich 331 (1965), the trial judge suppressed the incriminating statement that

defendant made to the police. The judge did so after viewing the videotape of defendant's police interview. Defendant is a deaf-mute.

The judge found that defendant was not advised of her rights under *Miranda v Arizona,* 384 US 436 (1966), in a manner that she understood. The prosecution asserts otherwise. It has not furnished us the videotape. Without that tape, the prosecution cannot demonstrate to us, any more than it did to the Court of Appeals, that the judge's findings of fact were clearly erroneous. I would deny leave to appeal and allow the case to go to trial.

Summary Disposition July 12, 2006:

SIPORIN v AUTO CLUB INSURANCE ASSOCIATION, No. 131500. The motion for immediate consideration is granted. The application for leave to appeal the June 9, 2006, order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion to stay the trial court proceedings is granted, and the proceedings in the Washtenaw Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 269727.

Reconsideration Denied July 13, 2006:

MICHIGAN CIVIL RIGHTS INITIATIVE v BOARD OF STATE CANVASSERS, No. 130342. The motions to file brief amicus curiae are granted. Leave to appeal denied at 474 Mich 1099. Reported below: 268 Mich App 506.

MARKMAN, J. (*concurring*). In their motion for reconsideration, intervenors ask this Court to consider a report prepared by the Michigan Civil Rights Commission (CRC). This report contends that numerous petition signatures were obtained in support of placing the proposed Michigan Civil Rights Initiative (MCRI) on the ballot this November by circulators who misrepresented that this measure was "in favor of" affirmative action. For the following reasons, I concur in the majority's order denying this motion.

(1) Assuming the accuracy of everything set forth in the CRC report, 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. This Court does not sit in review of the hundreds of thousands of individual conversations that may have occurred between petition circulators and signers. Rather, it sits in review of the petitions themselves.

(2) The Board of State Canvassers (BSC) has the authority only to "ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). Therefore, once the BSC determined that there was a sufficient number of valid signatures,

the BSC was obligated to certify the petition. This was the conclusion of the Court of Appeals, and it is consistent with the law.

(3) Once this Court embarks upon the task of evaluating countless conversations between petition circulators and signers, it is difficult to imagine what, short of a verbatim rendition, would constitute an appeal-proof description of a proposed constitutional amendment. Any summarization of such a measure necessarily will involve some loss in precision or accuracy, and there will always be signers who might claim that their signatures were a function of such imprecision or inaccuracy.

(4) Moreover, it is not the role of the judiciary to evaluate conversations of this kind in order to determine what constitutes a "fair" representation concerning a matter of political dispute. Rather, this is a determination for the people of Michigan when they cast their votes.

(5) Further, it is the premise of our constitutional process that public debate and discussion, media analysis, and an informed electorate will, in the end, overcome false or unreasonable representations concerning matters of political dispute. It is not for the judiciary to take sides.

(6) In carrying out the responsibilities of self-government, "we the people" of Michigan are responsible for our own actions. In particular, when the citizen acts in what is essentially a legislative capacity by facilitating the enactment of a constitutional amendment, he cannot blame others when he signs a petition without knowing what it says. It is not to excuse misrepresentations, when they occur, to recognize nonetheless that it is the citizen's duty to inform himself about the substance of a petition before signing it, precisely in order to combat potential misrepresentations.

(7) A necessary assumption of the petition process must be that the signer has undertaken to read and understand the petition. Otherwise, this process would be subject to perpetual collateral attack, and the judiciary would be required to undertake determinations for which there are no practical legal standards and which essentially concern matters of political dispute.

(8) The ultimate check on the petition process must remain the electoral process. No ballot measure can become part of our Constitution unless it is approved by a majority of the voters of this state in November.

CAVANAGH, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

KELLY, J. (*dissenting*). The Michigan Supreme Court should grant reconsideration in this case and grant leave to appeal. The issues involved are of enormous public importance and merit full briefing and oral argument before the Court makes its final decision. Now, for the first time, the Court has for its review the Michigan Civil Rights Commission's *Report on the Use of Fraud and Deception in the Gathering of Signatures for the Michigan Civil Rights Initiative.*

In the motion for reconsideration, intervenor Operation King's Dream raises two issues: (1) whether the petition for the proposal was defective because it did not contain, on its face, the text of the current equal protection provision contained in the Michigan Constitution, and

(2) whether the Board of Canvassers had both the authority and the duty to investigate racially targeted fraud in the gathering of the signatures on the petitions.

The allegations of fraud seem credible and the statutes involved appear to give the Board of Canvassers the authority to investigate fraud. The Court should be concerned that the power of the initiative petition might be seriously undermined if the Board of Canvassers could not review challenges like the ones made in this case. The voters created the power of the initiative petition when they enacted our state constitution over 40 years ago. Const 1963, art 12, § 2.

Unfortunately, this Court denied the application for leave to appeal in this case. I believe it committed a grave error in doing so. The motion for reconsideration provides us the opportunity to revisit that decision. The motion raises the same important issues but, significantly, provides us through the report new in-depth factual information on the merits of the application. The report was not in existence when the matter first came before us.

In a letter accompanying the report, Commission Chairman Mark Bernstein and Vice Chairman Mohammed Abdrabboh, assert that the report "raises significant civil rights concerns relating to our most fundamental right, that being the right to vote." They ask this Court to intervene, stating:

> Two notable and distressing truths emerge from the hundreds of pages of testimony included in the report. First, the instances of misrepresentation regarding the content of the MCRI [Michigan Civil Rights Initiative] ballot language are not isolated or random. Acts of misrepresentation occurred across the state, in multiple locations in the same communities, and over long periods of time. Second, the impact of these acts of deception is substantial. It appears that the acts documented in the report represent a highly coordinated, systematic strategy involving many circulators and most importantly, thousands of voters.
>
> The events at issue in this report arise in the gap between the responsibilities attendant upon citizenship in a democracy. The responsibility of voters to read and understand the content of ballot language when signing a circulator's petition. And the responsibility of MCRI and its agents to be truthful. Does a voter's failure to live up to his or her responsibility give license to the fraudulent acts of a circulator? All fair-minded citizens know the answer to this question.
>
> These serious grievances go to the core of our democracy and violate the very constitution that this honorable court is sworn to uphold. It is not enough for this court to say that it is against injustice. It must work to secure justice. Just as our commission has done its duty, so, too, must this Court.

The report chronicles public hearings held in four locations: Detroit, Flint, Lansing, and Grand Rapids. The hearings were convened in response to citizen complaints of fraud in the signature gathering process. The commission relates that three distinct groups of people gave testimony.

The first and primary group was composed of citizens who claim to have been the victims of fraud and deceit in the gathering of signatures. Included are petition circulators who testified voluntarily regarding their role in the claimed deceptive practices. The second group included citizens who were approached by the circulators but did not sign the petitions. Members of the group testified that they refused to sign. They indicated that they were aware of the true purpose of the petition or that they read it and believed it to be against affirmative action. Finally, there were citizens outraged that the deceit allegedly occurred and that no apparent action has been taken to void the petitions or punish the organizers of the petition drive. The commission's conclusions are that the Michigan Civil Rights Initiative committed acts of misrepresentation that were neither random nor isolated. It concludes also that the impact of these fraudulent acts was substantial.

The commission's report is an impressive compilation of persuasive information that this Court should not dismiss without careful consideration. We should grant reconsideration and grant leave to appeal. We should provide these vital issues the briefing and argument they deserve. If we fail to do so, we shirk our responsibility as the state's highest court.

Leave to Appeal Granted July 19, 2006:

TRENTADUE v BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, Nos. 128579, 128623-128625. The parties are directed to include among the issues to be briefed whether the Court of Appeals application of a common-law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would otherwise control, should be overruled. Reported below: 266 Mich App 297.

PEOPLE v ALPHONZO WRIGHT NO 1, No. 130295. Leave to appeal is granted, limited to the issues: (1) whether a defendant must "keep or maintain" a vehicle used for the purpose of selling a controlled substance "continuously for an appreciable period of time" as required by *People v Griffin*, 235 Mich App 27, 32-33 (1999), in order to sustain a conviction under MCL 333.7405(1)(d); and (2) whether the evidence presented in this case was sufficient to sustain the defendant's conviction for keeping or maintaining a drug vehicle. We order that this case be argued and submitted to the Court together with the case of *People v Thompson* (Docket No. 130825), at such future session of the Court as both cases are ready for submission. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permis-

sion to file briefs amicus curiae. We further order the Genesee Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint attorney Patrick K. Ehlmann to represent the defendant in this Court. Court of Appeals No. 256475.

PEOPLE v JOHNSTON, No. 130526. Leave to appeal is granted, limited to the issues: (1) whether the sentencing guidelines statutes, MCL 777.31(2)(b), 777.32(2), and 777.33(2)(a), which require that offense variables be scored the same for all offenders in multiple offender cases, apply to the scoring of codefendants for different offenses; and (2) whether points scored for one offense should be scored for all offenses in a criminal transaction. Court of Appeals No. 254284.

INTERNATIONAL HOME FOODS, INC v DEPARTMENT OF TREASURY and LENOX, INC v DEPARTMENT OF TREASURY, Nos. 130542, 130543; reported below: 268 Mich App 356.

PEOPLE v THOMPSON, No. 130825. The application for leave to appeal is granted, limited to the issues: (1) whether a defendant must "keep or maintain" a vehicle used for the purpose of selling a controlled substance "continuously for an appreciable period of time" as required by *People v Griffin*, 235 Mich App 27, 32-33 (1999), in order to sustain a conviction under MCL 333.7405(1)(d); and (2) whether the evidence presented in this case was sufficient to sustain the defendant's conviction for keeping or maintaining a drug vehicle. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court. We order that this case be argued and submitted to the Court together with the case of *People v Wright* (Docket No. 130295), at such future session of the Court as both cases are ready for submission. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 258336.

CAVANAGH, J. I would grant the application for leave to appeal as cross-appellant.

Leave to Appeal Denied July 19, 2006:

DARMER v CITIZENS INSURANCE COMPANY, No. 129664; Court of Appeals No. 260479.

OIMAS v TRADEWINDS AVIATION, INC, Nos. 129710-129712; Court of Appeals Nos. 247762, 248409, 255789.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

CITY OF SOUTH LYON v OAKLAND COUNTY DRAIN COMMISSIONER, No. 130179. The motion for leave to file brief amicus curiae is granted. Court of Appeals No. 254571.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ALPHONZO WRIGHT NO 2, No. 130352; Court of Appeals No. 256475.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v ERNEST JACKSON, No. 130378; Court of Appeals No. 265335.

KELLY, J. I would grant leave to appeal.

PEOPLE v DAGWAN, No. 130525; reported below: 269 Mich App 338.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MILLER, No. 130590. The defendant alleges that after appointed appellate counsel missed the jurisdictional deadline for filing an application for leave to appeal to the Court of Appeals, counsel filed a motion for relief from judgment without the defendant's permission. The defendant further alleges that he did not discover these facts until after the Court of Appeals denied the application for leave to appeal the denial of counsel's motion for relief from judgment. Assuming, without deciding, that these allegations are true, defendant still must meet the requirements of MCR 6.508(D). Accordingly, the defendant's application for leave to appeal is denied, because he has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267331.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

KORNACKI v GURDEN, No. 130815; Court of Appeals No. 257646.

PEOPLE v HIRSCHI, No. 130950. The motion to remand is also denied. Court of Appeals No. 267703.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 21, 2006:

TRI-COUNTY INTERNATIONAL TRUCKS, INC v HILLS' PET NUTRITION, INC, No. 130671. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether defendant was under a duty to indemnify Tri-County. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 255695.

LAWSON v KREATIVE CHILD CARE CENTER, INC, No. 130872. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address only the issue whether the statements made by plaintiff's son to plaintiff, identifying his attacker, and then repeated by plaintiff to her son's physician, are admissible under MRE 803(4) as "[s]tatements made for the purposes of medical treatment or diagnosis . . . ." The parties may file supplemental briefs within 42 days of the

date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 256388.

Leave to Appeal Granted July 21, 2006:

In re FORFEITURE OF $180,975 (PEOPLE V $180,975 IN US CURRENCY), No. 127983. The parties shall include among the issues to be addressed: (1) the proper application of the exclusionary rule in a forfeiture proceeding in which the property subject to forfeiture has been illegally seized, and (2) whether *In re Forfeiture of United States Currency*, 166 Mich App 81 (1988), was correctly decided. 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. 249699.

WASHINGTON V SINAI HOSPITAL OF GREATER DETROIT, No. 130641. The parties are directed to include among the issues to be briefed: (1) whether a successor personal representative is entitled to her own two-year saving period in which to file a complaint under MCL 600.5852 if the first personal representative served a full two-year term, and (2) whether a subsequent complaint filed by a successor personal representative is barred by res judicata and MCR 2.116(C)(7) or MCR 2.504(B)(3) if the first personal representative filed a complaint. The Michigan Trial Lawyers Association and the Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 253777.

CZYMBOR'S TIMBER, INC V CITY OF SAGINAW, No. 130672. The parties shall include among the issues to be briefed: (1) whether the Saginaw City Ordinances, which prohibit the discharge of firearms and other weapons within the city limits, are preempted by the hunting control act or other state statutes that regulate hunting, see MCL 324.41901(1); and (2) whether MCL 324.41701 through 324.41703 affect this case. The Attorney General on behalf of the Department of Natural Resources, the Michigan United Conservation Clubs, the Michigan Municipal League, the Michigan Townships Association, the Michigan Association of Counties, and the Public Corporation Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. 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: 269 Mich App 551.

Summary Dispositions July 21, 2006:

PEOPLE V NICHOLAS JACKSON, No. 125250. By order of the Court, leave to appeal was granted, 472 Mich 884 (2005). By order of November 18, 2005,

this case was held in abeyance pending the decisions in *Davis v Washington*, cert gtd ___ US ___; 126 S Ct 547; 163 L Ed 2d 458 (2005), and *Hammon v Indiana*, cert gtd ___ US ___; 126 S Ct 552; 163 L Ed 2d 459 (2005). On order of the Court, the consolidated opinion having been issued on June 19, 2006, *Davis v Washington*, ___ US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the case is again considered. We remand this case to the Oakland Circuit Court for an evidentiary hearing to evaluate defense counsel's request to present evidence regarding defendant's stepbrother's alleged prior false accusation of sexual abuse. Because the evidence in this case of a prior false allegation of sexual abuse does not constitute evidence of the victim's "sexual conduct," the rape-shield statute, MCL 750.520j, does not apply, and the Court of Appeals erred in concluding that defendant was required to follow the procedural requirements of this statute. Nevertheless, before admitting evidence of a prior false allegation, the circuit court must first determine whether defense counsel has a good-faith basis to present evidence regarding the alleged prior false accusation. If the court determines that defense counsel has a good-faith basis, it must then determine whether the evidence of the alleged prior false accusation is being used for credibility purposes or for a proper purpose under MRE 404(b). Evidence that is admitted for credibility must be admitted in a manner that is consistent with MRE 608(b), which permits this type of specific conduct to be "inquired into on cross-examination of the witness" but does not permit the specific conduct to be "proved by extrinsic evidence." Evidence that is admitted for a proper purpose under MRE 404(b) can be proved by relevant extrinsic evidence. Accordingly, on remand, the circuit court shall determine whether defense counsel has a good-faith basis to present evidence regarding defendant's stepbrother's alleged prior false accusation and, if such a good-faith basis exists, whether the evidence is being admitted for credibility or for a proper purpose under MRE 404(b). We direct the circuit court to conduct the evidentiary hearing and to submit a transcript of the hearing along with its findings to the clerk of this Court within 35 days of the date of this order. We retain jurisdiction. Court of Appeals No. 242050.

WEAVER, J. (*dissenting*). I dissent and would not remand this case for an evidentiary hearing. This case has been pending in this Court for over 2½ years. There is sufficient information before this Court to decide this case now.

KELLY, J. I join the statement of Justice WEAVER.

PEOPLE V BARBARA WILLIAMS, No. 130714. 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. 266523.

WEAVER, J. I would deny leave to appeal and would not remand this case to the Court of Appeals, because the trial court made sufficient factual findings.

CORRIGAN, J. I would deny leave to appeal.

Leave to Appeal Denied July 21, 2006:

In re STODDARD TRUST, No. 131598. The motion for stay is denied. Court of Appeals No. 270508.

Leave to Appeal Denied July 26, 2006:

ALLSTATE INSURANCE COMPANY v BROE, No. 131530. The motion for immediate consideration is granted. The motion to stay the trial court proceedings is denied. Court of Appeals No. 266039.

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.

Order Entered May 12, 2006:

JACOBS V TECHNIDISC, INC; VAN TIL V ENVIRONMENTAL RESOURCES, INC, Nos. 128715, 128283. On November 3, 2005, we granted leave to appeal in these cases and ordered that they be argued and submitted to the Court together. 474 Mich 913, 914 (2005). On May 2, 2006, the Court heard oral argument. On order of the Court, the parties are directed to file supplemental briefs, within 42 days of the date of this order, addressing the likely practical consequences that would result if this Court were to overrule *Sewell v Clearing Machine Corp*, 419 Mich 56 (1984). The supplemental briefs shall also discuss the factors that a court is to consider before overruling a prior decision, as set forth in *Robinson v Detroit*, 462 Mich 439, 464 (2000). In particular, the briefs shall discuss (1) the effect of overruling *Sewell, supra*, on reliance interests and whether overruling would work an undue hardship because of that reliance, and (2) whether overruling *Sewell, supra*, would produce not just readjustments, but practical real-world dislocations. *Robinson, supra* at 466. Other participants that have previously submitted briefs in these cases, including the Workers' Compensation Law Section of the State Bar of Michigan, Michigan Defense Trial Counsel, Inc., the Michigan Trial Lawyers Association, and the Attorney General on behalf of the director of the Workers' Compensation Agency, are invited to file supplemental briefs on this issue within 42 days of the date of this order. Other persons or groups interested in the possible overruling of *Sewell*, *supra*, may move the Court for permission to file briefs amicus curiae. Court of Appeals Nos. 258271, 250539.

Orders Entered May 16, 2006:

PROPOSED ADOPTION OF RULE 3.929 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering adoption of new Rule 3.929 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.929. USE OF FACSIMILE COMMUNICATION EQUIPMENT.

The parties may file records, as defined in MCR 3.903(A)(24), by the use of facsimile communication equipment. Filing of records by the use of facsimile communication equipment in juvenile proceedings is governed by MCR 2.406.

Staff Comment: Proposed new Rule 3.929 would state that filing records, as defined in MCR 3.903(A)(24), in juvenile proceedings is allowed by facsimile communication equipment, and that MCR 2.406 governs the filing of such documents.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-43. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 6.106 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.106 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.106. PRETRIAL RELEASE.

(A) In General. At the defendant's first appearance before a court, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1) held in custody as provided in subrule (B);

(2) released on personal recognizance~~, or~~ an unsecured appearance bond, or pursuant to subsection (C) for criminal nonpayment of support; or

(3) released conditionally, with or without money bail (ten percent, cash or surety).

(B) Pretrial Release/Custody Order Under Const 1963, Art 1, § 15.

(1) The court may deny pretrial release to

(a) a defendant charged with

(i) murder or treason, or

(ii) committing a violent felony and

[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or

[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents, if the court finds that proof of the defendant's guilt is evident or the presumption great;

(b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.

(2) A "violent felony" within the meaning of subrule (B)(1) is a felony, an element of which involves a violent act or threat of a violent act against any other person.

(3) If the court determines as provided in subrule (B)(1) that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail.

(4) The court must state the reasons for an order of custody on the record and on a form approved by the State Court ~~Administrator's~~ Administrative Office entitled "Custody Order." The completed form must be placed in the court file.

(C) Pretrial release pursuant to MCL 750.165. If the defendant is being held in custody on a criminal warrant issued pursuant to MCL 750.165 for failure to pay support, the court must set the bond at not less than $500 or 25 percent of the unpaid support arrearage, whichever is greater, except for good cause shown on the record.

~~(C)~~(D) Release on Personal Recognizance. If the defendant is not ordered held in custody pursuant to subrule (B), the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond, or pursuant to subsection (C) for criminal nonpayment of support, subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public.

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

Staff Comment: The proposed amendment incorporates new statutory requirements for setting bond in criminal nonsupport cases under MCL 750.165 as amended by 2004 PA 570.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-38. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered May 24, 2006:

PROPOSED AMENDMENT OF RULE 2.420 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amending Rule 2.420 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.420. SETTLEMENTS AND JUDGMENTS FOR MINORS AND LEGALLY INCAPACITATED INDIVIDUALS.

(A) [Unchanged.]

(B) Procedure. In actions covered by this rule, a proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned and the judge shall pass on the fairness of the proposal.

(1) [Unchanged.]

(2) [Unchanged.]

(3) If a ~~next friend,~~ guardian~~,~~ or conservator for the minor or legally incapacitated individual has been appointed by a probate court, the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court, on a form substantially in the form approved by the state court administrator, that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court.

(4) The following additional provisions apply to settlements for minors.

(a) If the settlement or judgment requires payment of more than $5,000 to the minor either immediately, or if the settlement or judgment is payable in installments that exceed $5,000 in any single year during minority, a conservator must be appointed by the probate court before the entry of the judgment or dismissal. The judgment or dismissal must require that payment be made to the minor's conservator on behalf of the minor. The court shall not enter the judgment or dismissal until it receives written verification, on a form substantially similar to the form approved by the state court administrator, that the probate court has passed on the sufficiency of the bond of the conservator.

(b) If the settlement or judgment does not require payment of more than $5,000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.5102.

(5) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.420 would clarify the requirement that the payment of proceeds may only be made to a conservator on behalf of a legally incapacitated adult or a minor entitled to more than $5,000 in any one year during minority.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2006, at P. O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-15. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 3.972 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.972 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.972. TRIAL.

(A)-(B) [Unchanged.]

(C) Evidentiary Matters.

(1) Evidence; Standard of Proof. Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights.

(2) Child's Statement. Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(20) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(e), (f), (r), or (s), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement ~~the person to whom the statement is made~~ as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

(b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.

(c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness.

(D)-(E) [Unchanged.]

Staff Comment: This proposed amendment of Rule 3.972(C)(2) would allow testimony of the child to be admitted in a child protective proceeding if the statement is offered by a person who heard the child make the statement.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-22. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 5.744 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amending Rule 5.744 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be

considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 5.744. PROCEEDINGS REGARDING HOSPITALIZATION WITHOUT A HEARING.~~the Modification of an order That Provided for an Alternative Treatment Program~~

(A) Scope of Rule. This rule applies to any proceeding involving an individual hospitalized without a hearing as ordered by a court or by a psychiatrist ~~that results in a modification of an order without a hearing~~ and to the rights of ~~an~~ that individual ~~transferred to a hospital as a result of such a modification~~.

(B) Notification. The notification requesting an order of hospitalization, a ~~or of~~ change in an alternative treatment program, a notice of noncompliance, or a notice of hospitalization as ordered by a psychiatrist must be in writing.

(C) Service of Papers. If the court enters a new or modified order without a hearing, the court must serve the individual with a copy of that order. If the order includes hospitalization, the court must also serve the individual with notice of the right to object and demand a hearing.

(D) Objection; Scheduling Hearing. An individual hospitalized without a hearing, either by order of the court or by a psychiatrist's order, may file an objection to the order not later than 7 days after receipt of notice of the right to object. The court must schedule a hearing to be held within 10 days after receiving the objection.

(E) Conduct of Hearing. A hearing convened under this rule is without a jury. At the hearing the party seeking hospitalization of the individual must present evidence that hospitalization is necessary.

Staff Comment: The proposed amendment of MCR 5.744 would expand the scope of the rule to more accurately reflect procedures delineated in MCL 330.1474, 330.1474a, 330.1475, and 330.1475a.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2006, at P. O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-17. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 7.211 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.211(B) of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A) [Unchanged.]

(B) Answer.

(1) [Unchanged.]

(2) Subject to subrule (3), the ~~The~~ answer must be filed within

(a)-(c) [Unchanged.]

(d) 14 days after the motion is served on the other parties, for a motion for reconsideration of an opinion or an order, to stay proceedings in the trial court, to strike a full or partial pleading on appeal, to file an amicus brief, to hold an appeal in abeyance, or to reinstate an appeal after dismissal under MCR 7.217(D);

(e) [Unchanged.]

If a motion for immediate consideration has been filed, ~~the answer must be filed within the time stated above, or as directed by the Court of Appeals.~~ all answers to all affected motions must be filed within 7 days if the motion for immediate consideration was served by mail, or within such time as the Court of Appeals directs. See subrule (C)(6).

(3) In its discretion, the Court may dispose of the following motions before the answer period has expired: motion to extend time to order or file transcripts, to extend time to file a brief or other appellate pleading, to substitute one attorney for another, for oral argument when the right to oral argument was not otherwise preserved as described in MCR 7.212, or for an out-of-state attorney to appear and practice in Michigan.

~~(3)~~(4) [Renumbered but otherwise unchanged.]

(C)-(E) [Unchanged]

Staff Comment: The May 24, 2006, proposed amendments of the rule reflect the recommendations of Michigan Court of Appeals. The proposed amendments would extend the time to answer certain motions from 7 to 14 days, and would establish a new category of motions that can be decided in less than 7 days without delaying submission until the answer period has expired. The Court of Appeals believes that the resulting categories are distinguishable by the perceived likelihood that opposing

counsel will seek to answer the motion, by the complexity of the answer that would likely be drafted, and by the Court of Appeals interest in quickly resolving such motions.

The proposed amendments also would clarify that answers to motions for immediate consideration and any motions affected by such a motion are to be filed within 7 days if the motion for immediate consideration was served by mail or within such time as the Court directs in light of the circumstances of the case.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-07. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered May 26, 2006:

LEGAL AID & DEFENDER ASSOCIATION, INC v WAYNE COUNTY CIRCUIT COURT, No. 130541. The complaint for superintending control is considered, and relief is granted in part. We direct the chief judge of the Wayne Circuit Court to enter a written order disposing of the plaintiff's October 1, 2004, motion for attorney fees within 28 days after the date of this order. If the court determines that the plaintiff is due compensation, the court will include the amount due in its written order.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order granting in part plaintiff's complaint for superintending control. I would deny the requested writ of superintending control because defendant Wayne Circuit Court Chief Judge Mary Beth Kelly has not violated a clear legal duty.

The underlying matter involves legal fees allegedly due under a contract for plaintiff Legal Aid & Defender Association to provide legal services to indigent juveniles. Plaintiff filed a motion for fees allegedly owed to it. The chief judge stated that the matter could be resolved by contract negotiations. The chief judge then launched those negotiations.

I am extremely troubled that while plaintiff was participating in those contract negotiations, it sought superintending control against the chief judge, failed to serve the chief judge, and failed even to advise the chief judge during negotiations that it was seeking superintending control.

I. PROCEDURAL DEFECTS

As required by MCR 3.301(C), plaintiff allegedly completed service of process on defendant of its complaint for superintending control. Plaintiff's proof of service did not satisfy the requirements of MCR 2.104.[1] Plaintiff's proof of service did not establish the essential facts of service,

[1] MCR 2.104(A) provides:

such as the manner, time, or place of service. Defendant attests that she was not personally served and that no one in her office received plaintiff's complaint. Defendant learned that plaintiff sought superintending control from the State Court Administrative Office, although plaintiff and the circuit court's representatives had participated in at least one negotiating session involving this very dispute after plaintiff sought superintending control in this Court.

II. UNDERLYING FACTS

The circuit court contracted for plaintiff to provide legal representation to indigent juveniles involved in delinquency or neglect proceedings. That contract ran from October 1, 1999, through September 30, 2001. After the contract expired and at the circuit court's request, plaintiff agreed to continue to provide representation. Plaintiff contends that, since 2001, it has provided legal services for 1,202 cases over the 2,300-case threshold of the prior contract. In September 2004, plaintiff filed a motion for payment of legal fees for services rendered. At a hearing on October 8, 2004, one week after an initial hearing, defendant apparently set a further hearing on the matter for November 12, 2004, but no subsequent hearing occurred. On December 17, 2004, plaintiff's counsel inquired about the status of this motion in a letter to defendant. On December 23, 2004, plaintiff submitted a proposed order regarding the legal fees it sought, but the order was never entered. On March 23, 2005, plaintiff's counsel again inquired about the status of the motion in a letter.

In her reply, defendant chief judge states that, over the span of the contract and for the five years thereafter, plaintiff handled 1,881 fewer cases than would have been required under the contract. Since September 2001, plaintiff has been paid approximately $200,000 every month, as required under the earlier contract, through at least April 2006.

Defendant pointed out that at the October 8, 2004, hearing, she stated that plaintiff's motion for fees might alternatively be resolved through a new contract with plaintiff, rather than through adjudication.

On December 21, 2005, defendant wrote plaintiff's executive director describing the need for contract negotiations and requesting a meeting with plaintiff. On February 7 and 27, 2006, representatives of plaintiff and the circuit court met for contract negotiations.

Plaintiff filed this complaint for superintending control on February 17, 2006. Plaintiff's representatives did not mention this complaint during either contract negotiation session.

> Proof of service may be made by . . . (2) a certificate stating the facts of service, including the manner, time, date, and place of service, if service is made within the State of Michigan by . . . (d) an attorney for a party . . . .

III. ANALYSIS

Superintending control is an extraordinary remedy. See *People v Burton*, 429 Mich 133, 139 (1987) (exercising superintending control is invoking an "extraordinary power"). Our Court employs this authority only if a "lower court failed to perform a clear legal duty." See *Frederick v Presque Isle Circuit Judge*, 439 Mich 1, 15 (1991); see also MCR 3.302(B);[2] *Musselman v Governor*, 448 Mich 503, 521-524 (1995), (*On Rehearing*), 450 Mich 574 (1996) (refusing to issue a writ of mandamus because a lack of constitutional authority prevented the Court from having a clear legal duty to order disbursal of funds).

In light of the facts described above, it is obvious that the chief judge has not neglected this matter. Contract negotiations are ongoing about these issues in the Wayne Circuit Court. Defendant had no clear legal duty to issue an order, which would permit progress only through litigation. This Court's order will short-circuit these negotiations. Plaintiff has not demonstrated a violation of a clear legal duty on this record.

IV. CONCLUSION

By ordering defendant to enter an order disposing of plaintiff's claim within 28 days, our Court essentially requires plaintiff and the circuit court to resolve this contract matter by litigation. Defendant had no clear legal duty to issue an order because she stated that contract discussions, rather than adjudication, might address the matter. The chief judge has undertaken contract negotiations in which plaintiff has participated. Thus, I respectfully dissent.

YOUNG, J. I join the statement of Justice CORRIGAN.

Motion to Disqualify Denied June 1, 2006:

GRIEVANCE ADMINISTRATOR v FIEGER, No. 127547. The motions for disqualification of Justices CORRIGAN and MARKMAN are denied.

WEAVER, J. I do not participate in the decisions regarding the motions to disqualify Justice CORRIGAN and Justice MARKMAN.

On February 20, 2006, the Committee to Re-elect Justice MAURA CORRIGAN sent out a fundraising letter from former Governor John Engler stating:

> We cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack.

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[2] MCR 3.302(B), in relevant part, provides:

> If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed.

This statement was one of the grounds listed in the motion for disqualification filed against Justice CORRIGAN by the respondent, Geoffrey Fieger. I do not participate in deciding respondent's motion to disqualify Justice CORRIGAN.

This Court should publish proposals for public comment, place the issue on a public hearing for administrative matters, resolve, and make clear for all to know the proper procedures for handling motions for the recusal of Supreme Court justices from participation in a case. See *Scalise v Boy Scouts of America*, 473 Mich 853 (2005). This Court opened an administrative file on the question on May 20, 2003, but has yet to address the matter. See ADM 2003-26.

The question regarding the participation or nonparticipation of justices frequently recurs and is a matter of public significance because even one justice's decision to participate or not participate may affect the decision and outcome in a case. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96-104; 693 NW2d 358 (2005) (WEAVER, J., concurring).

MARKMAN, J. For the following reasons, I deny the motion for my disqualification.

Respondent first argues that I am "enmeshed in other matters" concerning him. However, this is true only because respondent by his own actions, specifically by initiating a series of federal lawsuits against me and other Justices of this Court, has so "enmeshed" me. It cannot be that a judge can be required to disqualify himself or herself simply on the basis of such lawsuits. *Grace v Leitman*, 474 Mich 1081 (2006); *People v Bero*, 168 Mich App 545, 552 (1988). To allow respondent's lawsuits to constitute a basis for my disqualification because I have thereby become "enmeshed" with him would simply be to incentivize such lawsuits on the part of any attorney or litigant desirous of excluding a disfavored judge from participation in his or her case.

Respondent next argues that my participation in this case would afford me the opportunity to "buttress a demand for money from him." This apparently refers to my defense in one of respondent's lawsuits that the lawsuit is "frivolous" and, therefore, that sanctions are appropriate under federal court rules. Again, it cannot be that a judge can be required to disqualify himself or herself on the basis of his or her defense to a lawsuit. It is the right of any litigant, including a judicial defendant, to defend himself or herself by appropriate means. To allow my defense to respondent's lawsuits to constitute a basis for my disqualification would again simply be to incentivize such lawsuits on the part of any attorney or litigant desirous of excluding a disfavored judge from participation in his or her case.

Respondent next argues that I have been a "target of personal abuse" from him and cannot be fair toward him. Whatever "abuse" respondent may or may not have directed toward me, I have never once called into question the propriety of his conduct. I have never questioned his right to direct any public criticism toward me or to undertake any financial contributions against me in the course of my campaigns for judicial office. Once again, it cannot be that a judge can be required to disqualify himself or herself on the basis of "abuse" that he has allegedly received from an

attorney or litigant. To allow such conduct to constitute a basis for my disqualification would again simply be to incentivize such conduct on the part of any attorney or litigant desirous of excluding a disfavored judge from participation in his or her case.

Respondent next argues that my nondisqualification would potentially allow me to "vent my spleen" against him because of his opposition to my reelection to this Court. However, as was observed in *Adair v Michigan*, 474 Mich 1027 (2006) (statement by TAYLOR, C.J., and MARKMAN, J.), if campaign opposition constituted a basis for disqualification, there would rarely, if ever, be a full contingent of this Court hearing an appeal. Lawful campaign contributions, in support of and in opposition to a judge, have never before constituted a basis for disqualification. Respondent himself, for example, has made contributions in support of or in opposition to each of the Justices of this Court.

Finally, respondent argues that my wife has a pecuniary interest in the outcome of this case because he "might" run for Attorney General someday. For the reasons set forth by Chief Justice TAYLOR and myself in *Adair*, my participation in cases concerning the Office of the Attorney General and other public and private offices in which my wife has worked, has always been in accord with the highest standards of judicial conduct. My wife, who is a civil service employee, has no financial stake in whether respondent prevails or not in this case, or in whether respondent someday chooses to run for Attorney General or any other public position.

After carefully considering the instant motion for disqualification, I am convinced that I can fairly and impartially consider the present appeal just as in the past I have fairly and impartially considered both appeals in which respondent was a party and appeals in which he represented other parties.

CAVANAGH and KELLY, JJ. We do not participate in the decisions regarding the motions to disqualify Justice CORRIGAN and Justice MARKMAN.

Order Entered June 20, 2006:

PROPOSED AMENDMENT OF RULES 2.112 AND 7.206 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 2.112 and 7.206 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.112. PLEADING SPECIAL MATTERS.
(A)-(G)[Unchanged.]

(H) Statutes, Ordinances, or Charters. In pleading a statute, ordinance, or municipal charter, it is sufficient to identify it, without stating its substance, except as provided in subrule (M).

(I)-(L) [Unchanged.]

(M) Headlee Amendment Actions. In an action alleging violation of Const 1963, art 9, §§ 25-34, the factual basis for the alleged violation must be stated with particularity. All statutes involved in the case must be identified, and copies of all ordinances and municipal charter provisions involved, and any documentary evidence supportive of a claim or defense, must be attached to the pleading.

RULE 7.206. EXTRAORDINARY WRITS, ORIGINAL ACTIONS, AND ENFORCEMENT ACTIONS.

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff shall file with the clerk:

(a) for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of a complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of a complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy;

(b)-(d) [Unchanged.]

(2) Answer. The defendant or any other interested party must file with the clerk within 21 days of service of the complaint and any supporting documents or affidavits:

(a) for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of an answer to the complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of an answer to the complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy.

(b)-(c) [Unchanged.]

(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment: The proposed amendments establish special pleading requirements in actions alleging a violation of the Headlee Amendment, Const 1963, art 9, §§ 25-34. The amendments require that a complaint or answer state the factual basis for an alleged violation or defense with particularity. Additionally, documentary evidence supportive of a claim or defense must be attached to the pleading as an exhibit.

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

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2006, at P.O. Box 30052, Lansing, MI, 48909, or MSC_clerk@courts.mi.gov. When filing a

comment, please refer to file ADM File No. 2003-59. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 7.211 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.211 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

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

(1)-(4) [Unchanged.]

(5) Motion to Withdraw. A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) [Unchanged.]

(b) The motion to withdraw and supporting papers will be submitted to the court for decision on the first Tuesday ~~56 days after the appellant is served.~~

(i) 28 days after the appellant is served in appeals from orders of the family division of the circuit court terminating parental rights under the Juvenile Code; or

(ii) 56 days after the appellant is served in all other appeals.

The appellant may file with the court an answer and brief in which he or she may make any comments and raise any points that he or she chooses concerning the appeal and the attorney's motion. The appellant must file proof that a copy of the answer was served on his or her attorney.

(c) [Unchanged.]

(6)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The June 20, 2006, proposed amendments of MCR 7.211 reflect the recommendations of the Michigan Court of Appeals. The

proposed amendments would reduce from 56 days to 28 days the deadline for submission of a motion to withdraw as appointed counsel in an appeal from an order terminating parental rights. The 56-day deadline would be retained for all other appeals The Court of Appeals points out that if the proposed amendment is approved, the time before submission that is allotted to the party to file an answer to the motion will be equivalent to the time provided to that same party to draft the appellant's brief on appeal. See MCR 7.212(A)(1)(a)(iii) for the standard case (56 days), and MCR 7.212(A)(1)(a)(i) for cases involving orders terminating parental rights (28 days). The Court of Appeals therefore believes that shortening the time allotted in cases involving termination of parental rights would be consistent with the truncated time line that is otherwise applied to those cases.

The Court of Appeals also believes that the review function of the Court of Appeals staff is a good safeguard against frivolous motions to withdraw in cases where answers are not filed.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-08. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered July 5, 2006:

PROPOSED AMENDMENT OF RULES 6.610, 6.625, AND 7.103 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 6.610, 6.625, and 7.103 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1)-(2)[Unchanged.]

(3) Immediately after imposing a sentence of incarceration, the court must advise the defendant, on the record or in writing, that:

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

(b) the request for a lawyer must be made within 7 days after sentencing.

(G)-(H) [Unchanged.]

RULE 6.625. APPEAL; APPOINTMENT OF APPELLATE COUNSEL

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

(B) If the court imposed a sentence of incarceration and the defendant is indigent, the court must enter an order appointing a lawyer if, within 7 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 7 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 7 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.101(B)(1) and MCR 7.103(B)(1) shall commence on the day of the appointment.

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

RULE 7.103. APPLICATION FOR LEAVE TO APPEAL.

(A) [Unchanged.]

(B) Procedure.

(1) Except when another time is prescribed by statute or court rule, an application for leave to appeal must be filed within 21 days after the entry of the judgment or order appealed from.

(2)-(6) [Unchanged.]

(C) [Unchanged.]

Staff Comment: The Court received correspondence dated January 10, 2006, from John T. Berry, Executive Director of the State Bar of Michigan, informing the Court that the Representative Assembly of the State Bar of Michigan had unanimously approved a proposal, recommended by the Criminal Jurisprudence and Practice Committee, that the Court amend MCR 6.610 by adding a new subrule (I). The bar believes that its proposed language to the rule would ensure that individuals who are convicted in district court are aware of their right to counsel pursuant to *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005), and their right to appeal. The Court, however, instead is proposing amendments of the rule that would reflect alternative language.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the

Supreme Court Clerk in writing or electronically by November 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-05. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

CAVANAGH, J. I concur with publishing the stated proposal. However, the Court also received the following proposal from the State Bar of Michigan:

> Proposed MCR 6.610(I) - Notification of Appellate Rights in the District Court after Misdemeanor Conviction
>
> At the time of plea or sentence, the Court shall advise the Defendant of his/her appellate rights as follows:
>
> (1) After Trial. You have a right to appeal your conviction and sentence. If you wish to do so, you must file your claim of appeal within 21 days of the sentencing date. If you cannot afford an attorney, you may petition this court for a court appointed attorney.
>
> (2) After plea of guilty or no contest. You have the right to file an application for leave to appeal your conviction and sentence. If you wish to do so, you must file your application within 6 months of the sentencing date. If you cannot afford an attorney, you may petition this court for a court appointed attorney.
>
> I would solicit public comments on this proposal as well.

KELLY, J., concurred with CAVANAGH, J.

PROPOSED AMENDMENT OF RULE 9.207 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 9.207 of the Michigan Court Rules. Before determining whether either of the alternative proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of these proposed alternatives does not mean that the Court will issue an order on the subject, not does it imply probable adoption of the proposal in its present form.

ALTERNATIVE A

RULE 9.207. INVESTIGATION; NOTICE.

(A) [Unchanged.]

(B) Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held. If there is insufficient cause to warrant filing a complaint, the commission may:

(1) dismiss the matter,

(2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct,

(3) dismiss the matter contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring,

(4) admonish the respondent, or

(5) recommend to the Supreme Court private censure, with a statement of reasons.

~~If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members determine that the public interest and the interests of justice require otherwise.~~

(C) Adjourned Investigation. If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members determine that the public interest and the interests of justice require otherwise.

~~(C)~~(D) Notice to Judge.

(1)-(4) [Unchanged.]

(5) If the commission admonishes a judge pursuant to MCR 9.207(B)(4),

(a) The judge may file 24 copies of a petition for review in the Supreme Court, serve two copies on the commission, and file a proof of service with the commission within 28 days of the date of the admonishment. The petition for review, and any subsequent filings, shall be placed in a confidential file and shall not be made public unless ordered by the Court.

(b) The executive director may file a response with a proof of service on the judge within 14 days of receiving service of the petition for review.

(c) The Supreme Court shall review the admonishment in accordance with MCR 9.225. Any opinion or order entered pursuant to a petition for review under this subrule shall be published and shall have precedential value pursuant to MCR 7.317.

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

~~(E)~~(F) [Relettered but otherwise unchanged.]

ALTERNATIVE B

RULE 9.207. INVESTIGATION; NOTICE.

(A) [Unchanged.]

(B) Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held. If there is insufficient cause to warrant filing a complaint, the commission may dismiss the matter.~~:~~

~~(1) dismiss the matter,~~

~~(2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct,~~

~~(3) dismiss the matter contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring,~~

~~(4) admonish the respondent, or~~

~~(5) recommend to the Supreme Court private censure, with a statement of reasons.~~

If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members determine that the public interest and the interests of justice require otherwise.

(C)-(E)[Unchanged.]

Staff comment: Alternative A would allow a judge admonished by the Judicial Tenure Commission to request review of the admonishment by the Supreme Court. Alternative B would eliminate the ability of the Judicial Tenure Commission to dismiss a matter with a letter of explanation, caution, or admonishment, or recommend private censure.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No.2003-21. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered July 6, 2006:

PROPOSED AMENDMENT OF RULES 8.103, 8.108, AND 8.109 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 8.103, 8.108, and 8.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.103. STATE COURT ADMINISTRATOR

The state court administrator, under the Supreme Court's supervision and direction, shall:

(1)-(8) [Unchanged.]

(9) approve and publish forms as required by these rules, and such other recommended forms as the administrator deems advisable; and

~~(10) certify the adequacy of recording devices to be used for making records of different types of proceedings in trial courts pursuant to these rules and applicable statutes and publish a list of certified recording devices and the proceedings for which they are certified for use; and~~

~~(11)~~ [Renumbered as (10), but otherwise unchanged.]

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(F) [Unchanged.]

(G) Certification.

(1) Certification Requirement.

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

(b) Proceedings held pursuant to MCR 6.102 or 6.104 need not be recorded by persons certified under this rule; however, transcripts of such proceedings must be prepared by court reporters, recorders, ~~operators,~~ or voice writers certified pursuant to this rule.

(c)-(f) [Unchanged.]

(2)-(5) [Unchanged.]

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

(a) Certifications under this rule must be renewed annually. The fee for renewal is $30. Renewal applications must be filed by August 1. A renewal application filed after that date must be accompanied by an additional late fee of $~~30~~100. The board may require certified reporters, recorders, operators, and voice writers to submit, as a condition of renewal, such information as the board reasonably deems necessary to determine that the reporter, recorder, operator, or voice writer has used his or her reporting or recording skills during the preceding year.

(b)-(d) [Unchanged.]

(7) [Unchanged.]

RULE 8.109. MECHANICAL RECORDING OF COURT PROCEEDINGS.

(A) Official Record. If a trial court uses audio or video recording devices for making the record of court proceedings, it shall use only recording devices that meet the standards as published by the State Court Administrative Office. ~~approved by the state court administrator pursuant to MCR 8.103(10). Except where such a requirement was previously imposed by statute, this provision shall apply only to recording devices purchased after the effective date of this subrule.~~

(B) [Unchanged.]

Staff Comment: These changes would clarify that certified electronic operators do not have the authority to prepare transcripts. The amendments would also increase the late renewal fee to $100, and would remove references to approval by the state court administrator of recording devices, requiring instead that recording systems meet SCAO-approved standards.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-48. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Rehearing denied July 11, 2006:

PEOPLE V MONACO, No. 126852. In this cause, the Attorney General's motion to intervene and motion for rehearing have been considered. The motion to intervene is denied as unnecessary. Pursuant to MCL 14.28, the Attorney General is required to prosecute all actions in this Court in which the state is a party. Because this is a criminal action in which the state is a party, the Attorney General has been listed as a representative of the state throughout the proceedings in this Court and, therefore, does not need to intervene. As for the motion for rehearing, it is denied. Reported at: 474 Mich 48.

WEAVER, J. (*dissenting in part*). I dissent from the majority's decision to deny rehearing. I previously joined Justice KELLY in her concurrence/dissent to the majority's affirmance of the Court of Appeals decision regarding the appropriate statute of limitations. *People v Monaco,* 474 Mich 48 (2006). I dissented from section IV and the conclusion of the majority opinion because I believed that the Court of Appeals was correct when it found that felony nonsupport is a continuing violation. Consequently, I would have affirmed the conclusions of the Court of Appeals. For these same reasons, I would grant the Attorney General's motion for rehearing.

KELLY, J. (*concurring in part and dissenting in part*). I dissent from the majority's decision to deny the motion for rehearing. As I opined in

my concurrence/dissent in *People v Monaco*, 474 Mich 48, 59-65 (2006), the majority incorrectly determined that felony nonsupport is not a continuing violation.

With respect to the motion to intervene, I concur in the majority's determination that the motion is unnecessary. The Attorney General asks to join the suit as an intervening plaintiff-appellee. His arguments are framed on behalf of the people of the state of Michigan. But the people are already a party in this case. They are the plaintiff-appellee. Attorney General Michael A. Cox is listed, along with Assistant Prosecuting Attorney Jennifer Frustaci Adlhoch, as the representative of the people. See *Monaco, supra* at 48. Because the people are already a party, the Attorney General had no need to resort to MCL 14.28 or 14.101 in order to intervene. Hence, the people already are entitled to file a motion for rehearing, and the Attorney General is entitled to argue the motion.

Order Entered July 11, 2006:

PROPOSED AMENDMENT OF RULES 2.512, 2.513, 2.514, 2.515, 2.516, AND 6.414 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.512. INSTRUCTIONS TO JURY ~~RENDERING VERDICT.~~

~~(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that~~

~~(1) the jury will consist of any number less than 6,~~

~~(2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or~~

~~(3) if more than six jurors were impaneled, all of the jurors may deliberate.~~

~~Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.~~

~~(B) Return; Poll.~~

~~(1) The jury must return its verdict in open court.~~

~~(2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.~~

~~(3) If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation; otherwise the verdict is complete, and the court shall discharge the jury.~~

~~(C) Discharge From Action; New Jury. The court may discharge a jury from the action:~~

~~(1) because of an accident or calamity requiring it;~~

~~(2) by consent of all the parties;~~

~~(3) whenever an adjournment or mistrial is declared;~~

~~(4) whenever the jurors have deliberated until it appears that they cannot agree.~~

~~The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury discharged.~~

~~(D) Responsibility of Officers.~~

~~(1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.~~

~~(2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act for him or her during the deliberations of the jury.~~

(A) Request for Instructions.

(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.

(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.

(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

(B) Instructing the Jury.

(1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.

(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

(D) Model Civil Jury Instructions.

(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, the committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model civil jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions . Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.

RULE 2.513. CONDUCT OF JURY TRIAL ~~VIEW~~

(A) Preliminary Instructions. After the jury is sworn and before

evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions. ~~By Jury. On motion of either party or on its own initiative, the court may order an officer to take the jury as a whole to view property or a place where a material event occurred. During the view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial. The court may order the party requesting a jury view to pay the expenses of the view.~~

(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.~~By Court. On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred.~~

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

(D) Interim Commentary. Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.

(E) Reference Documents. The court must encourage counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other appropriate information to assist jurors in their deliberations.

(F) Deposition Summaries. Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a

summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.

(G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

(1) Scheduling the presentation of the parties' expert witnesses sequentially; or

(2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination; or

(3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.

(H) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(I) Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

(J) Jury View. On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion.

(K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

(L) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The plaintiff or the prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the plaintiff or the prosecutor may offer a rebuttal limited to the issues

raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

(M) Comment on the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

(N) Final Instructions to the Jury.

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

(2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

(3) Copies of Final Instructions. The court shall provide each juror with a written copy of the final jury instructions to take into the jury room for deliberation. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

(4) Clarifying or Amplifying Final Instructions. Where it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions.

(O) Materials in the Jury Room. The court shall permit the jurors, on retiring to deliberate, to take into the jury room their notes and final instructions. The court may permit the jurors to take into the jury room the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence.

(P) Provide Testimony or Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been

allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

RULE 2.514. RENDERING VERDICT ~~SPECIAL VERDICTS~~

~~(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:~~

~~(1) written questions that may be answered categorically and briefly;~~

~~(2) written forms of the several special findings that might properly be made under the pleadings and evidence; or~~

~~(3) the issues by another method, and require the written findings it deems most appropriate.~~

~~The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.~~

~~(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.~~

~~(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless before the jury retires the party demands its submission to the jury. The court may make a finding as to an issue omitted without a demand; or, if the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.~~

(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that

(1) the jury will consist of any number less than 6,

(2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or

(3) if more than six jurors were impaneled, all the jurors may deliberate.

Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.

(B) Return; Poll.

(1) The jury must return its verdict in open court.

(2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.

(3) If the number of jurors agreeing is less than required, the jury must be sent back for further deliberation; otherwise, the verdict is complete, and the court shall discharge the jury.

(C) Discharge From Action; New Jury. The court may discharge a jury from the action:

(1) because of an accident or calamity requiring it;

(2) by consent of all the parties;

(3) whenever an adjournment or mistrial is declared;

(4) whenever the jurors have deliberated and it appears that they cannot agree.

The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged.

(D) Responsibility of Officers.

(1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.

(2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act for him or her during the deliberations of the jury.

RULE 2.515. SPECIAL VERDICTS. ~~MOTION FOR DIRECTED VERDICT.~~

~~A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.~~

(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:

(1) written questions that may be answered categorically and briefly;

(2) written forms of the several special findings that might properly be made under the pleadings and evidence; or

(3) the issues by another method, and require the written findings it deems most appropriate.

The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.

(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.

(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless the party demands its submission to the jury before it retires for deliberations. The court may make a finding with respect to

an issue omitted without a demand. If the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.

RULE 2.516. MOTION FOR DIRECTED VERDICT. ~~INSTRUCTIONS TO JURY.~~

~~(A) Request for Instructions.~~

(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

~~(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case as to each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact which are supported by the evidence. The theory may include those claims supported by the evidence or admitted.~~

~~(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.~~

~~(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.~~

~~(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.~~

~~(B) Instructing the Jury.~~

~~(1) After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. MCR 2.516(D)(2) does not apply to such preliminary instructions.~~

~~(2) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict.~~

~~(3) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case. The court, at its discretion, may also comment on the evidence, the testimony, and the character of the witnesses as the interests of justice require.~~

~~(4) While the jury is deliberating, the court may further instruct the jury in the presence of or after reasonable notice to the parties.~~

~~(5) Either on the request of a party or on the court's own motion, the court may provide the jury with~~

~~(a) a full set of written instructions,~~

~~(b) a full set of electronically recorded instructions, or~~

~~(c) a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided.~~

~~If it does so, the court must ensure that such instructions are made a part of the record.~~

~~(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.â~~

~~(D) Model Civil Jury Instructions.~~

~~(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, the committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.~~

~~(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if~~

~~(a) they are applicable,~~

~~(b) they accurately state the applicable law, and~~

~~(c) they are requested by a party.~~

~~(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that~~

~~(a) the instruction is necessary to state the applicable law accurately, and~~

~~(b) the matter is not adequately covered by other pertinent model civil jury instructions.~~

~~(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.~~

A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.

~~Rule 6.414. CONDUCT OF JURY TRIAL.~~

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

~~(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.~~

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

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

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

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

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

~~(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action~~

~~on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.~~

~~(I) Materials in the Jury Room. The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record.~~

~~(J) Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.~~

Staff Comment: MCR 2.513 is completely rewritten. The rule collects the rules governing jury trials in civil and criminal cases in a single rule. Additional provisions ensure that jurors have the necessary information to enable them to deliberate and reach a decision based on the facts and the law applicable to a case.

Subrule (A) requires a court to give preliminary instructions to the jury, including a statement of the elements of the civil claims or charged offenses. The court is required provide a written copy of the instructions to the jurors.

Proposed subrule (B) is substantially the same as MCR 6.414(B).

Proposed subrule (C) is substantially the same as MCR 6.414(C)

Proposed subrule (D) gives the court discretion to allow the parties to present interim commentary during the trial. Interim commentary, which are statements made by counsel in the course of trial to assist the jurors in comprehending or putting testimony or other evidence in the context of the theory of the case, is especially useful in a long or complex trial. It has been allowed in some jurisdictions, and is currently in use in Massachusetts. See, e.g., *Consorti v Armstrong World Industries,* 72 F3d 1003, 1008 (CA 2, 1995). The court may limit or bar interim commentary by a party when it appears that the opposing party will not be making such comment.

Proposed subrule (E) would allow the use of reference documents or notebooks by jurors. Such notebooks may reduce the jurors' need to take notes and would provide documents and other materials for the jurors' reference throughout the trial.

Proposed subrule (F) would allow the parties to use deposition summaries in lieu of reading deposition transcripts into the record. The proposed rule anticipates that the party proffering the testimony first would prepare the summary and the opposing party would then add a narrative to the summary based on that party's perspective of the deposition. If either side believed a summary was wrong or misleading, objections would be resolved by the trial judge.

Proposed subrule (G) would allow the court to craft a procedure designed to allow the jurors to better understand the expert testimony introduced on a particular subject. For example, the court could allow the experts to testify out of order so that the testimony of opposing experts in a given field would be heard sequentially. The court also could convene a panel discussion at which the attorneys would ask questions of the experts to educate the jurors in a particular field, followed by specific questions related to the experts' opinions on the relevant topic.

Proposed subrule (H) is substantially the same as MCR 6.414(D). The proposed rule eliminates language that allows a court to bar jurors from taking their notes into the jury room during deliberations.

Subrule (I) is substantially the same as MCR 6.414(E). The proposed rule ensures that the parties' objections, if any, will be heard outside the jury's presence.

Proposed subrule (J) incorporates the jury view provisions presently contained in MCR 2.513(A) and MCR 6.414(F).

Proposed subrule (K) would allow jurors to discuss the evidence in a case as it is admitted. Such discussions may promote timely questions to be propounded to the witnesses by the court. But jurors should be instructed that such discussions are tentative and are intended only to promote a better understanding of the evidence as is it introduced.

Proposed subrule (L) is substantially the same as MCR 6.414(G).

Proposed subrule (M) expands on MCR 2.516(B)(3). It would allow the court to summarize the evidence and to comment on the weight of the evidence, much like the attorneys do in closing arguments.

Proposed subrule (N)(1) adopts language from MCR 6.414(H) regarding final instructions to the jury.

Proposed subrule (N)(2) would allow a trial court to ask the jury if it needs immediate clarification on the final instructions that it received. The proposed rule also would provide for notification of the jury that it later may ask for a clarification on an instruction and would provide a procedure to handle such requests.

Proposed subrule (N)(3) would require the trial court to provide jurors with a copy of the final jury instructions.

Proposed subrule (N)(4) would specify the procedures a trial court may employ if a jury has reached an impasse.

Proposed subrule (O) is substantially the same as MCR 6.414(I).

Proposed subrule (P) is substantially the same as MCR 6.414(J). It provides further elaboration on the materials that the jury may take into the jury room to assist in deliberations.

The amendments of MCR 2.516 delete provisions that now are in MCR 2.513. The amendments to 2.512 incorporate the provisions that are now in MCR 2.516.

MCR 6.414 is deleted in its entirety, having been subsumed by MCR 2.513.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2006, at P.O. Box 30052, Lansing, MI 48909, MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-19. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Rehearing denied July 12, 2006:

JOLIET v PITONIAK, No. 127175; reported at: 475 Mich 30.

Order Entered July 20, 2006:

PROPOSED AMENDMENT OF RULE 3.921 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rule 3.921 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) [Unchanged.]

(B) Protective Proceedings.

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a) the respondent,

(b) the attorney for the respondent,

(c) the lawyer-guardian ad litem for the child,

(d) subject to subrule (C), the parents, guardian, or legal custodian, if any, other than the respondent,

(e) the petitioner,

(f) a party's guardian ad litem appointed pursuant to these rules, ~~and~~

(g) ~~any other person the court may direct to be notified.~~ the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state, and

(h) any other person the court may direct to be notified.

(2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(a) the agency responsible for the care and supervision of the child,

(b) the person or institution having court-ordered custody of the child,

(c) the parents of the child, subject to subrule (C), and the attorney for the respondent parent, unless parental rights have been terminated,

(d) the guardian or legal custodian of the child, if any,

(e) the guardian ad litem for the child,

(f) the lawyer-guardian ad litem for the child,

(g) the attorneys for each party,

(h) the prosecuting attorney if the prosecuting attorney has appeared in the case,

(i) the child, if 11 years old or older,

(j) any tribal leader, if there is an Indian tribe affiliation, ~~and~~

(k) ~~any other person the court may direct to be notified.~~ the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state, and

(l) any other person the court may direct to be notified.

(3) Termination of Parental Rights. Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2).

(C)-(D) [Unchanged.]

Staff Comment: This amendment would add a requirement mandated by 42 USC 638(b) that foster parents, preadoptive parents, and relative caregivers receive notice of hearings in child protective proceedings.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-26. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Resubmission Ordered July 21, 2006:

JACOBS v TECHNIDISC, INC and VAN TIL v ENVIRONMENTAL RESOURCES MANAGEMENT, INC, Nos. 128283, 128715. Supplemental briefs filed by the parties pursuant to the order of May 12, 2006, are considered, and it is ordered that these cases be resubmitted without further briefing or oral argument.

WEAVER, J. I dissent and join the statement of Justice KELLY.

KELLY, J. (*dissenting*). Because I see no need to delay ruling on these cases until next term, I must dissent from the order. The issues in these two cases were fully briefed and argued before this Court in May 2006. We later asked for additional briefing on the likely practical consequences should we overrule *Sewell v Clearing Machine Corp*, 419 Mich 56 (1984).

The parties and the amici curiae dutifully and quickly filed supplemental briefs. The court clerk received the last of them on June 23, 2006. Therefore, we have had three weeks to consider all the parties' latest filings. This has provided ample time to weigh the implications of overruling *Sewell*.

Those favoring a delay in deciding these cases offer no rationale for it. Because over two weeks remain in our term, and because we have had the parties' briefs for weeks, we should decide the cases now. These appeals were brought to us over 15 months ago. The parties deserve a decision on them sooner, not later.

Index-Digest

INDEX–DIGEST

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CIVIL RIGHTS 1

ACTIONS

ATTORNEY GENERAL

1. MCL 14.28 and 14.101, which provide the Attorney General authority to prosecute, defend, and intervene in certain actions, do not allow the Attorney General to prosecute an appeal from a lower court ruling unless an aggrieved party appeals. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286.

MEDICAL MALPRACTICE

2. A governmental employee who satisfies the requirements of MCL 691.1407(2) for governmental immunity is not required to file an affidavit of meritorious defense under MCL 600.2912e where the defendant governmental employee invokes the defense of governmental immunity in a medical malpractice action; where the defense of governmental immunity is invoked but the trial court has entered an order denying such immunity, the affidavit requirements of § 2912e must be stayed during the pendency of any appeal from that order. *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403.

THIRD PARTIES

3. A litigant generally may not vindicate the rights of another person but may vindicate the rights of that person where the litigant (1) establishes standing, (2) has a close relationship with that person, and (3) establishes that there is a hindrance to that person's ability to protect his or her own interests; standing is established by a showing that (1) the plaintiff has suffered a concrete

injury in fact, (2) there is a causal connection between the injury and conduct complained of that is fairly traceable to the challenged action of the defendant, and (3) the injury will likely be redressed by a favorable decision. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363.

ADMINISTRATIVE LAW

PRIMARY JURISDICTION

1. Factors that may be considered in determining whether an administrative agency has primary jurisdiction over a dispute include whether the matter falls within the agency's specialized knowledge, whether the court would interfere with the uniform resolution of similar issues, and whether the court would upset the regulatory scheme of the agency. *City of Taylor v The Detroit Edison Co*, 475 Mich 109.

AFFIDAVITS OF MERITORIOUS DEFENSE—*See*

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PARENT AND CHILD 1

CIVIL RIGHTS

EMPLOYMENT DISCRIMINATION

1. A claim of unlawful discrimination against a former employer, which claim does not involve an allegation of discriminatory discharge, accrues for the purposes of the three-year period of limitations on the date the alleged discriminatory act occurred, not on the plaintiff employee's last day of work (MCL 600.5805[9], now [10]; MCL 600.5827). *Joliet v Pitoniak*, 475 Mich 30.

CONTROLLED SUBSTANCES

SCHEDULE 1 CONTROLLED SUBSTANCES

1. 11-carboxy-THC is a schedule 1 controlled substance of the Public Health Code for purposes of the Michigan Vehicle Code provision that prohibits the operation of a motor vehicle by a person with any amount of a schedule

1 controlled substance in his or her body (MCL 257.625[8], 333.7212[1][c]). *People v Derror*, 475 Mich 316.

COSTS OF PRODUCING RECORDS—*See*

RECORDS 2

COURTS

JURISDICTION

1. A court may refuse to hear a case on the basis of the doctrine of forum non conveniens even though it otherwise may have jurisdiction; the application of the doctrine lies within the discretion of the trial court; the ultimate inquiry for the court is where trial will best serve the convenience of the parties and the ends of justice; Michigan does not follow a rule that a court may not decline jurisdiction under the doctrine unless its own forum is "seriously inconvenient." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598.
2. Dismissal of an action on the basis of the forum non conveniens doctrine may be warranted where the plaintiff chose the forum not because it is convenient, but solely in order to take advantage of favorable law. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598.
3. The trial court should give a foreign plaintiff's choice of forum less deference than that accorded to a domestic plaintiff's choice of forum. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598.

CRIMINAL LAW

AIDING AND ABETTING

1. The three elements necessary for a conviction under an aiding and abetting theory are (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave aid and encouragement; a defendant is liable for the crime the defendant intends to aid or abet as well as for the natural and probable consequences of that crime; the prosecution must prove that the defendant aided or abetted the commission of an offense and that the

defendant intended to aid the commission of the charged offense, knew the principal intended to commit the charged offense or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense (MCL 767.39). *People v Robinson*, 475 Mich 1.

AUTOMOBILES

2. The prosecution, in an action under the Michigan Vehicle Code provision that prohibits the operation of a motor vehicle by a person with any amount of a schedule 1 controlled substance in his or her body, need only prove that the defendant's driving, not his or her intoxication, was the proximate cause of the accident (MCL 257.625[8]). *People v Derror*, 475 Mich 316.

3. The prosecution, in an action under the Michigan Vehicle Code provision that prohibits the operation of a motor vehicle by a person with any amount of a schedule 1 controlled substance in his or her body, need not prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated by a controlled substance (MCL 257.625[8]). *People v Derror*, 475 Mich 316.

CONSTITUTIONAL LAW

4. A defendant is deprived of the Sixth Amendment right of confrontation when a nontestifying codefendant's statements implicating the defendant are introduced at their joint trial; the violation is of constitutional magnitude and is not ameliorated when the defendant's confession is also introduced; however, such a confrontation violation is subject to harmless error analysis, and the defendant's confession admitted into evidence may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. *People v Pipes*, 475 Mich 267.

DOUBLE JEOPARDY

5. A defendant who receives one conviction of first-degree murder supported by two theories, first-degree premeditated murder and first-degree felony murder, and is also convicted of the felony underlying the felony-murder charge and whose conviction of the underlying felony is thereafter vacated on double-jeopardy grounds may have a judgment of conviction of the underlying felony entered against the defendant where the defendant's murder con-

FREEDOM OF INFORMATION ACT

APPEAL

1. A de novo standard of review is applied in actions under the Freedom of Information Act with regard to the application of exemptions involving legal determinations; the clear error standard of review is appropriate where a party challenges the underlying facts that support the trial court's decision; an appellate court reviewing a decision committed to the trial court's discretion must review the discretionary determination for an abuse of discretion and cannot disturb the decision unless it falls outside the principled range of outcomes (MCL 15.231 *et seq.*). *Herald Co, Inc v Eastern Michigan University Bd of Regents*, 475 Mich 463.

EXEMPTIONS

2. A document is a "frank communication" for purposes of the Freedom of Information Act where the trial court finds that it is a communication or note of an advisory nature made within a public body or between public bodies, it covers other than purely factual material, and it is preliminary to a final agency determination of policy or action (MCL 15.243[1][m]). *Herald Co, Inc v Eastern Michigan University Bd of Regents*, 475 Mich 463.

GOVERNMENTAL IMMUNITY

See, also, ACTIONS 2

HIGHWAYS

1. The duty of the state or a county road commission to repair and maintain a highway under its jurisdiction attaches only to the improved portion of the highway that is designed for vehicular travel; the shoulder of a

the presumption, show more than the evidence required for a prima facie case under MCL 436.1801(3); the plaintiff must present clear and convincing evidence to rebut the presumption. *Reed v Breton*, 475 Mich 531.

2. A plaintiff in a dramshop action must present evidence of actual visible intoxication to establish visible intoxication under MCL 436.1801(3). *Reed v Breton*, 475 Mich 531.

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MUNICIPAL CORPORATIONS

CONSTITUTIONAL LAW

1. A local unit of government may exercise reasonable control over its highways, streets, alleys, and public places as long as such regulation does not conflict with state law (Const 1963, art 7, §§ 22, 29). *City of Taylor v The Detroit Edison Co*, 475 Mich 109.

MUTUAL MISTAKE OF FACT—*See*

TAXATION 1

180-DAY RULE—*See*

CRIMINAL LAW 10

OPERATING A VEHICLE—*See*

CRIMINAL LAW 6

PARENT AND CHILD

COURT DETERMINATIONS

1. A court determination under MCL 722.711(a) that a child is not "the issue of the marriage" requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the