MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

September 8, 2006 to May 7, 2007

DANILO ANSELMO
REPORTER OF DECISIONS

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2007

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SUPREME COURT

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

Commissioners

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

JOHN K. PARKER
TIMOTHY J. RAUBINGER
LYNN K. RICHARDSON
KATHLEEN A. FOSTER
NELSON S. LEAVITT
DEBRA A. GUTIERREZ-McGUIRE
ANNE-MARIE HYNOUS VOICE
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DANIEL C. BRUBAKER
MICHAEL S. WELLMAN
GARY L. ROGERS
RICHARD B. LESLIE
FREDERICK M. BAKER, Jr.
KATHLEEN M. DAWSON
RUTH E. ZIMMERMAN
LAURA L. MOODY[1]
SAMUEL R. SMITH
ANNE E. ALBERS[2]

State Court Administrator: CARL L. GROMEK

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

[1] To September 8, 2006.
[2] From January 22, 2007.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM C. WHITBECK, Lansing	2011
Chief Judge Pro Tem	
BRIAN K. ZAHRA, Northville	2013
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2013
MARK J. CAVANAGH, Royal Oak	2009
JANET T. NEFF, Grand Rapids	2013
KATHLEEN JANSEN, St. Clair Shores	2013
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	2013
MICHAEL R. SMOLENSKI, Grand Rapids	2013
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
JESSICA R. COOPER, Beverly Hills	2013
KIRSTEN FRANK KELLY, Grosse Pointe Park	2013
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	2013
ALTON T. DAVIS, Grayling	2009
DEBORAH A. SERVITTO, Mt. Clemens	2013

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

CIRCUIT JUDGES

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

[1] From January 1, 2007.

[2] To January 1, 2007.

		Term Expires January 1 of
	SHEILA ANN GIBSON, Detroit,	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009
	DAVID ALAN GRONER, Grosse Pointe Park,	2011
	RICHARD B. HALLORAN, Jr., Detroit,	2013
	AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2013
	CYNTHIA GRAY HATHAWAY, Detroit,	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
	MICHAEL M. HATHAWAY, Detroit,	2011
	MURIEL D. HUGHES, Grosse Pointe Woods,	2009[3]
	THOMAS EDWARD JACKSON, Detroit,	2013
	VERA MASSEY JONES, Detroit,	2009
	MARY BETH KELLY, Grosse Ile,	2009
	TIMOTHY MICHAEL KENNY, Livonia,	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
	KATHLEEN M. McCARTHY, Dearborn,	2013
	WADE H. McCREE, Detroit,	2009
	WARFIELD MOORE, Jr., Detroit,	2009
	BRUCE U. MORROW, Detroit,	2011
	JOHN A. MURPHY, Plymouth Twp.,	2011
	MARIA L. OXHOLM, Detroit,	2013
	LITA MASINI POPKE, Canton,	2011
	DANIEL P. RYAN, Redford,	2013
	MICHAEL F. SAPALA, Grosse Pointe Park,	2013
	RICHARD M. SKUTT, Detroit,	2009
	LESLIE KIM SMITH, Northville Twp.,	2013
	VIRGIL C. SMITH, Detroit,	2013
	JEANNE STEMPIEN, Northville,	2011
	CYNTHIA DIANE STEPHENS, Detroit,	2013
	CRAIG S. STRONG, Detroit,	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,	2011
	DEBORAH A. THOMAS, Detroit,	2013
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	MARY M. WATERSTONE, Detroit,	2007
	CAROLE F. YOUNGBLOOD, Grosse Pointe,	2013
	ROBERT L. ZIOLKOWSKI, Northville,	2009
4.	EDWARD J. GRANT, Jackson,	2011
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHARLES A. NELSON, Jackson,	2007

[3] From December 18, 2006.

		Term Expires January 1 of
	CHAD C. SCHMUCKER, Jackson,	2011
	THOMAS D. WILSON, Grasslake,	2013[4]
5.	JAMES H. FISHER, Hastings,	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills,	2009
	MARTHA ANDERSON, Troy,	2009
	STEVEN N. ANDREWS, Bloomfield Hills,	2009
	LEO BOWMAN, Pontiac,	2009[5]
	RAE LEE CHABOT, Franklin,	2011
	MARK A. GOLDSMITH, Huntington Woods,	2013
	NANCI J. GRANT, Bloomfield Hills,	2009
	DENISE LANGFORD-MORRIS, West Bloomfield,	2013
	CHERYL A. MATTHEWS, Sylvan Lake,	2011
	JOHN JAMES McDONALD, Farmington Hills,	2011
	FRED M. MESTER, Bloomfield Hills,	2009
	RUDY J. NICHOLS, Clarkston,	2009
	COLLEEN A. O'BRIEN, Rochester Hills,	2011
	DANIEL PATRICK O'BRIEN, Troy,	2011
	WENDY LYNN POTTS, Birmingham,	2013
	GENE SCHNELZ, Novi,	2009
	EDWARD SOSNICK, Bloomfield Hills,	2013
	DEBORAH G. TYNER, Franklin,	2007
	MICHAEL D. WARREN, Jr., Beverly Hills,	2013
	JOAN E. YOUNG, Bloomfield Village,	2011
7.	DUNCAN M. BEAGLE, Fenton,	2011
	JOSEPH J. FARAH, Grand Blanc,	2011
	JUDITH A. FULLERTON, Flint,	2013
	JOHN A. GADOLA, Fenton,	2009
	ARCHIE L. HAYMAN, Flint,	2013
	GEOFFREY L. NEITHERCUT, Flint,	2013
	DAVID J. NEWBLATT, Linden,	2011
	MICHAEL J. THEILE, Flushing,	2009
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011
	CHARLES H. MIEL, Stanton,	2009
9.	GARY C. GIGUERE Jr., Portage,	2009[6]
	STEPHEN D. GORSALITZ, Portage,	2011
	J. RICHARDSON JOHNSON, Portage,	2011
	RICHARD RYAN LAMB, Kalamazoo,	2007

[4] From January 1, 2007.

[5] From February 6, 2007.

[6] From February 28, 2007.

		Term Expires January 1 of
	PAMELA L. LIGHTVOET, Kalamazoo,	2013[7]
	PHILIP D. SCHAEFER, Portage,	2011[8]
	WILLIAM G. SCHMA, Kalamazoo,	2009[9]
10.	FRED L. BORCHARD, Saginaw,	2011
	WILLIAM A. CRANE, Saginaw,	2011
	LYNDA L. HEATHSCOTT, Saginaw,	2013
	DARNELL JACKSON, Saginaw,	2013
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2013
	TIMOTHY G. HICKS, Montague,	2011
	WILLIAM C. MARIETTI, North Muskegon,	2011
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Twp.,	2011
	DIANE M. DRUZINSKI, Shelby Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2009
	PETER J. MACERONI, Clinton Twp.,	2009
	DONALD G. MILLER, Harrison Twp.,	2013
	EDWARD A. SERVITTO, Jr., Warren,	2013
	MARK S. SWITALSKI, Ray Twp.,	2013
	MATTHEW S. SWITALSKI, Clinton Twp.,	2009
	ANTONIO P. VIVIANO, Clinton Twp.,	2011
	DAVID VIVIANO, Sterling Heights,	2013[10]
	TRACEY A. YOKICH, St. Clair Shores,	2013
17.	GEORGE S. BUTH, Grand Rapids,	2011
	KATHLEEN A. FEENEY, Rockford,	2009
	DONALD A. JOHNSTON, III, Grand Rapids,	2013
	DENNIS C. KOLENDA, Rockford,	2013
	DENNIS B. LEIBER, Grand Rapids,	2013
	STEVEN MITCHELL PESTKA, Grand Rapids,	2011
	JAMES ROBERT REDFORD, East Grand Rapids,	2011

[7] From January 1, 2007.

[8] To April 2, 2007.

[9] To December 1, 2006.

[10] From January 1, 2007.

		Term Expires January 1 of
	PAUL J. SULLIVAN, Grand Rapids,	2009
	MARK A. TRUSOCK, Comstock Park,	2013[11]
	DANIEL V. ZEMAITIS, Grand Rapids,	2009
18.	WILLIAM J. CAPRATHE, Bay City,	2011
	KENNETH W. SCHMIDT, Bay City,	2013
	JOSEPH K. SHEERAN, Essexville,	2009
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2009
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2013
	MELINDA MORRIS, Ann Arbor,	2013
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009
23.	RONALD M. BERGERON, Standish,	2009
	WILLIAM F. MYLES, East Tawas,	2009
24.	DONALD A. TEEPLE, Sandusky,	2009
25.	THOMAS L. SOLKA, Marquette,	2011
	JOHN R. WEBER, Marquette,	2009
26.	JOHN F. KOWALSKI, Alpena,	2009
27.	ANTHONY A. MONTON, Pentwater,	2013
	TERRENCE R. THOMAS, Newaygo,	2009
28.	CHARLES D. CORWIN, Cadillac,	2009[12]
29.	JEFFREY L. MARTLEW, DeWitt,	2011[13]
	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2013
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2013
	BEVERLEY NETTLES-NICKERSON, Okemos,	2009
31.	JAMES P. ADAIR, Port Huron,	2013
	PETER E. DEEGAN, Port Huron,	2011

[11] From January 1, 2007.

[12] To February 1, 2007.

[13] To May 1, 2007.

		Term Expires January 1 of
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Owosso,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2013
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2013
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2013
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2013
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	PAUL J. CLULO, Midland,	2009
	JONATHAN E. LAUDERBACH, Midland,	2013[14]
	THOMAS L. LUDINGTON, Sanford,	2007[15]
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2013
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2013
46.	JANET M. ALLEN, Gaylord,	2011
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	HARRY A. BEACH, Otsego,	2009[16]
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2013
	RONALD C. NICHOLS, Big Rapids,	2015[17]
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2013
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Port Austin,	2009

[14] From December 7, 2006.

[15] To June 30, 2006.

[16] To January 31, 2007.

[17] From January 1, 2007.

		Term Expires January 1 of
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2013
55.	THOMAS R. EVANS, Beaverton,	2009
	ROY G. MIENK, Gladwin,	2013[18]
56.	THOMAS S. EVELAND, Dimondale,	2013
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2013

[18] From January 1, 2007.

DISTRICT JUDGES

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

[1] To May 1, 2007.

		Term Expires January 1 of
14B.	JOHN B. COLLINS, Ypsilanti,	2009
15.	JULIE CREAL, Ann Arbor,	2013
	ELIZABETH POLLARD HINES, Ann Arbor,	2011
	ANN E. MATTSON, Ann Arbor,	2009
16.	ROBERT B. BRZEZINSKI, Livonia,	2009
	KATHLEEN J. McCANN, Livonia,	2013
17.	KAREN KHALIL, Redford,	2011
	CHARLOTTE L. WIRTH, Redford,	2009
18.	C. CHARLES BOKOS, Westland,	2009
	SANDRA A. CICIRELLI, Westland,	2013[2]
	GAIL McKNIGHT, Westland,	2007
19.	WILLIAM C. HULTGREN, Dearborn,	2011
	MARK W. SOMERS, Dearborn,	2009
	RICHARD WYGONIK, Dearborn,	2013
20.	LEO K. FORAN, Dearborn Heights,	2007
	MARK J. PLAWECKI, Dearborn Heights,	2009
	DAVID TURFE, Dearborn Heights,	2013[2]
21.	RICHARD L. HAMMER, Jr., Garden City,	2009
22.	SYLVIA A. JAMES, Inkster,	2013
23.	GENO SALOMONE, Taylor,	2013
	WILLIAM J. SUTHERLAND, Taylor,	2009
24.	JOHN T. COURTRIGHT, Allen Park,	2009
	RICHARD A. PAGE, Allen Park,	2011
25.	DAVID A. BAJOREK, Lincoln Park,	2009
	DAVID J. ZELENAK, Lincoln Park,	2011
26-1.	RAYMOND A. CHARRON, River Rouge,	2009
26-2.	MICHAEL F. CIUNGAN, Ecorse,	2009
27.	RANDY L. KALMBACH, Wyandotte,	2013
28.	JAMES A. KANDREVAS, Southgate,	2009
29.	LAURA REDMOND MACK, Wayne,	2013
30.	BRIGETTE R. OFFICER, Highland Park,	2011
31.	PAUL J. PARUK, Hamtramck,	2009
32A.	ROGER J. La ROSE, Harper Woods,	2009
33.	JAMES KURT KERSTEN, Trenton,	2009
	MICHAEL K. McNALLY, Trenton,	2013
	EDWARD J. NYKIEL, Grosse Ile,	2011
34.	TINA BROOKS GREEN, New Boston,	2013
	BRIAN A. OAKLEY, Romulus,	2011
	DAVID M. PARROTT, Belleville,	2009
35.	MICHAEL J. GEROU, Plymouth,	2011
	RONALD W. LOWE, Canton,	2013
	JOHN E. MacDONALD, Northville,	2009
36.	LYDIA NANCE ADAMS, Detroit,	2011
	ROBERTA C. ARCHER, Detroit,	2013
	MARYLIN E. ATKINS, Detroit,	2013

[2] From January 1, 2007.

		Term Expires January 1 of
	JOSEPH N. BALTIMORE, Detroit,	2009
	NANCY McCAUGHAN BLOUNT, Detroit,	2009
	IZETTA F. BRIGHT, Detroit,	2011
	RUTH C. CARTER, Detroit,	2011
	DONALD COLEMAN, Detroit,	2013
	NANCY A. FARMER, Detroit,	2013
	DEBORAH GERALDINE FORD, Detroit,	2011
	RUTH ANN GARRETT, Detroit,	2013
	RONALD GILES, Detroit,	2013[3]
	JIMMYLEE GRAY, Detroit,	2009
	KATHERINE HANSEN, Detroit,	2011
	BEVERLY J. HAYES-SIPES, Detroit,	2009
	PAULA G. HUMPHRIES, Detroit,	2011
	PATRICIA L. JEFFERSON, Detroit,	2009
	VANESA F. JONES-BRADLEY, Detroit,	2013
	KENNETH J. KING, Detroit,	2009
	DEBORAH L. LANGSTON, Detroit,	2013
	WILLIE G. LIPSCOMB, Jr., Detroit,	2009
	LEONIA J. LLOYD, Detroit,	2011
	MIRIAM B. MARTIN-CLARK, Detroit,	2011
	DONNA R. MILHOUSE, Detroit,	2013
	B. PENNIE MILLENDER, Detroit,	2011
	CYLENTHIA L. MILLER, Detroit,	2011
	JEANETTE O'BANNER-OWENS, Detroit,	2009
	MARK A. RANDON, Detroit,	2009
	KEVIN F. ROBBINS, Detroit,	2013
	DAVID S. ROBINSON, Jr., Detroit,	2013
	C. LORENE ROYSTER, Detroit,	2013
	RUDOLPH A. SERRA, Detroit,	2007
37.	JOHN M. CHMURA, Warren,	2013
	JENNIFER FAUNCE, Warren,	2009
	DAWNN M. GRUENBURG, Warren,	2011
	WALTER A. JAKUBOWSKI, Jr., Warren,	2013
38.	NORENE S. REDMOND, Eastpointe,	2009
39.	JOSEPH F. BOEDEKER, Roseville,	2009
	MARCO A. SANTIA, Fraser,	2013
	CATHERINE B. STEENLAND, Roseville,	2011
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2013
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009
41A.	MICHAEL S. MACERONI, Sterling Heights,	2009
	DOUGLAS P. SHEPHERD, Macomb Twp.,	2013
	STEPHEN S. SIERAWSKI, Sterling Heights,	2011
	KIMBERLEY ANNE WIEGAND, Sterling Heights,	2013
41B.	LINDA DAVIS, Clinton Twp.,	2009
	SEBASTIAN LUCIDO, Clinton Twp.,	2013

[3] From January 1, 2007.

		Term Expires January 1 of
	SHEILA A. MILLER, Clinton Twp.,	2011
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2013
43.	KEITH P. HUNT, Ferndale,	2013
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2013
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[4]
	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2013
	WILLIAM J. RICHARDS, Beverly Hills,	2009[5]
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2013
	KIMBERLY SMALL, West Bloomfield,	2009
50.	LEO BOWMAN, Pontiac,	2013[6]
	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2013
52-1.	ROBERT BONDY, Milford,	2013
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2013
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2013
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2013
	MICHAEL A. MARTONE, Troy,	2011
53.	THERESA M. BRENNAN, Brighton,	2009
	L. SUZANNE GEDDIS, Brighton,	2011
	A. JOHN PIKKARAINEN, Brighton,	2007
	CAROL SUE READER, Howell,	2013[7]

[4] To January 31, 2007.

[5] From February 20, 2007.

[6] To February 6, 2007.

[7] From January 1, 2007.

		Term Expires January 1 of
54A.	LOUISE ALDERSON, Lansing,	2011
	PATRICK F. CHERRY, Lansing,	2009
	FRANK J. DeLUCA, Lansing,	2013
	CHARLES F. FILICE, Lansing,	2009
	AMY R. KRAUSE, Lansing,	2011
54B.	RICHARD D. BALL, East Lansing,	2011
	DAVID L. JORDON, East Lansing,	2013
55.	ROSEMARIE ELIZABETH AQUILINA, East Lansing,	2011
	THOMAS P. BOYD, Okemos,	2009
56A.	HARVEY J. HOFFMAN, Grand Ledge,	2011
	JULIE H. REINCKE, Eaton Rapids,	2009
56B.	GARY R. HOLMAN, Hastings,	2013
57.	STEPHEN E. SHERIDAN, Saugatuck,	2013
	JOSEPH S. SKOCELAS, Plainwell,	2009
58.	SUSAN A. JONAS, Spring Lake,	2009
	RICHARD J. KLOOTE, Grand Haven,	2013
	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[8]
	MARIA LADAS HOOPES, North Muskegon,	2009[9]
	MICHAEL JEFFREY NOLAN, Twin Lake,	2013
	ANDREW WIERENGO, Muskegon,	2011
61.	PATRICK C. BOWLER, Grand Rapids,	2009
	DAVID J. BUTER, Grand Rapids,	2009
	J. MICHAEL CHRISTENSEN, Grand Rapids,	2011
	JEANINE NEMESI LaVILLE, Grand Rapids,	2013
	BEN H. LOGAN, II, Grand Rapids,	2013
	DONALD H. PASSENGER, Grand Rapids,	2011
62A.	PABLO CORTES, Wyoming,	2009
	STEVEN M. TIMMERS, Grandville,	2013
62B.	WILLIAM G. KELLY, Kentwood,	2009
63-1.	STEVEN R. SERVAAS, Rockford,	2009
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	2009
64A.	RAYMOND P. VOET, Ionia,	2009
64B.	DONALD R. HEMINGSEN, Sheridan,	2009
65A.	RICHARD D. WELLS, DeWitt,	2009
65B.	JAMES B. MACKIE, Alma,	2009
66.	WARD L. CLARKSON, Corunna,	2013
	TERRANCE P. DIGNAN, Owosso,	2009
67-1.	DAVID J. GOGGINS, Flushing,	2009
67-2.	JOHN L. CONOVER, Davison,	2009
	RICHARD L. HUGHES, Otisville,	2011

[8] To August 2, 2006.

[9] From December 14, 2006.

		Term Expires January 1 of
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2013
68.	WILLIAM H. CRAWFORD, II, Flint,	2013
	HERMAN MARABLE, Jr., Flint,	2013
	MICHAEL D. McARA, Flint,	2009[10]
	NATHANIEL C. PERRY, III, Flint,	2009
	RAMONA M. ROBERTS, Flint,	2011
70-1.	TERRY L. CLARK, Saginaw,	2013
	M. RANDALL JURRENS, Saginaw,	2011
	M. T. THOMPSON, Jr., Saginaw,	2009
70-2.	CHRISTOPHER S. BOYD, Saginaw,	2011
	ALFRED T. FRANK, Saginaw,	2009
	KYLE HIGGS TARRANT, Saginaw,	2013
71A.	LAURA CHEGER BARNARD, Metamora,	2009
	JOHN T. CONNOLLY, Lapeer,	2013
71B.	KIM DAVID GLASPIE, Cass City,	2009
72.	RICHARD A. COOLEY, Jr., Port Huron,	2011
	JOHN D. MONAGHAN, Port Huron,	2013[11]
	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,	2013
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	STEVEN CARRAS, Midland,	2011[12]
	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,	2013

[10] To March 31, 2007.

[11] From January 1, 2007.

[12] From January 1, 2007.

		Term Expires January 1 of
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE, Grosse Pointe,	2008
CARL F. JARBOE, Grosse Pointe Park,	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
Alcona	LAURA A. FRAWLEY	2013[1]
Alger/Schoolcraft	WILLIAM W. CARMODY	2013
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013[1]
Alpena	DOUGLAS A. PUGH	2007
Antrim	NORMAN R. HAYES	2013
Arenac	JACK WILLIAM SCULLY	2013
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013[1]
Crawford	JOHN G. HUNTER	2007
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	MICHAEL F. SKINNER	2013
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2009

[1] From January 1, 2007.

Genesee	ROBERT E. WEISS	2013
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	CHARLES R. GOODMAN	2013
Huron	DAVID L. CLABUESCH	2013
Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013[2]
Jackson	SUSAN E. VANDERCOOK	2007
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2009
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	JOSEPH E. DEEGAN	2013
Lenawee	MARGARET MURRAY-SCHOLZ NOE	2013
Livingston	CAROL HACKETT GARAGIOLA	2013[2]
Livingston	SUSAN L. RECK	2007
Luce/Mackinac	W. CLAYTON GRAHAM	2013[2]
Luce/Mackinac	THOMAS B. NORTH	2007
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013[2]
Manistee	JOHN R. DeVRIES	2007
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	LaVAIL E. HULL	2013
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013

[2] From January 1, 2007.

Monroe	JOHN A. HOHMAN, JR.	2013
Monroe	PAMELA A. MOSKWA	2009
Montcalm	CHARLES W. SIMON, III	2013[3]
Montcalm	EDWARD L. SKINNER	2007
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2013
Newaygo	GRAYDON W. DIMKOFF	2013
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	BRADLEY G. LAMBRIX	2013[3]
Oceana	WALTER A. URICK	2007
Ogemaw	SHANA A. LAMBOURN	2013[3]
Ogemaw	EUGENE I. TURKELSON	2007
Ontonagon	JOSEPH D. ZELEZNIK	2013
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013[3]
Presque Isle	KENNETH A. RADZIBON	2007
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. MCGRAW	2013
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN R. MONAGHAN	2007
St. Clair	JOHN TOMLINSON	2013[3]
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2013
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	DARLENE A. O'BRIEN	2013
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2009
Wayne	JAMES E. LACEY	2007
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011

[3] From January 1, 2007.

Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wayne	FRANK S. SZYMANSKI	2013[4]
Wexford	KENNETH L. TACOMA	2013

[4] From January 1, 2007.

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Allegan	Allegan	48
Alpena	Alpena	26
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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
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ADMINISTRATIVE ORDER No. 2006-7

INTERACTIVE VIDEO PROCEEDINGS (FAMILY DIVISION OF CIRCUIT COURT AND PROBATE COURT)

Entered September 19, 2006 (File No. 2002-09)—REPORTER.

On order of the Court, the experimental use of two-way interactive video technology (IVT) authorized by Administrative Order No. 2004-3 is hereby extended until July 1, 2007, or until a rule is adopted by the Court authorizing the use of IVT, whichever occurs first.

ADMINISTRATIVE ORDER

Entered November 7, 2006, effective immediately (File No. 2006-37) —REPORTER.

On order of the Court, Administrative Order No. 1998-1 is amended as follows, effective immediately

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

ADMINISTRATIVE ORDER No. 1998-1

REASSIGNMENT OF CIRCUIT COURT ACTIONS TO DISTRICT JUDGES

In 1996 PA 374 the Legislature repealed former MCL 600.641, which authorized the removal of actions from circuit court to district court on the ground that the amount of damages sustained may be less than the jurisdictional limitation as to the amount in controversy applicable to the district court. In accordance with that legislation, we repealed former MCR 4.003, the court rule implementing that procedure. It appearing that some courts have been improperly using transfers of actions under MCR 2.227 as a substitute for the former removal procedure, and that some procedure for utilizing district judges to try actions filed in circuit court would promote the efficient administration of justice, we adopt this ad-

ministrative order, effective immediately, to apply to actions filed after January 1, 1997.

A circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) The parties stipulate to the transfer and to an appropriate amendment of the complaint, see MCR 2.111(B)(2); or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.

Circuit courts and the district courts within their geographic jurisdictions are strongly urged to enter into agreements, to be implemented by joint local administrative orders, to provide that certain actions pending in circuit court will be reassigned to district judges for further proceedings. An action designated for such reassignment shall remain pending as a circuit court action, and the circuit court shall request the State Court Administrator assign the district judge to the circuit court for the purpose of conducting proceedings. Such administrative orders may specify the categories of cases that are appropriate or inappropriate for such reassignment, and shall include a procedure for resolution of disputes between circuit and district courts as to whether a case was properly reassigned to a district judge.

Because this order was entered without having been considered at a public hearing under Administrative Order No. 1997-11, the question whether to retain or amend the order will be placed on the agenda for the next administrative public hearing, currently scheduled for September 24, 1998.

Staff Comment: This order deletes the requirement in Administrative Order No. 1998-1 for courts to report to the State Court Administrative Office when a case is transferred from circuit court to district court. That requirement was originally adopted to monitor the transfer of cases from circuit court to district court, following the repeal of a

statute authorizing the practice. The transfer of cases under MCR 2.227 has been working smoothly and without incident, and no further statewide monitoring is necessary.

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

ADMINISTRATIVE ORDER

Entered November 9, 2006, effective immediately (File Nos. 2002-34, 2002-44)—REPORTER.

SECOND AMENDED ADMINISTRATIVE ORDER No. 2004-5

EXPEDITED SUMMARY DISPOSITION DOCKET IN THE COURT OF APPEALS

Pursuant to Administrative Order No. 2004-5, this Court adopted an expedited summary disposition docket in the Court of Appeals to take effect on January 1, 2005, and to expire on December 31, 2006. On December 21, 2005, Amended Administrative Order No. 2004-5 was adopted to take effect January 1, 2006. We now order that the expedited summary disposition docket continue in effect, as modified *infra*, for an additional one-year period to expire December 31, 2007.

Although the Court of Appeals has failed to meet the stated objectives for this pilot program during its existence, the Court is persuaded to approve the extension of the expedited summary disposition docket because the Court of Appeals Work Group (which consists of members of the Court of Appeals, Court of Appeals staff members, and members of the Appellate Practice Section) unanimously recommended the extension in anticipation that the newest recommended changes will permit the program to meet its goals. The Court of

Appeals and members of the bar should not presume that this extension in any way signals the Court's intention to eventually make the program permanent, particularly if it does not meet its intended goal of reducing appellate delay in the Court of Appeals during this additional year of experimentation.

1. Applicability. This second amended administrative order applies to appeals filed on or after January 1, 2007, arising solely from orders granting or denying motions for summary disposition under MCR 2.116. Unless otherwise removed by order of the Court of Appeals, these appeals shall be placed on an expedited appeal track under which they shall generally be briefed, argued, and disposed of within six months of filing. A motion to remove is required for a party to divert such an appeals to the standard appeal track.

2. Time Requirements. Appeals by right or by leave in cases covered by this second amended order must be taken within the time stated in MCR 7.204 or MCR 7.205. Claims of cross-appeal must be filed within the time stated in MCR 7.207.

3. Trial Court Orders on Motions for Summary Disposition. If the trial court concludes that summary disposition is warranted under MCR 2.116(C), the court shall render judgment without delay in an order that specifies the subsection of MCR 2.116(C) under which the judgment is entered.

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

(A) A docketing statement is not required unless the case is removed by order before the filing of the appellant's brief.

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

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

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

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

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

5. Application for Leave—Form of Filing. An application for leave to appeal, or an answer to an application for leave to appeal, filed under this second amended administrative order shall conform in all pertinent respects with the requirements of MCR 7.205. At the time an application or an answer is filed, the filing party must provide the Court of Appeals with 5 copies of that party's trial court summary disposition motion or response, brief, and appendices.

6. Claim of Cross-Appeal. A claim of cross-appeal filed under this second amended administrative order shall conform in all pertinent respects with the requirements of MCR 7.207. Upon the filing of a claim of cross-appeal in an appeal proceeding on the summary disposition track, the Court will remove the case from the track as provided in section 7, if it determines that the case is no longer appropriate for the track.

7. Removal from Summary Disposition Track. A party may file a motion, or the Court may act sua

sponte, to remove a case from the summary disposition track to the standard track.

(A) Time to File. A motion to remove may be filed by any party at any time.

(B) Form. Motions to remove shall concisely state the basis for removal, and must be in the form prescribed by the Court of Appeals. Factors that weigh in favor of removal include:

(1) the length of one or more briefs exceeds 25 pages; removal of the case from the summary disposition track becomes more likely as the briefs approach the 35-page limit under section 9(C),

(2) the lower court record consists of more than 3 moderately sized files and more than 100 pages of transcripts from the relevant hearing(s) and deposition(s),

(3) there are more than four issues to be decided, and

(4) one or more of the issues are matters of first impression, including the first interpretation of a statute, or are factually or legally complex.

(C) Fee. No fee is required for a motion to remove from the summary disposition track.

(D) Answer. An answer to a motion to remove must be filed within 7 days after service of the motion.

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

(F) Docketing Statement. If the case is removed from the summary disposition track before the filing of the

appellant's brief, a docketing statement must be filed within 14 days after the date of certification of the order on the motion.

(G) Administrative Removal. The Court of Appeals will remove a case from the summary disposition track, on its own motion, if it appears to the Court that the case is not an appropriate candidate for processing under this second amended administrative order. Such administrative removal may be made at any time, even after the parties' briefs are filed.

(H) Effect of Removal. If the Court of Appeals removes a case from the summary disposition track before the filing of the appellant's brief, the parties are entitled to file briefs in accordance with the time requirements and page limitations set forth in MCR 7.212. New or supplemental briefs shall not be permitted in cases removed from the summary disposition track after the filing of the parties' briefs except upon motion of a party and further order of the Court.

8. Transcript—Production for Purposes of Appeal.

(A) Appellant.

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

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

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

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

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

(3) If the transcript is not timely filed, the appellant or an appellee may file an appropriate motions with the Court of Appeals at any time. Avoiding undue delay in filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.

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

(5) Absent an order of the Court of Appeals that resets the time, the appellant's brief will be due as provided in section 9(B)(1), regardless of whether the ordered transcript is timely filed.

(B) Appellee.

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

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

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

(D) Transcript Fee. The court reporter or recorder shall be entitled to the sum of $3.00 per original page and 50 cents per page for each copy for transcripts ordered in

appeals processed under the expedited docket, if the transcript is filed within 28 days after it was ordered. If the court reporter or recorder does not file the transcript within 28 days after it was ordered, the rate will remain $1.75 per original page and 30 cents per page for each transcript, as set by MCL 600.2543.

9. Briefs on Appeal.

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

(B) Time For Filing.

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

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

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

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

(C) Length and Form. Briefs filed under this second amended administrative order are limited to 35 pages, double-spaced, exclusive of tables, indexes, and appendices. At the time each brief is filed, the filing party must provide the Court of Appeals with that party's trial court summary disposition motion or response, brief, and appendices. Failure to file these documents at the time of filing the appellant's brief will not extend the time to file the appellee's brief. If the appellant filed copies of the appellee's summary disposition response, brief, and appendices, the appellee may omit these documents provided that appellee notes the omission prominently on the title page of the appellee's brief.

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

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

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

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

This amended order will remain in effect until December 31, 2007, during which time the Court of Appeals Work Group will monitor the expedited docket program. If, at any time during that monitoring process, it becomes apparent to the work group that procedural aspects of the program need to be modified, the group is encouraged to seek authorization from this Court to implement modifications. The work group will provide this Court with a written report by November 1, 2007, for this Court's use in evaluating expedited processing of summary disposition appeals to determine whether the procedure will be discontinued, changed, or continued.

CAVANAGH, J., concurs in the extension.

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

month anniversaries of the pilot period. The group is authorized, during the two-year pilot period, to seek from the Court modification of the expedited docket procedures.

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

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

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

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

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

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

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

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

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

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

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

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

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

Staff Comment for second amended order: After 18 months' experience with the expedited track, the Case Management Work Group has reviewed Court data indicating that the expedited track has attracted substantially more filings than had been projected and that only 29 percent of the expedited track cases are being disposed within 180 days of filing. Court data also indicates that roughly 30 percent of the cases on the expedited track are quantifiably more difficult cases than the Work Group had anticipated would be filed on the track.

In the early months of the program, the Court made a significant effort to discourage parties and attorneys from filing motions to remove cases from the track. Further, although the original and amended administrative order authorized the Court to administratively remove cases from the track at any time, in fact the Court rarely exercised that authority because of a perception that it would be unfair to remove a case that the parties and attorneys had succeeded in briefing on the shortened

timeline. These two policies undoubtedly led to the large number of nonroutine appeals that continued on the track from filing to disposition.

Now, in an effort to continue to provide practitioners and parties with a properly functioning expedited track for processing *routine* appeals from orders granting or denying summary disposition, the work group proposes to modify the track to facilitate motions to remove so that cases that are inappropriate for the track can be diverted to the standard track as easily as possible. Further, the Court also will more actively exercise its existing authority to remove cases that are too complex for expedited processing.

As standards for determining whether a case should be removed from the track, the second amended administrative order states that parties and practitioners should focus on markers such as:

- Brief Length—one or more of the briefs are more than 25 pages in length.

- Lower Court Record—there are more than one to three moderately sized lower court files and more than 100 pages of transcript from the relevant motion hearing(s) and deposition(s).

- Issues Raised on Appeal—there are more than four issues and one or more of the issues involve (i) matters of first impression, including the first-time construction of a Michigan statute or court rule, and (ii) complex facts or law. Additional issues may be allowed if they are merely separate factual challenges involving the same general area of law.

Further, the Court of Appeals notes that Case-Type Codes also offer some guidance in this area. Summary disposition appeals in cases that fall within one of the following case-type codes have often proven to be factually or legally complex, and thus may be inappropriate for the track: AA, AS, AW, CB, CD, CH, CL, CP, DE, MK, MM, MT, MZ, ND, NS, NZ, PZ, TI, and TV.

In more specific detail, the following changes are proposed in the second amended administrative order:

1. It will run for a period of 12 months from January 2007 through December 2007.

2. It will apply to cases filed on or after January 1, 2007. Note, however, that qualifying summary disposition applications for leave to appeal that are pending on January 1 can continue to be ordered onto the track by the panel if leave is granted.

3. The time for filing a claim of cross-appeal is changed from 14 days to 21 days to conform with MCR 7.207.

4. A motion to remove from the track may still be filed by any party, but no motion fee will be required. As noted above, the second amended administrative order recites specific criteria to be applied by parties and attorneys in making this request that are derived from case data gathered in the first 18 months of the experimental program. These criteria reflect quantifiable differences between routine and nonroutine appeals from orders on summary disposition motions. Parties and attorneys are urged to carefully apply these criteria so that nonroutine cases, which are inappropriate for expedited processing by the Court, are removed from the track as early as possible in each appeal.

5. Absent a party's motion to remove, the Court will exercise its administrative removal authority at any time, even if the determination cannot be made until after the parties have filed their briefs. This authority is essential to the Court's ability to manage the expedited track so that routine summary disposition appeals can be disposed within 180 days of filing.

6. The time for filing appellant's brief that was previously stated in section 8(A)(5), Transcript Production, has been replaced with a cross reference to the primary statement of time for filing in section 9(B)(1), concerning Briefs on Appeal.

7. Under the current administrative order, if appellant's brief is not filed within 7 days after the due date, and a warning order is issued under section 9(B)(4), the order must direct that the brief be filed within 14 days of the original deadline, more than 7 days of which have already elapsed by operation of the provision. The proposed amendment will provide appellant with 7 days from the date of the order in which to file the brief and avoid dismissal.

8. Briefs filed under the second amended administrative order are still limited to 35 pages. However, the Court of Appeals notes that case data gathered in the first 18 months of the experimental program indicate that appellants' briefs in the bulk of the nonroutine summary disposition appeals exceeded an average of 20-21 pages in length. The most complex appeals averaged 35 pages. Thus, one of the removal factors listed in section 7(B) is that the length of one or both briefs exceeds 25 pages. In the Court's view, a case that cannot be briefed in 25 pages is *usually* not appropriate for continued placement on the track.

9. Briefs on appeal must be accompanied by the filing party's trial court summary disposition documents. An appellee can omit these appendices if they were filed by the appellant, but the appellee must note the basis for the omission on the title page of its brief.

ADMINISTRATIVE ORDER No. 2006-8

DELIBERATIVE PRIVILEGE AND CASE DISCUSSIONS IN THE SUPREME COURT

Entered December 6, 2006, effective immediately and as a supplement to Administrative Order No. 1997-10—REPORTER.

All correspondence, memoranda, and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a justice may disclose any unethical, improper, or criminal conduct to the Judicial Tenure Commission or a proper authority.

CAVANAGH, WEAVER, and KELLY, JJ., dissented.

Dissenting statements by WEAVER and KELLY, JJ., to follow.

Entered December 20, 2006—REPORTER.

WEAVER, J. (*dissenting*). I dissent to the unscheduled and abrupt adoption of Administrative Order 2006-08 (AO 2006-08) by the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN[1] because it unconstitutionally restricts a justice's ability

[1] On December 6, 2006, moved by Chief Justice TAYLOR, and seconded by Justices CORRIGAN and YOUNG, the majority of four adopted AO 2006-08. Justices CAVANAGH, WEAVER, and KELLY dissented. As adopted the order states:

to perform his duty to the public by barring a justice from "giv[ing] in writing" his "reasons for each decision" and "the reasons for his dissent."[2] By adopting AO 2006-08 and ordering the suppression of my dissent in *Grievance Administrator v Fieger,* #127547, the majority of four are attempting to hide their own unprofessional conduct and abuse of power which has resulted in their failure to conduct the judicial business of the people of Michigan in an orderly, professional, and fair manner.

The majority's adoption of AO 2006-08 during an unrelated court conference, without public notice or opportunity for public comment, illustrates the majority of four's increasing advancement of a policy of greater secrecy and less accountability—a policy that wrongly casts "a cloak of secrecy around the operations" of the Michigan Supreme Court.[3]

The following administrative order, supplemental to the provisions of Administrative Order 1997-10, is effective immediately.

All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

CAVANAGH, WEAVER and KELLY, JJ., dissent.

Dissenting statements by WEAVER and KELLY, JJ., to follow.

[2] Const 1963, art 6, § 6 requires that:

> Decisions of the Supreme Court, including all decisions on prerogative writs, *shall be in writing* and shall contain a concise statement of the facts and *reasons for each decision* and reasons for each denial of leave to appeal. *When a judge dissents in whole or in part he shall give in writing the reasons for his dissent*. (Emphasis added.)

[3] *Scott v Flowers,* 910 F2d 201, 213 (5th Cir 1990).

Simply put, AO 2006-08 is a "gag order," poorly disguised and characterized by the majority of four as a judicial deliberative privilege. The fact is, no Michigan case establishes a "judicial deliberative privilege," nor does any Michigan statute, court rule, or the Michigan Constitution.

AO 2006-08—the "gag order"— has been hastily created and adopted by the majority of four, without proper notice to the public, and without opportunity for public comment, despite such requirements directed by Administrative Order 1997-11. Administrative Order 1997-11(B)(2) states:

> Unless immediate action is required, the adoption or amendment of rules or *administrative orders that will significantly affect the administration of justice* will be preceded by an administrative public hearing under subsection (1). If no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment on whether the rule should be retained or amended. (Emphasis added.)

The adoption of AO 2006-08 was not preceded by an administrative public hearing. Further, AO 2006-08 was not shown on the notice of public administrative hearing scheduled for January 17, 2007 agenda that was circulated and published on December 14, 2006. After learning that AO 2006-08 was not placed on the next public administrative hearing agenda as required by AO 1997-11, I informed by memo of the same date (December 14) the justices and relevant staff, that AO 1997-11(B)(2) requires that AO 2006-08 be included in the notice for the next public administrative hearing on January 17, 2007. That AO 2006-08 significantly affects the administration of justice is obvious given that the majority of four relied on it to order on December 6, 2006, the suppression of my dissent in *Grievance Administrator v Fieger,* #127547,

motion to stay. As of today, December 19, 2006, AO 2006-08 has not been placed on the January 17, 2007 public hearing notice and agenda.[4]

The majority has not publicly articulated any reason why AO 2006-08 should be adopted, nor any reason why immediate action without prior notice to the public or a public hearing was necessary. Article 6, §6 of the Michigan Constitution requires in writing reasons for decisions of the Court. However, AO 2006-08 can be employed by any majority to impermissibly and unconstitutionally restrict the content of a justice's dissent or concurrence. Thus any present or future majority can in essence censor and suppress a dissenting or concurring justice's opinions.

The public has a vested, constitutional interest in knowing the reasons for a dissenting or concurring justice's divergence from a majority opinion.[5] The majority of four's efforts to censor and suppress the opinions of other justices significantly affect the administration of justice and violate the Michigan Constitution Art 6 § 6. The "gag order," AO 2006-08, is unconstitutional and unenforceable. As employed by the majority in *Grievance Administrator v Fieger*, #127547, the current majority is using AO 2006-08 to censor and suppress my dissent. I cannot and will not allow it to interfere with the performance of my duties as prescribed by the Michigan Constitution and with the exercise of my

[4] Note that AO 2006-08 must be placed on the public hearing notice for January 17, 2007, by December 20, 2006, to conform to the 28 day notice requirement of AO 1997-11.

[5] By requiring that justices give reasons for their decisions in writing, Michigan Constitution Art 6 §6 gives the people of Michigan an opportunity to improve justice by providing a window to learn how their Supreme Court is conducting Michigan's judicial business. Furthermore, requiring written decisions from justices provides information and guidance for case preparation to future litigants, who may have similar issues to decided cases.

rights of free expression as guaranteed by both the Michigan Constitution and the United States Constitution.

The majority of four has adopted this "gag order" (AO 2006-08) in order to suppress my dissent in *Grievance Administrator v Fieger,* motion for stay, #127547. Finding no "gag rule" in the Michigan Constitution, statutes, case law, court rules and canons of judicial ethics, the majority of four has decided instead to legislate its own "gag order." The majority of four's "gag order" evidences an intent to silence me now, and to silence any future justice who believes it is his duty to inform the public of serious mishandling of the people's business.[6]

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[6] On November 13, 2006, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN voted to adopt an Internal Operating Procedure (IOP) of the Court, substantively identical to the "gag order" adopted by AO 2006-08. Justices CAVANAGH and KELLY abstained. I voted against the IOP/secret "gag rule." The majority of four adopted the IOP/secret "gag rule" in an unannounced executive session from which court staff were excluded. As adopted on November 13, the IOP/secret "gag rule" states:

> All memoranda and conference discussions regarding cases or controversies on the CR and opinion agendas are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical or criminal conduct to the Judicial Tenure Commission or proper law enforcement authority.

IOPs are unenforceable guidelines adopted by majority vote, without public notice or comment, and can be changed at any time, without public notice or comment, by a majority vote. (*See* Supreme Court internal operating procedures at <http://courts.michigan.gov/supremecourt/> (accessed on December 19, 2006), which provides in a disclaimer that the IOPs are unenforceable and only require a majority vote to be adopted.) The adoption of this IOP was never reported in the Supreme Court minutes. It appears that the majority found that the hastily adopted IOP "gag rule" would not be a proper vehicle to suppress my dissents because my dissents could not be suppressed by color of an unenforceable court guideline.

Thus, on November 29, 2006 the majority moved and seconded the adoption of an "emergency" Michigan Court Rule, another "gag rule," to

The majority's "gag order" purportedly protects the justices' deliberations under a so-called "judicial deliberative privilege" based on unwritten traditions.

But the Michigan Constitution, statutes, case law, and court rules do not establish a judicial deliberative privilege.[7] In fact, the closest thing to a "judicial deliberative privilege" in Michigan is contained within the Canons of the Code of Judicial Conduct. It is this so-called "judicial deliberative privilege" that I have understood for my entire 32-year judicial career, and by which I strive to abide.

As to a judge's ability to speak regarding "a pending or impending proceeding in any court," Canon 3A(6) provides:

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suppress my dissents and concurrences. The majority discussed but tabled the new proposed emergency court rule that was substantively identical to AO 2006-08 "gag order" that was adopted on December 6, 2006.

Finally, on December 6, 2006, during an unrelated court conference, without public notice or opportunity for public comment, the majority adopted AO 2006-08, the "gag order." There was no notice given to the justices that an administrative order was to be considered, nor was the matter ever on an administrative agenda of this Court. Nonetheless, AO 2006-08 was adopted by a 4-3 vote by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. Shortly thereafter, it was moved, seconded, and adopted by a 4-3 vote, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN to suppress my dissent in *Grievance Administrator v Fieger*, #127547, motion to stay. Justices CAVANAGH, WEAVER and KELLY dissented. Chief Justice TAYLOR then ordered the clerk of court, who was present, not to publish my dissent in *Fieger*.

[7] In the order, AO 2006-08 states that AO 2006-08 is "supplemental to the provisions of Administrative Order 1997-10." I note that Administrative Order 1997-10 (AO 1997-10) does not prohibit a justice of the Supreme Court from disclosing information.

By its plain language, AO 1997-10 is inapplicable. It addresses *public* access to judicial branch administrative information. The order lists types of information that this Court can exempt from disclosure *when faced with a request from the public* for that information. Administrative Order 1997-10 is not relevant to and does not prohibit a justice of this Court from disclosing information, even information that might be considered deliberative, when disclosure involves matters of *legitimate public concern*.

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

Canon 3A(6) thus recommends against a judge speaking on a case that is pending or impending in any court; however, Canon 3A(6) does not absolutely prohibit comment on such cases.[8]

As to a judge's "administrative responsibilities," Canon 3B *does not* even address, much less recommend or require, abstention from public comment. Canon 3 B(1) *does* state that

> A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

One way to "facilitate the performance of the administrative responsibilities of other judges and court officials" is to inform the public when they need to know of a misuse or abuse of power, or know of repeated, unprofessional behavior seriously affecting the conduct of the people's business.

Certainly nothing in Canon 3 can be said to create any obligation of confidentiality or permanent secrecy like that adopted by the majority of four in AO 2006-08, and in the November 13, 2006, IOP. It should be noted that there have been instances both in the past and present, in which justices have made references in

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[8] To abstain is "[t]o refrain from something by one's own choice." Webster's New World Dictionary, 2nd College Edition (1982).

opinions to matters discussed at conference and in memorandum, and to actions before the Court.[9]

In determining when one must speak out, or abstain from speaking out, I am guided by the fact that, as a justice, I am accountable first and foremost to the public. The public expects to be informed by a justice if something is seriously wrong with the operations of the Supreme Court and the justice system. How else would the public know and be able to correct the problem through the democratic and constitutional processes? The public rightly expects the justices of this Court to act with courtesy, dignity, and professionalism toward one another. In matters of principle and legitimate public concern,

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[9] For example, most recently, in Justice CAVANAGH'S concurring statement in *In re Haley,* 476 Mich 180, 201 n 1 (2006), he stated:

> This Court is currently engaged in a discussion about the proper procedure for judicial disqualifications, as well as the ethical standards implicated in such a procedure. Further, this Court will soon be asking for public comment and input to further this discussion in a more open manner.

In addition, in his dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 327 n 17 (2006), Justice CAVANAGH stated:

> Further, while I do not join in the fray between the majority and my colleague Justice WEAVER, I take this opportunity to note that three alternate proposals, two of which have been crafted by this majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.

Note that Justice CAVANAGH's statements, published in his concurrence in *Haley* and his dissent in *Fieger,* were not objected to by any justice, including the majority of four.

In addition to these more recent references to matters discussed at judicial conferences, see in *In re Mathers*, 371 Mich 516 (1963).

however, the public does not expect a justice to "go along to get along." The public trusts, or should be able to trust, that the justices of this Court will not transform the Court into a "secret society" by making rules to protect themselves from public scrutiny and accountability.

Yet the public also expects that justices will exercise wise and temperate discretion when disclosing information regarding the operations of the Court and the justices' performance of their duties. The public does not expect, and likely would not tolerate, being informed every time a justice changes positions on a matter before the court, or every time a justice loses his temper with a colleague. The public expects justices to debate frankly, to be willing to change positions when persuaded by better argument, and to be willing to admit that they have changed their positions. Moreover, momentary, human imperfections do not affect the work of the Court. The public would lose patience with and not support a justice who recklessly and needlessly divulged such information for intemperate or political reasons. It is an elected or appointed justice's compact with the people that, whenever possible, a justice will make all reasonable efforts to correct problems on the Court from within.

But the public needs and expects to be informed by a justice when repeated abuses of power and/or repeated unprofessional conduct influence the decisions and affect the work of their Supreme Court and the justice system. I believe it is my duty and right to inform the public of such repeated abuses and/or misconduct if and when they occur.

I recognize that there is a federal judicial deliberative privilege of *uncertain scope* in federal common law, but that is not Michigan law and is not binding on this Court. Moreover, the deliberative privilege articulated in federal law does not prevent a justice from speaking out regarding

matters of legitimate public concern. *Pickering v Board of Educ*, 391 US 563 (1968).

The federal deliberative privilege is narrowly construed and qualified and it does not apply to administrative actions. Furthermore, that privilege is not intended to protect justices, but rather operates to protect the public confidence in the integrity of the judiciary.

For such public confidence to be warranted, the Michigan Supreme Court must be orderly and fair and must act with integrity, professionalism, and respect. In a pertinent case, the federal Fifth Circuit Court of Appeals addressed whether a judge could be reprimanded for publicly commenting upon the administration of justice as it related to a case in his court. *Scott v Flowers,* 910 F2d 201 (5th Cir 1990). The court cited *Pickering, supra,* in recognition that the deliberative privilege could not prevent the judge from truthfully speaking out regarding matters of legitimate public concern where the judge's First Amendment rights outweighed the government's interest in promoting the efficient performance of its function.

In light of *Pickering, supra*, the *Scott* court concluded:

> Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote. [*Scott, supra* at 213.]

The *Scott* court thus held that the judge could not constitutionally be reprimanded for making public statements critical of the court.

The federal deliberative privilege as defined in the federal common law does not extend to every utterance and action within the Court's conferences and communications. It does not protect actions taken on nonadjudicative matters involving administrative responsibilities. It also does not extend to actions or decisions of the Court, because the actions and decisions of the Court are not *deliberations*, they are *facts* that occur at the end of a deliberative period.

Further, any judicial deliberative privilege does not extend to repeated resort to personal slurs, name calling, and abuses of power, such as threats to exclude a justice from conference discussions, to ban a justice from the Hall of Justice, or to hold a dissenting justice in contempt. Nor does any judicial privilege extend to conduct such as refusing to meet with justices on the work of the Court as the majority of four have now twice done on November 13 and November 29, 2006. The privilege certainly does not extend to illegal, unethical, and improper conduct. Abuses of power and grossly unprofessional conduct are entirely unrelated to the substantive, frank, and vigorous debate and discussion of pending or impending adjudicated cases that a properly exercised judicial privilege should foster.

An absolute judicial deliberative privilege that the majority of four of this Court has wrongly created in AO 2006-08 does not exist in the Michigan Constitution, statutes, case law, court rules, or Code of Judicial Conduct, and should not be allowed to prohibit the publication of any justice's dissent or concurrence.

Perhaps further attempts to define the scope of the so-called "judicial deliberative privilege" in Michigan may be warranted. However, the privilege cannot effectively be expanded beyond that expressed within the Code of Judi-

cial Conduct through the abrupt, unconstitutional adoption of Administrative Order 2006-08, "gag order."

Most importantly, any judicial deliberative privilege defined in any rule or order must not infringe on a justice's constitutional duties and rights. Const 1963, art 6, § 6 requires that

> Decisions of the Supreme Court, including all decisions on prerogative writs, *shall be in writing* and shall contain a concise statement of the facts and *reasons for each decision* and reasons for each denial of leave to appeal. *When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.* (Emphasis added.)

Any new court rule or administrative order on deliberations that would force a dissenting or concurring justice to not include in his dissent or concurrence any or all of his reasons would interfere with the justice's duty under art 6, § 6. In effect, such a rule would allow the majority justices to re-write the dissent or concurrence, silence their opposition, and would be unconstitutional. AO 2006-08 is such an unconstitutional rule.

If the majority wanted to attempt to further define the so-called "judicial deliberative privilege" in Michigan, it should have done so by opening an administrative file on the issue and by inviting public comment before making a rash decision to adopt a "gag order" without public notice or comment and before implementing the "gag order" by ordering the suppression of a fellow justice's dissent. After all, any judicial deliberative privilege must serve the public's interest in maintaining an efficient and impartial judiciary, not the justices' personal interests in concealing conduct that negatively and seriously affects the integrity and operations of the Court. The public must, therefore, have a voice in defining the boundaries of any expanded so-called "judicial deliberative privilege" that the majority

of this Court desires to legislate. I have already expressed in dissents on administrative matters (which the majority has refused to release) that the majority of four has repeatedly abused its authority in the disposition of and closure of ADM 2003-26, the Disqualification of Justices file. They have mischaracterized final actions as straw votes and failed to correct, approve and publish minutes, and my dissents thereto, for conferences on the Disqualification of Justices file, ADM 2003-26, dating back almost ten (10) months to March 1, 2006.

Regrettably, under the guise of promoting frank discussion, the majority of four has tried to erect an impermeable shield around their abusive conduct—itself the cause of the breakdown of frank, respectful and collegial discussion on this Court. No law or rule exists to support this idea, anywhere. The majority of four have precipitously and abruptly adopted AO 2006-08 without notice to fellow justices or the public, and without opportunity for public comment.

Over the past year and longer, the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, have advanced a policy toward greater secrecy and less accountability. I strongly believe that it is past time to end this trend and to let sunlight into the Michigan Supreme Court. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts." *Scott, supra.*

ADMINISTRATIVE ORDER

Entered December 12, 2006, effective immediately (File No. 2004-48) —REPORTER.

On order of the Court, Administrative Order No. 1990-7 is rescinded, effective immediately.

Staff Comment: Administrative Order No. 1990-7 expanded previous Administrative Order 1989-2 authorizing courts to seek approval by the State Court Administrative Office to use videotape court recording systems on a pilot basis. The emergence of digital technology and the widespread use of video court recording by the trial courts have rendered this order obsolete. Standards and guidelines for video court recording systems have been updated and included in the SCAO *Trial Court Case File Management Standards*.

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

ADMINISTRATIVE ORDER No. 2006-9

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 28th CIRCUIT COURT, THE 84th DISTRICT COURT, AND THE PROBATE COURT OF MISSAUKEE COUNTY

Entered December 27, 2006, effective April 1, 2007 (File No. 2004-04) —REPORTER.

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

The Court hereby approves the adoption of the following concurrent jurisdiction plan effective April 1, 2007:

The 28th Circuit Court, the 84th District Court, and the Probate Court of Missaukee County

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

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

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

ADMINISTRATIVE ORDER

Entered February 6, 2007, effective immediately (File No. 2007-03)—REPORTER.

On order of the Court, Administrative Order No. 1983-3 is rescinded, effective immediately.

Staff Comment: The adoption of AO Nos. 1988-4 and 1998-4 has made AO No. 1983-3 obsolete.

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

ADMINISTRATIVE ORDER

Entered February 14, 2007, effective May 1, 2007 (File No. 2002-09) —REPORTER.

On order of the Court, Administrative Order Nos. 2001-4, 2003-4, 2004-3, and 2006-7 are rescinded, effective May 1, 2007.

Staff Comment: Administrative Order Nos. 2001-4, 2003-4, 2004-3, and 2006-7 implemented and then continued and expanded a pilot program in various courts allowing for the use of interactive video technology (IVT) in certain juvenile and probate proceedings. With the adoption of MCR 3.904 and MCR 5.738a, courts will be able to institute IVT without prior approval by the State Court Administrative Office, as long as the IVT system installed by the courts meets IVT standards established by SCAO. Thus, those administrative orders will be obsolete.

ADMINISTRATIVE ORDER
No. 2007-1

EXPANDED USE OF INTERACTIVE VIDEO TECHNOLOGY

Entered February 14, 2007, effective May 1, 2007 (File No. 2002-09) —REPORTER.

By order entered February 14, 2007, this Court has adopted new rules authorizing the use of interactive video technology (IVT) for specified hearings in delinquency proceedings, child protective proceedings, and probate matters. In addition to the use of IVT specifically authorized under new Rules 3.904 and 5.738a of the Michigan Court Rules, this Court encourages courts in appropriate circumstances to expand the use of IVT in those proceedings and matters to hearings not enumerated in the new rules by seeking permission from the State Court Administrative Office. The goal of the expanded use of IVT is to promote efficiency for the court and accessibility for the parties while ensuring that each party's rights are not compromised.

Effective May 1, 2007, each court seeking to expand its use of IVT beyond the uses set forth in new MCR 3.904 and 5.738a must submit a local administrative order for approval by the State Court Administrator, pursuant to MCR 8.112(B), describing the administrative procedures for each type of hearing for which IVT will be used. Upon a court's filing of a local administrative order, the State Court Administrative Office shall either approve the order or return the order to the chief

judge of the circuit court or the probate court for amendment in accordance with requirements and guidelines provided by the State Court Administrative Office.

The State Court Administrative Office shall assist courts in implementing the expanded use of IVT, and shall report to this Court regarding its assessment of any expanded IVT programs. Those courts approved for an expanded program of IVT use shall provide statistics and otherwise cooperate with the State Court Administrative Office in monitoring the expanded-use programs.

Staff Comment: Former Administrative Order Nos. 2001-4, 2003-4, 2004-3, and 2006-7 were rescinded with the adoption of MCR 3.904 and 5.738a, which allow courts to implement IVT programs without the approval of the State Court Administrative Office. However, the Court believes that the use of IVT should be encouraged in appropriate circumstances for additional hearings in delinquency proceedings, child protective proceedings, and probate matters. Adoption of this administrative order authorizes courts to seek to use IVT in expanded settings not currently allowed under the rules, and requires SCAO to approve and monitor those expanded-use programs for evaluation and assessment as the Court considers further amendments of the rules in the future.

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

AMENDED ADMINISTRATIVE ORDER No. 1997-10

ACCESS TO JUDICIAL BRANCH ADMINISTRATIVE INFORMATION

Entered March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

On order of the Court, the following order is effective February 1, 1998. The Court invites public comment on ways in which the objectives of the policy expressed in this order—an informed public and an accountable judicial branch—might be achieved most effectively and efficiently, consistent with the exercise of the constitutional responsibilities of the judicial branch. Comments should be sent to the Supreme Court Clerk by January 31, 1998.

(A) [Unchanged.]

(B) Access to Information Regarding Supreme Court Administrative, Financial, and Employee Records.

(1)-(6) [Unchanged.]

(7) The following are exempt from disclosure:

(a)-(l) [Unchanged.]

(m) Reports filed pursuant to MCR 8.110(C)(5), and information compiled by the Supreme Court exclusively for purposes of evaluating judicial and court performance, pursuant to MCL 600.238. Such information shall be made accessible to the public as directed by separate administrative order.

(n)-(q) [Unchanged.]

(8)-(11) [Unchanged.]

Staff Comment: This amendment corrects an incorrect reference.

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

THIRD AMENDED ADMINISTRATIVE ORDER No. 2007-2

EXPEDITED SUMMARY DISPOSITION DOCKET
IN THE COURT OF APPEALS

Entered May 2, 2007 (File Nos. 2002-34, 2002-44)—REPORTER.

Pursuant to Administrative Order No. 2004-5, this Court adopted an expedited summary disposition docket in the Court of Appeals to take effect on January 1, 2005, and to expire on December 31, 2006. On December 21, 2005, Amended Administrative Order No. 2004-5 was adopted to take effect January 1, 2006, and to expire December 31, 2007. At the request of Chief Judge WILLIAM C. WHITBECK, we now order that the expedited summary disposition docket be suspended indefinitely effective May 7, 2007.

The Court of Appeals has indicated that as of May 7, 2007, all cases currently on the expedited summary disposition track will no longer be considered on an expedited basis and will proceed on the standard track. If any party believes this shift would create a hardship or a significant inequity, a party may file a motion for appropriate relief in conformity with MCR 7.211. Parties to cases that were filed under the expedited summary disposition docket need not file a docketing statement, as is required for cases that were not filed under the expedited summary disposition docket. If tran-

scripts in an expedited summary disposition case have been ordered and are completed by the court reporter within the time limits established in Administrative Order No. 2004-5, the court reporter is entitled to charge the premium rate per page.

Staff Comment: The expedited summary disposition track was created at the request of the Court of Appeals to deal more quickly with cases that were appealed following a grant or denial of summary disposition by the trial court. It was intended to assess the question whether parties and the court could brief, argue, and dispose of cases within six months of filing. While parties generally have been able to meet the stricter briefing requirements under the program, the court's serious budget constraints have prevented it from meeting the expedited timelines, which the court believes places practitioners at a disadvantage. Rather than continue to be unable to comply with the time requirements of the expedited summary disposition track, the Court believes it is more advisable to suspend the operation of the expedited track indefinitely.

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

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted September 12, 2006, effective immediately (File No. 2004-42)—REPORTER.

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

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(4) [Unchanged.]

(5) The chief judge of the court in which criminal proceedings are pending shall have filed with the state court administrator a quarterly report listing the following cases in a format prescribed by the state court administrator:

(a) felony cases in which there has been a delay of more than 301 days between the order binding the defendant over to circuit court and adjudication;

(b) misdemeanor cases and cases involving local ordinance violations that have criminal penalties in which there has been a delay of more than 126 days between the date of the defendant's first appearance on the warrant and complaint or citation and adjudication.

(c) In computing the 126-day and 301-day periods, the court shall exclude periods of delay

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

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

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

(6)-(7) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The amendments modify the reporting requirements for the Delay in Criminal Proceedings Report to reflect the 100 percent disposition periods incorporated in Administrative Order No. 2003-7, to make the reporting quarterly instead of monthly, and to eliminate the need to give a reason for delay.

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

Adopted October 3, 2006, effective January 1, 2007 (File No. 2006-15)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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 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 payable 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 in 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 amendment of MCR 2.420 clarifies the requirement that the payment of proceeds may be made only 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.

Adopted October 3, 2006, effective January 1, 2007 (File No. 2005-43)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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: New Rule 3.929 states that filing records by facsimile communication equipment is allowed in juvenile proceedings. MCR 3.903(A)(24) defines the term "records," and MCR 2.406 governs the filing of records by facsimile communication equipment.

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

Adopted October 3, 2006, effective Januaray 1, 2007 (File No. 2006-17)—REPORTER.

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

RULE 5.744. PROCEEDINGS REGARDING HOSPITALIZATION WITHOUT A HEARING.

(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 and the rights of that individual.

(B) Notification. A notification requesting an order of hospitalization or a notification requesting a 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)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 5.744 expands the scope of the rule to more accurately reflect the 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.

Adopted October 3, 2006, effective January 1, 2007 (File No. 2004-44)—REPORTER.

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

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.977(I)(3) or MCR 6.425(F)(2), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of

testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

Staff Comment: The amendment of MCR 7.210 resolves a conflict between this rule, which generally requires production of the full transcript of testimony and other proceedings in the trial court or tribunal for appeal, and MCR 3.977(I)(1)(b), which allows the trial court to furnish only the portions of the transcript and record the attorney requires to appeal. See, also, Administrative Memorandum 2004-02.

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

Adopted October 17, 2006, effective January 1, 2007 (File Nos. 2006-07, 2006-08)—REPORTER.

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

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A) [Unchanged.]

(B) Answer.

(1) [Unchanged.]

(2) Subject to subrule (3), 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, 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.

(4) [Renumbered but otherwise 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.

(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 amendment of subrule (B) extends the time to answer certain motions from 7 to 14 days, and establishes a new category of motions that can be decided in less than 7 days without delaying submission until the answer period has expired. The amendment also clarifies 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 amendment of subrule (C) reduces 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 is retained for all other appeals

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

Adopted October 24, 2006, effective January 1, 2007 (File No. 2005-04)—REPORTER.

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

RULE 3.915. ASSISTANCE OF ATTORNEY.

(A) [Unchanged.]

(B) Child Protective Proceedings.

(1) [Unchanged.]

(2) Child.

(a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d. At each hearing, the court shall inquire whether the lawyer-guardian ad litem has met or had contact with the child, as required by the court or MCL 712A.17d(1)(d) and if the lawyer-guardian ad litem has not met or had contact with the child, the court shall require the lawyer-guardian ad litem to state, on the record, the reasons for failing to do so.

(b) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.963. PROTECTIVE CUSTODY OF CHILD.

(A) [Unchanged.]

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. When appropriate, the court shall make a judicial determination that reasonable efforts to prevent removal of the

child have been made. The court may also include in such an order authorization to enter specified premises to remove the child.

(2) The written order must indicate that the judge or referee has determined that continuation in the home is contrary to the welfare of the child and must state the basis for that determination.

(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(10) [Unchanged.]

(11) Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial. The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b). The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631.

(12)-(13) [Unchanged.]

(C) Pretrial Placement; Contrary to the Welfare Determination.

(1)-(2) [Unchanged.]

(3) Findings. If placement is ordered, the court must make a statement of findings, in writing or on the record, explicitly including the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding. If the "contrary to

the welfare of the child" finding is placed on the record and not in a written statement of findings, it must be capable of being transcribed. The findings may be made on the basis of hearsay evidence that possesses adequate indicia of trustworthiness.

(4)-(7) [Unchanged.]

(D) Pretrial Placement; Reasonable Efforts Determination. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court.

(1) When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether the agency has made reasonable efforts to prevent the removal of the child or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. Nunc pro tunc orders or affidavits are not acceptable.

(2) Reasonable efforts to prevent a child's removal from the home are not required if a court of competent jurisdiction has determined that

(a) the parent has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, MCL 722.638 (1) and (2); or

(b) the parent has been convicted of 1 or more of the following:

(i) murder of another child of the parent,

(ii) voluntary manslaughter of another child of the parent,

(iii) aiding or abetting, or attempting, conspiring, or soliciting to commit a murder, or aiding and abetting the commission of a voluntary manslaughter, of another child of the parent, or

(iv) a felony assault that results in serious bodily injury to the child or another child of the parent; or

(c) parental rights of the parent with respect to a sibling have been terminated involuntarily.

(E) [Unchanged.]

RULE 3.966. OTHER PLACEMENT REVIEW PROCEEDINGS.

(A) Review of Placement Order and Initial Service Plan.

(1) On motion of a party, the court must review the placement order or the initial service plan, and may modify the order and plan if it is in the best interest of the child and, if removal from the parent, guardian, or legal custodian is requested, determine whether the conditions in MCR 3.965(C)(2) exist.

(2) If the child is removed from the home and disposition is not completed, the progress of the child must be reviewed no later than 182 days from the date the child was removed from the home.

(B)-(C) [Unchanged.]

RULE 3.972. TRIAL.

(A) Time. If the child is not in placement, the trial must be held within 6 months after the filing of the petition unless adjourned for good cause under MCR 3.923(G). If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:

(1) on stipulation of the parties for good cause;

(2) because process cannot be completed; or

(3) because the court finds that the testimony of a presently unavailable witness is needed.

When trial is postponed pursuant to subrule (2) or (3), the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child.

If the child has been removed from the home, a review hearing must be held within 182 days of the date of the child's removal from the home, even if the trial has not been completed before the expiration of that 182-day period.

(B)-(E) [Unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(B) [Unchanged.]

(C) Time. The interval, if any, between the trial and the dispositional hearing is within the discretion of the court. When the child is in placement, the interval may not be more than 28 days, except for good cause.

(D)-(H) [Unchanged.]

RULE 3.974. POST-DISPOSITIONAL PROCEDURES: CHILD AT HOME.

(A) Review of Child's Progress.

(1) General. The court shall periodically review the progress of a child not in foster care over whom it has retained jurisdiction.

(2) Time. If the child was never removed from the home, the progress of the child must be reviewed no later than 182 days from the date the petition was filed and no later than every 91 days after that for the first year that the child is subject to the jurisdiction of the court. After that first year, a review hearing shall be

held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding hearing until the court terminates its jurisdiction. The review shall occur no later than 182 days after the child returns home when the child is no longer in foster care. If the child was removed from the home and subsequently returned home, review hearings shall be held in accordance with MCR 3.975.

(3) Change of Placement. Except as provided in subrule (B), the court may not order a change in the placement of a child solely on the basis of a progress review. If the child over whom the court has retained jurisdiction remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court must conduct a hearing before it may order the placement of the child. Such a hearing must be conducted in the manner provided in MCR 3.975(E).

(B)-(C) [Unchanged.]

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(B) [Unchanged.]

(C) Time. The court must conduct dispositional review hearings at intervals as follows, as long as the child remains in foster care:

(1) not more than 182 days after the child's removal from his or her home and no later than every 91 days after that for the first year that the child is subject to the jurisdiction of the court. After the first year that the child has been removed from his or her home and is subject to the jurisdiction of the court, a review hearing shall be held not more than 182 days from the immediately preceding review hearing before the end of that first year and no

later than every 182 days from each preceding review hearing thereafter until the case is dismissed; or

(2) if a child is under the care and supervision of the agency and is either placed with a relative and the placement is intended to be permanent or is in a permanent foster family agreement, not more than 182 days after the child has been removed from his or her home and no later than 182 days after that so long as the child is subject to the jurisdiction of the court, the Michigan Children's Institute, or other agency as provided in MCR 3.976(E)(3).

A review hearing under this subrule shall not be canceled or delayed beyond the number of days required in this subrule, regardless of whether a petition to terminate parental rights or another matter is pending.

(D)-(F) [Unchanged]

(G) Dispositional Review Orders. The court, following a dispositional review hearing, may:

(1) order the return of the child home,

(2) change the placement of the child,

(3) modify the dispositional order,

(4) modify any part of the case service plan,

(5) enter a new dispositional order, or

(6) continue the prior dispositional order.

(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A) [Unchanged.]

(B) Time.

(1) An initial permanency planning hearing must be held within 28 days after a judicial determination that

reasonable efforts to reunite the family or to prevent removal are not required given one of the following circumstances:

(a) There has been a judicial determination that the child's parent, guardian, custodian, or nonparent adult has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, 1975 PA 238, MCL 722.638.

(b) The parent has been convicted of one or more of the following:

(i) murder of another child of the parent;

(ii) voluntary manslaughter of another child of the parent;

(iii) aiding or abetting, or attempting, conspiring, or soliciting to commit the murder of another child of the parent, or aiding and abetting the voluntary manslaughter of another child of the parent, or the attempted murder of the child or another child of the parent; or

(iv) a felony assault that results in serious bodily injury to the child or another child of the parent.

(c) The parent has had rights to one of the child's siblings involuntarily terminated.

(2) If subrule (1) does not apply, the court must conduct an initial permanency planning hearing no later than 12 months after the child's removal from the home, regardless of whether any supplemental petitions are pending in the case.

(3) Requirement of Annual Permanency Planning Hearings. During the continuation of foster care, the court must hold permanency planning hearings beginning no later than 12 months after the initial permanency planning hearing. The interval between permanency planning hearings is within the discretion of the court as

appropriate to the circumstances of the case, but must not exceed 12 months. The court may combine the permanency planning hearing with a review hearing.

(4) The judicial determination to finalize the court-approved permanency plan must be made within the time limits prescribed in subsections (1)-(3).

(C) Notice. The parties entitled to participate in a permanency planning hearing include the parents of the child, if the parent's parental rights have not been terminated, the child, if the child is of an appropriate age to participate, foster parents, pre-adoptive parents, and relative caregivers. Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

(D) [Unchanged.]

(E) Determinations; Permanency Options.

(1)-(2) [Unchanged.]

(3) Other Permanency Plans. If the court does not return the child to the parent, guardian, or legal custodian, and if the agency demonstrates that termination of parental rights is not in the best interest of the child, the court may

(a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child, or

(b) place the child with a fit and willing relative, or

(c) upon a showing of compelling reasons, place the child in an alternative planned permanent living arrangement.

The court must articulate the factual basis for its determination in the court order adopting the permanency plan.

RULE 3.978. POST-TERMINATION REVIEW HEARINGS.

(A) Review Hearing Requirement. If a child remains in foster care following the termination of parental rights to the child, the court must conduct a hearing not more than 91 days after the termination of parental rights and not later than every 91 days after that hearing for the first year following the termination of parental rights to the child. At the post-termination review hearing, the court shall review the child's placement in foster care and the progress toward the child's adoption or other permanent placement, as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan Children's Institute or other agency. If the child is residing in another permanent planned living arrangement or is placed with a fit and willing relative and the child's placement is intended to be permanent, the court must conduct a hearing not more than 182 days from the preceding review hearing.

(B)-(D) [Unchanged.]

Staff Comment: The amendment of MCR 3.915 corresponds with the January 3, 2005, amendments of MCL 712A.17d enacted in 2004 PA 475 requiring the lawyer-guardian ad litem to "meet with or observe the child," and authorizing the court to allow alternative means of contact with the child if good cause is shown on the record. Other changes in MCR 3.915 are stylistic changes of the rule's language.

The amendment of MCR 3.963(B)(1) reflects the reality that Family Division judges or referees are not always presented with a petition when

a request is made to remove a child from the home. In emergency circumstances, a police officer or social worker may seek the court's permission to remove a child from a home, but will not have an opportunity to draft a petition before seeking the child's removal. Other changes require orders authorizing the removal of a child to be in writing.

The amendment of MCR 3.965(B)(11) more accurately reflects the decisions made at the preliminary hearing in Family Division courts and discourages the practice of the court's placing a child in a specific foster care facility. "Foster care" is defined in MCR 3.903(C)(4) as including placement with a relative and specifies that the court has given the Family Independence Agency (now the Department of Human Services) placement and care responsibility.

The amendments of MCR 3.965(C)(3) require the court to make not only a "contrary to the welfare" finding, but also to include the reasons for that finding.

The amendments of MCR 3.965(D)(2) conform the rule language to that of the recent amendments of the "reasonable efforts" language in MCL 712A.19a, as amended by 2004 PA 473, and make its language consistent with the proposed "reasonable efforts" language in MCR 3.976(B)(1). The amendments add language to clarify that a court can determine that an agency has made reasonable efforts to prevent removal or can determine that reasonable efforts to prevent removal are not required due to aggravated circumstances.

The amendments of MCR 3.966 delete the term "custody order," and add the requirement from 2004 PA 477 that a review hearing occur within 182 days of a child's removal from the home.

The amendments of MCR 3.972 conform the rule language to the requirements of the Adoption and Safe Families Act and foster compliance with the timing requirements of that act, thereby helping to ensure that children in foster care will receive federal funding. The amendments require that a review hearing be held within 182 days of a child's removal from the home, even if the trial in the proceeding has not been completed.

The amendment of MCR 3.973(C), reducing the time for holding a dispositional hearing from 35 to 28 days, conforms the time for resolving an abuse and neglect case to the mandatory federal time lines for ensuring that a child removed from the home receives federal foster care funding. Although federal law does not require that a dispositional hearing be held within a certain period, adding this requirement will encourage courts to complete disposition within 91 days, which then prompts scheduling of a dispositional review hearing 91 days later, and

ensure compliance with the federal requirement to complete a review hearing within 182 days of the child's removal from the home.

The amendment of MCR 3.974(A)(2) conforms the review hearing time lines to recent statutory amendments of MCL 712A.19 as implemented by 2004 PA 477. It also requires courts to hold a hearing to conduct a review, which will generate an order with appropriate findings and determinations.

The amendment of MCR 3.975 conforms the review hearing time lines to statutory amendments of MCL 712A.19 as implemented by 2004 PA 477.

The amendments of MCR 3.976(B)(1) track amendments of MCL 712A.19a of the Juvenile Code as adopted by 2004 PA 473. The change of the phrase "one year" to "12 months" in subrules (B)(2) and (3) conforms the rule's language to that used in the Juvenile Code and to the other Family Division rules that generally mention time limits in terms of months rather than years. The additional language in subrule (2) and new subrule (4) ensures that the permanency planning hearing is completed within the time limitations required by the Adoption and Safe Families Act (ASFA), 42 USC 675(C). Compliance with ASFA is necessary for a child placed in foster care to receive federal funds. 42 USC 672. Amendments of MCR 3.975(C) clarify, in compliance with federal regulations, the specific parties that are entitled to participate in permanency planning hearings. Amendments of MCR 3.976(E)(1) clarify the kinds of placement decisions courts must make in order to comply with the Children's Bureau's interpretation of ASFA regarding qualifying placements for federal foster care funds.

The amendment of MCR 3.978(A) clarifies a misconception created by the existing language of the subrule. Because the current language appears to create an exception for relative placements and permanent foster care arrangements, courts often failed to hold the requisite post-termination review hearings in such situations. The amendment makes it clear to Family Division courts that they are required to hold post-termination review hearings even in cases in which the child is placed with a relative or in a long-term foster care setting. The phrase "permanent planned living arrangement" replaces the reference to "permanent foster family agreement." The substituted phrase comports with the Children's Bureau's interpretation of ASFA regarding qualifying permanent placements for receipt of federal foster care funds.

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

Adopted November 7, 2006, effective January 1, 2007 (File No. 2005-22) —REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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 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 amendment of MCR 3.972(C)(2) allows testimony of the child to be admitted in a child protective proceeding trial if the statement is offered by a person who heard the child make the statement.

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

Adopted December 5, 2006, effective January 1, 2007 (File No. 2005-12)—REPORTER.

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

RULE 5.403. PROCEEDINGS ON TEMPORARY GUARDIANSHIP.

(A) [Unchanged.]

(B) Notice of Hearing, Minor. For good cause stated on the record and included in the order, the court may shorten the period for notice of hearing or may dispense with notice of a hearing for the appointment of a temporary guardian of a minor, except that the minor shall always receive notice if the minor is 14 years of age or older. If a temporary guardian is appointed following an ex parte hearing in a case in which the notice period was shortened or eliminated, the court shall send notice of the appointment to all interested persons. The notice shall inform the interested persons about their right to object to the appointment, the process for objecting, and the date of the next hearing, if any. If an interested person objects to the appointment of a temporary guardian following an ex parte hearing in a case in which the notice period was

shortened or eliminated, the court shall hold a hearing on the objection within 14 days from the date the objection is filed.

(C) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The amendment of MCR 5.403(B) requires the court to state on the record and in the order the reasons for shortening or eliminating notice of hearing for the appointment of a temporary guardian of a minor. It also requires the court to serve interested persons with notice that a temporary guardian has been appointed for a minor, if the appointment followed an ex parte hearing for which the notice period was shortened or eliminated. The new rule provisions allow interested persons to object to entry of the order and have a hearing on the matter within 14 days.

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

Adopted January 23, 2007, effective May 1, 2007 (File No. 2006-05) —REPORTER.

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

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

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.106, 6.125, 6.427, 6.445(A)-(G), and the rules in subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1)-(2) [Unchanged.]

(3) Immediately after imposing a sentence of incarceration, even if suspended, 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 14 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, even if suspended, and the defendant is indigent, the court must enter an order appointing a lawyer if, within 14 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 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition. 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.

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 amendment of Rule 6.001 makes subrules 6.005(B) and (C) applicable to misdemeanor cases. Subrules 6.005(B) and (C) set forth the factors to be used by the court in determining whether a criminal defendant is indigent and, if a defendant is able to pay part of the cost of a lawyer, allow the court to require the defendant to contribute to the cost of providing a lawyer and establish a plan for collecting the contribution.

The amendment of Rule 6.610 ensures that indigent defendants who are convicted in district court and sentenced to terms of incarceration, are aware of their right to counsel pursuant to *Halbert v Michigan*, 545 US 605 (2005), and *Shelton v Alabama*, 535 US 654 (2002). The amendment requires that after imposing a sentence of incarceration, even if suspended, the court must advise the defendant that 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 if the request for a lawyer is made within 14 days after sentencing.

The amendment of Rule 6.625 requires the court to enter an order appointing a lawyer to represent an indigent defendant on appeal from a conviction in district court if the court imposed a sentence of incarceration, even if suspended, and the defendant requests a lawyer within 14 days after sentencing. If there is a postjudgment motion pending, the court must rule on the request for counsel within 14 days after the disposition of the postjudgment motion. The amendment also provides that if a lawyer is appointed, the 21 days for taking an appeal pursuant to subrules 7.101(B)(1) and 7.103(B)(1) shall commence on the day of the appointment.

The amendment of Rule 7.103 is a technical amendment necessitated by the amendment of Rule 6.625.

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

Adopted January 23, 2007, effective May 1, 2007 (File No. 2004-48) —REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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) attend to other matters assigned by the Supreme Court.

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(F) [Unchanged.]

(G) Certification.

(1) Certification Requirement.

(a) Only reporters, recorders, 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, 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 $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.

(B) [Unchanged.]

Staff Comment: These changes clarify that certified electronic operators do not have the authority to prepare transcripts. The amendments also increase the late renewal fee to $100, and 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.

Entered January 23, 2007, effective immediately (File No. 2005-17) —REPORTER.

By order dated February 23, 2006, this Court amended Rule 7.213 of the Michigan Court Rules, effective imme-

diately. 474 Mich cclx (2006). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment, which granted priority status in the Court of Appeals to cases involving election issues. Notice and an opportunity for comment at a public hearing having been provided, the amendment of Rule 7.213 is retained.

Entered January 23, 2007, effective immediately (File No. 2004-42) —REPORTER.

By order dated September 12, 2006, this Court amended Rule 8.110 of the Michigan Court Rules, effective immediately. 477 Mich clxxv (2006). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment, which eased the reporting requirements for trial courts submitting information in the Delay in Criminal Proceedings Report. Notice and an opportunity for comment at a public hearing having been provided, the amendment of Rule 8.110 is retained.

Adopted February 14, 2007, effective May 1, 2007 (File No. 2002-09) —REPORTER.

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

RULE 3.904. USE OF INTERACTIVE VIDEO TECHNOLOGY.

(A) Facilities. Courts may use two-way interactive video technology to conduct the proceedings outlined in subrule (B).

(B) Hearings.

(1) Delinquency Proceedings. Two-way interactive video technology may be used to conduct hearings in

which the court does not order a more restrictive placement or more restrictive treatment, and may be used to conduct preliminary hearings under MCR 3.935(A)(1), postdispositional progress reviews, and dispositional hearings.

(2) Child Protective Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings or review hearings.

(C) Mechanics of Use. The use of two-way interactive video technology must be conducted in accordance with any requirements and guidelines established by the State Court Administrative Office. All proceedings at which such technology is used must be recorded verbatim by the court.

RULE 5.738a. USE OF INTERACTIVE VIDEO TECHNOLOGY.

(A) Probate courts may use two-way interactive video technology to conduct the proceedings outlined in subrule (B).

(B) Hearings. Probate courts may use two-way interactive video technology to conduct hearings concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons receiving treatment in mental health facilities.

(C) Mechanics of Use. The use of two-way interactive video technology must be conducted in accordance with any requirements and guidelines established by the State Court Administrative Office. All proceedings at which such technology is used must be recorded verbatim by the court.

Staff comment: Rule 3.904, effective May 1, 2007, allows courts to use interactive video technology during the specified delinquency and child protective proceedings, if the court does not order more restrictive placement or treatment.

Rule 5.738a, effective May 1, 2007, allows courts to use interactive video technology to conduct hearings concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons receiving treatment in mental health facilities.

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

Adopted March 7, 2007, effective May 1, 2007 (File No. 2006-26)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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,

(g) 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,

(k) 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 adds a requirement mandated by 42 USC 629h that for states receiving federal Court Improvement Program grants, a court rule must be in effect ensuring that foster parents, preadoptive parents, and relative caregivers are notified of any proceedings relating to the child. Form JC 45 will be amended to allow courts to instruct the Department of Human Services to provide notice to the listed individuals, and to require the Department of Human Services to inform courts that it has notified the required parties.

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

Adopted March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A)-(C) [Unchanged.]

(D) Proof of Service. Except as otherwise provided by MCR 2.104, 2.105, or 2.106, proof of service of papers required or permitted to be served may be by written acknowledgment of service, affidavit of the person making the service, a statement regarding the service verified under MCR 2.114(B), or other proof satisfactory to the court. The proof of service may be included at the end of the paper as filed. Proof of service must be filed promptly and at least at or before a hearing to which the paper relates.

(E)-(G) [Unchanged.]

Staff Comment: This amendment corrects an incorrect reference.

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

Adopted March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 2.314. DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY.

(A)-(B) [Unchanged.]

(C) Response by Party to Request for Medical Information.

(1) A party who is served with a request for production of medical information under MCR 2.310 must either:

(a)-(b) [Unchanged.]

(c) object to the request as permitted by MCR 2.310(C)(2); or

(d) [Unchanged.]

(2) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: This amendment corrects an incorrect reference.

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

Adopted March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A) Scope and Applicability of Rule, Definitions.

(1) All domestic relations cases, as defined in MCL 552.502(l), are subject to mediation under this rule, unless otherwise provided by statute or court rule.

(2)-(4) [Unchanged.]

(B)-(K) [Unchanged.]

Staff Comment: This amendment corrects a reference to a relettered provision of MCL 552.502, the Friend of the Court Act.

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

Adopted March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(4) [Unchanged.]

(5) "custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, or a case in which the family division of circuit court has entered an order terminating parental rights or an order of disposition removing a child from the child's home;

(6) [Unchanged.]

Staff Comment: This change reflects the fact that after court reorganization accomplished pursuant to MCL 600.1001 *et seq.*, cases involving the termination of parental rights are handled by the family division of circuit court, and not by the juvenile division of probate court.

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

Adopted March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 7.313. MOTIONS IN SUPREME COURT.

(A) What to File. To have a motion heard, a party must file with the clerk:

(1)-(3) [Unchanged.]

(4) the fee provided by MCR 7.319(B)(7)(c) or (d); and

(5) [Unchanged.]

Eight copies of the motion must be filed, except only 2 copies need be filed of a motion to extend time, to place a case on or withdraw a case from the session calendar, or for oral argument. The attorney must sign the motion. By filing a motion for immediate consideration, a party may obtain an earlier hearing on the motion.

(B)-(E) [Unchanged.]

Staff Comment: This change reflects the fact that two different motion fees are applicable in the Michigan Supreme Court, and adds a reference so that both are included.

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

Adopted March 14, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 8.103. STATE COURT ADMINISTRATOR.

The state court administrator, under the Supreme Court's supervision and direction, shall:

(1)-(2) [Unchanged.]

(3) on receipt of the quarterly reports as provided in MCR 8.110(C)(5), investigate each case in an effort to determine the reason for delays, recommend actions to eliminate delays, and recommend further actions to expedite process to insure speedy trials of criminal cases;

(4)-(11) [Unchanged.]

Staff Comment: This change is required as a result of a previous amendment of MCR 8.110, dated September 12, 2006, in ADM File No. 2004-42, requiring that the Delay in Criminal Proceedings Report be submitted quarterly instead of monthly.

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

Adopted March 15, 2007, effective May 1, 2007 (File No. 2007-02)—REPORTER.

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

RULE 6.433. DOCUMENTS FOR POSTCONVICTION PROCEEDINGS; INDIGENT DEFENDANT.

(A) Appeals of Right. An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(G)(2), must order the preparation of the transcript.

(B)-(C) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provi-

sions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

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

(a) in accordance with MCR 6.425(G)(3);

(b)-(d) [Unchanged.]

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

(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.977(I)(3) or MCR 6.425(G)(2), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

Staff Comment: These changes reflect relettered provisions of MCR 6.425.

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

Adopted March 20, 2007, effective immediately (File No. 2006-21)—REPORTER.

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

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) [Unchanged.]

(B) Notice to Personal Representative. At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. The notice should be substantially in the following form or in the form specified by MCR 5.310(E), if applicable:

"Inventory Information: Within 91 days of the date of the letters of authority, you must submit to the court the information necessary for computation of the probate inventory fee.

"Change of Address: You must keep the court and all interested persons informed in writing within 7 days of any change in your address.

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all

interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the original appointment and all subsequent anniversaries during which the administration remains uncompleted.

"Duty to Complete Administration of the Estate: You must complete the administration of the estate and file appropriate closing papers with the court. Failure to do so may result in personal assessment of costs."

(C)-(D) [Unchanged.]

RULE 5.310. SUPERVISED ADMINISTRATION.

(A)-(D) [Unchanged.]

(E) Notice to Personal Representative. When supervised administration is ordered, the court must serve a written notice of duties on the personal representative. The notice must be substantially as follows:

"Inventories: You are required to file an inventory of the assets of the estate within 91 days of the date of your letters of authority or as ordered by the court. The inventory must list in reasonable detail all the property owned by the decedent at the time of death, indicating, for each listed item, the fair market value at the time of decedent's death and the type and amount of any encumbrance. If the value of any item has been obtained through an appraiser, the inventory should include the appraiser's name and address with the item or items appraised by that appraiser.

"Accountings: You are required to file annually, or more often if the court directs, a complete itemized accounting of your administration of the estate, showing in detail all the receipts and disbursements and the property remaining in your hands together with the form of the property. When the estate is ready for

closing, you are required to file a final accounting and an itemized and complete list of all properties remaining. Subsequent annual and final accountings must be filed within 56 days after the close of the accounting period.

"Change of Address: You are required to keep the court and interested persons informed in writing within 7 days of any change in your address.

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the original appointment and all subsequent anniversaries during which the administration remains uncompleted.

"Duty to Complete Administration of Estate: You must complete the administration of the estate and file appropriate closing papers with the court. Failure to do so may result in personal assessment of costs."

(F)-(H) [Unchanged.]

Staff Comment: The amendments of MCR 5.307(B) and 5.310(E) conform to language in MCL 700.3951 by clarifying that a Notice of Continued Administration is tracked from the date of the appointment of the original personal representative, including a special personal representative.

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

Adopted March 20, 2007, effective May 1, 2007 (File No. 2003-21)—REPORTER.

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

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.

(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.

(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.

(E) [Relettered but otherwise unchanged.]

(F) [Relettered but otherwise unchanged.]

Staff comment: This amendment allows a judge admonished by the Judicial Tenure Commission to request review of the admonishment by the Supreme Court. The amendment in subsection B adds a letter designation and descriptive heading to the provision relating to adjournments granted for requests for investigation filed within 90 days of an election in which the respondent is a candidate.

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

CORRIGAN, J. (*concurring*). I concur in the order, which adopts revisions to MCR 9.207 that allow judges to seek review in this Court of certain decisions of the Judicial Tenure Commission (JTC). The JTC, under MCR 9.207(B)(4), already has the power to admonish a judge in lieu of filing a complaint. Accordingly, at this time, I favor the addition of MCR 9.207(D)(5), which allows judges to appeal such decisions to this Court. In the meantime, however, I would engage in further study of the imposition of private sanctions by the JTC under MCR 9.207(B) and whether those sanctions are lawful, desirable, and workable.

WEAVER, J. (*dissenting).* I dissent from the amendment of this court rule, MCR 9.207, allowing for a judge subject to admonishment by the Judicial Tenure Commission (JTC) to ask the Supreme Court to review the matter, because MCR 9.207(B)(4) itself is unconstitutional. MCR 9.207(B)(4) is unconstitutional because it authorizes the JTC to "admonish" judges.

MCR 9.207(B) states:

> (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:
>
> * * *
>
> (4) admonish the respondent,

The power to admonish a judge is equivalent to the power to censure a judge. By its plain meaning, a common usage of "admonish" means to "reprove mildly." *The New American Webster's Dictionary* (1995). A common definition of "reprove" means to "censure." *The New American Webster's Dictionary* (1995). Thus MCR 9.207(B)(4) gives the JTC the power to directly censure judges.

This delegation of power contravenes Const 1963, art 6, § 30(2), which states that the JTC can *recommend censure* to the Supreme Court. Art 6, § 30(2) does not provide any language authorizing the JTC to directly censure a judge. The JTC does not have the power to "admonish" judges because under Const 1963, art 6, § 30(2), the JTC only has the power to *recommend* "censure" to the Michigan Supreme Court.

Const 1963, art 6, § 30(2) states:

> *On recommendation of the judicial tenure commission,*

> *the supreme court may censure . . . . The supreme court shall make rules implementing this section* and providing for confidentiality and privilege of proceedings. [Emphasis added.]

The last sentence of art 6, § 30(2) of the Michigan Constitution only allows the Supreme Court to make court rules authorizing the JTC to *recommend* censure, suspension, or removal of a judge to the Supreme Court for final action—it does not authorize the Supreme Court to make rules that allow the JTC to directly censure judges. The Supreme Court does not have the constitutional authority to confer on the JTC the power to censure judges. The Supreme Court is constitutionally authorized only to "make rules implementing [Const 1963, art 6, § 30(2),]"[1] which states that "on recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge."[2] Giving the JTC the power to directly censure judges goes beyond implementing the power to recommend—it unconstitutionally gives the JTC authority that is constitutionally delegated to the Supreme Court.

Because MCR 9.207(B)(4), the rule allowing the JTC to admonish judges, is unconstitutional, I dissent from the amendment of MCR 9.207 allowing for a judge subject to admonishment by the JTC to ask the Supreme Court to review the matter.

YOUNG, J. (*dissenting*). I dissent from the amendment to MCR 9.207. I do not favor any changes in our court rules that perpetuate the normalization of private resolutions to judicial ethical violations. Rather, I believe that private censures and private admonitions by the Judicial Tenure Commission should be completely eliminated.

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[1] Const 1963, art 6, § 30(2).

[2] *Id.*

Adopted March 27, 2007, effective May 1, 2007 (File No. 2006-31)—REPORTER.

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

RULE 9.227. IMMUNITY.

A person is absolutely immune from civil suit for statements and communications transmitted solely to the commission, its employees, or its agents, or given in an investigation or proceeding on allegations regarding a judge, and no civil action predicated upon the statements or communications may be instituted against a complainant, a witness, or their counsel. Members of the commission, their employees and agents, masters, and examiners are absolutely immune from civil suit for all conduct in the course of their official duties.

Staff Comment: This proposal extends immunity from civil suit for statements or communications made to agents of the Judicial Tenure Commission, and adds agents to the individuals who are immune from civil suit for conduct in the course of their official duties with the commission.

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

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted November 14, 2006, effective immediately (File No. 2006-39) —REPORTER.

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

RULE 1.10. IMPUTED DISQUALIFICATION: GENERAL RULE.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a) or (c), or 2.2. If a lawyer leaves a firm and becomes associated with another firm, MRPC 1.10(b) governs whether the new firm is imputedly disqualified because of the newly hired lawyer's prior services in or association with the lawyer's former law firm.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, is disqualified under Rule 1.9(b), unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Staff Comment: This amendment clarifies that when an attorney associates with a new firm, the attorney's disqualification does not necessarily disqualify the attorney's new firm by imputed disqualification, if the new firm imposes timely and appropriate screening under MRPC 1.10(b). The amendment clarifies that MRPC 1.10(b) governs the issue of imputed disqualification following the transfer of an attorney to a new firm, which was the intent of the rule and has been the practice since the rule was adopted in 1988 and further amendments were adopted in 1990. This proposal was prompted by the decision issued in *Nat'l Union Fire Ins Co v Alticor, Inc,* 466 F3d 456 (CA 6, 2006).

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

SUPREME COURT CASES

PEOPLE v PRICE

Docket No. 128156. Decided October 31, 2006. On application by the defendant for leave to appeal, the Supreme Court held the application in abeyance pending the decision in another case. Following the denial of leave to appeal in that case, the Supreme Court directed the prosecution to respond to the application for leave to appeal in this case. Following such response, the Supreme Court, in a memorandum opinion, remanded the matter to the trial court for resentencing and, in all other respects, denied leave to appeal.

Tore L. Price pleaded guilty in the Oakland Circuit Court, Rudy J. Nichols, J., of bank robbery. The plea was pursuant to a *Cobbs* agreement that the defendant would be sentenced within the appropriate statutory sentencing guidelines range. See *People v Cobbs*, 443 Mich 276 (1993). The trial court sentenced the defendant within the range as scored by the court. The trial court then denied the defendant's motion for resentencing, which motion alleged that prior record variable (PRV) 1 and offense variable (OV) 13 were improperly scored. The Court of Appeals, MURPHY, P.J., and BANDSTRA and HOEKSTRA, JJ., denied the defendant's delayed application for leave to appeal in an unpublished order, entered January 11, 2005 (Docket No. 258410). On application by the defendant for leave to appeal, the Supreme Court held the application in abeyance pending the decision in *People v McKay* (Docket No. 126930). 703 NW2d 806 (2005). Following denial of leave to appeal in *McKay*, 474 Mich 967 (2005), the prosecution was directed to respond to the defendant's application. 713 NW2d 771 (2006).

In a unanimous memorandum opinion the Supreme Court *held*:

PRV 1 and OV 13 were scored improperly. The matter must be remanded to the trial court for resentencing. Leave to appeal was denied in all other respects.

1. The trial court erred in scoring 50 points for PRV 1 on the basis that the defendant had two prior high severity felony convictions. The defendant's two prior convictions in Canada do not constitute convictions of "a felony under a law of the United

States or another state" for the purposes of scoring PRV 1. MCL 777.51(2). Therefore, PRV 1 should have been scored at zero points.

2. The trial court erred in assessing 25 points for OV 13 on the basis that the instant offense was part of a pattern of criminal activity involving three or more crimes against a person. Only those crimes committed during a five-year period that encompasses the sentencing offense can be considered for such purposes under MCL 777.43(2)(a). The two prior offenses considered here did not occur within five years of the sentencing offense. Therefore, OV 13 should have been scored at zero points. When PRV 1 and OV 13 are scored at zero points, as they should be, the appropriate guidelines range is five to 21 months, and, thus, defendant's sentence of 60 months to 15 years is not within the appropriate guidelines range.

3. Although the foreign convictions may not be considered in scoring PRV 1 and the two prior offenses that did not occur within five years of the sentencing offense cannot be considered under OV 13, those convictions and offenses may, under appropriate circumstances, give rise to substantial and compelling reasons to justify a departure from the guidelines range. However, if the trial court, on remand, decides to depart from the guidelines range, the defendant must be afforded an opportunity to withdraw his guilty plea, which was tendered in reliance on the trial court's agreement to impose a sentence within the guidelines range.

CAVANAGH, J., concurring, wrote separately to note that the only appropriate circumstance in which a conviction from a foreign nation may be considered to be a substantial and compelling reason to depart from the sentencing guidelines range is where the defendant was afforded due process by the foreign nation.

CORRIGAN, J., concurring, wrote separately to emphasize that only under appropriate circumstances may foreign convictions give rise to a substantial and compelling reason to depart from the sentencing guidelines range. It is reasonable to conclude that such appropriate circumstances do not exist where a defendant was convicted in a foreign nation that does not afford due process rights. In this case, it is undisputed that Canada does afford due process rights. Accordingly, the sentencing court on remand may consider whether the defendant's Canadian convictions are a substantial and compelling reason to depart from the guidelines.

Remanded for resentencing; leave to appeal denied in all other respects.

1. SENTENCES — PRIOR RECORD VARIABLES — WORDS AND PHRASES — ANOTHER STATE.

A "prior high severity felony conviction" for purposes of scoring prior record variable 1 is a conviction for a crime listed in offense class M2, A, B, C, or D or for a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D if the conviction was entered before the sentencing offense was committed; the term "another state" refers to one of the states, other than Michigan, that comprise the United States (MCL 777.51[2]).

2. SENTENCES — PRIOR RECORD VARIABLES — FOREIGN CONVICTIONS.

Although convictions in a foreign country cannot be considered under prior record variable 1, they can, under appropriate circumstances, give rise to a substantial and compelling reason to justify a departure from the guidelines range consistent with the standards articulated in *People v Babcock,* 469 Mich 247 (2003) (MCL 777.51[2]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David Gorcyca*, Prosecuting Attorney, *Joyce Todd*, Chief, Appellate Division, and *Kathryn G. Barnes*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Rolf E. Berg*) for the defendant.

MEMORANDUM OPINION. Pursuant to a *Cobbs* agreement,[1] the trial court agreed to sentence defendant within the appropriate statutory sentencing guidelines range if he pleaded guilty of bank robbery, MCL 750.531. After he did so plead, the trial court sentenced defendant to five to 15 years of imprisonment, which

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). We reject the prosecutor's argument that defendant waived any objection to the scoring of the guidelines. *People v Wiley*, 472 Mich 153; 693 NW2d 800 (2005). The court and defendant did not reach an agreement for a specific sentence. Rather, the prosecutor concedes that defendant generally agreed to a sentence within the guidelines range however the trial court ultimately calculated it.

was within the guidelines range as scored by the trial court. Defendant filed a motion for resentencing, arguing that prior record variable (PRV) 1 and offense variable (OV) 13 should have been given a score of zero points and that the correct guidelines range was five to 21 months. The trial court denied defendant's motion, and the Court of Appeals denied defendant's delayed application for leave to appeal. Unpublished order of the Court of Appeals, entered January 11, 2005 (Docket No. 258410). This Court held defendant's application for leave to appeal in abeyance for *People v McKay* (Docket No. 126930). 703 NW2d 806 (2005). Subsequently, we denied the application for leave to appeal in *McKay,* 474 Mich 967 (2005), and directed the prosecutor to respond to the instant application. 713 NW2d 771 (2006). We now remand to the trial court for resentencing.

Defendant argues that PRV 1 was misscored. We agree. Defendant was assessed 50 points for PRV 1 on the basis that he had two "prior high severity felony convictions." MCL 777.51(2) defines a " 'prior high severity felony conviction' " as "a conviction for a crime listed in offense class M2, A, B, C, or D or for a felony under a law of the United States *or another state* corresponding to a crime listed in offense class M2, A, B, C, or D, if the conviction was entered before the sentencing offense was committed." (Emphasis added.) Both of defendant's prior felony convictions were Canadian convictions.

The common understanding of "state" in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of "another state" in this context is one of the states, other than Michigan, that

comprise the United States. A Canadian conviction is not a conviction for "a felony under a law of the United States or another state," and the trial court erred in scoring PRV 1 at 50 points.[2]

With PRV 1 scored at 50 points and OV 13 scored at 25 points, the guidelines range was 43 to 107 months. The trial court sentenced defendant to 60 months to 15 years. If PRV 1 and OV 13 are scored at zero points, as they should be, the guidelines range is five to 21 months. Therefore, defendant's sentence is not within the guidelines range.

However, although foreign convictions cannot be considered under PRV 1, they can, under appropriate circumstances, give rise to a substantial and compelling reason to justify a departure from the guidelines range consistent with the standards articulated in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).[3]

For these reasons, we remand to the trial court for resentencing. On remand, PRV 1 and OV 13 shall be scored at zero and the court shall sentence defendant

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[2] Defendant also argues that OV 13 was misscored. Again, we agree. Defendant was assessed 25 points for OV 13 on the basis that the instant offense was part of a pattern of criminal activity involving three or more crimes against a person. MCL 777.43(2)(a) provides, "For determining the appropriate points under [OV 13], all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In *People v Francisco,* 474 Mich 82, 86; 711 NW2d 44 (2006), we held that "only those crimes committed during a five-year period that encompasses the sentencing offense can be considered." In this case, the two prior offenses occurred on September 16, 1997, and the sentencing offense occurred on September 24, 2002. Because the two prior offenses did not occur within five years of the sentencing offense, they cannot be considered under OV 13.

[3] Likewise, although prior offenses that did not occur within five years of the sentencing offense cannot be considered under OV 13, that does not mean that they cannot give rise to a substantial and compelling reason to justify a departure from the guidelines range consistent with *Babcock*.

within the appropriate sentencing guidelines range or else articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *Babcock*. However, if the trial court does decide to depart from the guidelines range, defendant must be afforded the opportunity to withdraw his plea because he agreed to plead guilty in reliance on the court's agreement to sentence him within the guidelines range. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). In all other respects, leave to appeal is denied.

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

CAVANAGH, J. (*concurring*). I concur with the memorandum opinion. I write separately only to note that, as the prosecutor has also recognized, I believe the only appropriate circumstance in which a conviction from a foreign nation can be considered a substantial and compelling reason to depart from the sentencing guidelines range is when a defendant has been afforded due process by the foreign nation.

CORRIGAN, J. (*concurring*). I concur fully in the analysis and holding set forth in the memorandum opinion. I write separately to emphasize that foreign convictions can give rise to a substantial and compelling reason to depart from the sentencing guidelines range only *"under appropriate circumstances." Ante* at 5 (emphasis added). It is reasonable to conclude that such "appropriate circumstances" would not exist where a defendant was convicted in a foreign nation that does not afford due process rights, and that a conviction from such a nation should not be considered.

Here, however, it is undisputed that Canada does afford due process rights. Accordingly, the sentencing court on remand may consider whether defendant's Canadian convictions give rise to a substantial and compelling reason to depart from the guidelines range.

SAFFIAN v SIMMONS

Docket No. 129263. Decided February 6, 2007.

Kim Saffian brought an action in the Cheboygan Circuit Court against Robert R. Simmons, D.D.S., alleging malpractice related to a root canal. Although the defendant was a general practitioner, the plaintiff filed a complaint accompanied by an affidavit of merit signed by a specialist whose dental practice is limited to root canals. A default was entered against the defendant after he failed to answer the complaint. The court, Scott L. Pavlich, J., granted the defendant's subsequent motion to set aside the default, ruling that the defendant had shown good cause to set it aside because the failure to answer was based on an error in the defendant's fax transmittal of the plaintiff's complaint to the defendant's malpractice insurer. The defendant filed a motion for summary disposition, claiming that the period of limitations had ended and the action had not been commenced because the affidavit of merit did not meet statutory requirements. The plaintiff moved for reinstatement of the default on the ground that the defendant's allegation of clerical error was apparently false as shown by telephone records. The court denied the defendant summary disposition, granted reinstatement of the default, and denied the defendant's motion for reconsideration. On appeal by the defendant, the Court of Appeals, NEFF and COOPER, JJ. (ZAHRA, P.J., concurring in part and dissenting in part), affirmed, holding that the trial court did not abuse its discretion in failing to set aside the default. 267 Mich App 297 (2005). The defendant sought leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 475 Mich 861 (2006).

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

A malpractice defendant must timely answer or otherwise file some responsive pleading to the complaint or be subject to a default where an affidavit of merit is filed with the plaintiff's complaint. A defendant's unilateral belief that the affidavit of merit does not conform to the requirements for such affidavits

does not constitute good cause for failing to respond timely to the complaint, and thus is not a proper basis on which to challenge the entry of a default. In this case, when presented with the plaintiff's evidence that no long-distance telephone call was made from the defendant's office to the insurer on the day the fax was allegedly sent, the defendant failed to offer evidence to rebut the reasonable inference that no fax was sent; therefore, the trial court was not required to hold an evidentiary hearing to determine whether the defendant had defrauded the court. The trial court's discretionary determination that the defendant's excuse was not reasonable fell within the range of principled outcomes, and the trial court therefore did not abuse its discretion in reinstating the default.

Justice KELLY concurred in the result only.

Affirmed.

Justice WEAVER would grant leave to appeal.

NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVIT OF MERIT — DEFAULT.

Where an affidavit of merit is filed with a medical malpractice complaint, a defendant must timely answer or otherwise file some responsive pleading to the complaint, or else be subject to a default; a defendant's unilateral belief that the affidavit does not conform to statutory requirements does not constitute good cause for failing to respond timely to the medical malpractice complaint, and is not a proper basis to challenge the entry of a default.

Patrick & Kwiatkowski, PLLC (by *Peter P. Patrick*), and *Gauthier & Goodrich, P.C.* (by *Aaron J. Gauthier*), for the plaintiff.

Bensinger, Cotant & Menkes, P.C. (by *Scott R. Eckhold* and *Kerr L. Moyer*), for the defendant.

PER CURIAM. The first question presented in this dental malpractice case is whether defendant, who chose not to respond to a summons and complaint because he believed it was accompanied by a technically deficient affidavit of merit under MCL 600.2912d(1), could be defaulted. The second question is, if the default was properly entered, did the trial court abuse its discretion under MCR 2.603(D)(1) in not setting it aside. The trial court and the Court of Appeals con-

cluded that defendant was required to answer or otherwise timely respond to the complaint, notwithstanding the allegedly defective affidavit of merit and, thus, defendant had been properly defaulted. The Court of Appeals also concluded that the trial court did not abuse its discretion in refusing to set aside the default. We affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

The Court of Appeals summarized the underlying facts as follows:

> On August 28, 2001, plaintiff filed suit alleging that defendant committed malpractice in performing a root canal. The complaint was accompanied by an affidavit of merit signed by Mark Nearing, D.D.S., whose dental practice is limited to root canals. Defendant failed to timely answer the complaint, and on October 4, 2001, plaintiff filed a default.
>
> On December 10, 2001, defendant moved to set aside the default on the ground that defendant's employee faxed the summons and complaint to defendant's insurance carrier, but that the fax was not received, and therefore the carrier did not forward the complaint to its counsel for response. Further, plaintiff was not prejudiced, and defendant's affidavit established a meritorious defense based on the facts. At a hearing on the motion, defense counsel argued that the default should be set aside because policy favored setting aside defaults in favor of a fair, reasonable hearing on the merits and this case involved completely innocent circumstances of a failed communication. The trial court granted defendant's motion to set aside the default.
>
> On January 4, 2002, defendant filed an answer to the lawsuit. On March 20, 2002, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the statute of limitations was not tolled by the filing of the complaint because the affidavit of merit did not meet the statutory requirements. While that motion was pending,

> plaintiff moved for discovery sanctions or reinstatement of the default. The trial court denied defendant's motion for summary disposition, but granted plaintiff's motion to reinstate the default. The trial court concluded that the motion to set aside the default had been improvidently granted and that plaintiff's affidavit of merit, while technically deficient, was sufficient to commence the complaint.
>
> In its opinion and order, the court noted that it earlier set aside the default on the basis of defendant's representations that the fax of the summons and complaint was not received by defendant's insurance carrier and the failure to try this case on the merits would result in manifest injustice to defendant. However, the court observed that, following discovery, defendant's phone records called into question defendant's representation that the summons and the complaint were faxed to the insurance carrier as indicated. Further, the court was misled concerning setting aside the default because defendant now sought dismissal of the case on the ground that the affidavit of merit was signed by an expert in the field of endodontics rather than general dentistry. The court concluded that, unlike *White v Busuito,* 230 Mich App 71; 583 NW2d 499 (1998), in which the plaintiff filed no affidavit of merit with the complaint and, therefore, failed to commence a suit, here the affidavit was filed. Consequently, defendant was not relieved of his obligation to answer or otherwise defend the action and the default was not void *ab initio*. The court denied defendant's motion for reconsideration. [*Saffian* v *Simmons*, 267 Mich App 297, 299-301; 704 NW2d 722 (2005).]

The Court of Appeals affirmed in its published opinion. All three judges rejected defendant's argument that he could not be defaulted because he was never obligated to answer the complaint. The majority held that the trial court did not abuse its discretion "in failing to set aside the default." *Id.* at 307. Defendant applied for leave to appeal. We ordered oral argument on whether to grant defendant's application or take other peremptory action. 475 Mich 861 (2006).

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). This Court also reviews de novo questions of statutory interpretation. *Ayar v Foodland Distributors,* 472 Mich 713, 715; 698 NW2d 875 (2005). " 'The primary goal of statutory interpretation is to give effect to the intent of the Legislature.' " *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516, 519; 676 NW2d 207 (2004) (citation omitted). In so doing, we examine the language of the statute itself. "If the statute is unambiguous it must be enforced as written." *Id.* Review of a trial court's decision on a motion to set aside a default or a default judgment is for a clear abuse of discretion. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552; 620 NW2d 646 (2001). The determination that a trial court abused its discretion " 'involves far more than a difference in judicial opinion.' " *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004) (citation omitted). Rather, an abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. ANALYSIS

"A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession." MCL 600.2912(1). MCL 600.2912e(1) provides that a defendant in a medical malpractice action "shall" answer the complaint within 21 days after the plaintiff has filed "an affidavit in compliance with section 2912d." Similarly, MCR 2.108(A)(6) states that a defendant must answer

within 21 days after being served with the affidavit "required by MCL 600.2912d."

Importantly, nothing in either MCL 600.2912e(1) or MCR 2.108(A)(6) authorizes a defendant to determine unilaterally whether the plaintiff's affidavit of merit satisfies the requirements of MCL 600.2912d. As the Court of Appeals majority pointed out in ruling for plaintiff, when an affidavit is filed, it is presumed valid. It is only in subsequent judicial proceedings that the presumption can be rebutted. As is evident, no such presumption arises when no affidavit is filed.

Judge ZAHRA in his partial concurrence, in discussing the statute and the court rule, also pointed out that these provisions "merely identify the type of affidavit that, if filed with the complaint, brings about a defendant's obligation to answer or otherwise file a responsive pleading to the complaint." *Saffian, supra* at 312 (ZAHRA, P.J., concurring in part and dissenting in part). He continued by reinforcing the majority's point that it is the court's province to determine the sufficiency of pleadings, not a defendant's.

In response to these arguments, defendant counters that *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000), can only be interpreted to provide that, when the affidavit of merit is technically deficient, the action is never "commenced" and, thus, no duty to answer the complaint arises. Accordingly, he concludes that any default entered in that circumstance is void *ab initio*.

We believe that defendant misunderstands *Scarsella.* In *Scarsella, supra* at 550, we concluded that a medical malpractice complaint not accompanied by an affidavit of merit does not "commence" a medical malpractice cause of action and thus the defendant need not file an answer to preclude a default. *Scarsella* did not address

the problem of a defective affidavit of merit. In that situation, as the Court of Appeals pointed out, the defendant must file an answer to preclude the entry of a default.[1]

Further, this more orderly process of honoring the presumption of the validity of pleadings, requiring an answer, and then allowing the defendant to challenge the affidavit reduces the chaotic uncertainty that allowing the defendant to decline to answer would introduce. Finally, this rule advances the efficient administration of justice because to allow defendants to nitpick plaintiffs' affidavits and, upon discovering an imperfection, to decline to answer surely leads, as it did here, to challenged default judgments and the hearings those entail. On the other hand, no such hearings are necessitated if the procedure is to require an answer and then a motion by the defendant to challenge the affidavit. This approach will conserve judicial resources and is advisable for that reason.

Having determined that defendant could not be relieved of his duty to respond to plaintiff's complaint, we now address whether defendant's default should have been set aside. MCR 2.603(D)(1) establishes that, to set aside a default, a defendant must demonstrate both good cause, i.e., a reasonable excuse for the failure to answer, and a meritorious defense. *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 229; 600 NW2d 638 (1999).

In his motion to set aside the default, defendant claimed that his employee's unsuccessful attempt to fax a copy of the complaint to his insurer constituted good

[1] Further, defendant's reliance on *White, supra,* is also misplaced. In *White,* the Court of Appeals held that where the plaintiff failed to file any affidavit of merit, the defendant had no obligation to respond. *White* then is harmonious with *Scarsella* and our holding in this case.

cause. The trial court initially accepted defendant's claim as good cause for his failure to answer the complaint. Later factual development caused the trial court to reconsider this determination. Essentially, the trial court ruled that, if it had known at the time of defendant's motion to set aside the default that no long-distance telephone calls were made from defendant's office on the date the fax was allegedly sent, it never would have accepted defendant's excuse as good cause for failing to answer the complaint.

Defendant argues, following the reasoning of Judge ZAHRA's partial dissent, that a remand to the trial court is necessary because the trial court never held an evidentiary hearing regarding whether defendant fabricated his excuse for failing to answer the complaint. Although defaults are not favored, neither is setting aside defaults. *Alken-Ziegler, supra* at 229. As the defaulting party, the burden of demonstrating good cause and a meritorious defense to set aside the default fell on defendant. MCR 2.603(D)(1). Defendant, however, presented no evidence whatsoever supporting his version of the events. Defendant's employee, who allegedly faxed the complaint to defendant's insurer, offered no explanation for the lack of a long-distance telephone call on defendant's phone records for the relevant date. Neither defendant nor his employee did anything to follow up on the allegedly attempted fax, such as calling the insurer to confirm that the documents had been received and that an answer would be filed.

Although Judge ZAHRA listed several possible explanations, other than fraud or fabrication, for the lack of a record of a long-distance telephone call made from defendant's business on the day the fax was allegedly sent, defendant never made any such argument to the trial court. When presented with plaintiff's evidence,

defendant simply gave no explanation. Because defendant failed to offer any evidence or explanation to rebut the reasonable inference that no fax was sent on the day in question, the trial court was not required to hold an evidentiary hearing to determine whether defendant defrauded the court. Rather, in ruling on defendant's motion to set aside the default, and on plaintiff's motion for reconsideration, the trial court had discretion to determine whether defendant's excuse for failing to timely answer the complaint was reasonable. In light of defendant's failure to present any explanation for the lack of a telephone record of the alleged fax, the trial court's determination that defendant's excuse was not reasonable fell within the range of principled outcomes. We therefore cannot say that the trial court abused its discretion in reinstating the default against defendant.

IV. CONCLUSION

We hold that, where an affidavit of merit is filed with a medical malpractice complaint, a defendant must timely answer or otherwise file some responsive pleading to the complaint, or else be subject to a default. A defendant's unilateral belief that the affidavit of merit does not conform to the requirements of MCL 600.2912d does not constitute "good cause" for failing to respond timely to a medical malpractice complaint, and thus is not a proper basis to challenge the entry of a default.

In the present case, defendant claimed that some technical or mechanical error with his fax machine established good cause for his failure to respond timely to plaintiff's complaint. Defendant, however, presented no evidence to support this claim. After further discovery, plaintiff proffered evidence to contradict defendant's excuse, but defendant offered no contrary expla-

nation. We hold that the trial court did not abuse its discretion by reinstating the default against defendant, and an evidentiary hearing on the issue of fraud or fabrication was not required. Accordingly, we affirm the judgment of the Court of Appeals upholding the entry of the default judgment against defendant.

Affirmed.

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

KELLY, J. I concur in the result only.

WEAVER, J. I would grant leave to appeal.

PEOPLE v BUEHLER

Docket No. 131943. Decided February 6, 2007.

Nicholas Buehler pleaded no contest to a charge of indecent exposure, MCL 750.335a, and guilty to a charge of being a sexually delinquent person, MCL 750.10a, in the Ottawa Circuit Court. The court, Calvin L. Bosman, J., imposed a sentence of three years' probation, although the sentencing guidelines provided for a minimum sentence of 42 to 70 months' imprisonment. On application by the prosecution for leave to appeal, the Court of Appeals, ZAHRA, P.J., and KELLY and MURRAY, JJ., vacated the judgment of sentence and remanded the matter for resentencing. Unpublished order, entered September 12, 2003 (Docket No. 250160). The same panel of the Court of Appeals then granted the defendant's motion for reconsideration, vacated its previous order, and denied the prosecution's application for leave to appeal. Unpublished order, entered October 23, 2003 (Docket No. 250160). The Supreme Court, in lieu of granting the prosecution's application for leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. 469 Mich 1019 (2004). On remand, the Court of Appeals, GAGE, P.J., and HOEKSTRA and MURRAY, JJ., held that a term of probation was a sentence authorized by law and, thus, proper in this matter. 268 Mich App 475 (2005). The Supreme Court, in lieu of granting the prosecution's application for leave to appeal, vacated the judgment of the Court of Appeals and remanded the matter to the Court of Appeals to consider whether the trial court articulated substantial and compelling reasons to depart from the sentencing guidelines range and whether the sentencing guidelines or the sentence prescribed in MCL 750.335a controlled the sentence that may be imposed. 474 Mich 1081 (2006). On second remand, the Court of Appeals, HOEKSTRA, P.J., and ZAHRA and MURRAY, JJ., affirmed the defendant's sentence, holding that, although the trial court failed to articulate substantial and compelling reasons to depart from the guidelines range and the sentencing guidelines control over the sentence provided in MCL 750.335a when a court decides to impose a sentence of imprisonment, probation was a valid alternative sentence. 271 Mich App 653 (2006). The Supreme Court, in

lieu of granting the prosecution's application for leave to appeal and without oral argument, issued an opinion per curiam reversing the judgment of the Court of Appeals and remanding the matter to the trial court for it to state on the record substantial and compelling reasons for the departure from the guidelines range or for resentencing within the appropriate guidelines range.

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

1. The sentencing guidelines provide the minimum sentence to be imposed on a person convicted of indecent exposure by a sexually delinquent person. The defendant's sentence of probation does not fall within the appropriate guidelines' range of 42 to 70 months' imprisonment. The trial court failed to provide a substantial and compelling reason for the departure from the guidelines range as required under MCL 769.34(3). The sentence is invalid.

2. The Court of Appeals correctly stated that under MCL 750.335a courts have discretion to sentence individuals convicted of indecent exposure to a fine or imprisonment. However, the sentencing court's discretion is limited with regard to a person convicted of indecent exposure by a sexually delinquent person and MCL 777.16q makes that offender subject to the mandatory sentencing guidelines, which provide for a minimum sentence range of 21 to 35 months' imprisonment. The court must sentence the defendant within that range or articulate on the record substantial and compelling reasons for a departure.

3. The statutory sentencing guidelines, MCL 769.34 *et seq*., were enacted after the probation statute, MCL 771.1 (1), and are more specific. Therefore, the sentencing guidelines control for a crime that could be punished under the guidelines or with probation.

4. Probationary sentences constitute a downward departure from any sentencing guidelines range that does not permit the imposition of intermediate sanctions. The judgment of the Court of Appeals must be reversed, and the matter must be remanded to the trial court for an articulation of substantial and compelling reasons on the record for the downward departure or for resentencing.

Justice WEAVER, concurring, wrote separately to note that the defendant's sentence is invalid under the sentencing guidelines because the trial court departed from the mandatory sentencing guidelines but did not state on the record a substantial and compelling reason for the departure.

Reversed and remanded.

CRIMINAL LAW — SENTENCES — INDECENT EXPOSURE BY SEXUALLY DELINQUENT PERSON.

A person convicted of the offense of indecent exposure by a sexually delinquent person must be sentenced to a term of imprisonment whose minimum is within the range provided in the sentencing guidelines, unless the sentencing court articulates on the record a substantial and compelling reason to depart from the range provided by the guidelines; a sentence of probation is one such departure that must be supported by a substantial and compelling reason (MCL 750.10a, 750.355a, and 769.34 *et seq*.)

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

PER CURIAM. This case concerns when a trial court may impose a sentence of probation where the properly scored sentencing guidelines compel a term of imprisonment. Under the Michigan Sentencing Guidelines, the minimum sentence must be within the appropriate sentence range unless the court states substantial and compelling reasons to depart.[1] In this case, the trial court sentenced defendant to probation, when the appropriate minimum sentence range was scored at 42 to 70 months. The Court of Appeals held that probation was a valid alternative to the prison sentence called for by the guidelines. We disagree. Because defendant's probationary sentence is not within the appropriate sentence range and the trial court failed to articulate substantial and compelling reasons for the downward departure, we reverse the judgment of the Court of Appeals and remand the case to the trial court to state substantial and compelling reasons on the record for

[1] MCL 769.34(3).

the departure or to sentence defendant within the appropriate sentence range.

FACTS AND PROCEDURAL HISTORY

The prosecutor charged defendant with resisting and obstructing a police officer,[2] indecent exposure,[3] and being a sexually delinquent person.[4] Pursuant to a plea agreement, defendant pleaded nolo contendere to the indecent exposure charge and guilty to the sexually delinquent person charge in exchange for the dismissal of the remaining charge. Defendant did not challenge the guidelines scoring that produced a sentence range of 42 to 70 months. The trial court stated its intention to downwardly depart from the guidelines and impose a sentence of 36 months' probation. In support of the probationary sentence, the trial court noted defendant's problem with alcohol and his ability to conform his behavior to the law when not inebriated. The prosecutor moved for resentencing, arguing that, under MCL 750.335a,[5] the court must sentence defendant to the indeterminate sentence of one day to life. The trial court disagreed, affirming the sentence of probation.

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[2] MCL 750.81d(1).

[3] MCL 750.335a.

[4] MCL 750.10a.

[5] At the time defendant committed his crime, MCL 750.335a provided:

> Any person who shall knowingly make an open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

The prosecutor filed an application for leave to appeal in the Court of Appeals. The prosecutor abandoned the argument that the indeterminate sentence provided in MCL 750.335a was mandatory and argued that defendant's sentence was not proper under the Michigan Sentencing Guidelines because the trial court failed to articulate substantial and compelling reasons for the departure. The Court of Appeals initially vacated the judgment of sentence and ordered resentencing in an unpublished order, entered September 12, 2003 (Docket No. 250160). However, the panel granted defendant's motion for reconsideration, vacated its previous order, and denied the prosecutor's application for leave to appeal in an unpublished order, entered October 23, 2003 (Docket No. 250160). The prosecutor sought leave to appeal, and this Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted.[6]

On remand, the Court of Appeals held that MCL 750.335a gave courts broad discretion in sentencing defendants convicted of indecent exposure. Further, the Court held that "a term of probation is also a valid alternative to which a trial court may, in its discretion, sentence a defendant convicted of indecent exposure as a sexually delinquent person."[7] The panel relied on MCL 767.61a, which provides that a person convicted of indecent exposure may receive "any punishment provided by law for such offense." The Court of Appeals reasoned that because the general probation statute allows a court to place a defendant on probation for any felony or misdemeanor "other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance of-

[6] 469 Mich 1019 (2004).

[7] *People v Buehler,* 268 Mich App 475, 482; 710 NW2d 475 (2005) (*Buehler I*).

fenses,"[8] probation was a sentence "authorized by law," and thus, proper.

When the prosecutor again sought leave to appeal in this Court, in lieu of granting leave to appeal, we vacated the published Court of Appeals judgment and remanded to that Court a second time to consider (1) whether the trial court articulated substantial and compelling reasons for a departure from the appropriate sentence range and (2) whether the legislative sentencing guidelines or the indeterminate sentence prescribed by MCL 750.335a controlled the sentence that may be imposed.[9] On second remand, the Court of Appeals again affirmed defendant's sentence.[10] The Court held that the trial court did not articulate substantial and compelling reasons to depart from the appropriate guidelines range and that the more recently enacted guidelines control, as opposed to the indeterminate sentence provided for in MCL 750.335a, when a court decides to impose a sentence of imprisonment. Nonetheless, the panel affirmed defendant's sentence, reaffirming the portion of its previous opinion that held that probationary sentences are a valid "alternative" sentence. The prosecutor has again filed an application for leave to appeal in this Court. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated below.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo.[11] This Court reviews a trial court's

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[8] MCL 771.1(1).

[9] 474 Mich 1081 (2006).

[10] *People v Buehler (On Remand),* 271 Mich App 653; 723 NW2d 578 (2006) (*Buehler II*). Judge ZAHRA replaced retired Judge GAGE on the panel.

[11] *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

decision to depart from the guidelines for an abuse of discretion.[12]

ANALYSIS

Under the Michigan Sentencing Guidelines,[13] "the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 *shall be within the appropriate sentence range* under the version of those sentencing guidelines in effect on the date the crime was committed."[14] Indecent exposure by a sexually delinquent person is "a felony enumerated in part 2 of chapter XVII."[15] As noted, defendant did not dispute that the appropriate sentence range was 42 to 70 months' imprisonment. Furthermore, there is no question that defendant's probationary sentence does not fall within that range.[16] Under the guidelines, "[a] court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq*.] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."[17] We agree with the Court of Appeals that the trial court in this case failed to state substantial and compelling reasons for a departure. Therefore, defendant's sentence is invalid under the sentencing guidelines.[18]

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[12] *Id.* at 269.

[13] MCL 769.34 *et seq*.

[14] MCL 769.34(2) (emphasis added).

[15] MCL 777.16q.

[16] See *Babcock*, *supra*, discussing whether the trial court articulated substantial and compelling reasons for imposing probation when the guidelines range was 36 to 71 months.

[17] MCL 769.34(3).

[18] We agree with the panel in *Buehler II* that the Michigan Sentencing Guidelines control over the version of MCL 750.335a in force when

The Court of Appeals did not end its analysis at that point. Instead, the Court held that probation is a valid "alternative" sentence for any crime not specifically excepted from probation.[19] The panel in *Buehler II* relied on the discussion of MCL 750.335a and MCL 771.1 in *Buehler I*. The *Buehler I* panel examined the language of MCL 750.335a, which stated at the time of defendant's offense:

> Any person who shall knowingly make an open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

The panel in *Buehler I* held that this statute "indicates a clear intent by the Legislature to provide a discretionary and alternative sentencing scheme for persons convicted of indecent exposure."[20] The panel is correct

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defendant committed his crime. We also agree that it is unnecessary to determine whether the recent amendment of MCL 750.335a, 2005 PA 300, has altered this conclusion for future offenders. Therefore, we too express no opinion on that issue.

[19] MCL 771.1(1):

> In all prosecutions for felonies or misdemeanors other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

[20] *Buehler I, supra* at 480.

insofar as MCL 750.335a states that courts have discretion to sentence individuals convicted of indecent exposure to a fine or imprisonment. However, that conclusion does not support the notion that a defendant convicted of the crime of indecent exposure by a sexually delinquent person is entitled to probation. The Legislature has actually limited sentencing courts' discretion for individuals convicted of that crime by listing it in MCL 777.16q and thereby making it subject to the mandatory sentencing guidelines. The Legislature has further limited the courts' discretion by classifying indecent exposure by a sexually delinquent person as a Class A felony, which carries a *minimum* sentence range of 21 to 35 months.[21] Under the guidelines, the sentencing court *must* sentence defendant within that range or articulate on the record substantial and compelling reasons for a departure.

Both panels held that courts may avoid the guidelines for any probationable felony. The probation statute and the sentencing guidelines must be construed together because "statutes that relate to the same subject or that share a common purpose are *in para materia* and must be read together as one."[22] When there is a conflict between statutes that are read *in para materia*, the more recent and more specific statute controls over the older and more general statute.[23] Significantly, the panel in *Buehler II* found that MCL 750.335a and the sentencing guidelines were *in para materia* and that the more recently enacted guidelines control. Unfortunately, neither panel applied the same analysis to the probation statute and the sentencing

[21] MCL 777.62.

[22] *Buehler II, supra* at 658.

[23] See *Imlay Twp Primary School Dist No 5 v State Bd of Ed,* 359 Mich 478; 102 NW2d 720 (1960).

guidelines. The sentencing guidelines were enacted after the probation statute, and they are more specific in that they provide a detailed and mandatory procedure for sentencing involving all enumerated crimes. Therefore, the sentencing guidelines control for a crime that could be punished under the guidelines or with probation.

The panel in *Buehler II* correctly noted that probation is *available* for all nonenumerated crimes; however, this fact does not lead to the conclusion that sentencing courts have unfettered discretion to impose probation for *all* such crimes. For crimes not subject to the sentencing guidelines, such as simple indecent exposure, a sentencing court would have the option of imposing one of the sentences listed in the statute (one year or less of incarceration or a fine of $1,000 or less) or if the court determines that the defendant is not likely to be a recidivist and that the public good does not require the statutory penalty, the court may sentence the defendant to probation.[24]

The calculus changes, however, if the offense is subject to the mandatory sentencing guidelines. The minimum sentence for any crime listed in part two of chapter XVII committed after January 1, 1999, *must* be within the minimum guidelines sentence range. In some instances, the Legislature has determined that probation is a permissible sentence within the sentence range, such as when the guidelines call for an intermediate sanction.[25] However, the guidelines do not indicate that probation is available for ranges that require a minimum term of imprisonment. Therefore, probation-

[24] MCL 771.1(1).

[25] MCL 769.31(b): " 'Intermediate sanction' means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed."

ary sentences constitute a downward departure from any sentencing guidelines range that does not permit the imposition of intermediate sanctions. In such cases, if the sentencing court desires to impose a probationary sentence, the court must articulate substantial and compelling reasons for the downward departure on the record. Because the sentencing court did not properly sentence defendant under the guidelines, the sentence of probation is invalid.

CONCLUSION

Defendant's probationary sentence is a departure from the appropriate guidelines sentence range, and the trial court failed to articulate substantial and compelling reasons for the departure on the record as required by MCL 769.34(3). Because defendant's sentence is invalid, we reverse the judgment of the Court of Appeals and remand the case to the Ottawa Circuit Court for an articulation of substantial and compelling reasons on the record or resentencing.

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

WEAVER, J. (*concurring*). I concur in the result reached by the majority, but I write separately to note that as stated in my partial dissent and partial concurrence in *People v Babcock,* 469 Mich 247, 280-284; 666 NW2d 231 (2003), a trial court need only state "a substantial and compelling reason for that departure . . . ." MCL 769.34(3). Because the trial court departed from the mandatory sentencing guidelines, but did not state on the record "a substantial and compelling reason" for departure, defendant's sentence is invalid under the sentencing guidelines.

HAYNES v NESHEWAT

Docket No. 129206. Argued October 3, 2006 (Calendar No. 4). Decided March 28, 2007.

Gregory Haynes, an African-American physician, brought an action in the Wayne Circuit Court against Michael J. Neshewat; Oakwood Healthcare, Inc.; and others, alleging, in part, a violation of the public accommodations provision of the Civil Rights Act (CRA), MCL 37.2302, in that the defendants treated him differently than similarly situated physicians because of his race. The trial court, John A. Murphy, J., denied the defendants' motion for summary disposition with regard to the CRA claims, ruling that the scope of the CRA was broad enough to protect the plaintiff's privilege to practice medicine without suffering racial discrimination within the hospital, and that the hospital was a place of public accommodation under the CRA. The Court of Appeals granted the defendants' application for leave to appeal from that order. The Court of Appeals, TALBOT, P.J., and WILDER, J. (GRIFFIN, J., dissenting), reversed in an unpublished opinion per curiam, issued June 23, 2005 (Docket No. 249848). The Court of Appeals held that a place of public accommodation exists only through the provision of goods, services, facilities, privileges, advantages, or accommodations to the public, that services and privileges that a facility does not provide to the public do not implicate the public accommodations provision of the CRA, and that a physician's complaint concerning his or her medical staff privileges at a hospital does not come within the purview of the public accommodations provision of the CRA. The Supreme Court granted the plaintiff's application for leave to appeal. 474 Mich 1000 (2006).

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

MCL 37.2302 prohibits unlawful discrimination against any individual, not just members of the public. Section 302(a) forbids unlawful discrimination, be it public or private, against any individual in a place of public accommodation and not just against

members of the public. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the trial court for further proceedings.

1. A plaintiff must establish four elements in order to state a claim under § 302(a): (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services facilities, privileges, advantages, or accommodations (4) of a place of public accommodation. The plaintiff established all four elements.

2. The decision in *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433 (1992), must be overruled to the extent that it can be read to limit the Civil Rights Act inconsistently with the opinion in this case. *Kassab* was wrongly decided. The CRA implements the equal-protection and antidiscrimination guarantees of the Michigan Constitution, and it would be inconsistent with these guarantees to uphold *Kassab*'s erroneous interpretation of the CRA.

Justice KELLY, joined by Justice CAVANAGH, concurring, wrote separately to state that, in interpreting MCL 37.7302, it is also appropriate to consider the remedial nature of the statute, decisions from outside Michigan, Michigan caselaw, and legislative acquiescence in interpreting the statute. All these additional considerations support the outcome reached in this case.

Justice MARKMAN, joined by Chief Justice TAYLOR and Justices CORRIGAN and YOUNG, concurring, wrote separately to observe that, while Justice KELLY's majority opinion reaches a proper result through a proper legal analysis, her concurring opinion reaches the same result through less disciplined means.

Reversed and remanded.

CIVIL RIGHTS — PUBLIC ACCOMMODATIONS — INDIVIDUALS.

The public accommodations provision of the Civil Rights Act does not limit its prohibition against discrimination to members of the public; the provision prohibits unlawful discrimination against any individual's full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation (MCL 37.2302[a]).

Amos E. Williams, P.C. (by *Amos E. Williams*), for the plaintiff.

Dykema Gossett P L L C (by *William M. Thacker* and *Claire S. Harrison*) for the defendants.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Genevieve Dwaihy Tusa*, Assistant Attorney General, for the Michigan Civil Rights Commission and the Department of Civil Rights.

KELLY, J. We granted leave to appeal to determine whether plaintiff has stated a cause of action under MCL 37.2302, the public accommodations provision of the Civil Rights Act (CRA). This case arose when plaintiff, Dr. Gregory Haynes, an African-American physician with staff privileges at Oakwood Hospital-Seaway Center, alleged that defendants treated him differently than similarly situated white physicians on the basis of his race. Plaintiff claims that a result of this different treatment was that he was deprived of the ability and opportunity to fully utilize the medical facilities in violation of the CRA.

Defendants moved for summary disposition of the CRA claims, arguing that plaintiff's allegations did not come within the scope of the act. The trial court rejected defendants' arguments and denied the motion. A divided Court of Appeals reversed and decided that MCL 37.2302(a) addresses discrimination with respect to services made available only to the public. We disagree. We find that MCL 37.2302 prohibits unlawful discrimination against any individual, not just members of the public. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff is a physician licensed in the state of Michigan with specialties in internal medicine and gastroen-

terology. In order to care for patients requiring hospitalization, plaintiff has maintained, and still maintains, medical staff membership and clinical privileges at Oakwood Hospital-Seaway Center. Plaintiff is the only African-American staff physician who conducts the majority of his hospital practice at Oakwood. Defendant Oakwood Healthcare, Inc. (Oakwood),[1] is a Michigan nonprofit corporation that does business as Oakwood Hospital-Seaway Center. Defendant Dr. Michael J. Neshewat was the chief of staff at Oakwood.

On October 31, 2001, plaintiff filed his four-count complaint against defendants.[2] In the complaint, he asserted claims for violation of the CRA, tortious interference with business relationships and expectancies, negligence, and conspiracy under the CRA. Plaintiff alleges that defendants have treated him differently than similarly situated physicians on the basis of his race. He claims that he has been subjected to excessive charges of unprofessional behavior and administrative hearings designed to discourage him from using the facilities at Oakwood. He also alleges that defendants have attempted to steal his patients and have disparaged his professional competence in an effort to impair his relationships with patients and other physicians.[3]

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[1] Unless it is necessary to distinguish between the two, both Oakwood-Seaway Center and Oakwood Healthcare, Inc., will be referenced as Oakwood.

[2] The complaint named as defendants Oakwood Healthcare, Inc.; Dr. Michael Neshewat; Dr. Robert Murray; and Brian Peltz. Before the filing of defendants' motion for summary disposition, Mr. Peltz and Dr. Murray were dismissed from the action by stipulation of the parties. Dr. Neshewat failed to appear or plead and a default judgment was entered against him. Defendants opposed plaintiff's motion for entry of a default judgment, thereby preserving the right to challenge the trial court's decision granting the default judgment.

[3] Plaintiff's medical practice is largely dependent on referrals by patients and other physicians. Plaintiff claims that defendant Neshewat

Plaintiff claims that this discriminatory treatment has deprived him of the ability and opportunity to fully and equally utilize the facilities at Oakwood.

Defendants moved for summary disposition, arguing, among other things, that a hospital is not a place of public accommodation with respect to its decisions concerning staff privileges. The trial court granted defendants' motion with respect to the claims of negligence and tortious interference with business relationships.[4] Summary disposition was denied on the CRA claims pursuant to MCR 2.116(C)(8). The trial court determined that the CRA's reach was broad enough to protect plaintiff's privilege to practice medicine without plaintiff suffering racial discrimination within the hospital, a place of public accommodation.

Defendants timely applied for, and were granted, interlocutory review. In a split decision, the Court of Appeals reversed. Unpublished opinion per curiam, issued June 23, 2005 (Docket No. 249848). The Court of Appeals majority held that a place of public accommodation exists only through the provision of goods, services, facilities, privileges, advantages, or accommodations to the public. Services and privileges that a facility does not provide to the public, it reasoned, do not implicate the public accommodations provision of the CRA. Therefore, the Court held that a health facility is certainly a place of public accommodation under the CRA in some respects. However, a physician's complaint concerning his or her private medical staff privileges at a hospital does not come within the purview of the public accommodations provisions.

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intimidated other physicians in an attempt to cause them to stop referring patients to him. Plaintiff alleges that he has been singled out for this treatment because of his race.

[4] Plaintiff did not appeal from this ruling.

Judge GRIFFIN dissented. He would have held that the denial of a physician's full and equal enjoyment of hospital staff privileges because of racial discrimination is prohibited by the CRA. We granted plaintiff's application for leave to appeal. 474 Mich 1000 (2006).

STANDARD OF REVIEW

This case involves a question of statutory interpretation, which we review de novo. *Ostroth v Warren Regency, GP, LLC,* 474 Mich 36, 40; 709 NW2d 589 (2006). We also review de novo a trial court's decision on a motion for summary disposition. *Id.* Defendant's motion for summary disposition was made pursuant to MCR 2.116(C)(8).[5] In reviewing a ruling made under this court rule, a court tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). The motion should be granted only if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

ANALYSIS

A. INTERPRETING THE STATUTE

We are called on to decide whether plaintiff stated a cause of action under the public accommodations section of the CRA. He alleged that defendants' discrimi-

[5] MCR 2.116(C)(8) provides:

> (C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (8) The opposing party has failed to state a claim on which relief can be granted.

natory behavior deprived him of the opportunity to fully and equally utilize the Oakwood facilities. Two provisions of the public accommodations section are relevant to our inquiry: MCL 37.2301(a) and MCL 37.2302(a). MCL 37.2301(a) defines the phrase "place of public accommodation" while MCL 37.2302(a) lists the rights persons cannot deny individuals in places of public accommodation on the basis of a protected characteristic.

To resolve the issue before us, we must interpret the CRA. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). If the statute is unambiguous, this Court will apply its language as written. *Id.* When a statute specifically defines a given term, that definition alone controls. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

MCL 37.2302 provides in part:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

In order to state a claim under MCL 37.2302(a), plaintiff must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation.

Plaintiff claims that he was discriminated against because of his race. Race is one of the specifically listed

protected characteristics. Therefore, this allegation sufficiently establishes the first element. The CRA defines "person" as "an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity." MCL 37.2103(g). Both defendant Neshewat and defendant Oakwood fit within this definition. As a result, the second element is also sufficiently established.

In order to establish the third element, plaintiff must have been denied the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations. The CRA does not define these terms. We give undefined terms their ordinary meanings. *Koontz v Ameritech Services*, *Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002). A dictionary may be consulted if necessary. *Id. Webster's* defines "privilege" as "a right, immunity, or benefit enjoyed by a particular person or a restricted group of persons." *Random House Webster's College Dictionary* (2001).

Plaintiff has staff privileges at Oakwood. These privileges give him the right to use the hospital facilities to treat his patients. Staff privileges are "privileges" because they are a "right" or "benefit" that is enjoyed only by a restricted group of people, in this case doctors. Thus, the full and equal enjoyment of staff privileges is protected by § 302(a). Plaintiff alleged that defendants interfered with his staff privileges and that this denied him the opportunity to fully and equally utilize the facilities. This allegation sufficiently establishes the third element of the statute.

The last remaining inquiry is whether Oakwood is a place of public accommodation.

MCL 37.2301(a) provides in part:

> As used in this article:
>
> (a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

Oakwood provides a full range of health services to the public. It is a "business [or] . . . health . . . facility . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." MCL 37.2301(a). Therefore, Oakwood qualifies as a place of public accommodation. See *Whitman v Mercy-Memorial Hosp*, 128 Mich App 155; 339 NW2d 730 (1983). As a result, all four elements of the statute are sufficiently established and plaintiff has stated a cause of action under the CRA.

B. MCL 37.2302(a) PROTECTS INDIVIDUALS, NOT MEMBERS OF THE PUBLIC

Defendants argue, and the Court of Appeals majority agreed, that plaintiff states a claim under § 302(a) only if he alleges that he was deprived of goods, services, facilities, privileges, advantages, or accommodations that were made available to the public. According to defendants, even if there has been an interference with plaintiff's ability to practice as a physician at Oakwood, plaintiff has not stated a cause of action. They reason that the practice of medicine is not a privilege offered to the public. We reject this interpretation because it is contrary to the language of the statute.

MCL 37.2302(a) protects the rights of individuals.[6] Individuals, not members of the public, are protected from the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations. Nowhere within the wording of § 302(a) is it required that the goods, services, facilities, privileges, advantages, or accommodations be offered to the public. We will not read into the statute a limitation that is not there. We hold that MCL 37.2302(a) forbids unlawful discrimination against any individual in a place of public accommodation, not just against members of the public.

C. *KASSAB*

The defendants argue that this case is controlled by our decision in *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433; 491 NW2d 545 (1992). In *Kassab*, this Court decided that the CRA did not provide a remedy for discriminatory processing of insurance claims. *Id.* at 442. The Court concluded that, even if the insurance company was a " '[p]lace of public accommodation,' " the CRA did not extend beyond " 'services . . . made available to the public' " and so did not provide a cause of action to Mr. Kassab. *Id*. at 440-441. It held that, as long as the company provided access to services, the CRA did not prevent it from discriminating in providing full and equal enjoyment of those services. *Id.* at 441.

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[6] MCL 37.2302 provides in part:

> Except where permitted by law, a person shall not:
>
> (a) Deny an *individual* the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [Emphasis added.]

We conclude that the Court in *Kassab* erred by reading nonexistent limitations into the statute. To the extent that *Kassab* can be read to limit the CRA inconsistently with our holding today, it is overruled.

We are mindful of the doctrine of stare decisis and do not take lightly our decision to overrule *Kassab*. In *Robinson v Detroit*,[7] we discussed stare decisis and the factors to be considered when deciding whether to overrule a prior decision. When evaluating the factors, the first question we ask is whether the earlier decision was wrongly decided. *Id.* at 464. As we discussed previously, *Kassab* was wrongly decided. The Court erred by reading a nonexistent limitation into the statute.

Finding that a prior decision was wrongly decided is not the end of our inquiry. We must also weigh the effects of overruling the decision. *Id.* at 466. This consideration involves a review of whether the decision "defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Id.* at 464.

We find that there are no factors that counsel against overruling *Kassab*. *Kassab* held that the CRA does not provide a cause of action for discriminatory processing of insurance claims. The fact that some parties may rely on a decision to protect them from civil liability for discriminatory behavior is not a reason to uphold an erroneous decision. This is especially true when the prior decision involves the interpretation of the CRA. The CRA implements the equal protection and antidiscrimination guarantees of the Michigan Constitution. It would be inconsistent with these constitutional guarantees to uphold an erroneous interpretation of the CRA.

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[7] 462 Mich 439; 613 NW2d 307 (2000).

CONCLUSION

The public accommodations provision of the CRA, MCL 37.2302, does not limit its prohibition against discrimination to members of the public. Rather, § 302(a) prohibits unlawful discrimination against any individual's full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Plaintiff is a physician with staff and clinical privileges at Oakwood. By alleging that defendants' discriminatory behavior deprived him of the opportunity to fully utilize the Oakwood medical facilities, plaintiff stated a cause of action under the CRA. The judgment of the Court of Appeals is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

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

KELLY, J. (*concurring*). This case requires us to interpret the public accommodations provision of the Civil Rights Act (CRA), MCL 37.2302. A unanimous Court agrees that this provision prohibits unlawful discrimination against any individual, and not just members of the public. Having authored the opinion, obviously I agree with it. But I write separately because I believe that it is important to set forth additional reasons for the decision to which not all my colleagues adhere.

To start, I find frequent ambiguity in statutory language. I do not subscribe to the belief that "only a few [statutory] provisions are truly ambiguous." *Mayor of Lansing v Michigan Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). For various reasons,

not the least of which is the imprecise character of language, it is often impossible to discern legislative intent solely from the language written into statutes. As Justice Frankfurter eloquently stated:

> Unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of an individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts. [Frankfurter, *Some reflections on the reading of statutes*, 47 Colum L R 527, 528 (1947).]

Accordingly, rather than restraining myself to the text and "mak[ing] a fortress out of the dictionary,"[1] I weigh on the balance any material that illuminates legislative intent. In this case, I have found numerous persuasive factors, not discussed in the majority opinion, that indicate that this Court has reached the correct interpretation of the statute.[2]

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[1] *Cabell v Markham,* 148 F2d 737, 739 (CA 2, 1945) (opinion by Hand, J.)

[2] Justice MARKMAN writes a concurring opinion criticizing my approach to statutory analysis, suggesting it lacks discipline. The aids to statutory construction I use in my concurring opinion are among many that have been applied by the Michigan Supreme Court since long before either Justice MARKMAN or I was born. Almost every justice who has ever sat in this Court would be shocked to hear the statutory analysis I use depreciated as "language-avoidance 'interpretative' techniques." I agree with Justice MARKMAN that aids to statutory analysis should not be misused and, I might add, that includes the "textualist" approach to which he so avidly subscribes.

A. REMEDIAL STATUTES

The canon of statutory construction that remedial statutes are to be liberally construed is deeply imbedded in American jurisprudence. Indeed, all 50 states[3] and

[3] See, e.g., Alabama: *Austin v Alabama Check Cashers Ass'n*, 936 So 2d 1014, 1026 (Ala, 2005). Alaska: *DH Blattner & Sons v NM Rothschild & Sons, Ltd*, 55 P3d 37, 47 (Alas, 2002). Arizona: *Special Fund Div v Industrial Comm*, 191 Ariz 149, 152; 953 P2d 541 (1998). Arkansas: *Chicago Mill & Lumber Co v Smith*, 228 Ark 876; 310 SW2d 803 (1958). California: *Betancourt v Storke Housing Investors*, 31 Cal 4th 1157; 82 P3d 286 (2003). Colorado: *Christy v Ibarra*, 826 P2d 361 (Colo App, 1991). Connecticut: *Pereira v State*, 228 Conn 535, 542; 637 A2d 392 (1994). Delaware: *Vance v Irwin*, 619 A2d 1163, 1164-1165 (Del, 1993). Florida: *Joshua v City of Gainesville*, 768 So 2d 432, 435 (Fla, 2000). Georgia: *Mitchell v Wilkerson*, 258 Ga 608, 610; 372 SE2d 432 (1988). Hawaii: *Kalima v State*, 111 Hawaii 84, 99; 137 P3d 990 (2006). Idaho: *Page v McCain Foods, Inc,* 141 Idaho 342, 346; 109 P3d 1084 (2005). Illinois: *Grant Contracting Co v Murphy*, 387 Ill 137, 143; 56 NE2d 313 (1944). Indiana: *United Nat'l Ins Co v DePrizio*, 705 NE2d 455, 459-460 (Ind, 1999). Iowa: *TLC Home Health Care, LLC v Iowa Dep't of Human Services,* 638 NW2d 708, 714 (Iowa, 2002). Kansas: *O'Donoghue v Farm Bureau Mut Ins Co, Inc,* 275 Kan 430, 437; 66 P3d 822 (2003). Kentucky: *City of Louisville v Slack*, 39 SW3d 809, 815 (Ky, 2001). Louisiana: *Jim Walter Homes, Inc v Guilbeau*, 934 So 2d 239, 245 (La App, 2006). Maine: *Bennett v Prawer*, 2001 Me 172; 786 A2d 605 (2001). Maryland: *Caffrey v Dep't of Liquor Control*, 370 Md 272, 306; 805 A2d 268 (2002). Massachusetts: *Gasior v Massachusetts Gen Hosp*, 446 Mass 645, 654; 846 NE2d 1133 (2006). Michigan: *Eide v Kelsey-Hayes Co*, 431 Mich 26, 36; 427 NW2d 488 (1988). Minnesota: *Foley v Whelan*, 219 Minn 209, 213; 17 NW2d 367 (1945). Mississippi: *Cahoon v Scarborough*, 159 Miss 5, 10; 131 So 431 (1930). Missouri: *Scheble v Missouri Clean Water Comm,* 734 SW2d 541, 556 (Mo App, 1987). Montana: *In re CH*, 318 Mont 208, 214; 79 P3d 822 (2003). Nebraska: *State v Kastle*, 120 Neb 758, 772; 235 NW 458 (1931). Nevada: *Virden v Smith*, 46 Nev 208, 211; 210 P 129 (1922). New Hampshire: *Newell v Moreau*, 94 NH 439, 442; 55 A2d 476 (1947). New Jersey: *Feldman v Hunterdon Radiological Assoc*, 187 NJ 228, 239; 901 A2d 322 (2006). New Mexico: *Mem Med Ctr v Tatsch Constr, Inc*, 129 NM 677, 685; 12 P3d 431 (2000). New York: *Rizzo v New York State Div of Housing & Community Renewal*, 6 NY3d 104, 114; 843 NE2d 739 (2005). North Carolina: *Nationwide Mut Ins Co v Lankford*, 118 NC App 368, 376; 455 SE2d 484 (1995). North Dakota: *Schaefer v Job Service North Dakota,* 463 NW2d 665, 666 (ND, 1990). Ohio: *Clark v Scarpelli*, 91

courts in each federal circuit[4] have endorsed it. Even

Ohio St 3d 271, 275; 744 NE2d 719 (2001). Oklahoma: *Associated Indemnity Corp v Cannon*, 1975 Okla 87; 536 P2d 920 (1975). Oregon: *Rash v Employment Div*, 85 Or App 570, 573; 737 P2d 966 (1987). Pennsylvania: *School Dist v Montgomery*, 227 Pa 370; 76 A 75 (1910). Rhode Island: *Weybosset Hill Investments, LLC v Rossi,* 857 A2d 231, 239 (RI, 2004). South Carolina: *Elliott v South Carolina Dep't of Transportation,* 362 SC 234, 237; 607 SE2d 90 (SC App, 2004). South Dakota: *Chiolis v Lage Dev Co*, 512 NW2d 158, 163 (SD, 1994). Tennessee: *Kannon v Pillow*, 26 Tenn 281 (1846). Texas: *Mecca Fire Ins Co v Stricker*, 136 SW 599, 601 (Tex Civ App, 1911). Utah: *Tolle v Fenley*, 2006 Utah App 78; 132 P3d 63 (2006). Vermont: *Celeste Washington Supreme Court v Pierce*, 179 Vt 318; 895 A2d 173 (2005). Virginia: *Brooks v Hannan*, 53 Va Cir 465, 466 (2000). Washington: *State ex rel Winston v Seattle Gas & Electric Co*, 28 Wash 488, 493; 68 P 946 (1902). West Virginia: *Plummer v Workers' Compensation Div*, 209 W Va 710, 713; 551 SE2d 46 (2001). Wisconsin: *Dep't of Transportation v Transportation Comm,* 111 Wis 2d 80, 92; 330 NW2d 159 (1983). Wyoming: *Wyoming Ins Guaranty Ass'n v Woods,* 888 P2d 192, 195 (Wy, 1994).

[4] See, e.g., First Circuit: *Carew v Boston Elastic Fabric Co*, 5 F Cas 56 (D Mass, 1871); *United States, to Use and Benefit of Sargent Co v Century Indemnity Co*, 9 F Supp 809 (D Me, 1935); *Stevens v Bangor & Aroostook R Co*, 97 F3d 595 (CA 1, 1996). Second Circuit: *Imlay v Norwich & W R Co*, 13 F Cas 1 (D Conn, 1858); *Bossert Electric Constr Co v Pratt Chuck Co*, 179 F 385 (CA 2, 1910); *Pittston Stevedoring Corp v Dellaventura,* 544 F2d 35 (CA 2, 1976); *Rogers v Consolidated Rail Corp,* 948 F2d 858 (CA 2, 1991); *Travelers Ins Co v Carpenter*, 411 F3d 323 (CA 2, 2005). Third Circuit: *Sirkin v Phillips Colleges, Inc*, 779 F Supp 751 (D NJ, 1991); *Clarke v Unum Life Ins Co of America,* 14 F Supp 2d 1351 (SD Ga, 1998). Fourth Circuit: *Dorsey v Bowen*, 828 F2d 246 (CA 4, 1987); *Bass v City of Wilson*, 835 F Supp 255 (ED NC, 1993). Fifth Circuit: *Everett v Ribicoff,* 200 F Supp 103 (ND Fla, 1961); *Harris v Wal-Mart Stores, Inc*, 205 F3d 847 (CA 5, 2000); Sixth Circuit: *Jeter v Finch*, 310 F Supp 1371 (ED Ky, 1970); *Marshall v Davis*, 517 F Supp 551 (WD Mich, 1981). Seventh Circuit: *Smith v Packard*, 98 F 793 (CA 7, 1900); *Schweizer v Mager*, 297 F 334 (ND Ill, 1924); *Johnson v Runyon*, 47 F3d 911 (CA 7, 1995); Eighth Circuit: *Surrisi v Conwed Corp,* 510 F2d 1088 (CA 7, 1975); *Maune v IBEW, Local #1, Health & Welfare Fund*, 83 F3d 959 (CA 8, 1996). Ninth Circuit: *Mahroom v Hook,* 563 F2d 1369 (CA 9, 1977); *Smith v CMTA-IAM Pension Trust*, 746 F2d 587 (CA 9, 1984); *Carson Harbor Village, Ltd v Unocal Corp,* 270 F3d 863 (CA 9, 2001). Tenth Circuit: *In re Dederick Herzig*, 91 F2d 646 (CA 10, 1937); *Sierra Club v Seaboard Farms Inc*, 387 F3d 1167 (CA 10, 2004). Eleventh Circuit: *Hellums v*

the United States Supreme Court has adopted the canon and construed many federal laws using it.[5] This long-established canon still has a place in Michigan law. Though it cannot be relied on to reach a result that is inconsistent with statutory language, it is otherwise entitled to consideration. Plaintiff brought suit under the Michigan Civil Rights Act. As we have stated on prior occasions, the CRA is a broad, remedial statute. *Eide v Kelsey- Hayes*, 431 Mich 26, 36; 427 NW2d 488 (1988). When interpreting this statute and similar remedial statutes, it is important to remember the "well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy." *Id*. at 34 (citing 3 Sands, Sutherland Statutory Construction [4th ed], § 60.01, p 55).

Webster Industries, 97 F Supp 2d 1287 (MD Ala, 2000); *Cusumano v Maquipan Int'l, Inc*, 2005 US Dist LEXIS 30257 (MD Fla, 2005). D.C. Circuit: *Bethel v Jefferson*, 589 F2d 631 (1978); *Thomas v Mineta*, 310 F Supp 2d 198 (D DC, 2004).

[5] The United States Supreme Court has used this canon in interpreting: the Securities and Exchange Act, 15 USC 78a *et seq*., *Tcherepnin v Knight,* 389 US 332, 336; 88 S Ct 548; 19 L Ed 2d 564 (1967); patent laws, *Winans v Denmead*, 56 US 330, 341; 14 L Ed 717 (1854); the federal Motor Carrier Act, 49 USC 306, *McDonald v Thompson,* 305 US 263, 266; 59 S Ct 176; 83 L Ed 164 (1938); revenue statutes, *United States v Hodson,* 77 US 395, 406; 19 L Ed 937 (1870); the Longshoremens and Harbors Act, 39 USC 900 *et seq.*, *Baltimore & Philadelphia Steamboat Co v Norton*, 284 US 408, 414; 52 S Ct 187; 76 L Ed 366 (1932); the Fair Labor Standards Act, 42 USC 12101 *et seq*., *Mitchell v Lublin, McGaughy & Assoc,* 358 US 207, 211; 79 S Ct 260; 3 L Ed 2d 243 (1959); the Civil Rights Act, 42 USC 1983, *Gomez v Toledo*, 446 US 635, 639; 100 S Ct 1920; 64 L Ed 2d 572 (1980); the Americans with Disabilities Act, 42 USC 12101 *et seq*., *PGA Tour, Inc v Martin,* 532 US 661, 676; 121 S Ct 1879; 149 L Ed 2d 904 (2003); antitrust laws, *Jefferson Co Pharmaceutical Ass'n, Inc v Abbott Laboratories,* 460 US 150, 159; 103 S Ct 1011; 74 L Ed 2d 882 (1983); and the federal Employers' Liability Act, 45 USC 51 *et seq*., *Atchison T & S F R Co v Buell*, 480 US 557, 562; 107 S Ct 1410; 94 L Ed 2d 563 (1987).

B. SUPPORT FOR OUR INTERPRETATION OUTSIDE OUR JURISDICTION

There is also support for our interpretation outside this jurisdiction. The language used in the CRA[6] is substantially similar to the language of title III of the Americans with Disabilities Act.[7] For this reason, the caselaw interpreting the Americans with Disabilities Act is instructive with regard to the correct interpretation of our statute.

In *Menkowitz v Pottstown Mem Med Ctr*,[8] the United States Court of Appeals for the Third Circuit decided a case involving almost identical facts. In that case, the defendant hospital suspended the staff privileges of the plaintiff, a disabled orthopedic surgeon. *Id.* at 115. The plaintiff sued, alleging that the hospital had discriminated against him on the basis of his disability. *Id.* at 116. The district court dismissed the claim, deciding that title III protects only those seeking medical care, not the employees and other staff who serve them. *Id.*

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[6] MCL 37.2302 provides in part:

> Except where permitted by law, a person shall not:
>
> (a) Deny an *individual* the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [Emphasis added.]

[7] 42 USC 12182 (title III) provides:

> (a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

[8] 154 F3d 113 (CA 3, 1998).

The Third Circuit reversed, holding that a "medical doctor with staff privileges . . . may assert a cause of action under Title III of the ADA as an 'individual' who is denied the 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.' " *Id.* at 122. This is the same conclusion we have reached in interpreting our statute. Because the Third Circuit was interpreting a similar statute under similar circumstances, the *Menkowitz* decision supports the conclusion that we reached the correct interpretation of our statute.

C. OUR INTERPRETATION IS CONSISTENT WITH MICHIGAN LAW

Our conclusion is also consistent with existing Michigan caselaw. The fact that, in considering a similar issue, another Michigan court reached an analogous result gives us confidence that our interpretation of the statute is correct.

In *Neal v Dep't of Corrections,* the plaintiffs were women inmates in Michigan Department of Corrections facilities who claimed they were victims of sexual harassment. Initially, the Court of Appeals ruled that the prisoners were not protected by the CRA because the prison did not furnish a service to its prisoners. *Neal v Dep't of Corrections*, 230 Mich App 202, 209; 583 NW2d 249 (1998) (*Neal I*). However, on rehearing, the Court of Appeals ruled that the prisoners were protected because the CRA does not preclude its application on the basis of a person's status as a prisoner or inmate. *Neal v Dep't of Corrections* (*On Rehearing*), 232 Mich App 730, 740; 592 NW2d 370 (1998) (*Neal II*). A special panel of the Court of Appeals affirmed the decision in *Neal II* in its opinion in *Doe v Dep't of Corrections*, 240 Mich App 199; 611 NW2d 1 (2000). The special panel conceded that it

was possible that the Legislature did not intend the CRA to apply to prisoners. But, it stated, it did not have the liberty to change the meaning of statutory language. *Id.* at 201.

Neal arose in a different context. However, the argument advanced by the defendants in that case is the same one advanced by defendants here, that there is an inferred exclusion from the protection of the CRA. *Neal I*, 230 Mich App at 206. In *Neal*, the defendants claimed that penal institutions should be divided into a public side, where discrimination is prohibited, and a nonpublic side, where inmates are not protected. *Id.* In this case, according to defendants, discrimination is not allowed when hospitals are providing services to the public. But, they reason, as regards relationships with the hospitals' physicians, the CRA does not prohibit discrimination. We reject this argument here just as the Court of Appeals did in *Neal*. The statute simply does not preclude its application on the basis of a person's status.

D. LEGISLATIVE ACQUIESCENCE

Aside from the similarity of the arguments advanced, the Court of Appeals decision in *Doe* is persuasive for another reason. After the special panel's decision, the Legislature amended the CRA specifically to exclude prisoners. When it did so, it had the opportunity to carve out a broader exclusion. However, it did not remove prisons as places of public service, nor did it engage in the artifice of dividing the institution into public and nonpublic areas. The Legislature simply removed prisoners from the protection of the act. It has made no further exclusion of persons or classes of persons from the CRA, nor has it given any indication of an intent to further restrict this remedial statute. Its

decision not to insert further exclusionary language is evidence that the Legislature approved the Court's broad interpretation of this statute. See, e.g., *Twork v Munising Paper Co*, 275 Mich 174, 178; 266 NW 311 (1936); *Gordon Sel-Way, Inc v Spence Bros Inc*, 438 Mich 488, 505; 475 NW2d 704 (1991).

CONCLUSION

The language of the CRA clearly supports the decision in this case. I write separately to stress that the language is not the only consideration that courts should weigh in interpreting a statute. "[T]he purpose of construction is the ascertainment of meaning; nothing that is logically relevant should be excluded." Stephen Breyer, *Active Liberty* (New York: Knopf, 2005), p 18, quoting Learned Hand, *The Spirit of Liberty* (New York: Knopf, 1960), p 109. Interpreting a statute involves a search for intent, and courts should be free to use all available interpretative tools in undertaking it. Here, each of the factors I have discussed is relevant to that search.

CAVANAGH, J., concurred with KELLY, J.

MARKMAN, J. (*concurring*). Having reached the proper result in this case through a proper legal analysis, Justice KELLY in a concurrence to her own majority opinion proceeds to demonstrate that she could have reached the same result through less disciplined means. Not content to rely, as she does in her majority opinion, on the actual language of the law, Justice KELLY invokes an array of alternative techniques to "interpret" the law in her concurring opinion. She relies upon a "liberal construction" of the statute in question; she relies upon characterizations of the statute as "broad" and "reme-

dial"; she relies upon a summary description of the law as "ambiguous," therefore apparently affording her the discretion to pick and choose the law she prefers; she relies upon the Legislature's inaction in the wake of an earlier court decision, equating this to approval of the Court's decision; she disparages the value of dictionaries as an essential tool in the interpretative process; and she relies upon an extraordinarily broad understanding of "legislative history." For the sake of future reference, a further catalogue of language-avoidance "interpretative" techniques would include the following: divining the "spirit of a statute"; relying upon considerations of "public policy"; standardlessly applying "equity"; characterizing statutes with which a judge disagrees as "absurd"; and concocting creative "balancing" and "totality of circumstances" tests. Innovatively applied, each of these techniques can be relied upon to avoid the hard task of having to discern a statute's meaning from its actual language.

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

CITY OF MT PLEASANT v STATE TAX COMMISSION

Docket No. 129453. Argued October 3, 2006 (Calendar No. 6). Decided March 28, 2007.

The city of Mt. Pleasant petitioned the Michigan Tax Tribunal to have declared exempt from taxation under MCL 211.7m over 320 acres of land that the city acquired as vacant land and prepared for development. The purpose was to sell the property to attract economic development and enhance the tax base. The tribunal held that the land was not exempt from taxation while it was being marketed to the eventual private users because the city was not making an appropriate and present tax-exempt use of the property. The Court of Appeals, OWENS, P.J., and CAVANAGH and NEFF, JJ., affirmed on the basis that the city's use of the property was not active and actual and therefore did not qualify for exemption under the statute. 267 Mich App 1 (2005). The Supreme Court granted the city's application for leave to appeal. 474 Mich 1001 (2006).

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

The property was exempt from taxation because the city used the property for public purposes when it acquired and improved the land for resale for economic development.

1. A public purpose promotes public health, safety, morals, general welfare, security, prosperity, and the contentment of all the inhabitants or residents within a municipal corporation.

2. Drawing commerce to an area promotes prosperity and the general welfare. Economic development creates jobs and stimulates private investment and redevelopment to ensure a healthy and growing tax base, and these are examples of goals that advance a public purpose.

3. Land that is being actively annexed, assembled, marketed, and prepared for resale by a city to attract economic development is being "used for public purposes" and is entitled to tax exemption under MCL 211.7m.

Reversed and remanded to the Tax Tribunal for entry of judgment in favor of the petitioner.

TAXATION — MUNICIPAL CORPORATIONS — EXEMPTIONS — PUBLIC PURPOSES.

Land that a city is actively annexing, assembling, marketing, and preparing for resale to attract economic development and ensure a healthy and growing tax base is being "used for public purposes" and is therefore exempt from taxation pursuant to MCL 211.7m.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), and *Simen, Figura & Parker, PLC* (by *Richard J. Figura*), for the petitioner.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Heidi L. Johnson-Mehney* and *Ross H. Bishop*, Assistant Attorneys General for the respondent.

Amici Curiae:

Edward M. Thomas, Corporation Counsel, *Robert S. Gazall*, Chief Assistant Corporation Counsel, and *Jeanne D' Arc Hanna*, Assistant Corporation Counsel, for Wayne County.

Miller, *Canfield*, *Paddock* & *Stone*, P.L.C. (by *William J. Danhof* and *Bree Popp Woodruff*), for Michigan Municipal League Legal Defense Fund.

CAVANAGH, J. We granted leave to appeal in this case to determine whether MCL 211.7m exempts property from taxation on the basis that it is "used for public purposes" when a city acquires property and implements a plan to use the property for economic development purposes. Because the city of Mt. Pleasant used the property at issue for public purposes when it acquired and improved the land for resale for economic development, we hold that the property was exempt from taxation under MCL 211.7m. The Michigan Tax Tribunal made an error of law when it concluded otherwise; therefore, we reverse the judgment of the

Court of Appeals that affirmed the judgment of the Tax Tribunal.

I. STATEMENT OF FACTS AND PROCEEDINGS

In 1990, petitioner city of Mt. Pleasant purchased over 320 acres of vacant land adjacent to its border and annexed the property. The city's stated purpose for purchasing the land was to allow for the extension of city streets that would connect to a "ring road" around the city; widen and extend various streets; provide land for needed housing, much of which would be low-income housing; and plat and prepare land for sale to developers for residential, commercial, and industrial uses to increase the city's tax base.

The property was initially treated as tax-exempt on the assessment rolls. However, the city assessor asked respondent State Tax Commission for guidance in assessing the property, and the city assessor was eventually told to treat the property as taxable property. The city objected to that assessment before the local board of review, but the assessment was affirmed. The city then proceeded with petitions before the Michigan Tax Tribunal asking for a ruling that the property was exempt under MCL 211.7m.

On October 31, 2003, the Tax Tribunal issued its decision, concluding that the property was not exempt and that the city was required to pay two years of back taxes on the property. The Tax Tribunal stated that the city was not entitled to the exemption because the city did not make a "present" use of the property. The Tax Tribunal did not view acquiring and improving the property for economic development as a present use.

The city appealed to the Court of Appeals. The Court of Appeals affirmed the judgment of the Tax Tribunal, concluding that the city's use of the property was not an

"active, actual" use and, therefore, did not qualify for an exemption under MCL 211.7m. *Mt Pleasant v State Tax Comm*, 267 Mich App 1, 5; 703 NW2d 227 (2005). The Court of Appeals then denied the city's motion for reconsideration, and this Court granted the city's application for leave to appeal. 474 Mich 1001 (2006).

II. STANDARD OF REVIEW

The proper interpretation of a statutory provision is a question of law that this Court reviews de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). Additionally, appellate review of Michigan Tax Tribunal decisions is limited. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 482; 473 NW2d 636 (1991). "All factual findings are final if supported by competent and substantial evidence." *Id*. "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28.

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 statutory provision at issue in this case provides, in relevant part, as follows:

> Property owned by, or being acquired pursuant to, an installment purchase agreement by a county, township, city, village, or school district *used for public purposes* and property owned or being acquired by an agency, authority, instrumentality, nonprofit corporation, commission, or other separate legal entity comprised solely of, or which is wholly owned by, or whose members consist solely of a political subdivision, a combination of political subdivisions, or a combination of political subdivisions and the state and is used to carry out a public purpose itself or on behalf of a political subdivision or a combination is exempt from taxation under this act. [MCL 211.7m (emphasis added).]

This Court has previously stated that a "public purpose" promotes " 'public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation . . . .' " *Gregory Marina, Inc v Detroit*, 378 Mich 364, 396; 144 NW2d 503 (1966), quoting 37 Am Jur, Municipal Corporations, § 120, p 734; see also *City of Gaylord v Gaylord City Clerk*, 378 Mich 273, 299-301; 144 NW2d 460 (1966); *Hays v City of Kalamazoo*, 316 Mich 443, 454; 25 NW2d 787 (1947). This Court has also recently stated in *Wayne Co v Hathcock*, 471 Mich 445, 461-462; 684 NW2d 765 (2004), that economic development constitutes a "public purpose." This Court stated that creating jobs for Michigan's citizens and stimulating private investment and redevelopment to ensure a healthy and growing tax base are examples of goals that advance a public purpose. Drawing commerce to an area promotes prosperity and the general welfare. While these goals did not meet the narrow constitutional requirements at issue in *Hathcock*, the definition of what constitutes a "public purpose" does not change merely because this Court is reviewing the phrase in the context of developing property under MCL 211.7m as opposed to condemning property.

In this case, the city had no vacant industrial land within its limits; thus, the city acquired the land at issue and prepared it for development. The city improved and sold various parcels of the land, and these efforts at economic development and enhancing the tax base are indeed for a public purpose. While the land at issue was vacant during the time that the city owned it, the city improved the land by platting the property and beginning to install an infrastructure in 1991 to ready the land for sale. Among the items installed by the city were water lines, sanitary sewer lines, curbs, gutters, and roads. Also in 1991, the city began the completion or extension of at least three roads. A study conducted in the 1980s determined that a major street grid system was needed. The street widening and expansions resulted in better vehicle flow and provided a quicker response time for emergency vehicles. The city also noted in an amended resolution for annexation that efforts to develop roads for better traffic flow and safety were hampered by the city's lack of control over lands that were outside the city limits but necessary for the street extensions.

The land at issue also provided a location for much-needed housing. A housing study conducted on behalf of the city indicated that about 100 new residential low- and moderate-income units would be needed for city residents. The Mt. Pleasant Housing Commission purchased approximately 6.1 acres in 1991 for the development of low-income rental housing. In 1992, the city further platted two subdivisions containing about 4.6 acres. The land was also used for a 65-unit housing development for the elderly.

Moreover, the city's determination that it needed to expand its tax base with industrial development resulted in the city rejecting offers for the land that were

not projected to create jobs or enhance the tax base. Subsequently, the land was used to create various projects, including five subdivisions, one condominium development, three apartment developments, soccer fields and a park, a county health department and emergency center, a state police post, an industrial park, a social security building, an optometrist's office, and at least one other commercial development.

Because we have determined that the city's efforts at economic development and enhancing the tax base were for "public purposes," we must next determine when the city "used" the land for these public purposes. The language chosen by the Legislature indicates that to be tax-exempt, the property must be "*used* for public purposes." MCL 211.7m (emphasis added). Thus, during each tax year in question, the city must have made a present use of the land that qualifies as a "public purpose" so that the city will have "used" the land for that purpose. While this inquiry is, of course, fact-intensive, the court must consider what steps the city has taken to move from merely holding the land to actually using it for a public purpose.

In this case, the city conducted numerous activities that lead to the conclusion that the city "used" the land for a public purpose. The city engaged in a number of activities, such as expanding and installing streets and public utilities, to indicate that it purposefully moved toward implementation of its development plan for the land and did not delay in engaging in reasonable activities to prepare the land to attract economic development that would create jobs, stimulate investments, and ensure a sound and growing tax base. The reality of economic development is that acquiring and improving land for resale is not done in a day. It takes time to assemble and prepare land. Consequently, the city's

ongoing actions in annexing, assembling, marketing, and preparing the land for resale to attract economic development indicate that the land was indeed "used for public purposes."

Today's decision that the city actively prepared and marketed the land at issue in accordance with its plan to foster economic development is in line with prior cases from this Court. In *Traverse City v East Bay Twp*, 190 Mich 327, 330; 157 NW 85 (1916), this Court held that vacant land owned by the plaintiff, Traverse City, was not tax-exempt. The plaintiff had purchased 960 acres of vacant land at the same time that it purchased operating power-plant facilities. Counsel for the plaintiff admitted at a hearing that the plaintiff had no plans for the vacant land and that the land was not part of any plan with a broader vision. Counsel stated that the land was not being used and nothing had been done to develop it.

A city commissioner also testified that the land was undeveloped and that the plaintiff had not attempted to improve or change the natural condition of the land. The city commissioner stated that while the land *could* be used in the future to provide power, there was no plan to do so, and there was no time line when the land might be used. The city commissioner further stated that the current power plant was meeting the present needs and could meet a considerable increase in need. As this Court stated, "The lands not only are not used for any public purpose, but they are not used for *any* purpose." *Id*. at 330 (emphasis added). The land in *Traverse City* was being held for pure speculation—there was not even a vague plan regarding when or if the land would be used in the future.

In marked contrast, the city's plan for the property at issue in this case was not merely aspirational. In the

resolution passed by the city to approve the property acquisition, the city stated that it wanted to acquire the land to handle the increased traffic demand caused by growth within the city and to use the land for the development of new industry that "is badly needed in the future to expand the City's tax base" because of the lack of other available land in the city. The city also had a conceptual site plan that divided the property into various zones to accommodate future uses under the master plan. The site plan provided a guide for areas of future development, such as roads, utilities, population densities, residential neighborhoods, and commercial areas. The city solicited requests for proposals related to the land that were based on the conceptual site plan and land-use plan. The city did not delay in requesting these proposals, issuing a deadline of March 7, 1991. The city followed its plan for the land at issue and purposefully moved toward implementation of its plan by actively improving the land for resale. The city platted, developed, marketed, and eventually sold the land to encourage economic growth; thus, the city used the land for public purposes.

The city's use of the land for public purposes began when it started to prepare the land for economic development after the city purchased land adjacent to its borders and annexed this property to the city. In December 1990, the city reviewed the responses to its request for proposals for the recently purchased and annexed land, and the city also began developing a request for proposals for local real estate companies to market the property. Throughout 1991, the city actively engaged in planning for the land. For example, in January 1991, the city reviewed requests for proposals and discussed options for the sale of the land. Interviews that had taken place with two agencies that had submitted proposals for the land were discussed, as was

a recommendation to list land with a cobroker to market the land. The city's land-marketing committee was also given specific authorization by the city to work with a development corporation to market and sell the land. In February 1991, the mayor discussed recommendations from the land-marketing committee with the city commission. Additionally, evaluations of the city's options were discussed, and members of the public spoke at a city commission meeting about their concerns and opinions. In March 1991, proposals for the land were discussed and a resolution was passed regarding road expansion. In May 1991, a master plan for the residential portion of the land was discussed and a master plan for the newly acquired property was approved. In June 1991, the city continued to work on marketing and selling the land.

In July 1991, the city hired a management company to market approximately 220 acres of land. The city also hired a local nonprofit organization dedicated to attracting new industries to the area. The agreement between the city and the nonprofit organization provided that the organization was to develop a comprehensive master plan for the development of the proposed 138-acre industrial park and also develop, within 30 days of the signing of the agreement, a detailed marketing plan to be presented to the city. In 1991, the city also platted some of the land, and streets and public utilities were expanded and installed. The city also considered the master plan for the industrial part of the land.

Throughout 1992, the city continued platting and actively developing the property. The city considered and accepted offers for the land, as well as extended an agreement for surveying services to continue platting the land. The city also submitted an application for a

grant to the Economic Development Administration to assist with the cost of constructing necessary infrastructure improvements. When the grant was approved, roads and utilities were constructed in the industrial park area. Throughout 1993, 1994, and 1995, and subsequently when applicable, the city continued to market and sell the land.

The city's efforts with regard to the land indicate its active and purposeful engagement in using the land for the public purpose of economic development. The city's efforts to actively prepare the land for resale distinguish its actions from those of the plaintiff school district in *Rural Agricultural School Dist v Blondell*, 251 Mich 525, 526-527; 232 NW 377 (1930). In *Blondell*, the plaintiff acquired land with the intent to use the land for school purposes at some point in the future, but the plaintiff was renting dwellings on the land for private purposes. This Court held that the land was not tax-exempt because a future intended use of the property could not control the determination regarding its use for a public purpose when the *present* use of the land—renting it to private citizens just as any other landlord would do—was not for a public purpose. In contrast, in this case the city's present use was for a public purpose because the city actively and purposefully prepared the land for resale for the public purpose of economic development.

IV. CONCLUSION

The city of Mt. Pleasant acquired and actively prepared property for sale for economic development purposes and purposefully moved toward implementation of its plan for the land. As such, the property was being "used for public purposes" and is exempt from taxation

under MCL 211.7m. Because the Michigan Tax Tribunal made an error of law when it concluded otherwise, we reverse the judgment of the Court of Appeals and remand this case to the Tax Tribunal for entry of a judgment for the city.

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

PERRY v GOLLING CHRYSLER PLYMOUTH JEEP, INC

Docket No. 129943. Decided April 11, 2007.

Brian J. Perry brought an action in the Oakland Circuit Court against Golling Chrysler Plymouth Jeep, Inc., seeking damages for injuries he sustained when a vehicle driven by Ksenia Nichols collided with a parked vehicle. The accident occurred only hours after Nichols had taken possession of the vehicle from Golling and after Nichols had signed an application for title to the vehicle. The court, Edward Sosnick, J., granted summary disposition in favor of Golling on the basis that the title had been transferred to Nichols when the application for title was signed and, therefore, Golling was not the owner of the vehicle at the time of the accident. The Court of Appeals, SAAD, P.J., and JANSEN and MARKEY, JJ., reversed in an unpublished opinion per curiam, issued October 11, 2005 (Docket No. 254121), on the basis of its interpretation that *Goins v Greenfield Jeep Eagle, Inc,* 449 Mich 1 (1995), held that a title was not effectively transferred until the application for title is mailed or delivered to the Secretary of State. Golling sought leave to appeal from the judgment of the Court of Appeals. The Supreme Court directed the clerk to schedule oral argument on whether to grant the application or take other peremptory action, 474 Mich 1135 (2006), and heard oral argument.

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

An application for title to a motor vehicle is "executed" for purposes of MCL 257.233(9), and title is transferred to the new owner, at the time the application is signed. At that moment, the title transfers to the new owner, without regard to the mailing or delivery of the application to the Secretary of State. The holding in *Goins* was incorrectly understood by the Court of Appeals to require delivery as part of the execution.

Court of Appeals judgment reversed; circuit court order reinstated.

Justice KELLY, dissenting, disagreed with the majority's interpretation of *Goins*. The statement in *Goins* that "[t]he application for title was executed when [the automobile dealership] sent the

necessary forms to the Secretary of State" was essential to the determination of that case and is binding precedent for this case. A consideration of whether *Goins* was correctly decided, whether *Goins* defies practical workability, whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the *Goins* decision leads to the conclusion that *Goins* remains good law and should not be overturned. The application for leave to appeal in this case should be denied.

Justice CAVANAGH would deny leave to appeal.

MOTOR VEHICLES — TRANSFERS OF TITLE — EXECUTION OF TRANSFERS.

An application for title to a motor vehicle is "executed" and the title is transferred to the new owner the instant the application is signed; the sending or delivery of the application to the Secretary of State is not required in order to complete the execution (MCL 257.233[9]).

Barnett & Traver, P.C. (by *Larry Barnett* and *Scott R. Traver*), for the plaintiff.

Sullivan, Ward, Asher & Patton, P.C. (by *Ronald S. Lederman, Charles E. Randau,* and *Jennifer R. Moran*), for the defendant.

Amici Curiae:

Abbott, Nicholson, P.C. (by *Robert Y. Weller II*, and *Michael J. Weikert*), for Detroit Auto Dealers Association.

Willingham & Coté, P.C. (by *Ray Foresman* and *Jason W. Johnson*), for Michigan Automobile Dealers Association.

TAYLOR, C.J. In this case, we are called on to determine whether, pursuant to MCL 257.233(9), an application for title to a motor vehicle is "executed" and therefore the title is transferred to the new owner at the time the application is signed, or if the application is not "executed" and the title transferred until the applica-

tion is sent to the Secretary of State. We hold that "execution" is complete at signing and thus at that moment title transfers to the new owner, without regard to mailing or delivery to the Secretary of State. Because the Court of Appeals held to the contrary on the basis of *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1; 534 NW2d 467 (1995), we reverse its judgment and reinstate the trial court's grant of summary disposition for defendant.

The relevant facts in this case are brief. Ksenia Nichols sought to purchase a vehicle from Golling Chrysler Plymouth Jeep, Inc. In that process, much of the paperwork had been completed, including the application for title that Nichols had signed. Hours after taking possession of the vehicle, Nichols collided with a parked car, causing injury to Brian Perry. Perry sued Golling, asserting that Golling was still the owner of the vehicle and thus liable under MCL 257.401 for the acts of its permissive user (Nichols), because, although the application for title had been signed, the title was not effectively transferred until the application was delivered to the Secretary of State. In making this argument, Perry relied on *Goins*, *supra*, to assert that the transfer was incomplete until the mailing or delivery of the application of title to the Secretary of State. Defendant argued that this was a misinterpretation of *Goins* and that the transfer was effective upon the signing of the application for title. Defendant sought summary disposition under MCR 2.116(C)(10) on the basis of its understanding of when title is transferred, and the trial court granted defendant's motion, ruling that at signing the title had transferred to Nichols and thus Golling was no longer the owner at the time of the accident. The Court of Appeals reversed, however, on the basis of its interpretation of *Goins*, concluding that a question of fact existed regarding ownership of the vehicle. Unpub-

lished opinion per curiam, issued October 11, 2005 (Docket No. 254121). Golling sought leave to appeal from the judgment of the Court of Appeals. The Supreme Court directed the clerk to schedule oral argument on whether to grant the application. 474 Mich 1135 (2006).

STANDARD OF REVIEW

We review de novo an issue of statutory construction, and ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Likewise, a trial court's grant of summary disposition is reviewed de novo. *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002).

ANALYSIS

Under MCL 257.401, the "owner" of a vehicle is liable for injury resulting from operation of the vehicle, even if the owner is not the driver. An "owner" is one who holds the title (unless the vehicle is leased). MCL 257.37. MCL 257.233(9) explains when title is transferred (emphasis added):

> Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the title or interest in a motor vehicle by a person, including a dealer, *the effective date of the transfer of title or interest in the vehicle shall be the date of execution of either the application for title or the assignment of the certificate of title.*[1]

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[1] We note that MCL 257.233 was amended by 2006 PA 317, effective January 3, 2007. Subsection 9 now provides:

> Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the title or interest in a motor vehicle by a person, including a dealer, the effective date of the transfer of title or

Thus, we must determine in this case what is the date of execution of either the application for title or the assignment of the certificate of title.

In *Goins, supra*, the issue was whether the title had been transferred where the Secretary of State had received the application and issued a certificate of title, even though the dealer failed to ensure that the buyer had proper insurance, which should have precluded his being issued a title.[2] The *Goins* Court, in concluding that the title in that case had been transferred, said, "The application for title was executed when defendant sent the necessary forms to the Secretary of State, and the certificate of title was executed when the Secretary of State issued a new certificate in the purchaser's name." *Goins, supra* at 14. This statement, by itself, does not clearly say when execution occurred: because of sending and receipt at the Secretary of State or an earlier point (perhaps at the time of mailing before receipt or possibly at the moment of signing). This is not a flaw in the opinion because the only question the *Goins* Court had to answer, and did answer, was whether a title application sent to and received by the Secretary of State is one that has been executed. In fact, the question the present case poses actually builds on the *Goins* question and asks: Conceding that execution was surely effected when the application was sent to the Secretary of State, was the execution effective at some point before that? We believe it was effective even earlier. It was effective at the moment of signing.

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interest in the vehicle is the date of signature on either the application for title or the assignment of the certificate of title by the purchaser, transferee, or assignee.

[2] MCL 257.233 was slightly different at that time, with title transferring on "the date of execution of either the application for title or the certificate of title," rather than the "assignment of the certificate of title."

Our caselaw has consistently held that execution requires signing, and that delivery is separate from execution.[3] Other statutes within the Michigan Vehicle Code likewise indicate that mailing or delivery occurs *after* execution.[4] This is also consistent with the definition of "execute" found in Black's Law Dictionary (6th ed): "To complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of." This, then, is the correct understanding of "executed" in MCL 257.233(9), and *Goins* is entirely harmonious with this reading of the statute. The dissent's suggestion that our holding necessitates overruling *Goins* reflects a misunderstanding of our holding, and we reject it.

We conclude that the application for title was executed in this case because it was signed by the parties. Defendant was not required to send the application to the Secretary of State in order to complete the execution. We clarify that the statement in *Goins* was incorrectly understood by the Court of Appeals to require delivery as part of the execution. We reverse the Court of Appeals judgment and reinstate the trial court's grant of summary disposition for defendant.

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

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[3] See, e.g., *Farrell v Nutter*, 362 Mich 639; 107 NW2d 770 (1961); *Wiedbrauk v Wiedbrauk*, 284 Mich 15; 278 NW 747 (1938); *Roth v Smilay*, 251 Mich 381; 232 NW 220 (1930).

[4] For example, MCL 257.238, which requires the person named as the owner on the certificate of title to add security interests to the title, requires the owner to first "execute" an application, then "deliver" it to the holder of the security interest, and then requires that the owner "shall cause the [application] to be mailed or delivered" to the Secretary of State.

KELLY, J. (*dissenting*). I would deny the application for leave to appeal. Although the majority contends that it merely expands on this Court's holding in *Goins*,[1] in point of fact, it distorts and actually rewrites the *Goins* holding. Also, the critical statement in *Goins* that "[t]he application for title was executed when defendant sent the necessary forms to the Secretary of State," *id*., was essential to the determination of the case and therefore is binding precedent for this case. When the majority misreads the statement, it effectively overrules *Goins*. I maintain that *Goins* should not be overruled.

THE *GOINS* DECISION

The issue in *Goins* was whether an automobile dealership remained the owner of a vehicle when the dealership failed to send proof of its purchaser's insurance coverage to the Secretary of State. *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1, 2; 534 NW2d 467 (1995). In deciding the case, the Michigan Supreme Court noted that the dealership's liability turned on whether the dealership owned the vehicle on the date the vehicle was involved in an accident. *Id.* at 4. The Court reiterated the importance to ownership of the transfer of title. *Id.* at 13-14. Specifically, it noted that "[t]itle transfers when there has been an 'execution of either the application for title or the certificate of title.' " *Id.* at 14, citing MCL 257.233(5).[2] In that regard, the *Goins* Court made this statement:

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[1] *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1, 14; 534 NW2d 467 (1995).

[2] 1998 PA 346 redesignated subsection 5 as subsection 9. 1999 PA 206 amended subsection 9 by inserting the term "assignment of the." When the instant case accrued, MCL 257.233(9) stated:

> Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the title or interest in a motor vehicle by a person, including a dealer, the effective date of the transfer of title or

> The application for title was executed when [the dealership] sent the necessary forms to the Secretary of State, and the certificate of title was executed when the Secretary of State issued a new certificate in the purchaser's name. [*Goins,* 449 Mich at 14.]

Therefore, because both events had occurred by the time of the accident, the Court concluded that title had transferred and the dealership was not the vehicle owner, hence not liable. *Id.* at 14.

THE MAJORITY DISTORTS THE HOLDING OF *GOINS*

The majority contends that its opinion does not necessitate an overruling of *Goins* because its opinion is a harmonious extension of the *Goins* holding. The irrefutable fact is that the *Goins* Court wrote that the application for "title was executed when [the dealership] sent the necessary forms to the Secretary of State." *Goins*, 449 Mich at 14. The majority effectively rewrites this sentence to read, "the application for title *had been executed by the time* the dealership sent the necessary forms to the Secretary of State." It then adds that the application for title was executed at the moment the purchaser signed the application for title.

The majority implies that the *Goins* Court was sloppy in its phraseology. That seems unlikely given that the *Goins* Court dedicated a significant portion of its analysis to past decisions that emphasized the importance of the transfer of title to the transfer of ownership. See *Goins*, 449 Mich at 10-14. Considering its detailed discussion of the importance of deciding when title transferred, it is not credible that the *Goins* Court found it unnecessary to specify the exact moment the

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> interest in the vehicle shall be the date of the execution of either the application for title or the assignment of the certificate of title.

title transferred. For that reason, I conclude that the *Goins* Court meant what it wrote: the application for title was executed, hence title transferred, "when [the dealership] sent the necessary forms to the Secretary of State."

THE STATEMENT IN *GOINS* WAS CENTRAL TO THE HOLDING OF THE CASE

The statement under consideration was not dictum for the reason that it was essential to the determination of the case.[3] As indicated above, the dealership's liability in *Goins* turned on whether it owned the vehicle at the time of the accident. *Goins*, 449 Mich at 4. The *Goins* Court concluded that the dealership did not own it because both requirements of MCL 257.233(5) had been satisfied. *Goins*, 449 Mich at 14. In order to make that determination, the Court had to ascertain whether, at the time of the accident, the application for title had been executed. *Id*. Accordingly, the Court's statement that the application was executed when the necessary forms were sent to the Secretary of State was part of the resolution of the central issue.

The Court of Appeals was correct in relying on *Goins* to conclude that the date the dealership mailed the application to the Secretary of State determined whether the dealership was liable. *Perry v Golling Chrysler Plymouth Jeep, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2005 (Docket No. 254121). Moreover, the statement in *Goins* binds this Court in this case.

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[3] "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." Black's Law Dictionary (6th ed), defining "dictum."

APPLICATION OF THE *ROBINSON* FACTORS

Because the majority reads *Goins* as it does, it denies that it has overruled that case. As a consequence, it makes no mention of the *Robinson*[4] factors. But given that the *Robinson* Court held that precedent should not be overturned without consideration of these factors, I will apply them now. We should consider whether *Goins* was wrongly decided. *Robinson*, 462 Mich at 464. We should also determine whether *Goins* "defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the [*Goins*] decision." *Id*.

My application of the *Robinson* factors reveals that *Goins* should not be overturned. First and most importantly, the *Goins* Court did not err in holding that the application for title was executed when the dealership sent it to the Secretary of State. This conclusion requires an understanding of MCL 257.233. When the claim in *Goins* occurred, the Legislature had not defined the term "execute," as it appears in the statute. However, the statute does address owners transferring title. Therefore, it was reasonable for the *Goins* Court to conclude that the term "execute" referred to an action that the owner, i.e., the dealership, must take.

Moreover, the *Goins* Court's statement that execution occurred when the dealership sent the necessary forms to the Secretary of State was consistent with how Michigan courts interpreted the statute at the time. In *Zechlin v Bridges Motors Sales*,[5] which the *Goins* Court cited, the Court of Appeals observed that the effective date of a transfer of title is the date of the execution of

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[4] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[5] 190 Mich App 339, 342; 475 NW2d 60 (1991).

the application for title. *Id.* at 342. In *Zechlin,* the dealership had filed the application for title with the Secretary of State before the accident occurred. *Id.* at 342. Therefore, the Court of Appeals concluded that the dealership's ownership interest in the vehicle terminated before the accident. *Id.* Accordingly, the *Goins* Court's determination that execution occurred when the dealership sent the necessary forms to the Secretary of State was consistent with how the Court of Appeals interpreted the statute at the time.

There is also a public policy basis for the *Goins* decision. By holding that the application was executed when the dealership sent the application for title to the Secretary of State, the *Goins* Court prevented a possible fraud on buyers. Were execution interpreted to occur when the buyer signed the application, the dealership, no longer the owner, could escape liability for a subsequent accident yet retain the application. It could thereby try to prevent the buyer from obtaining a certificate of title until the buyer paid it more for the vehicle. The *Goins* holding circumvented this problem. For the above reasons, I believe that *Goins* was correctly decided.

Additionally, no argument has been made that the *Goins* decision cannot be applied in a practical manner. *Robinson,* 462 Mich at 464. The *Goins* rule that the application for title is considered executed when the dealership sends it to the Secretary of State is easy to understand and to apply.[6]

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[6] See, e.g., *Akmakjian v Make a Deal Auto Sales, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1996 (Docket No. 181933) (referring to *Goins* and deciding that the application for title was executed on the date that the *dealership* completed the application for title), and *Hartford Accident & Indemnity Co v The Used Car Factory, Inc,* unpublished opinion per curiam of the Court of Appeals, issued December 9, 1997 (Docket No. 198104) (The court rejected the

The next *Robinson* factor to consider is whether, if the decision were overturned, reliance interests would work an undue hardship. *Robinson,* 462 Mich at 464. It is unknown whether or how dealerships and vehicle purchasers altered their procedures in order to conform to the holding in *Goins*. Therefore, it is not possible to ascertain whether there will be any hardship when *Goins* is overturned.

The final factor to consider is whether changes in the law or facts no longer justify the decision. *Id.* From the time *Goins* was decided until the time the instant case arose, the relevant portion of MCL 257.233 remained the same. Specifically, the statute provided that one could ascertain the date of transfer of title by identifying the date of execution of the application for title. Also, the record does not reflect that the procedure for obtaining title to a motor vehicle has changed. Accordingly, no change has occurred in the law or facts. Considering all the *Robinson* factors, *Goins* should not be overturned.

CONCLUSION

The majority has rewritten the holding in *Goins*. Moreover, the statement in *Goins* that execution occurred when the dealership sent the necessary forms to the Secretary of State was essential to the determination of that case. Therefore, it is binding precedent. Finally, the *Robinson* factors do not support overruling *Goins*. For these reasons, *Goins* should remain good law. Its holding governs this case, as the Court of

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dealership's argument that title transferred when the dealership and the purchaser signed the application. It also referred to *Goins* for the proposition that execution of the application for title does not occur until the dealership sends the necessary forms to the Secretary of State.).

Appeals recognized. Therefore the Court of Appeals decision was proper and the application for leave to appeal should be denied.

CAVANAGH, J. I would deny leave to appeal.

CITIZENS INSURANCE COMPANY
v PRO-SEAL SERVICE GROUP, INC

Docket No. 130099. Decided April 25, 2007.

Citizens Insurance Company brought an action in the Oakland Circuit Court against Pro-Seal Service Group, Inc.; and others, seeking a declaration that the plaintiff was not required to defend Pro-Seal in an underlying action brought against Pro-Seal by its competitor that alleged that Pro-Seal repaired two mechanical seals made by the competitor and shipped the seals to a Pro-Seal customer in the competitor's original container with Pro-Seal's label affixed to the container. Citizens Insurance had refused to defend Pro-Seal on the basis that the allegations in the underlying complaint were beyond the scope of either of two insurance policies issued by Citizens Insurance to Pro-Seal. The trial court, Edward Sosnick, J., granted summary disposition in favor of Citizens Insurance on the basis that the policy excluded coverage for advertising injuries that are knowingly made. The trial court concluded that the allegations alleging "an intentional course of conduct involving fraud, deceit and counterfeit parts being sold as genuine" fell within the exclusion. The Court of Appeals, COOPER, P.J., and FORT HOOD and BORRELLO, JJ., vacated the trial court's order of summary disposition and remanded the matter to the trial court for the entry of an order of summary disposition for Pro-Seal. 268 Mich App 542 (2005). The Court of Appeals held that the allegations fell within the definition of an advertising injury. Citizens Insurance sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, directed the clerk to schedule oral argument on the application. 474 Mich 1112 (2006). Following oral argument, the Supreme Court issued an opinion per curiam reversing the judgment of the Court of Appeals and remanding this case to the trial court for further proceedings.

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

The act of shipping a product in a competitor's packaging with one's own name affixed is insufficient to satisfy the definition of an "advertisement" in the relevant insurance policy. The judgment of

the Court of Appeals must be reversed and the case must be remanded to the trial court for further proceedings.

1. The Court of Appeals erred in failing to enforce the definition of the term "advertisement" as it is defined in the insurance policy.

2. The policy provided that an "advertisement" occurs when there is a notice that is broadcast or published to the general public or specific market segments for the purpose of attracting customers. Here, Pro-Seal sent the container to a specific customer in the competitor's container provided by that customer for the purpose of completing a single transaction. The act forming the basis of the underlying complaint did not "arise out of an advertisement" and, therefore, there was no "advertising injury" that would obligate Citizens Insurance to tender a defense under the terms of the policy.

Reversed and remanded to the trial court for further proceedings.

Justice CAVANAGH, joined by Justice WEAVER, dissenting, agreed with Justice KELLY that Flowserve's allegations in its complaint against Pro-Seal amounted to allegations of a violation of Flowserve's trade dress. He also agreed with her analysis of the terms "advertisement" and "notice." However, Justice CAVANAGH would resolve this case simply by reviewing Flowserve's allegations against Pro-Seal. If those allegations even arguably come within the coverage of Citizens Insurance's policy, Citizens Insurance must provide a defense. Flowserve alleged that Pro-Seal used Flowserve's trademarks to identify Pro-Seal products and through its actions caused customer confusion regarding the origin or manufacture of the goods. These allegations accused Pro-Seal of taking actions that inherently involved advertisement, i.e., notice broadcast or published to the general public or specific market segments about its goods, products, or services for the purpose of attracting customers or supporters. The Court of Appeals correctly determined that Citizens Insurance had a duty to defend Pro-Seal.

Justice KELLY, joined by Justice WEAVER, dissenting, stated that an insurer's duty to defend its insured depends on the allegations the third party makes in the underlying complaint against the insured. If the allegations fall even arguably within the coverage of the policy, the insurer has a duty to defend. Where there is doubt about whether the complaint alleges a liability covered by the insurer under its policy, the doubt must be resolved in favor of the insured. The insurance policy at issue in this case provides coverage for advertising injury arising out of infringing another's

trade dress in the insured's advertisement. The complaint against Pro-Seal alleged an "advertising injury," as defined in the policy. A policy exclusion for advertising injury caused by the insured with knowledge that the act would violate the rights of another and would inflict advertising injury does not apply in this case, where Flowserve sought recovery for innocent, inadvertent, negligent, or reckless conduct on the part of Pro-Seal. The judgment of the Court of Appeals should be affirmed.

Plunkett & Cooney, P.C. (by *Jeffrey C. Gerish* and *James R. Lilly*), for Citizens Insurance Company.

Pierce, Duke, Farrell & Tafelski, PLC (by *Mark C. Pierce*), and *Foley & Lardner LLP* (by *Jeffrey G. Collins*), for Pro-Seal Service Group, Inc.

PER CURIAM. At issue in this insurance coverage dispute is whether defendant Pro-Seal Service Group, Inc.'s, act of shipping a product in a competitor's packaging with Pro-Seal's labeling affixed to it constitutes an "advertisement" for purposes of an insurance policy. The Court of Appeals determined that plaintiff (Citizens Insurance Company) was required to defend defendant under the terms of a commercial general liability policy (CGL policy) because the underlying complaint alleged a violation of trade dress[1] and such a violation inherently involves advertising activity. Because we conclude that the act of shipping a product in a competitor's packaging with one's own name affixed to it is insufficient to satisfy the CGL policy's definition of an "advertisement," we reverse the judgment of the Court of Appeals that held to the contrary and remand

[1] "The trade dress of a product is essentially its total image and overall appearance. It involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." *Two Pesos, Inc v Taco Cabana, Inc*, 505 US 763, 764 n1; 112 S Ct 2753; 120 L Ed 2d 615 (1992) (internal quotation marks and citations omitted).

this case to the trial court for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant Pro-Seal Service Group, Inc., is a Michigan corporation that sells and repairs mechanical seals used in oil production facilities in Alaska. Pro-Seal has a CGL policy and an umbrella insurance policy with plaintiff Citizens Insurance. Pro-Seal's major competitor for mechanical seal sales in the Alaskan market is defendant Flowserve Corporation, a New York corporation that manufactures, sells, and refurbishes mechanical seals. The dispute between Flowserve and Pro-Seal began in June 2003, when a Flowserve employee discovered that two Flowserve mechanical seals that had been repaired by Pro-Seal were being shipped to a customer in the original Flowserve container, with the name "Pro-Seal" affixed to the outside of the container. Flowserve brought a suit against Pro-Seal in the United States District Court for the District of Alaska, claiming that Pro-Seal created confusion in the marketplace by imitating or infringing trademarks or product marks, and by using trade secrets, blueprints, engineering drawings, packaging materials, and sales practices that misrepresented Pro-Seal seals as being Flowserve seals.[2] Pro-Seal requested that plaintiff defend it in the Flowserve action pursuant to both insurance policies. Plaintiff concluded that the nature of the allegations in the Flowserve complaint were beyond the scope of either policy and, therefore, refused to defend Pro-Seal. Plaintiff filed the instant action seeking a declaration that plaintiff was not required to defend Pro-Seal under either policy.

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[2] After a facilitation session, the Flowserve complaint was dismissed by stipulation. Defendant admitted two inadvertent trademark infringements and settled the case for $1,800.

The trial court granted plaintiff's motion for summary disposition, introducing its analysis by noting that if a contract is plain and unambiguous, it must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). According to the terms of the instant insurance contract, coverage is excluded for advertising injuries that are "knowingly made." The trial court concluded that coverage did not exist for the conduct asserted in the Flowserve lawsuit because it "alleges an intentional course of conduct involving fraud, deceit, and counterfeit parts being sold as genuine."

On appeal, the Court of Appeals vacated the judgment of the trial court in a published opinion, holding that plaintiff was required to represent defendant Pro-Seal because Flowserve's allegations fell within the definition of an "advertising injury" under the CGL policy. 268 Mich App 542; 710 NW2d 547 (2005). The Court of Appeals undertook its analysis by noting that the protection of trade dress is intended to " ' "secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers." ' " *Id.* at 550-551, quoting *Two Pesos, supra* at 774, quoting *Park 'N Fly, Inc v Dollar Park & Fly, Inc*, 469 US 189, 198; 105 S Ct 658; 83 L Ed 2d 582 (1985). Because the underlying complaint alleged that Pro-Seal's conduct confused and misled customers into believing that Pro-Seal seals were Flowserve seals, the ability of customers to "distinguish between competing producers" was implicated. On that basis, the Court of Appeals held that Flowserve's complaint alleged a trade dress infringement. The Court of Appeals also held that the alleged trade dress infringement occurred in an "advertisement" because " 'allegations of trademark and trade dress infringement inherently involve advertising activity. In other words, there

can be no trademark/trade dress infringement without advertising having occurred.' " *Id.* at 551-552, quoting *Poof Toy Products, Inc v United States Fidelity & Guaranty Co*, 891 F Supp 1228, 1235-1236 (ED Mich, 1995).

Leave to appeal was sought in this Court and, after directing the parties to address certain issues,[3] we heard oral argument on whether to grant the plaintiff's application for leave to appeal or take other peremptory action permitted by MCR 7.302(G)(1). 474 Mich 1112 (2006).

II. STANDARD OF REVIEW

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). This case requires that we consider whether defendant's alleged conduct took place in an "advertisement" as that term in defined in the insurance policy. The construction and interpretation of the language in an insurance contract is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 463; 663 NW2d 447 (2003).

III. ANALYSIS

The terms of the CGL policy provide that plaintiff "will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and

[3] These issues were as follows: "(1) whether Flowserve's complaint alleged an advertising injury within the meaning of the commercial general liability policy that Citizens Insurance Company issued to Pro-Seal, Inc., and (2) if so, whether Citizens was relieved of its duty to defend Pro-Seal by operation of the policy exclusion for actions taken with knowledge that an advertising injury would result."

advertising injury' to which this insurance applies." The CGL policy defines a "personal and advertising injury" as follows:

> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> * * *
>
> (f) The use of another's advertising idea in your "advertisement"; or
>
> (g) Infringing upon another's copyright, trade dress or slogan in your "advertisement."

The umbrella policy defines an "advertising injury" as follows:

> A. Advertising Injury means injury caused by one or more of the following offenses committed during the policy period in the course of advertising your goods, products or services:
>
> 1. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services.
>
> 2. Oral or written publication of material that violates a person's right or [sic] privacy.
>
> 3. Misappropriation of advertising ideas or style of doing business; or
>
> 4. Infringement of copyright, title or slogan.

The term "advertisement" is defined in the CGL policy as[4]

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[4] The umbrella policy does not define the word "advertising." However, the umbrella insurance policy does state:

> The definitions, terms, conditions and exclusions of underlying insurance in effect at the inception of this policy apply to [the umbrella] coverage unless:

> a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.

"[I]n reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). In *Henderson*, this Court described those principles as follows:

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity.
>
> While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured. The fact that a

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> A. They conflict with any of the provisions of this policy; or
>
> B. There is a provision in this policy for which a similar provision is not contained in underlying insurance.

As it relates to an "advertising injury," there is no conflict between the terms of the CGL policy and the umbrella policy. Furthermore, the "advertising injury" section of the umbrella policy is substantially similar to the "advertising injury" provisions in the CGL policy. The dictionary defines the term "advertising" as "paid announcements; advertisements." *Random House Webster's College Dictionary* (1997) at 20. Therefore, pursuant to the terms of the umbrella policy, the definition of the term "advertisement" in the CGL policy applies to the umbrella policy as well.

> policy does not define a relevant term does not render the policy ambiguous. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism. [*Id.* at 354 (citations omitted).]

The Court of Appeals erred in this case by failing to enforce the terms of the CGL policy as written.[5] While the Court of Appeals noted that the CGL policy defined the term "advertisement," it ultimately rejected that definition in favor of a different definition articulated by the United States District Court in *Poof Toy, supra* at 1235-1236. In *Poof Toy*, the United States District Court held that

> allegations of trademark and trade dress infringement inherently involve advertising activity. In other words, there can be no trademark/trade dress infringement without advertising having occurred. This conclusion results from a required element in every trademark/trade dress case, that the mark or dress is likely to cause confusion to the consumer or deceive the consumer as to the origin or manufacturer of the goods. See 15 U.S.C. § 1125(a). To have (or potentially cause) this effect, one must clearly advertise (announce to the intended customers) the mark or dress.

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[5] Justice CAVANAGH argues that Flowserve alleged in its complaint that Pro-Seal used the Flowserve trademark to identify its products as Flowserve products and, on that basis, "it can be deduced that Pro-Seal was accused of taking actions that inherently involved notice broadcast or published to the general public or specific market segments about its goods, products, or services for the purpose of attracting customers or supporters." *Post* at 90. However, the only portion of the Flowserve complaint relied upon by the Court of Appeals in this case is the allegation that Pro-Seal "shipped the counterfeit [seals] to the customer in a shipping crate prominently labeled with the Flowserve label." Flowserve complaint at paragraph 22. We should not resolve this case on the basis of allegations that were not addressed by the Court of Appeals.

However, the Court of Appeals failed to recognize that *Poof Toys* is readily distinguishable because the insurance contract at issue in that case did not define the term "advertisement." Because the term was left undefined, the United States District Court consulted a dictionary to define the term and concluded on the basis of that definition that there was coverage under that policy. Because the term "advertisement" is defined in the instant CGL policy, and that definition is incorporated into the umbrella policy as well, the Court of Appeals' reliance on *Poof Toy* was inappropriate inasmuch as it potentially subjects plaintiff to a risk that it did not assume. See, e.g., *Westfield Companies v OKL Can Line*, 155 Ohio App 3d 747, 755; 804 NE2d 45 (2003) (holding that *Poof Toy* did not apply to an insurance policy that specifically defined the term "advertisement").

Thus, in order to determine whether plaintiff had a duty to defend in this case, we must ascertain whether defendant's conduct falls within the scope of the term "advertisement" as written in the CGL policy. This Court interprets the words used in a contract "in accordance with their commonly used meanings." *Henderson, supra* at 354. Further, when defining a phrase used in a contract, this Court "read[s] the phrase as a whole, giving the phrase its commonly used meaning." *Id.* at 356. Under the instant policy, an "advertisement" takes place when there is: (1) a notice; (2) that is broadcast or published; (3) to the general public or specific market segments; (4) about [the company's] goods, products, or services; and (5) for the purpose of attracting customers. "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." *Greene v A P Products, Ltd*, 475 Mich 502, 510; 717 NW2d 855 (2006). The dictionary defines

"notice," in relevant part, as "a written or printed statement conveying . . . information . . . ." *Random House Webster's College Dictionary* (1997) at 895. The dictionary defines "broadcast," in relevant part, as "to speak, perform, or present on a radio or television program" or "to spread widely; disseminate." *Id.* at 166. "Publish" is defined, in relevant part, as "to announce formally or officially; proclaim; promulgate" or "to make publicly or generally known." *Id.* at 1054. These definitions are consistent with the common understanding of the term "broadcast or publish" in the advertising realm as the public dissemination of information intended to inform potential customers of a company's availability to do business. Thus, for example, a business such as Pro-Seal may utilize television, radio, newspapers, or billboards in order to inform potential customers about the goods and services they provide and to attract the patronage of such customers.

The Court of Appeals concluded that when defendant shipped one of its seals to a customer in a Flowserve container, that was an act that "constitute[ed] notice that is published to the specific market segment in which Pro-Seal and Flowserve compete about the seals for the purpose of attracting customers or supporters." 268 Mich App at 552. Pro-Seal seizes on this argument, claiming that when it shipped the seal at issue to a distribution center to be forwarded to its customer, it could be observed by members of the general public visiting that distribution center. Therefore, according to defendant, the use of the Flowserve packaging constituted an "advertisement."

However, both the Court of Appeals and defendant overlook that, under the terms of the CGL policy, defendant must publicly disseminate information about its goods and services for the purpose of attracting the

patronage of potential customers. Here, defendant sent a seal to a *specific* customer in a Flowserve container for the purpose of completing a single transaction. At best, Pro-Seal's argument that it expected that other customers might view the package at the distribution center and, as a result, would be encouraged in doing business with defendant was an incidental and remote benefit that does not fundamentally alter the fact that this was a single transaction with a specific customer. We conclude that the purpose for placing a Pro-Seal label on the Flowserve container in this instance was to identify for *that specific customer* the source of the seal to allow that specific customer to contact defendant with any questions or complaints about that product.[6] Accord-

[6] We do not, as Justice KELLY asserts, hold that a company must engage in "wide-scale dissemination of information, such as by television or radio, for there to be an advertisement." *Post* at 99. In fact, we agree with Justice KELLY that, in a limited market such as the Alaskan oil market, a notice broadcast to even a single customer might constitute "advertising," as long as that notice was designed to "attract[] customers or supporters." However, Justice KELLY overlooks the fact that the conduct complained of in this case, namely Pro-Seal's act of shipping the seal in question to its customer in the original Flowserve container affixed with a Pro-Seal label, was not undertaken to "attract[] customers or supporters." Rather, Pro-Seal shipped the seal in question in order to complete an already agreed-upon transaction. In other words, Pro-Seal had already "attracted" its customer by the time the seal in question was shipped in the container provided to Pro-Seal by that customer. While the complaint alleges that customer was confused about the origin of the seal at issue in this appeal, there is nothing in the complaint that could reasonably be construed as an allegation that the Pro-Seal labeling was designed to "attract" that customer to purchase *another* seal from Pro-Seal. Rather, looking at the context of the transaction, the Pro-Seal labeling simply served to identify the source of the repaired seal and to provide contact information if the customer had any questions or concerns. Likewise, contrary to Justice KELLY's contention, nothing in the Flowserve complaint alleged that Pro-Seal utilized the container in question in order to "attract[] customers or supporters." Rather, Flowserve alleged that the shipping container was used as part of an attempt by Pro-Seal to lead customers to believe that its seals were actually Flowserve seals. Accord-

ingly, we conclude that the harm alleged to have been caused by Pro-Seal's act of shipping a seal in a Flowserve container did not "arise out of an advertisement" and, therefore, plaintiff was not obligated to tender a defense based on this allegation under the terms of the CGL policy.[7]

IV. CONCLUSION

In order to constitute an advertisement under the CGL policy, defendant must publicly disseminate information about its goods and services for the purpose of attracting the patronage of potential customers. We conclude that when defendant shipped the seal in question to its customer in a Flowserve container affixed with a Pro-Seal label, there was no "advertising injury" under the CGL policy. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with this opinion.[8]

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ingly, Pro-Seal's act of shipping a seal to its customer in the original Flowserve container is simply not an "advertisement" as the term is defined by the policy.

[7] Because we conclude that no advertising occurred, we find it unnecessary to decide whether the underlying complaint alleged a "trade dress" or "trademark" violation, or whether Citizens Insurance was relieved of its duty to defend Pro-Seal by operation of the policy exclusion for actions taken with knowledge that an advertising injury would result.

[8] Justice CAVANAGH argues that a remand to the trial court is inappropriate because when the trial court held that the policy did not apply to advertising injuries that are knowingly made, "it is clear that it found [an advertising injury] because it determined that the advertising injury was made knowingly." *Post* at 90-91. We disagree. In granting summary disposition to plaintiff, the trial court concluded that the Flowserve complaint "alleges an intentional course of conduct involving fraud, deceit, and counterfeit parts being sold as genuine. Clearly, this conduct does not fall within the scope of the limited coverage for advertising injury provided by the policy." Because the trial court relied wholly on the intentional nature of Pro-Seal's conduct, it did not address whether the

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

CAVANAGH, J. (*dissenting*). I agree with dissenting Justice KELLY that in the underlying complaint in this action, Flowserve's allegations amounted to allegations of a violation of its trade dress. I also agree with her analysis of the terms "advertisement" and "notice." However, I would resolve this case simply by reviewing the specific allegations Flowserve made in its complaint against Pro-Seal Service Group, Inc., because as Justice KELLY notes, and as the majority ignores, the question whether an insurer has the duty to defend must be answered by examining the allegations in the underlying complaint, rather than by looking at the insured's specific actions. In fact, "[i]f the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense." *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996), citing *Polkow v Citizens Ins Co*, 438 Mich 174, 178, 180; 476 NW2d 382 (1991); *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989). "This is true even where the claim may be groundless or frivolous." *Id.*

Here, Flowserve accused Pro-Seal's individual employees of misrepresenting to the public that they were associated with Flowserve, that they were capable of performing certified repairs on Flowserve products, and that Pro-Seal seals were Flowserve seals. Flowserve further alleged that defendant "improperly appropriated and used Flowserve's 'P-50' trademark to identify their inferior seal" to "capitalize on Flowserve's good-

Flowserve complaint actually set forth an "advertising injury" as defined by the policy. Because the trial court never addressed the issue left unresolved in this opinion, it should do so on remand.

will and to further confuse the process industry into believing that [Pro-Seal's] competitive seals are Flowserve seals." Further, Flowserve accused Pro-Seal of using three of Flowserve's trademarks and attached several purchase orders allegedly showing that customers were ordering Flowserve seals from Pro-Seal and were being sent Pro-Seal seals. Flowserve attached a photograph of a Flowserve product bearing Flowserve trademarks and alleged that Pro-Seal had replaced internal parts with Pro-Seal parts. Flowserve explained that it discovered these internal parts while fixing a pump in which the seal had been installed and that it also discovered another seal it accused Pro-Seal of altering before it was installed. Another allegation involved an allegedly improperly labeled crate, which contained another allegedly altered Flowserve product, and an assembly drawing bearing the Flowserve name and trademark in the box in which the seal was shipped.

Specific guiding principles governing the determination of an insurer's duty to defend were aptly set forth in *American Bumper*, *supra*, and bear repeating here:

> " 'An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Dochod v Central Mutual Ins Co*, 81 Mich App 63; 264 NW2d 122 (1978). The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. *Shepard Marine Construction Co v Maryland Casualty Co*, 73 Mich App 62; 250 NW2d 541 (1976). In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. 14 Couch, Insurance, 2d (rev ed), § 51:45, p 538 [now § 51:49, p 489].' " [*American Bumper*, *supra* at 451-452, quoting *Protective Nat'l Ins Co v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374

(1991), quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980).]

While the complaint in the present case certainly could have been crafted more specifically with respect to describing precisely how defendant accomplished these violations, i.e., how it "advertised," Flowserve's allegations were sufficient to trigger a duty to defend. Flowserve alleged that Pro-Seal used Flowserve's trademarks to identify Pro-Seal products and through its actions caused customer confusion regarding the origin or manufacturer of the goods. From these allegations alone, it can be deduced that Pro-Seal was accused of taking actions that inherently involved notice broadcast or published to the general public or specific market segments about its goods, products, or services for the purpose of attracting customers or supporters. Thus, the Court of Appeals correctly determined that plaintiff had a duty to defend Pro-Seal.

On that basis, I would affirm the Court of Appeals. But even if I agreed with the majority's substantive analysis, I would not remand this case to the trial court to allow it to determine anew whether plaintiff was required to defend Pro-Seal. The trial court was presented with this and other issues in the proceedings on this declaratory judgment action, and it made its ruling accordingly. In its written opinion and order granting summary disposition for plaintiff, the trial court described the nature of the claims being made, summarized the various complaint allegations, and ruled that plaintiff had no duty to defend. In fact, it ruled that "coverage is excluded for advertising injuries that are 'knowingly made.' " See *ante* at 79. While the trial court did not provide a detailed analysis with regard to the alleged "advertising injury," it is clear that it found one because it determined that the advertising injury was

made knowingly. And it did not use conditional language, such as stating that if there were an advertising injury, it was knowingly made. Presumably, the trial court is unlikely to change its mind on remand, making the preliminary "victory" in this case hollow for defendant. Quite simply, the majority's remand unfairly gives plaintiff a second opportunity to convince the trial court to again rule in its favor.

WEAVER, J., concurred with CAVANAGH, J.

KELLY, J. (*dissenting*). The majority has decided that plaintiff Citizens Insurance Company had no duty to defend defendant Pro-Seal Service Group, Inc., in the underlying trademark infringement action. It asserts that the complaint did not allege an advertising injury as that term is defined by the parties' commercial general liability policy (CGL policy). I believe that the complaint alleges one of the advertising injury offenses covered by the policy and the injury complained of does not fall within an enumerated exception to coverage. As a consequence, I respectfully dissent. I would affirm the judgment of the Court of Appeals.

THE UNDERLYING FACTS

Defendant Pro-Seal is in the business of selling and repairing mechanical seals used in high-temperature and extreme-pressure environments. It is not a manufacturer of these seals but a distributor that sells mechanical seal products manufactured by others and performs repairs on seals, using its own employees.

In the underlying action, a customer of Pro-Seal requested that Pro-Seal make repairs and modifications to mechanical seals that the customer had purchased from defendants Flowserve Corporation and Flowserve

Management Company (Flowserve). Flowserve is a large manufacturer of mechanical seals that also operates a repair business for its seals. Flowserve and Pro-Seal are competitors in the Alaskan market in both the sale of new seals and in the repair of worn seals.

Pro-Seal repaired two Flowserve mechanical seals and shipped them to Alaska Roteq Corporation, an Alaskan distribution center engaged in the distribution and sale of mechanical seals, for delivery to Pro-Seal's client. The seals were shipped in a distinctive Flowserve reusable container. Pro-Seal's name appeared on the outside with a prominent red label that displayed the location of and contact information for Pro-Seal, a product description, and testing information. The exterior packaging also displayed the Flowserve trademark.

An employee of Flowserve observed the packaging while it sat in the open on the premises of Roteq. The Flowserve employee knew that the product inside had been repaired by Pro-Seal because the affixed label displayed Pro-Seal's name. Flowserve intercepted the repaired seal and the box in which it was contained.

Four months after the incident, Flowserve filed a complaint against Pro-Seal in the United States District Court in Alaska. It alleged, among other things, that Pro-Seal created confusion in the marketplace by (1) imitating or infringing trademarks and product marks, (2) by using trade secrets, blueprints, engineering drawings, and packaging materials, and (3) by engaging in sales-related conduct, all of which misrepresented Pro-Seal's products as being Flowserve products in violation of Flowserve product trademarks, trade names, and the Lanham Act. 15 USC 1125(a). The complaint asserted that Pro-Seal unfairly competed with Flowserve through these devices and misrepresented to particular

customers and the public that Pro-Seal's products and services were Flowserve products and services.

Pro-Seal notified its insurer, Citizens Insurance Company, of the lawsuit and requested that it provide a defense. Citizens Insurance declined and filed this lawsuit seeking a declaration that it had neither a duty to defend nor an obligation to indemnify. Both parties moved for summary disposition. The trial court went directly to an exclusion in the CGL policy. It pertains to injuries caused by acts of the insured done with knowledge that an injury to another will occur. It decided that the exclusion applied and, as a result, that Citizens Insurance had no duty to defend.

Pro-Seal appealed to the Court of Appeals, which, in a published opinion, vacated the trial court's order. The appellate court determined that the advertising injury coverage under the CGL policy required Citizens Insurance to defend the underlying action. It reasoned that the substance of the complaint relied on the doctrine of "trade dress," a theory on which recovery could be based. The claimed injury, the appeals court held, arguably fell within the definition of an advertising injury. It ruled that the CGL policy exclusion did not apply because the complaint alleged both intentional and nonintentional acts. Flowserve, it held, could have recovered without proving that any relevant act was committed intentionally.

STANDARD OF REVIEW

This Court reviews de novo the interpretation given to language in an insurance contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). An insurance company's duty to defend its insured depends on the allegations the third party makes in the underlying complaint against the insured.

Illinois Employers Ins of Wausau v Dragovich, 139 Mich App 502, 506; 362 NW2d 767 (1984). If the allegations fall even arguably within the coverage of the policy, the insurer has a duty to defend. *American Bumper & Mfg Co v Hartford Fire Ins Co,* 452 Mich 440, 450-451; 550 NW2d 475 (1996). Where there is doubt about whether the complaint alleges a liability of the insurer under the policy, the doubt must be resolved in favor of the insured. *Polkow v Citizens Ins Co*, 438 Mich 174, 180; 476 NW2d 382 (1991).

ADVERTISING INJURY

The issue in this case is whether Citizens Insurance had a duty to defend under the CGL policy. In resolving this issue, the Court must construe the terms of the policy. A court will not hold an insurance company liable for a risk that it did not assume. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

The policy provides in § 1(a) that Citizens Insurance "will pay those sums that the insured becomes legally obligated to pay as damages because of personal and advertising injury." In relevant part, "advertising injury" is defined in § V, paragraph 14:

> "Personal and advertising injury" means injury, . . . arising out of one or more of the following offenses:
>
> * * *
>
> (g) Infringing upon another's copyright, trade dress, or slogan in your "advertisement."

In order to qualify as an advertising injury under this subsection, two requirements must be satisfied: Pro-Seal must have infringed Flowserve's copyright, trade

dress, or slogan, and the infringement must have occurred in Pro-Seal's "advertisement."

Flowserve alleged that Pro-Seal used Flowserve's trademark and represented Flowserve products to be its own, and sent a seal that it had repaired to a customer in distinctive Flowserve packaging. The "trade dress" of a product refers to the product's overall image and may include features such as a particular sales technique. *Two Pesos, Inc v Taco Cabana, Inc*, 505 US 763, 764; 112 S Ct 2753; 120 L Ed 2d 615 (1992). It is a broad term that is expansive enough to include Flowserve's allegations, even though Flowserve never used the term "trade dress." Thus, considering the substance of the claim, contrasted with the language of the complaint, as this Court must do, the complaint alleged that Pro-Seal infringed Flowserve's trade dress. See *American Bumper*, 452 Mich 451-452.

The injury must also arise out of an "advertisement" in order to qualify as an advertising injury. As defined by the CGL policy, an "advertisement" takes place when the following four elements are satisfied: (1) a notice about the company's goods, products, or services, (2) is broadcast or published, (3) to the general public or specific market segments, (4) for the purpose of attracting customers.[1]

The first requirement is that there be notice about the company's goods, products, or services. The majority opinion defines "notice" as including " 'a written or printed statement conveying . . . information . . . .' " *Ante* at 85 (citation omitted.) In this case, Pro-Seal shipped a package containing a label displaying its

[1] "Advertisement" is defined in the CGL policy as "[n]otice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

name as well as product information. This satisfied the notice requirement under the majority's definition.

The next inquiry concerns whether the notice was broadcast or published. As defined by the majority, "publish" is " 'to make publicly . . . known.' " *Ante* at 85 (citation omitted). The act of providing a member of the public with information, without more, makes the information public. Since Pro-Seal placed the label on a package, then sent that package to a customer, there was publication.

The next requirement is that the notice be conveyed to the general public or to specific market segments. There is no definition in the CGL policy of "specific market segments." However, given that "segment" is a synonym for "piece" or "section," it can be presumed that "market segments" refers to particular customers or vendors in the marketplace. *Rogets II: The New Thesaurus* (3d ed).

Here, as the parties agree, the geographic area where Pro-Seal and Flowserve competed, the North Slope of Alaska, contains few customers. Because the market is so restricted, communication with one customer or vendor would be communication with a market segment. Accordingly, I conclude that, the sending of the package to Roteq for delivery to a specific customer constituted giving notice to a specific market segment.

The final requirement is that the notice be for the purpose of attracting customers. Flowserve's complaint alleges that Pro-Seal unfairly competed because its communications in the marketplace about its products and services caused Pro-Seal products and services to be confused with those of Flowserve. The essence of Flowserve's claim is that, by shipping a seal in a Flowserve package with a label containing Pro-Seal's

contact information, Pro-Seal unfairly sought to attract customers. This allegation satisfies the final requirement.

Since the allegation is that Pro-Seal infringed Flowserve's trade dress in Pro-Seal's "advertisement," I believe that the complaint asserted an advertising injury, as the policy defines that term.[2] Accordingly, Citizens Insurance had a duty to defend unless a specific policy exclusion excused it.

The majority disagrees and holds that Citizens Insurance had no duty to defend. It claims that the purpose of the notice must be to attract "potential" customers. *Ante* at 85. According to the majority, since the package was sent to a specific customer, the purpose of its label was to "allow that specific customer to contact defendant with any questions or complaints about that product," not to attract potential customers. *Ante* at 86.

The majority claims that I disregard the fact that the conduct complained of "was not undertaken to 'attract[] customers or supporters.' " *Ante* at 86 n 6. I disagree. Actually, it is the majority that errs by improperly ignoring the complaint in deciding that there is no duty to defend. See *Protective Nat'l Ins Co of Omaha v Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991).

A closer look illustrates that the majority's decision is contrary to crucial allegations in the complaint. Paragraph 22 of the complaint alleges that Pro-Seal's actions have led to customer confusion and lists specific examples of such acts. Subpart e of that paragraph

[2] Subsection f provides another means by which there could be an advertising injury. That subsection indicates that there is an advertising injury when the injury arises out of "[t]he use of another's advertising idea in your 'advertisement.' " However, because coverage is available for an advertising injury as defined in subsection g, it is unnecessary to determine if an advertising injury was alleged as defined by subsection f.

discusses the particular act at issue in this case. Paragraphs 34 through 37 assert the unfair competition claim. Paragraph 34 repeats and realleges the allegations of the prior 33 paragraphs. Paragraphs 35 through 37 contain the substance of the unfair competition claim, which is that Pro-Seal created confusion in the marketplace and this confusion caused Flowserve to lose business.

Though the complaint never explicitly states that the particular act at issue was done to "attract[] customers or supporters," the duty to defend cannot be limited by the precise language in the pleadings. *American Bumper*, 452 Mich 450-451. Rather, the insurer has a duty to look beyond the allegations to analyze whether coverage is required. *Id.* at 452. By asserting that the particular act at issue was done to cause confusion in the marketplace at Flowserve's expense, Flowserve alleged that the particular act was done to attract customers.

The majority appears to agree that the act at issue was done to cause confusion in the marketplace but still concludes that it was not performed to attract customers. This conclusion ignores reality. The only reason for Pro-Seal to cause confusion in the marketplace would be to draw customers to itself and away from Flowserve. Flowserve's complaint alleges as much by asserting that Flowserve has lost business as a result of this confusion. The majority errs by failing to look beyond the precise language used in the pleadings to determine whether there is a duty to defend.

The majority also errs by relying on the fact that the container was sent to an existing customer in order to conclude that the notice was not sent to attract customers. This fact is irrelevant. The policy says nothing about "potential" customers. As long as the complaint

alleges that the notice was meant to attract customers, be they existing or potential, the requirement is satisfied. Here, the complaint alleges that the container was sent to an existing customer. It further alleges that this act was done to cause confusion. Flowserve claims that this marketplace confusion made it lose business. We should consider the substance of this claim: Flowserve accused Pro-Seal of confusing this customer so that in the future the customer would conduct business with Pro-Seal under the mistaken belief that he was conducting business with Flowserve. By making this allegation, Flowserve clearly accused Pro-Seal of acting with the intent to attract future business from this particular customer.

By deciding as it does, the majority would seem to require wide-scale dissemination of information, such as by television or radio, for there to be an advertisement. I believe that it is error to impose such a requirement. There is nothing in the policy that precludes a finding that giving notice to a specific customer can qualify as an advertisement.[3] If the notice is published to the general public or to a specific market segment for the purpose of attracting customers, there is no requirement that it be widely disseminated. Rather, any such requirement is one of this Court's own making.

It is improper to read a nonexistent limitation on coverage into an insurance policy. This is especially true where, as here, the party benefiting from the limitation drafted the policy. If Citizens Insurance had intended to require dissemination through the public airwaves or

[3] The policy does require that the notice be sent to the general public or specific market segments. However, this language does not preclude situations, like this one, where the market is so restricted that one customer would constitute a specific market segment.

communication with a large number of people, it easily could have imposed such a requirement. It did not do so. It is the insurance company's obligation to define the coverage to be provided. The courts should not save an insurance company from the plain meaning of terms that it used in its policy or artificially limit the scope of coverage, as the majority does here.

EXCLUSIONS

As discussed above, I believe that the complaint alleged an advertising injury as that term is defined by the policy. Accordingly, Citizens Insurance has a duty to defend Pro-Seal unless a specific exclusion excuses it from this duty. See *Protective Nat'l Ins Co*, 438 Mich at 159.

The CGL policy's "personal and advertising injury" coverage is subject to the following exclusion:

> 2. Exclusions
>
> This insurance does not apply to:
>
> (a) "Personal and advertising injury":
>
> (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury[.]"

By requiring knowledge that the acts would violate the rights of another, this exclusion applies only to claims of intentional wrongdoing. Here, several of the allegations in Flowserve's complaint contain no reference to intent and seek recovery for conduct that was innocent, inadvertent, negligent, or reckless. As a result, even though Citizens Insurance correctly points out that the complaint also alleged intentional wrongdoing, the exclusion does not excuse it from its duty to defend Pro-Seal. An insurer must defend its insured

even if theories of liability asserted are not covered under the policy, if any asserted theories of recovery fall within the policy coverage. *American Bumper & Mfg Co*, 452 Mich at 451.

CONCLUSION

Since the complaint alleged that Pro-Seal infringed Flowserve's trade dress in its "advertisement," and no specific policy exclusion excused Citizens Insurance from its duty to defend, I must dissent. I would affirm the judgment of the Court of Appeals.

WEAVER, J., concurred with KELLY, J.

MILLER v CHAPMAN CONTRACTING

Docket No. 130808. Decided April 25, 2007.

Buddy Miller, II, brought an action in the Oakland Circuit Court against Chapman Contracting; Ramzy Kizy, Jr.; Kevin R. Paperd; and Sweepmaster, Inc., seeking damages for injuries sustained in an automobile accident that occurred when a vehicle driven by Paperd and that was owned by one or more of the remaining defendants struck Miller's vehicle. The defendants moved for summary disposition after the period of limitations expired, contending that Miller was not the real party in interest and lacked standing, because Miller had filed a petition for bankruptcy and all of Miller's rights regarding the accident had been transferred to the bankruptcy trustee. Miller moved to amend his complaint in order to correct the "misidentification" of the named plaintiff. The court, Fred M. Mester, J., denied Miller's motion to amend and granted the defendants' motion for summary disposition, ruling that the amendment would be futile because, under the relation-back rule of MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties. The Court of Appeals, METER, P.J., WHITBECK, C.J., and SCHUETTE, J., affirmed in an unpublished opinion per curiam, issued February 16, 2006 (Docket No. 256676). The Supreme Court ordered and heard oral argument on whether to grant Miller's application for leave to appeal or take other peremptory action. 476 Mich 851 (2006).

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

It is undisputed that the bankruptcy trustee is the real party in interest that should have been named as the plaintiff in this action. Although leave to amend a pleading shall be freely given when justice requires, MCR 2.118(A)(2), leave to amend a complaint may be denied where amendment would be futile. The relation-back doctrine of MCR 2.118(D) does not apply to the addition of new parties. Where, as in this case, the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine, which applies only to correct

inconsequential deficiencies or technicalities in the naming of parties, is inapplicable. The Court of Appeals properly affirmed the judgment of the trial court.

Affirmed.

Justice WEAVER, dissenting, would deny leave to appeal. The amendment of the complaint in this case was not for the addition of a new party, but was for the replacement of the wrongly named plaintiff with that plaintiff's bankruptcy trustee. Because a new plaintiff is not being added, any caselaw on the relation-back doctrine is immaterial. The Supreme Court has opened an administrative file to consider whether the court rules should be amended to include a rule on the addition of a party to a suit.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that MCR 2.118 does not mention whether a substitution of parties relates back to the date the original complaint was filed. MCR 2.118(D) does not limit relation back only to new claims or defenses and it is silent with regard to whether relation back can apply to added or substituted parties. Allowing the amendment here to relate back to the date of the filing of the complaint is consistent with the general principle underlying the relation-back doctrine, which is to deprive defendants of the opportunity to defeat a valid claim by using a legal technicality when the rationale of the statute of limitations has been met, and does not transcend the purpose of the statute of limitations, which is to prevent surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The judgments of the lower courts should be reversed, trustee Wendy Turner Lewis should be substituted as the party plaintiff, and the matter should be remanded for a trial.

1. ACTIONS — PLEADINGS — AMENDMENTS — NEW PARTIES.

The court rule that provides that an amendment that adds a claim or a defense relates back to the date of the original pleading does not apply to the addition of new parties to the action (MCR 2.118[D]).

2. ACTIONS — PLEADINGS — NAMING OF PARTIES — MISNOMER DOCTRINE.

The misnomer doctrine, which applies to correct inconsequential deficiencies or technicalities in the naming of parties to an action, does not apply where the plaintiff seeks to substitute or add a wholly new and different party to the proceedings.

Rockind & Liss, PLLC (by *Jason J. Liss*), for the plaintiff.

Secrest Wardle (by *Michael L. Updike*) and *Audrey R. Monaghan*, for the defendants.

PER CURIAM. In this case, plaintiff's attorney erroneously named plaintiff, instead of his bankruptcy trustee, as the plaintiff in this lawsuit. After the period of limitations expired, defendants moved to dismiss the case, pointing out the failure to name plaintiff's bankruptcy trustee in the lawsuit. Plaintiff filed a motion to amend the complaint to substitute the bankruptcy trustee as plaintiff, but the trial court dismissed the lawsuit. The Court of Appeals affirmed. We likewise affirm. MCR 7.302(G)(1). In doing so, we adopt as our own the following unpublished opinion per curiam of the Court of Appeals, issued February 16, 2006 (Docket No. 256676).

> Plaintiff appeals as of right from the trial court order denying his motion to amend his complaint and granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(5) based on lack of standing. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).
>
> Plaintiff's complaint alleged that on December 28, 2000, defendant Kevin Paperd was operating an automobile that was owned by one or more of the remaining defendants when he negligently struck plaintiff's vehicle, causing plaintiff to suffer a serious impairment of an important body function and/or serious permanent disfigurement. Defendants sought summary disposition pursuant to MCR 2.116(C)(5), contending that plaintiff was not the real party in interest and lacked standing to sue. Defendants alleged that plaintiff had filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code [11 USC 701 *et seq.*] on March 6, 2002, and that all of plaintiff's rights regarding the December 28, 2000, accident were therefore transferred to the bankruptcy trustee, who was the sole party who could pursue the lawsuit.

In response, plaintiff filed a motion for leave to file an amended complaint in order to correct the "misidentification" of the named plaintiff. Plaintiff stated that Wendy Turner Lewis, the trustee for his bankruptcy estate, had authorized plaintiff's counsel to file a complaint on behalf of the bankruptcy estate, and that counsel, through no fault of plaintiff or Lewis, had misidentified the plaintiff.

The trial court entered an order denying as futile plaintiff's motion to amend and granting defendants' motion for summary disposition, stating:

"There is no dispute the real party in interest is the bankruptcy trustee, not Plaintiff. Thus, the issue is whether Plaintiff should be granted leave to amend to add the bankruptcy trustee.

"Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Ben* [*P*] *Fyke & Sons v Gunter* [*Co*], 390 Mich 649; 213 NW2d 134 (1973). In [*Employers Mut Cas Co v Petroleum Equipment, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991)], the court held that 'Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties.'

"The court is satisfied that because the bankruptcy trustee was the real party in interest prior to the filing of the Complaint, this is a motion to add a party and is not merely a request to correct a misnomer. Thus, the court finds that based on the binding precedent in *Employers*, the amendment would be futile as the addition of the new party cannot relate back to the original Complaint."

MCR 2.201(B) provides that, generally, "[a]n action must be prosecuted in the name of the real party in

interest . . . .” “A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another.” *Blue Cross & Blue Shield of Michigan v Eaton Rapids Comm Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997). “This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy.”[*City of*] *Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997). It is undisputed that the bankruptcy trustee is the real party in interest and that she should have been named as the plaintiff.[1]

MCR 2.118(A)(2) provides that leave to amend a pleading “shall be freely given when justice so requires.” But “leave to amend a complaint may be denied for particularized reasons, such as . . . where amendment would be futile.” *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

MCR 2.118(D) provides:

“An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.”

However, “[t]he relation-back doctrine does not apply to the addition of new parties.” *Cowles v Bank West*, 263 Mich App 213, 229; 687 NW2d 603 (2004)[aff’d in part, vacated in part, and remanded 476 Mich 1 (2006)]; see also *Employers Mutual, supra* at 63.

Plaintiff contends, nevertheless, that the requested amendment would do no more than correct a misnomer and that the *Employers Mutual* rule therefore does not bar the amendment and its relation back. “ ‘As a general rule, . . . a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties.’ ” *Parke, Davis & Co v Grand Trunk Ry System*, 207 Mich 388, 391; 174 NW 145 (1919) (citation omitted). The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming

of parties, for example, " '[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name . . . .' " *Wells v Detroit News, Inc*, 360 Mich 634, 641; 104 NW2d 767 (1960), quoting *Daly v Blair*, 183 Mich 351, 353; 150 NW 134 (1914); see also *Detroit Independent Sprinkler Co v Plywood Products Corp*, 311 Mich 226, 232; 18 NW2d 387 (1945) (allowing an amendment to correct the designation of the named plaintiff from "corporation" to "partnership")[,] and *Stever v Brown*, 119 Mich 196; 77 NW 704 (1899) (holding that an amendment to substitute the plaintiffs' full names where their first and middle names had been reduced to initials in the original complaint would have been permissible). Where, as here, the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable. See *Voigt Brewery Co v Pacifico*, 139 Mich 284, 286; 102 NW 739 (1905); *Rheaume v Vandenberg*, 232 Mich App 417, 423 n 2; 591 NW2d 331 (1998).

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[1] See 11 USC 541; 11 USC 323;[*In re Cottrell*], 876 F2d 540 (CA 6, 1989).

Moreover, this Court adds that MCR 2.118(D) specifies that an amendment relates back to the date of the original pleading only if it "adds a claim or a defense"; it does not specify that an amendment to add a new party also relates back to the date of the original pleading.[1] Consequently, the Court of Appeals correctly

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[1] Justice KELLY contends that, because MCR 2.118(D) does not specifically forbid an amendment to add a new party to relate back, this Court may rely on the "purpose" and "basic policy" of the relation-back rule and the statute of limitations. This overlooks, however, that the "purpose" and "basic policy" of a court rule, as with other expressions of the law, are normally communicated by their language. In particular, it has been long understood that the expression of specific exceptions to the application of a law, as here, implies that there are no other exceptions. See *Hoerstman General Contracting, Inc v Hahn*, 474 Mich 66, 74 n 8; 711

affirmed the judgment of the trial court that the amendment to substitute plaintiff's bankruptcy trustee as plaintiff after the expiration of the period of limitations would be futile. Therefore, the decision of the Court of Appeals is affirmed.

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

WEAVER, J. (*dissenting*). I would deny leave to appeal in this case because to do otherwise would create an injustice.

I believe that the bankruptcy trustee in this case is not a "new party" in the sense of "another party" being added by amendment of the complaint. Rather, the amendment in this case simply involves replacing the wrongly named plaintiff, "Buddy Miller," with the correct name of Buddy Miller's bankruptcy trustee, "Wendy Turner Lewis." As a result, any caselaw dis-

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NW2d 340 (2006) (stating the interpretative rule *expressio unius est exclusio alterius*, i.e., "the expression of one thing is the exclusion of another").

Moreover, Justice KELLY's assertion that this Court is "allow[ing] gamesmanship to take precedence over the orderly disposition of an injured party's cause of action," *post* at 109, simply ignores that defendants in their answer to plaintiff's complaint provided plaintiff with notice of the defect that the wrong plaintiff had been named 12 days before the period of limitations expired. Justice KELLY's appeal to FR Civ P 15(c) is also inapposite, because the language of the federal rule is altogether different from MCR 2.118(D). The current federal rule allows for the relation back of amendments to add a party "against whom a claim is asserted," whereas MCR 2.118(D) does not. Although Justice KELLY also cites the 1937 version of FR Civ P 15(c), that version allowed an amendment to relate back "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence" in the original pleading. In contrast, MCR 2.118(D) only allows an amendment to relate back if the amendment "*adds* a claim or a defense." (Emphasis added.) Justice KELLY ignores this dispositive difference.

cussing whether the relation-back doctrine applies to adding plaintiffs to a suit is immaterial because a new plaintiff is not being added.

The Michigan Court Rules do not address the protocol for addition of parties to a suit. This Court has opened an administrative file to consider whether we should adopt, or not adopt, a rule amending the Michigan Court Rules to govern the addition of a party to a suit.

KELLY, J. (*dissenting*). A majority of the Court has affirmed the dismissal of this suit on the basis of a contrived legal technicality. It has misread MCR 2.118. In extinguishing the valid claim, it has allowed gamesmanship to take precedence over the orderly disposition of an injured party's cause of action. The result is sad. I respectfully dissent and would reverse the lower courts' judgments, allow trustee Wendy Turner Lewis to be substituted as the party plaintiff, and enable the case to proceed to trial.

FACTS

Plaintiff Buddy Miller, II, was injured when the automobile in which he was traveling was struck by another driven by defendant Kevin R. Paperd. The vehicle that Paperd was operating was owned by one or more of the other defendants. On March 6, 2002, plaintiff filed a voluntary petition for personal bankruptcy under Chapter 7 of the Bankruptcy Code. 11 USC 701 *et seq*. Lewis was appointed trustee of plaintiff's estate and all of plaintiff's rights regarding the accident were transferred to her. Lewis retained an attorney to bring suit to recover the damages that plaintiff sustained from the accident. On October 22, 2003, a lawsuit was filed.

Service of the lawsuit on defendants was timely. However, the complaint identified Miller as the party plaintiff. Trustee Lewis should have been the named plaintiff. In an affidavit, Lewis's attorney has taken full responsibility for the error.

On December 16, 2003, fewer than two weeks before the statutory period of limitations expired, defendants answered the complaint. They specifically raised as an affirmative defense that plaintiff Miller lacked standing to bring suit against defendants because trustee Lewis was the real party in interest. After the limitations period expired, defendants filed a motion for summary disposition. In response, plaintiff Miller sought to amend the complaint to substitute trustee Lewis as the party plaintiff.

The circuit court denied the motion to amend and granted defendants' motion for summary disposition. The court found that it would be futile to allow the complaint to be amended, because the limitations period had run. It ruled that the needed amendment would not relate back to the date of the filing of the complaint. The Court of Appeals affirmed the judgment in an unpublished opinion per curiam, issued February 16, 2006 (Docket No. 256676). The majority has adopted the opinion as its own.

ANALYSIS

It is undisputed that it would be futile to allow the substitution of Lewis for Miller unless the amendment related back to the date of the filing of the complaint. Thus, the issue that controls the resolution of this case is whether relation back applies to an amendment that substitutes a party plaintiff. A majority of this Court has decided that it does not. This is an erroneous decision, one that allows a miscarriage of justice to go

uncorrected.[1] As Justice Hugo Black of the United States Supreme Court has observed, the " 'principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.' " *Schiavone v Fortune*, 477 US 21, 27; 106 S Ct 2379; 91 L Ed 2d 18 (1986), quoting order adopting revised rules of the Supreme Court, 346 US 945, 946 (1954).

MCR 2.118

MCR 2.118 is the court rule that deals with amendments of pleadings. In relevant part, it provides:

> (A) Amendments.
>
> * * *
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

The court rules make no mention of whether a substitution of parties relates back to the date the original complaint was filed. The majority's chief reli-

[1] The Michigan Court Rules provide at MCR 1.105 that the "rules are to be construed to secure the just . . . determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." The result reached in this case is anything but just. In their answer, defendants stated that the trustee, not Miller, was the real party in interest. This is proof that they had full notice of the proper party plaintiff before the limitations period ran. Yet, defendants waited until after the period of limitations had expired to bring their motion for summary disposition. Although this proved an effective strategy, it illuminates what is wrong with the majority's decision. By allowing defendants to prevail with a statute of limitations defense, this Court has elevated the skill level of defendant's counsel over the pursuit of justice.

ance for its finding that the court rules do not permit a substitution of parties to relate back is MCR 2.118(D). It reads:

> Relation Back of Amendments. An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

But MCR 2.118(D) applies only to amendments that add a claim or defense. The amendment in this case does neither. The original complaint asserted a claim arising from Buddy Miller's automobile accident. Had the substitution that plaintiff requested been allowed, the complaint would have continued to assert the same claim, no other. Not only would no claim or defense have been added, no party would have been added. Before the amendment, there was one party plaintiff. After the substitution, there still would have been only one party plaintiff. Simply, Lewis would have been substituted for Miller.

Contrary to the majority's statement, MCR 2.118(D) does not limit relation back only to new claims or defenses. Rather, it is silent with respect to whether relation back can apply to added or substituted parties.

Although admittedly in a different context, this Court has previously allowed relation back where the amendment changed the named party. In the case of *Wells v Detroit News, Inc*,[2] the Court remarked, " 'While due diligence is required in pleadings of the plaintiff in the description of the parties, and pleadings still serve a necessary purpose, nevertheless, where no one has been misled in any manner by a misnomer, the amendment

[2] 360 Mich 634, 641; 104 NW2d 767 (1960).

should be permitted.' "[3] *Id.,* quoting *Fildew v Stockard*, 256 Mich 494, 498; 239 NW 868 (1932). Accordingly, the majority's claim that relation back is not allowed because the rules do not specifically allow it is unpersuasive and inconsistent with precedent.

Because the court rules are silent with respect to whether a substitution of parties relates back, it is appropriate to identify what best effectuates the principle underlying the relation-back doctrine. The purpose of relation back is to deprive defendants of the opportunity to defeat a valid claim by using a legal technicality when the rationale for the statute of limitations has been met. 6 Michigan Law & Practice, Civil Procedure, § 37, pp 69-70; *Smith v Henry Ford Hosp,* 219 Mich App 555, 558; 557 NW2d 154 (1996).

Relation back " 'satisfies the basic policy of the statute of limitations, because the transactional base of the claim must still be pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of that transaction.' " *LaBar v Cooper*, 376 Mich 401, 406; 137 NW2d 136 (1965), quoting Honigman & Hawkins, 1 Michigan Court Rules Annotated, p 416.

In this case, allowing the amendment to relate back to the date of the filing of the complaint is consistent with the general principle underlying the relation-back doctrine. Moreover, it does not transcend the purpose of the statute of limitations, which is to " 'prevent[] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memo-

[3] The majority finds that relation back is proper when the amendment corrects a misnomer, as in *Wells*, but not when the amendment substitutes a party, as it does here. However, when no one has been misled and the opposing party has full notice, the distinction is indefensible.

ries have faded, and witnesses have disappeared.' "[4] *Cowles v Bank West*, 476 Mich 1, 21; 719 NW2d 94 (2006),[5] quoting *American Pipe & Constr Co v Utah*, 414 US 538, 554; 94 S Ct 756; 38 L Ed 2d 713 (1974) (further citation omitted).

It is uncontested that defendants had notice of the claim and knew that trustee Lewis was the real party in interest. None of the facts concerning the accident and no part of the legal basis of the claim would change as a result of the amendment. Because defendants had notice and were not misled, it is illogical to conclude that the Legislature wrote the limitations statute intending that it be used as it has been here.

FEDERAL RULE OF CIVIL PROCEDURE 15

When MCR 2.118 was first adopted, it was modeled after Federal Rule of Civil Procedure 15.[6] As this Court noted, " 'Sub-rule 118.4 is intended to introduce a more liberal and workable test, borrowed from the Federal Rules.' " *LaBar*, *supra* at 405, quoting 1 Honigman & Hawkins, Michigan Court Rules Annotated, p 416. The current version of MCR 2.118(D) closely resembles Federal Rule 15(c).[7] Significantly, neither the current version of MCR 2.118(D) nor the 1937 version of Federal Rule 15(c) specifically addresses relation back

[4] The majority offers no reason other than its reading of MCR 2.118(D) for its decision that relation back does not apply to amendments that substitute parties.

[5] The majority cites the Court of Appeals decision in *Cowles* for the proposition that relation back does not apply to the addition of new parties. The holding in *Cowles* is inappropriate for a number of reasons. First, the statement was dictum since the Court of Appeals majority found that the amendment did not add new parties. Second, this case involves substituting one party for another, not adding new parties.

[6] The predecessor of MCR 2.118 was adopted in 1963 as GCR 1963, 118.

[7] Federal Rule 15(c), promulgated in 1937, stated:

of amendments that substitute parties. Despite this omission, federal courts have interpreted the 1937 version of Federal Rule 15(c) as allowing relation back of amendments changing parties.[8] In 1966, Federal Rule 15(c) was amended to address amendments of pleadings that change or rename party defendants.[9] The advisory committee notes to the 1966 amendments indicate that the new provision formally recognized the validity of permitting amendments to change parties to relate back.

> Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading. [Advisory Committee Notes to FR Civ P 15(c).]

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

[8] See *Russell v New Amsterdam Cas Co*, 303 F2d 674, 680-681 (CA 8, 1962); *Jackson v Duke*, 259 F2d 3, 6-7 (CA 5, 1958); *American Fidelity & Cas Co v All American Bus Lines, Inc*, 190 F2d 234, 236-237 (CA 10, 1951).

[9] Federal Rule 15(c), as amended in 1966, provided in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.* [Emphasis added.]

The amendment did not mention relation back when the change involves a party plaintiff. However, the advisory committee notes reveal that the omission of plaintiffs from 15(c) does not preclude relation back in such circumstances.

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. [*Id*.]

While committee notes do not bind this Court, they do serve as an instructive aid to interpretation. *Shields v Reddo*, 432 Mich 761, 778; 443 NW2d 145 (1989). The foregoing committee notes and federal caselaw support construing MCR 2.118(D) to allow relation back of amendments involving plaintiffs.

In its current form, Federal Rule 15(c) continues to support the use of the relation back rule for amendments substituting plaintiffs. Unlike MCR 2.118(D), Federal Rule 15(c)[10] specifically addresses and allows relation back when a party defendant is substituted. It provides, in part:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

[10] The federal rule was amended to its current form in 1991.

> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

In 1992, the United States Bankruptcy Court for the Southern District of California applied Rule 15(c) to allow the complaint to be amended to change the named party plaintiff in *Arthur v Schurek*, 139 BR 512 (1992). There, a trustee had filed a fraudulent conveyance claim only days before the statutory period of limitations was to expire. *Id.* at 513-514. In his haste to file, counsel denominated the plaintiff as "James D. Arthur on behalf of Ralph O. Boldt, Trustee." *Id.* at 514. The trustee later filed an amended complaint, which changed the name of the plaintiff to "Ralph O. Boldt, Trustee." *Id.* The defendants moved to dismiss the amended complaint, asserting that it instituted a new and separate claim belonging to the trustee, which was filed after the expiration of the limitations period. *Id.*

The *Arthur* court denied the motion, noting that "[t]he relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) . . . ." *Id.* at 515 n 5. However, by analogy, the court found the test to be "whether 'the [defendant] has received such notice of the institution of the action that the [defendant] will not be prejudiced in maintaining a defense on the merits.' " *Id.* at 515. The original complaint in *Arthur* notified the defendants of the institution of the fraudulent conveyance action. Also, the defendants alleged no prejudice.

Hence, the bankruptcy court found, by analogizing with rule 15(c), that the amendment substituting the trustee relates back to the date of the filing of the original complaint. *Arthur*, 139 BR at 515-516. In *Arthur*, the defendant was not misled and had full notice of the identity of the real party in interest. The decision illustrates that, under those circumstances, no reason exists to refuse to apply relation back to an amendment that substitutes the named party plaintiff.[11]

CONCLUSION

I would reverse the lower courts' judgments, allow the substitution of trustee Lewis as the party plaintiff, and remand the case for trial. The majority's reliance on MCR 2.118(D) is ill-founded because that rule does not address the substitution of a party.

Relation back should be allowed in this case because it is consistent with the general principle underlying the relation-back doctrine: defendants had full notice of the proper party plaintiff within the statutory period of limitations and were not misled by counsel's error in naming Miller. As Justice Black, speaking for the United States Supreme Court, stated "[t]here is no reason to apply a statute of limitations when, as here, [defendants have] had notice from the beginning that [plaintiff] was trying to enforce a claim against [them]." *Tiller v Atlantic Coast L R Co*, 323 US 574, 581; 65 S Ct 421; 89 L Ed 465 (1945).

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[11] Other federal cases applying relation back to an amendment that changes the named plaintiff are *Advanced Magnetics, Inc v Bayfront Partners, Inc*, 106 F3d 11, 18-21 (CA 2, 1997), *SMS Fin, Ltd Liability Co v ABCO Homes, Inc*, 167 F3d 235, 244-245 (CA 5, 1999), and *Plubell v Merck & Co*, 434 F3d 1070, 1071-1074 (CA 8, 2006).

Trustee Lewis has a valid claim. The majority should not read words into MCR 2.118 in such a manner as to deny Lewis her day in court.

CAVANAGH, J., concurred with KELLY, J.

APSEY v MEMORIAL HOSPITAL

Docket No. 129134. Decided May 1, 2007.

Sue H. Apsey and Robert Apsey, Jr., brought a medical malpractice action in the Shiawassee Circuit Court against Memorial Hospital; Russell H. Tobe, D.O.; James H. Deering, D.O.; James H. Deering, D.O., P.C.; and Shiawassee Radiology Consultants, P.C. The trial judge, Gerald D. Lostracco, J., granted summary disposition for the defendants because the affidavit of merit accompanying the complaint was notarized by a Pennsylvania notary public, but did not include a court certification of the notary's authority as required by MCL 600.2102(4). The judge found that this rendered the affidavit a nullity and the complaint invalid. The plaintiffs appealed, alleging that the affidavit was sufficient under MCL 565.262, a section of the Uniform Recognition of Acknowledgments Act (URAA), MCL 565.261 *et seq*. The Court of Appeals, CAVANAGH, P.J., and JANSEN and GAGE, JJ., affirmed in an opinion designated as a published opinion per curiam, issued April 19, 2005 (Docket No. 251110). The Court of Appeals then granted reconsideration and vacated its earlier opinion in an unpublished order, entered June 2, 2005 (Docket No. 251110). On reconsideration, the Court of Appeals, JANSEN and GAGE, JJ. (CAVANAGH, P.J., dissenting), reversed and remanded for further proceedings, essentially reaffirming its prior opinion, which held that the URAA did not diminish the more formal and specific requirements of MCL 600.2102(4) and that these more formal requirements controlled when an affidavit is to be officially received and considered by the judiciary. The Court of Appeals, however, gave its opinion only prospective application, because it would be unfair to dismiss the plaintiffs' case because of their reliance on the URAA. 266 Mich App 666 (2005). The defendants, with the exception of Memorial Hospital, sought leave to appeal in the Supreme Court, and the plaintiffs sought leave to appeal as cross-appellants. The Supreme Court directed the clerk to schedule oral argument on whether to grant the applications or take other peremptory action, 474 Mich 1135 (2006), and heard oral argument.

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

The URAA provides an additional or alternative method of proving notarial acts. As an additional method, the URAA method does not replace the earlier-enacted MCL 600.2102(4) method. MCL 600.2102(4) is not invalidated by the URAA and remains an additional method of attestation of out-of-state affidavits. A party may use either method to validate an affidavit. MCL 600.2102(4) is not rendered nugatory because it provides for the Governor to appoint a commissioner to authenticate out-of-state affidavits. Although such affidavits likely would not be admissible under the URAA, they would be admissible under MCL 600.2102(4), and, thus, MCL 600.2102(4) is not rendered nugatory by the Supreme Court's interpretation that the URAA and MCL 600.2102(4) provide alternative, coequal methods. The plaintiffs' affidavit was valid and admissible.

Justice KELLY, joined by Justice CAVANAGH, concurring, stated that the majority's interpretation of MCL 600.2102(4) and the URAA is further supported by written material supplied to the Legislature before it enacted the URAA. Both the Michigan Law Review Commission's report on the URAA and the prefatory note to the URAA prepared by the National Conference of Commissioners on Uniform State Laws indicated that the URAA was meant to provide an additional method of authentication and that no existing statutes had to be overturned to fully effectuate the URAA. In retaining MCL 600.2102, the Legislature did not intend it to prevail over the URAA. Moreover, the Court of Appeals failed to interpret the URAA uniformly with the interpretations of other states enacting the URAA as required by MCL 565.269.

Justice YOUNG, concurring only in the result to reverse the Court of Appeals, stated that the majority and the dissent each offered a compelling construction of the URAA and MCL 600.2102 of the Revised Judicature Act (RJA) and that, because of the unique nature of the conflict between these statutes, neither the majority's nor the dissent's construction is entirely unfaithful to the statutory language or departs from exacting judicial philosophy of the Supreme Court in recent years. Justice YOUNG urged the Legislature to dispel the confusion generated by the URAA and the RJA. He concurred with the result reached by the majority because the Legislature created in the URAA an alternative to the RJA for proving notarial acts where the two overlap and because the result is least unsettling and disruptive to the rule of law in Michigan.

Reversed and remanded to trial court for further proceedings.

Justice MARKMAN, dissenting, would deny leave to appeal, uphold the judgment of the Court of Appeals, and call on the Legislature to promptly clarify its intentions concerning the need for certification of foreign affidavits used in Michigan judicial proceedings. He would reconcile and harmonize MCL 565.268 of the URAA and MCL 600.2102 of the Revised Judicature Act by recognizing that § 2102 applies to the use of affidavits in judicial proceedings and the URAA applies to all uses of affidavits outside the scope of judicial proceedings, thus respecting both the language in § 2102 that foreign affidavits "must be authenticated" under the procedures set forth in that provision and the language in MCL 565.268 that the URAA "provides an additional method of proving notarial acts," albeit outside the scope of judicial proceedings. While a perfect harmonization of these provisions is not possible, a harmonization that gives reasonable meaning to both provisions should be preferred to the majority's "harmonization," which gives no meaning at all to § 2102.

NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — NOTARIZATION.

The methods for authenticating out-of-state affidavits provided in MCL 600.2102(4) of the Revised Judicature Act and in the Uniform Recognition of Acknowledgments Act, MCL 565.261 *et seq*., are alternative, coequal means for such authentication, and a party may use either method to validate an affidavit.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Jeffrey S. Zilinski,* for Sue H. Apsey and Robert Apsey, Jr.

Cline, Cline, Griffin (by *Glenn M. Simmington* and *Jose T. Brown),* for Memorial Hospital.

Willingham & Coté, P.C. (by *Michael W. Stephenson* and *Matthew K. Payok*), and *Hackney, Grover, Hoover & Bean* (by *Randy J. Hackney* and *Loretta B. Subhi*), for Russell H. Tobe, D.O.; James H. Deering, D.O.; James H. Deering, D.O., P.C.; and Shiawassee Radiology Consultants, P.C.

Amici Curiae:

Maddin, Hauser, Wartell, Roth & Heller, P.C. (by *Mark H. Fink*), and *Cooper & Walinsky* (by *Cary R. Cooper*), for Michigan Defense Trial Counsel.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Heather S. Meingast* and *Robert Welliver,* Assistant Attorneys General, for the Department of Community Health.

Charfoos & Christensen, P.C. (by *David R. Parker*), for State Bar of Michigan Negligence Section and State Bar of Michigan Elder Law Section.

Shermeta & Adams, P.C. (by *Barbara L. Adams*), and *Charfoos & Christensen*, *P.C.* (by *David R. Parker*), for Michigan Creditors Bar Association.

Linda M. Galante for Michigan Trial Lawyers Association.

Kerr, Russell and Weber, P.C. (by *Joanne Geha Swanson, Daniel J. Schulte*, and *Michael A. Sneyd*), for Michigan State Medical Society.

The Googasian Firm, P.C. (by *Dean M. Googasian*), and *Timothy Reiniger* and *Michael Closen*, for National Notary Association.

The Googasian Firm, P.C. (by *George A. Googasian* and *Dean M. Googasian*), for State Bar of Michigan.

Olsman, Mueller & James, P.C. (by *Jules B. Olsman* and *Phyllis A. Figiel*), for Citizens for Better Care.

KELLY, J. This case presents the question of what authentication is necessary for out-of-state affidavits in Michigan. The parties ask us to determine whether MCL 600.2102(4) of the Revised Judicature Act (RJA)

conflicts with the Uniform Recognition of Acknowledgements Act (URAA), MCL 565.261 *et seq*., and to discern the meaning of MCL 565.268 and its relation to MCL 600.2102(4). We find no conflict between the URAA and MCL 600.2102(4). The Legislature intended the URAA to serve as an alternative to MCL 600.2102(4) for authenticating out-of-state affidavits.

The Court of Appeals erred in concluding that MCL 600.2102(4) controlled because it is more specific. Therefore, it erroneously found that the signature of a notary public on an affidavit taken out of state must "be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court." MCL 600.2102(4). The Court of Appeals failed to give adequate weight and consideration to the language of MCL 565.268 that makes the URAA an additional method of attestation. *Apsey v Mem Hosp* (*On Reconsideration*), 266 Mich App 666; 702 NW2d 870 (2005). We reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Sue Apsey went to Memorial Healthcare Center for an exploratory laparotomy, which resulted in the removal of a large ovarian cyst. Medical complications followed this procedure. Plaintiffs allege that various acts of medical malpractice caused her to become septic, necessitating several follow-up surgeries.

Plaintiffs' affidavit of merit was prepared in Pennsylvania, and the notary public who signed it came from that state. A normal notarial seal appears on the document, but no other certification accompanied the seal. Plaintiffs later provided further certification, but

not until after the statutory period of limitations had run on their medical malpractice cause of action.

Defendants moved for summary disposition of plaintiffs' claims.[1] The trial court granted the motion. It found that plaintiffs' failure to provide further certification as required by MCL 600.2102(4) rendered the out-of-state notarization insufficient. As a result, it ruled that the affidavit was a nullity. Without the affidavit, plaintiffs' complaint was not complete, and their cause of action failed for never having been properly commenced.

Plaintiffs moved for reconsideration, arguing that the affidavit was sufficient under MCL 565.262, but the trial court denied reconsideration. Although it did not give its reasoning, the court stated that compliance with MCL 565.262 would not have changed its decision.

On appeal, the Court of Appeals issued an opinion in April 2005. It stated that, if it were basing its decision solely on the URAA, the affidavit in this case would be valid. But it found that MCL 600.2102(4) changed this. It found significance in the fact that MCL 600.2192 appears in the RJA, which deals with material presented to the courts. It reasoned that, on the other hand, the URAA appears among the statutes governing the conveyance of real property. It concluded that the URAA's emphasis is not on documents submitted to the courts.

The Court of Appeals also focused on the final sentence in MCL 565.268: "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." It reasoned that this

[1] Defendant Memorial Hospital is not an appellant in this Court. Subsequent references in this opinion to "defendants" are to defendants Russell H. Tobe, D.O.; James H. Deering, D.O.; James H. Deering, D.O., P.C.; and Shiawasee Radiology Consultants, P.C.

sentence indicated that the URAA did not diminish the more formal and specific requirements of MCL 600.2102(4). And it found that these more formal requirements controlled when the affidavit is to be officially received and considered by the judiciary. Given this, the Court of Appeals affirmed the trial court's dismissal of the case in a published opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 251110).

On June 2, 2005,[2] the Court of Appeals granted reconsideration and vacated its opinion. On June 9, 2005, it issued its published opinion on reconsideration. In a split decision, a majority of the Court of Appeals reaffirmed its past decision, issuing essentially the same opinion. But it decided to give the decision only prospective application. It found that it would be fundamentally unfair to dismiss plaintiffs' case because of plaintiffs' reliance on the URAA. It determined that the interests of justice would best be served by allowing plaintiffs' claim to proceed. *Apsey*, 266 Mich App at 681-682.

Judge MARK CAVANAGH dissented. He argued that the URAA provided an alternative method of proving that the notary actually notarized the document. He concluded that the URAA was a response to advances in technology and that the Legislature intended both it and MCL 600.2102 to provide legal methods of authenticating out-of-state affidavits. *Id*. at 685-686 (CAVANAGH, J., dissenting).

Defendants sought leave to appeal in this Court, and plaintiffs sought leave to cross-appeal. This Court directed the clerk to schedule oral argument on whether

[2] Unpublished order in Docket No. 251110.

to grant the applications or take other peremptory action pursuant to MCR 7.302(G)(1). 474 Mich 1135 (2006).

II. STANDARD OF REVIEW

Issues of statutory interpretation are questions of law that this Court reviews de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The fundamental rule and primary goal of statutory construction is to effectuate the Legislature's intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). To accomplish this task, we start by reviewing the text of the statute, and, if it is unambiguous, we will enforce the statute as written because the Legislature is presumed to have intended the meaning expressed. *Id*. Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory. *People v Warren*, 462 Mich 415, 429 n 24; 615 NW2d 691 (2000).

III. THE URAA PROVIDES AN ALTERNATIVE METHOD OF ATTESTATION AND AUTHENTICATION

The URAA and MCL 600.2102(4) require different certifications for out-of-state affidavits. MCL 600.2102 provides, in part:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
>
> * * *
>
> (4) If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the

> governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. *The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.* [Emphasis added.]

MCL 565.262(a) defines "notarial acts" under the URAA. It provides, in part:

> "Notarial acts" means acts that the laws of this state authorize notaries public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents. *Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons* authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this state:
>
> (*i*) A notary public authorized to perform notarial acts in the place in which the act is performed. [Emphasis added.]

It is undisputed that an affidavit is a "notarial act" that is controlled by the URAA.[3]

On first review, these statutes appear to be in conflict. The Court of Appeals majority was troubled by this and struggled to make the two fit together. But, in attempting to harmonize them, the Court of Appeals majority severely limited the reach and application of

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[3] In fact, defendants concede that the URAA applies to all notarial acts. This would include affidavits offered in a judicial proceeding. Defendants' concession undermines any argument that MCL 600.2102 was retained to carve out an exception to the URAA for affidavits used in judicial proceedings.

the URAA in ways unsupported by the text of the URAA and unintended by the Legislature. While it was appropriate for the Court of Appeals to read the statutes *in pari materia*,[4] the Court's method of doing so was incorrect. The Legislature has provided guidance on how to read the statutes in the URAA. The Court of Appeals should have used it before attempting other means of harmonizing the statutes.

In MCL 565.268, the Legislature indicated how the URAA was meant to interact with MCL 600.2102. MCL 565.268 provides:

> A notarial act performed prior to the effective date of this act is not affected by this act. *This act provides an additional method of proving notarial acts*. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state. [Emphasis added.]

Although the Court of Appeals majority took note of MCL 565.268, it focused on the last sentence to the exclusion of the others. It reasoned that, because the URAA does not diminish MCL 600.2102(4), this must mean that the Legislature intended MCL 600.2102(4) to

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[4] " 'The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject.' " *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994), quoting *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930).

> Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. [*Detroit v Michigan Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965).]

trump the requirements of the URAA. But this reasoning is not supported by the complete text of MCL 565.268.

The final sentence must be read in light of what precedes it. The second sentence of MCL 565.268 indicates that the URAA is an additional or alternative method of proving notarial acts. As an "additional" method, the URAA does not replace the prior method. Instead, it is intended to stand as a coequal with it. Because the two methods are alternative and coequal, the URAA does not diminish or invalidate "the recognition accorded to notarial acts by other laws of this state." MCL 565.268. Simply, MCL 600.2102(4) is not invalidated by the URAA. It remains an additional method of attestation of out-of-state affidavits. Because the two methods exist as alternatives, a party may use either to validate an affidavit.

Under the doctrine of *noscitur a sociis*,[5] a phrase must be read in context. A phrase must be construed in light of the phrases around it, not in a vacuum. Its context gives it meaning. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002). Similarly, it is a well-settled rule of law that, when construing a statute, a court must read it as a whole. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003); *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982); *Layton v Seward Corp*, 320 Mich 418, 427; 31 NW2d 678 (1948). Without proper adherence to this rule, the Court of Appeals could not effectuate the intent behind the URAA.

The Court of Appeals rejected the interpretation we use in the belief that reading the URAA as an alterna-

[5] "It is known by its associates." Black's Law Dictionary (7th ed).

tive method of authenticating out-of-state affidavits would render MCL 600.2102(4) nugatory. Of course, a reviewing court should not interpret a statute in such a manner as to render it nugatory. *Warren*, 462 Mich at 429 n 24. A statute is rendered nugatory when an interpretation fails to give it meaning or effect.[6] But our interpretation of MCL 565.268 does no such damage to MCL 600.2102(4).

Because the URAA does not repeal MCL 600.2102, the latter provision remains in effect as a viable means of authenticating out-of-state affidavits. If a party chooses to use it, the affidavit can be admitted as evidence just as if the party had decided to follow the URAA. MCL 600.2102(4) has the same meaning and effect after the enactment of the URAA as it did before. At both times, it was a viable means of authenticating an out-of-state affidavit.

We question how the Legislature could have signaled more clearly its intent that the URAA should function as an alternative to MCL 600.2102 than by stating that the URAA "provides an additional method of proving notarial acts." MCL 565.268. The Legislature need not repeal every law in a given area before it enacts new laws that it intends to operate in addition to their preexisting counterparts. The Legislature has the power to enact laws to function and interact as it sees fit. And when it does so, this Court is bound to honor its intent.

In this case, the Legislature made its intent clear through MCL 565.268. By enacting the URAA, it wished to create an additional method of authentica-

[6] Black's Law Dictionary (7th ed) defines "nugatory" as "of no force or effect; useless; invalid."

tion.[7] We must respect this decision. Despite its likely decreased use in light of the URAA's less rigorous requirements, MCL 600.2102(4) still has meaning. Hence, it is not rendered nugatory.[8]

Also, MCL 600.2102(4) is not rendered nugatory because it provides for the Governor to appoint a commissioner to authenticate out-of-state affidavits. Under the statute's language, Michigan's Governor could appoint a person who is not a notary to authenticate affidavits in any state or territory of the United States. MCL 600.2102(4). Such affidavits likely would not be admissible under the URAA. But they could be used because of MCL 600.2102(4). Given this, MCL 600.2102 is not rendered nugatory under our interpretation of the URAA. Instead, it has valid meaning and effect, even if it is rarely used.

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[7] The brief amicus curiae of the Negligence Section of the State Bar of Michigan makes the uncontested assertion that 24 states and the District of Columbia will not comply with the requirements of MCL 600.2102(4). This list includes heavily populated states such as California, Florida, Massachusetts, New Jersey, and Texas. This fact may have provided additional motivation for the Legislature to create an additional method of authenticating affidavits.

[8] Justice MARKMAN accuses us of rewriting and rendering nugatory the phrase "must be authenticated" as used in MCL 600.2102. This opinion does not render the phrase nugatory. As we have repeatedly noted, MCL 600.2102 still can be used as an alternative means of authentication. If a party chooses to use this method, the affidavit still "must be authenticated" in the same manner. As such, the phrase continues to have meaning.

This Court is not rewriting the statute. Instead, it is effectuating the intent behind the language written by the Legislature and considering MCL 600.2102 together with the URAA. The language of the URAA indicates that the Legislature intended to change MCL 600.2102 to render it no longer the exclusive means of authenticating out-of-state affidavits. To discern the true intent of the Legislature, the statutes must be read together, and no one section should be taken in isolation. This is where Justice MARKMAN's review fails.

By contrast, a strict application of MCL 600.2102 as the only method of authenticating affidavits would render part of MCL 565.268 nugatory. Only by ignoring the sentence "[t]his act provides an additional method of proving notarial acts" could we arrive at defendants' desired outcome. As discussed earlier, there is no reason to do so when we can provide both statutes full meaning as alternatives to one another. Therefore, we reverse the judgment of the Court of Appeals.[9]

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[9] Courts in other states have faced issues similar to the one we face today. They have consistently come to the conclusion that the uniform act creates an alternative means of authentication. *Rumph v Lester Land Co,* 205 Ark 1147; 172 SW2d 916 (1943), provides an excellent example. In that case, an Arkansas statute that predated the enactment of the uniform acknowledgement act required that

> "the certificate *shall be authenticated* by a certificate as to the official character of such officer, executed, if the acknowledgment is taken by a Clerk or Deputy Clerk of a court, by the presiding judge of the court or, if the acknowledgment is taken by a Notary Public, by a Clerk of a Court of Record of the County, Parish or District in which the acknowledgment is taken." [*Id*. at 1149, quoting § 9(2) of 1943 Ark Acts 169 (emphasis added).]

The Arkansas Supreme Court concluded that, despite this language, the statute was merely a system of acknowledgement that was an alternative to the uniform acknowledgement act:

> In other words, Act 169 of 1943 is merely permissive. Acknowledgments may still be taken, certified and authenticated just as heretofore; on the other hand, acknowledgments may be taken, certified and authenticated under the Uniform Acknowledgment Act, which is Act 169 of 1943. Two ways are open: (1) the old way; or (2) the way under Act 169 of 1943. Either way reaches the same goal: *i. e.,* the right to be recorded. [*Rumph*, 205 Ark at 1149.]

See also *First Nat'l Bank v Howard*, 148 Tenn 188; 253 SW 961 (1923), and *Valley Nat'l Bank of Arizona v Avco Dev Co*, 14 Ariz App 56; 480 P2d 671 (1971).

MCL 565.268 lays out how the Legislature intended to deal with MCL 600.2102 and the URAA. The URAA is an additional method of authenticating out-of-state affidavits, and either method may be used as an alternative to the other.[10] Because plaintiffs complied with the URAA, their affidavit was admissible.

IV. CONCLUSION

Because of the unambiguous language of MCL 565.268, there is no conflict between the URAA and MCL 600.2102(4). The URAA was enacted as an additional means of dealing with all notarial acts. This includes affidavits. Because of the unambiguous language of MCL 565.268, the URAA provides an alternative method of authenticating out-of-state affidavits. The Court of Appeals erred in holding that plaintiffs' affidavit was insufficient and inadmissible despite its compliance with the URAA. We reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

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

KELLY, J. (*concurring*). Given that I authored it, I fully concur in the majority opinion. I write this separate concurrence to address additional reasons why I believe the Court has reached the correct conclusion in

[10] We strongly disagree with Justice MARKMAN that the "most obvious means of reconciling and harmonizing" these two provisions is to find that MCL 600.2102 carves out an exception to the URAA. *Post* at 143. Again, this fails to give effect to MCL 565.268. The "most obvious" means of accomplishing this task is to follow the instructions of the Legislature and treat the provisions as alternative means of authentication.

this case. The following further explains why the two means of authentication continue to coexist and demonstrates why the Legislature did not simply repeal MCL 600.2102(4). It also offers an added explanation of how the Court of Appeals attempt to harmonize MCL 600.210(4) with the Uniform Recognition of Acknowledgements Act actually subverted the Legislature's intent.

Our interpretation of MCL 600.2102(4) and the Uniform Recognition of Acknowledgements Act (URAA), MCL 565.261 *et seq*., is supported by certain written matter that was supplied to the Legislature before it enacted the URAA. Of particular importance is the Michigan Law Revision Commission's report and recommendations. The commission was created by the Legislative Council Act (LCA), MCL 4.1101 *et seq*. It is charged with recommending changes in the law to the Legislature. MCL 4.1403. The LCA also created the Legislative Service Bureau. MCL 4.1105. It is this bureau's responsibility to compare pending bills with existing laws for the purpose of avoiding conflicts. MCL 4.1108(a). The bureau may also recommend legislation to the Legislative Council or the commission. MCL 4.1109. Along with its recommendations to the Legislature, the Legislative Council may submit proposed bills to implement the recommendations. MCL 4.1104(4).

The Michigan Law Revision Commission brought no conflicts to the Legislature's attention in its report on the URAA. Rather, the report specifically advised the Legislature that it need not repeal any laws in order to fully effectuate the URAA. It stated, "The act does not require the amendment or repeal of any existing legislation in Michigan but the old Uniform Act adopted in 1895 . . . ." Michigan Law Revision Commission, Third

Annual Report, 1968. The reason no such action had to be taken was because of proposed language that later became MCL 565.268.[1]

Given the specialized function of the Michigan Law Revision Commission, its report carries extra weight in assisting a court's interpretation of statutes. As the Legislature created the commission specifically to aid it in drafting legislation and identifying conflicts in the law, its report is a particularly useful tool in discerning legislative intent.

In this case, the report explains why MCL 600.2102 was retained. The Legislature did not repeal it because the commission advised that there was no need to do so. As the URAA was meant to provide an additional method of authentication, there was no need to repeal MCL 600.2102. Instead, by enacting MCL 565.268, the URAA made clear that there would be an additional and alternative method of authenticating affidavits. The commission's report belies the argument that, by retaining MCL 600.2102, the Legislature intended it to trump the URAA.

The report specifically indicated to the Legislature that the National Conference of Commissioners on Uniform State Laws prepared the URAA. Michigan Law Revision Commission, Third Annual Report, 1968. The national commissioners prepared a prefatory note to the URAA to aid in its uniform enactment. This note is also a useful tool in discerning the legislative intent behind the URAA and in explaining why both it and

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[1] MCL 565.268 provides:

> A notarial act performed prior to the effective date of this act is not affected by this act. *This act provides an additional method of proving notarial acts*. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state. [Emphasis added.]

MCL 600.2102 remain good law. This is because, like the Michigan Law Revision Commission's report, it told the Legislature that it need not overturn existing statutes to fully effectuate the URAA. The prefatory note stated that there was no need to amend existing acknowledgement law because the URAA was "in addition to" other recognition statutes. This demonstrates why the Legislature took no action to repeal MCL 600.2102.

The advice provided by these materials explains why the Legislature left MCL 600.2102 on the books when it adopted the URAA. And it informs our interpretation of the language of MCL 565.268. This provision of the URAA was included to streamline the enactment process. It did so by making the URAA a method of dealing with notarial acts that was additional to any existing before its enactment, including MCL 600.2102.

The Court of Appeals attempted to harmonize MCL 600.2102 with the URAA. But its attempts conflicted with the Legislature's intent that the URAA be interpreted as it has been in other states that have enacted it. MCL 565.269 provides: "This act shall be so interpreted as to make uniform the laws of those states which enact it." Use of the term "shall" in MCL 565.269 is a mandatory directive. *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005).

But far from making the URAA uniform, the Court of Appeals interpretation creates a gaping exception applicable only in Michigan. Contrary to the requirements of MCL 565.269, the Court of Appeals actually isolated Michigan from every other state that has enacted the URAA. The language of MCL 565.269 helps demonstrate that this could not have been the Legislature's intended interaction between the URAA and MCL

600.2102. The Court of Appeals erred in failing to follow the directive of MCL 565.269.

These materials provide substantial evidence that this Court properly interpreted the statutes in this case.

CAVANAGH, J., concurred with KELLY, J.

YOUNG, J. (*concurring in the result only*). I concur in the result to reverse the Court of Appeals. This is a case in which the majority and the dissent offer two compelling but competing constructions of the Uniform Recognition of Acknowledgements Act (URAA) and MCL 600.2102 of the Revised Judicature Act (RJA), and, in my view, neither construction is unprincipled.[1] Both sides invoke legitimate, well-established canons of statutory construction to justify their respective positions. In short, this is a rare instance where our

[1] It is not just the members of this Court who have struggled to reconcile the provisions of these two statutes. The Court of Appeals has twice considered this issue. Initially, it held that the more specific requirements of the RJA controlled over the requirements of the URAA and affirmed summary disposition in favor of defendants. *Apsey v Mem Hosp*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 251110). After granting reconsideration, one member of the original panel urged a different reading of the statutes, while a majority of the panel continued to hold that the RJA controlled over the URAA, but reversed the trial court and gave plaintiffs an opportunity to remedy the defect. *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005). Moreover, in their briefs filed with this Court, the parties themselves and the numerous amici curiae aligning with either side have thoroughly debated the competing approaches to construing the URAA and the RJA. Also, the Court of Appeals subsequently has questioned the correctness of its published decision in this case and, despite the fact that this case was pending before this Court, it took the unorthodox step of convening a special conflict panel to consider whether its decision in this case was correct. See *White v Barbara Ann Karmanos Cancer Institute*, order of the Court of Appeals, entered February 23, 2007 (Docket No. 270320).

conventional rules of statutory interpretation do not yield an unequivocal answer regarding how to reconcile the provisions of the two statutes that appear to conflict.

The majority honors the plain, unambiguous language in the more recently enacted URAA, noting that the statute explicitly states that it creates an "additional method" of authenticating notarial acts.[2] The majority theorizes, correctly I believe, that the Legislature, using the appropriate statutory language to signal its intent, is capable of prescribing a restrictive method of authentication then later approving a more lenient method as an alternative to the prior enactment without expressly repealing that earlier statute. I have no doubt of the Legislature's ability to provide an alternative, more lenient statutory regime, without having to negate a more restrictive one. The majority believes that the Legislature has clearly signaled such an intent in this case.

The dissent responds, first, that MCL 600.2102 dictates that out-of-state affidavits that are to be received in judicial proceedings "must be authenticated" in accordance with its more stringent requirements, and, second, that the more specific provision, that of the RJA, must govern the more general provision, the URAA, when the two overlap. The dissent also believes that the "additional method" language is an insufficient signal that the Legislature intended for both statutes to coexist as alternatives. Moreover, the dissent concludes that the majority's construction renders "nugatory" the more restrictive RJA.

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[2] MCL 565.268. Importantly, the URAA definition of "notarial acts" is very broad and encompasses those also covered by the RJA. MCL 565.262(a) (" 'Notarial acts' means acts that the laws of this state authorize notaries public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgements of instruments, and attesting documents.").

The dissent labels the majority's approach a "non-interpretation" and a "non-harmonization" of the URAA and the RJA, while criticizing my characterization of it as a reasonable application of basic principles of statutory construction.[3] In the process, the dissent recoils at the suggestion that his approach and the majority's approach are reasonable alternatives, as he believes that his interpretation is the only one that truly harmonizes the URAA and the RJA.

To the contrary, the dissent fails to explain why his "harmonization" is pre-eminent where the dissent gives little, if any, weight to the URAA's explicit statement that it "provides an additional method of proving notarial acts."[4] Given that the URAA expressly encompasses *all* notarial acts, if the URAA's methods are not "additional" to the RJA's methods where the statutes overlap, then I cannot conceive that the phase "additional method" has any significance. The dissent criticizes the majority for failing to give effect to the word "must," but meanwhile falls prey to the same criticism with respect to the phrase "additional method." The dissent's approach cannot be the only true means of harmonization where it criticizes the majority for rendering statutory language nugatory and proceeds to do the same. The dissent does not explain why the Legislature *could not* have created an all-encompassing alternative methodology for proving notarial acts and thus why his construction is *the* superior harmonization of the statutes. The Legislature apparently intended the URAA and the RJA to coexist as alternatives where they overlap, and the majority has attempted to respect the Legislature's will. Therefore, I believe that the best

[3] *Post* at 145.

[4] MCL 565.268.

"harmonization" of the two statutes allows both to coexist, as the Legislature apparently intended.

I also disagree with the dissent that the URAA renders nugatory the provisions of the RJA merely because, as a matter of practice, the public and the bar might preferentially choose to use the more liberal statute. If the Legislature can create two differing methods to accomplish the same act, then the *fact* that one is preferred does not render the other "nugatory" in a *legal* sense. See *The American Heritage Dictionary of the English Language, New College Edition* (1978) (defining "nugatory" as "[h]aving no power; invalid; inoperative: *a nugatory statute*"). Foreign affidavits to be used in judicial proceedings can still be certified under the RJA. The RJA will be neither invalid nor inoperative as a result of this decision.

Although the majority and the dissent readily expose the flaws apparent in the other's analysis of the URAA and the RJA, I cannot conclude that either construction is entirely unfaithful to the statutory language or departs from the exacting judicial philosophy that has marked this Court in recent years. Since I believe that the Legislature has created in the URAA an alternative to the RJA for proving notarial acts, including those required in judicial proceedings, I decline to join the dissent. Like the dissent, I believe that the Legislature should dispel much of the confusion generated by the URAA and the RJA for the benefit of future litigants. I hope it will do so. However, until that time, I favor a resolution that is least unsettling and disruptive to the rule of law in Michigan, and so I concur with the result to reverse the Court of Appeals.

MARKMAN, J. (*dissenting*). I respectfully dissent. I would deny leave to appeal and uphold the judgment of

the Court of Appeals. I would also call on the Legislature to promptly clarify its intentions concerning the need for the certification of foreign affidavits used in Michigan judicial proceedings.

Although the range of support from amici curiae for plaintiff's cross-application is impressive— encompassing the Michigan Trial Lawyers Association, the Michigan Defense Trial Counsel, and the State Bar of Michigan— their briefs and the majority opinion are ultimately unpersuasive, in my judgment, because each fails to accord *any* meaning to MCL 600.2102, which states that foreign affidavits "must be authenticated" by the procedures set forth in that law. It is not to read this law "technically," "narrowly," "crabbedly," "literally," "unreasonably," or "conservatively" to conclude that "must be authenticated" means what it says. The majority opinion would simply transform what the Legislature has written into "*may* be authenticated."[1] Although I am sympathetic to this result, and would urge the Legislature to consider an amendment to that effect, it is not within this Court's authority to modify the clear language of the law, even where there is a consensus within the bar for such a result.

Unquestionably, considerable confusion is introduced by the Uniform Recognition of Acknowledgments Act (URAA), which states, in part:

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[1] The majority opinion asserts that its harmonization "does not render the phrase nugatory" because "[i]f a party chooses to use this method, the affidavit still 'must be authenticated' in the same manner." *Ante* at 132 n 8. But, of course, the majority opinion's specified condition— "if a party chooses to use this method"— drains the remainder of its statement of any coherence, for this is the very question in controversy— *must* a party choose to use this method? The Legislature says "yes," and the majority opinion says "no." The majority opinion does "equity" in the guise of statutory interpretation, distorting both legal concepts in the process.

> This act provides an additional method of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state. [MCL 565.268.]

However, the most obvious means of reconciling and harmonizing MCL 600.2102 and MCL 565.268[2] is to recognize that the former— applicable only to the use of affidavits in *judicial proceedings*— is the more specific of these provisions, and therefore the latter is best understood as applicable only to the use of affidavits outside the scope of judicial proceedings. Such a harmonization, while imperfect as all harmonizations must be, respects the language of § 2102, while also respecting the language of the URAA, albeit outside the judicial sphere. While a perfect harmonization of these provisions is not possible, a harmonization that gives reasonable meaning to both provisions should be preferred to a "harmonization" that gives no meaning at all to one provision. In contrast, the majority's "harmonization," while fully respecting the language of the URAA, would accord *no* respect to the language of § 2102. As the Court of Appeals correctly observed, the majority's interpretation "basically makes the certification requirement in MCL 600.2102(4) worthless or nugatory." *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666, 677 n 4; 702 NW2d 870 (2005).

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[2] The majority states, "We question how the Legislature could have signaled more clearly its intent that the URAA should function as an alternative to MCL 600.2102 than by stating that the URAA 'provides an additional method of proving notarial acts.' " *Ante* at 131. I agree with this. However, it is equally true that the Legislature could hardly "have signaled more clearly its intent" concerning § 2102 than by providing that certain notarial acts "must be" authenticated under the procedures of that provision. The issue here is not the clarity of the URAA but how to reconcile it with the equally clear § 2102.

In response to Justice YOUNG's concurring opinion, I do not assert that the majority opinion renders § 2102 nugatory "merely because, as a matter of practice, the public and the bar might preferentially choose to use the more liberal statute." *Ante* at 141. Rather, I assert this because the majority opinion replaces "must" with "may," and thereby renders § 2102 "trifling, of little or no consequence, inconsequential," *Webster's New Collegiate Dictionary* (4th ed)— that is, "nugatory." In so doing, the majority opinion departs from what the concurring justice correctly describes as "the exacting judicial philosophy that has marked this Court in recent years." *Ante* at 141.

The concurring opinion also errs in characterizing the dispute between the majority and dissenting opinions as one in which the majority adheres to the dispositional rule that "later-in-time" statutes control while the dissent adheres to the rule that more specific statutes control. As useful as such maxims may be where statutes stand in irreconcilable conflict and where it must be determined which is to trump the other, it is *first* the obligation of a court to seek to harmonize or reconcile statutes so that *neither* must be trumped out of existence. "To make laws agree or harmonize with laws is the best mode of interpreting them." Halkerston, Maxims 70; see also *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002) ("In . . . a case of tension, . . . it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.").

That is, the process of harmonization, which is simply another name for one aspect of the process of interpretation, *precedes* the application of dispositional maxims of the sort identified by the concurring opinion. See *Klapp v United Ins Group Agency, Inc*, 468 Mich

459, 473; 663 NW2d 477 (2003). This opinion undertakes to harmonize; the majority opinion does not. No "harmonization" can fairly be said to occur where one statute ends up utterly without practical meaning or effect. *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999) ("[A] court's duty is to give meaning to all sections of a statute and to avoid, if at all possible, nullifying one by an overly broad interpretation of another."). "Words . . . ought to be interpreted in such a way as to have some operation." 8 Coke Reports 94a. "Words are to be received with effect, so that they may produce some effect." Bacon, Maxims, reg 3. "Words should be understood effectively." *Rickets v Livingston*, 2 Johns Cas 97, 101 (NY Sup Ct, 1800). If the majority opinion does not genuinely render § 2102 nugatory in the view of the concurring opinion, it is difficult to imagine when a statue would *ever* be rendered nugatory by judicial construction. A statute need not be physically ripped out of a legal code and set ablaze in a bonfire in order to be rendered nugatory; it is merely necessary that a statute be rendered of no consequence. Here, the operative word of § 2102 is transformed from "must" to "may," and there is simply *no* circumstance in which the statutory shell that remains could ever have any applicability or pertinence separate from the URAA. The concurring opinion fails to differentiate between an imperfect harmonization— which is what all harmonizations must necessarily be— and a non-harmonization. The difference is the difference between an interpretation and a non-interpretation.

The § 2102 "problem"— and I would acknowledge it as such— is easily and quickly remediable by the Legislature. By contrast, the "problem" caused to our jurisprudence by this Court reading the law in a manner that is unsupported by its language is considerably less easily and quickly remediable.

PEOPLE v THOMPSON

Docket No. 130825. Argued December 12, 2006 (Calendar No. 6). Decided May 1, 2007.

Keith D. Thompson was convicted by a jury in the Genesee Circuit Court, Geoffrey L. Neithercut, J., of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and knowingly keeping or maintaining a vehicle that is used for keeping or selling controlled substances, MCL 333.7405(1)(d). The Court of Appeals, DONOFRIO, P.J., and MURPHY and KELLY, JJ., affirmed the delivery conviction but reversed the conviction of maintaining a drug vehicle, holding that the statute, as interpreted in *People v Griffin*, 235 Mich App 27 (1999), requires for a conviction that a defendant knowingly keep or maintain a vehicle used for the purpose of selling a controlled substance "continuously for an appreciable period of time," and that the evidence in this case was insufficient on that score. Unpublished opinion per curiam, issued February 23, 2006 (Docket No. 258336). The Supreme Court granted the prosecution's application for leave to appeal and denied the defendant's application for leave to file a cross-appeal. 475 Mich 907 (2006).

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

MCL 333.7405(1)(d) precludes a conviction based on an isolated incident without other evidence of continuity; however, the statute does not require the prosecution to show that a defendant's actions occurred "continuously for an appreciable period" as was stated in *Griffin*. The phrase "keep or maintain" in § 7405(1)(d) implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence that conduces to the same conclusion. The *Griffin* definition unwarrantly established a higher burden of proof than is required by the statute. "Keep or maintain" is not synonymous with "use." The judgment of the Court of Appeals must be vacated and the matter must be remanded to the Court of Appeals for reconsideration of the issue regarding the sufficiency of the evidence pertaining to the conviction of maintaining a drug vehicle.

Justice MARKMAN, concurring, fully agreed with the majority opinion but wrote separately to state that the Legislature exceeds

its law-making authority and impinges on the Supreme Court's judicial power when it dictates a rule of statutory interpretation to the Supreme Court. MCL 333.7121(2), which provides that the controlled substances article of the Public Health Code shall be applied and construed in a manner that makes the article and similar laws of other states uniform, and MCL 333.1111(1), which provides that the Public Health Code shall be construed in a manner that makes it consistent with applicable federal and state law, if viewed as admonitions to construe "keep or maintain" in uniformity or consistently with judicial interpretations from other states, are two examples where the Legislature has exceeded its authority.

Justice KELLY concurred in the result only.

Vacated and remanded.

Justice CORRIGAN, joined by Justice YOUNG, concurring in part and dissenting in part, agreed with the majority that § 7405(1)(d) does not require the prosecution to show that the defendant's actions occurred continuously for an appreciable period. However, she would vacate the judgment of the Court of Appeals and reinstate the defendant's conviction because she disagreed with the majority's holding that the statute precludes conviction for an isolated incident without other evidence of continuity. Justice CORRIGAN would hold that evidence of an isolated incident of using a vehicle for keeping or selling controlled substances is sufficient to give rise to criminal liability under the unambiguous language of the statute if the offender, as in this case, keeps the vehicle by retaining it in his possession or power.

CRIMINAL LAW — MAINTAINING DRUG VEHICLE — WORDS AND PHRASES — KEEP OR MAINTAIN.

A conviction of knowingly keeping or maintaining a vehicle used for keeping or selling controlled substances may not be based on an isolated incident lacking evidence of continuity; however, the prosecution need not show that the defendant's actions occurred "continuously for an appreciable period"; "keep or maintain" is not synonymous with "use" and implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence that conduces to the same conclusion (MCL 333.7405[1][d]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David S. Leyton,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Research, Training and Appeals for the people.

Patrick K. Ehlmann for the defendant.

TAYLOR, C.J. The issue in this case is whether MCL 333.7405(1)(d), which, among other things, forbids a person from knowingly "keep[ing] or maintain[ing]" a vehicle that is used for keeping or selling controlled substances, requires for a conviction that the prosecutor show, as was stated in *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999), that the defendant's actions occurred "continuously for an appreciable period."

We reject the *Griffin* Court's construction of the statute and hold that while the statute precludes a conviction for an isolated incident without other evidence of continuity, the statute does not require the prosecution to show that a defendant's actions occurred "continuously for an appreciable period." Because the Court of Appeals reversed defendant's conviction for maintaining a drug vehicle on the basis of the *Griffin* Court's construction of the statute, we vacate the judgment of the Court of Appeals and remand this case for reconsideration in light of the test we adopt today.

I. FACTS AND PROCEEDINGS BELOW

Acting on a tip that defendant, who had the nickname of "Doughboy," was going to deliver some drugs at a parking lot of a restaurant, several law enforcement officers went to that location. A white van fitting the description of the vehicle "Doughboy" was expected to be driving entered and parked. A woman who appeared to have been waiting for the white van got out of a nearby red sedan and got into the van through its rear passenger door. A few minutes later she stepped out of the van, got back into the sedan, and started to back up

the sedan in order to drive away. After the police stopped the sedan, they found four rocks of crack cocaine on the floorboard of the driver's side of the sedan, and a crack pipe and lighter were found on the floor near the backseat. A passenger hiding in the back of the sedan was found to be in possession of a small amount of marijuana.

As one of the officers approached the white van, defendant started getting out of the van with a cell phone in his hand and he turned toward the van so that the officer could not see his hands.[1] Another officer observed a man in the passenger seat of the van remove a piece of plastic from his mouth and toss it to the floor. This man was later taken to the hospital when, with increasingly slurred speech, he told an officer that he had swallowed some cocaine. While no drugs were found in the van or on the defendant, a $50 bill was found on the console of the van as well as an empty and ripped plastic bag that had been twisted in a manner typical of drug packaging. As for the woman who had entered the van, a detective testified that defendant said that the woman had owed him money and had paid him the $50 she owed him, and that he had then given her a $20 rock of crack cocaine.[2]

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[1] The prosecutor argued in his closing argument that defendant likely had cocaine in his possession or on the driver's seat and that he threw the drugs to the passenger and told him to get rid of them.

[2] Neither the passenger in the van, the woman in the sedan, nor the man in the back of the sedan testified at trial. Defendant, however, did testify. He admitted that his nickname was "Doughboy" but he denied selling any cocaine or making the statement the detective attributed to him. Although one officer indicated that the white van was the vehicle Doughboy usually drove, and defendant acknowledged driving the van, there was no evidence that defendant owned or leased the van.

After a jury trial, defendant was convicted of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug vehicle, MCL 333.7405(1)(d).[3]

The Court of Appeals affirmed the cocaine delivery conviction but reversed the conviction of maintaining a drug vehicle for the reason that there was insufficient evidence to support the conviction.[4] The Court of Appeals, relying on *Griffin*, summarized its holding as follows:

> The prosecution did not present evidence that defendant exercised authority or control over the white van *for an appreciable period of time* for the purposes of making the van available for selling or keeping drugs. The prosecution only presented evidence that defendant used the van for selling or keeping drugs on the night of April 9, 2003. Because defendant's conviction is not supported by sufficient evidence, we reverse defendant's conviction for maintaining a drug vehicle.[5]

The prosecutor filed an application for leave to appeal regarding the reversal of the conviction for maintaining a drug vehicle, and defendant filed an application for leave to file a cross-appeal regarding the affirmance of his delivery conviction. We granted the

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[3] MCL 333.7405(1)(d) provides that a person

> [s]hall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

[4] Unpublished opinion per curiam, issued February 23, 2006 (Docket No. 258336).

[5] *Id.* at 2 (emphasis added).

prosecutor's application for leave to appeal, but denied defendant's cross-application.[6]

We limited the grant of leave to appeal to the issues 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 *Griffin, supra* at 32-33, in order to sustain a conviction under MCL 333.7405(1)(d) and whether the evidence presented in this case was sufficient to sustain the defendant's conviction for keeping or maintaining a drug vehicle.

II. STANDARD OF REVIEW

Whether MCL 333.7405(1)(d) requires the prosecutor to show that a defendant's actions occurred "continuously for an appreciable period" is a legal question, and we review legal questions de novo. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). Our fundamental obligation when interpreting statutes is "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art.[7] We consult a lay dictionary when defining common words or phrases that lack a unique legal

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[6] 475 Mich 907 (2006).

[7] MCL 8.3a provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

meaning. *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000). This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998).

III. ANALYSIS OF THE STATUTE

We have not previously had the occasion to construe MCL 333.7405(1)(d). The Court of Appeals, however, has issued two published opinions addressing it in the context of a charge of maintaining a drug house. First, in *People v Bartlett*, 231 Mich App 139, 147; 585 NW2d 341 (1998), the panel, citing *Wahrer v State*, 901 P2d 442, 444 (Alas App, 1995), explained, "Alas Stat 11.71.040(a)(5), which mirrors MCL 333.7405(d); MSA 14.15(7405)(d), requires proof that the defendant knew that the premises were being used for continuing illegal drug activity . . . ." The Court rejected the defendant's claim that the jury instructions were erroneous when the trial court refused to tell the jury that "keep or maintain" required "general supervisory control" rather than merely control or "general control." Second, in *Griffin*, *supra*, another panel, without reference to *Bartlett*, considered a defendant's claim that the prosecution failed to present evidence sufficient to support his conviction of maintaining a drug house. The defendant did not contest the fact that the house at issue was a drug house; he only challenged whether there was evidence that he had kept or maintained it. The Court of Appeals determined that the prosecution had presented sufficient evidence. In its opinion the panel stated:

> We hold that to "keep or maintain" a drug house it is not necessary to own or reside at one, but simply to exercise

> authority or control over the property for purposes of making it available for keeping or selling proscribed drugs *and to do so continuously for an appreciable period.* [*Griffin, supra* at 32 (emphasis added).]

With this in mind, we turn to an analysis of the proper meaning of this phrase.

MCL 333.7405(1)(d) provides, as relevant here, that a person "[s]hall not knowingly keep or maintain a . . . vehicle . . . that is used for keeping or selling controlled substances in violation of this article." To determine the proper meaning of "keep or maintain" we first examine the statute itself. As with most statutory phrases, neither the individual word "keep" or "maintain" nor the phrase "keep or maintain" is defined in the statute.

Random House Webster's College Dictionary (1991) defines "keep" as "to *maintain* . . . , to cause to continue in a given position, state, course, or action." (Emphasis added.) It defines "maintain" as "to *keep* in existence or continuance." *Id*. (emphasis added).[8] "Keep" is defined as "to maintain" and "maintain" is defined as "to keep." Thus, it appears that the terms "keep" and "maintain" are synonyms. The dissent contends that these two terms must be given distinct meanings because they are separated by the word "or." We respectfully disagree. The word "keep" is commonly understood to mean "maintain" and the word "maintain" is commonly understood to mean "keep." We cannot define these terms in a manner that is inconsistent with how they are commonly understood just because they

[8] We note that the definitions found in Black's Law Dictionary are consistent with the definitions found in *Random House Webster's College Dictionary*. Black's Law Dictionary (6th ed) defines "keep" as "[t]o maintain continuously," and it defines "maintain" as "keep in existence or continuance."

are separated by the word "or." In other words, the fact that these two terms are separated by the word "or" does not give us the authority to give these two terms distinct meanings when they are commonly understood to have the same meaning. If two words have the same meaning, then we must give them the same meaning even where they are separated by the word "or."

As discussed above, "keep" is defined as "to cause to *continue*" and "maintain" is defined as "to keep in existence or *continuance*." *Id*. (emphasis added). The words "keep" and "maintain" both contain an element of "continuity." Even the dissent's definitions of these terms contain an element of "continuity." The dissent defines "maintain" as " 'to keep in an existing state.' " *Post* at 163, quoting *Webster's Ninth New Collegiate Dictionary* (1987). Keeping something in an existing state necessarily requires some degree of continuity. The dissent defines "keep" as " 'to retain in one's possession . . . .' " *Post* at 164, quoting *Webster's Ninth New Collegiate Dictionary* (1987). "Retain" is defined as "to *continue* to use." *Random House Webster's College Dictionary* (1991) (emphasis added). Accordingly, some degree of "continuity" is an element even under the dissent's definition of "keep or maintain." Therefore, even assuming that the words "keep" and "maintain" have distinct meanings because they are separated by the word "or," the words "keep" and "maintain" both contain an element of continuity. That is, regardless of how one defines the words "keep" and "maintain," one cannot avoid a definition that requires some degree of continuity.

Finding that evidence of continuity is required to convict a person of "keeping or maintaining" a drug vehicle is consistent with this Court's decision in *People v Gastro*, 75 Mich 127; 42 NW 937 (1889). In *Gastro,*

supra at 133-134, this Court held that "[a] single act of lewdness or prostitution would not constitute the offense [of keeping and maintaining a house of ill fame] which the statute prohibits and punishes . . . ." Just as one does not keep and maintain a house of ill fame by engaging in an isolated act of lewdness or prostitution in the house, one does not keep or maintain a drug vehicle by engaging in an isolated act of selling drugs out of the vehicle.

The phrase "keep or maintain" implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that conduces to the same conclusion.

We note that the Legislature has twice indicated[9] that it desires MCL 333.7405(1)(d) to be interpreted in the same way similar acts in other states have been interpreted.

In states with statutes substantially similar to MCL 333.7405(1)(d) there is remarkable uniformity in giving

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[9] First, MCL 333.7405(1)(d) was drawn from § 402(a)(5) of the Uniform Controlled Substances Act of 1970. 9 ULA, part IV, § 402(a)(g), p 682. MCL 333.7121(2) is applicable to the statute at issue and states: "This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact laws similar to it."

Further, MCL 333.7405(1)(d) is part of the Public Health Code and § 1111(1) of this code provides: "This code is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1).

The interpretation that we adopt today is dependent on the language of the statute. We do not interpret MCL 333.7121(2) and MCL 333.7405(1)(d) as admonitions that we follow constructions placed on similar statutes in other jurisdictions if those rulings are inconsistent with the words used in our statutes.

meaning to "keep or maintain."[10] One of the most encyclopedic discussions of the cases is found in *Dawson v State*, 894 P2d 672, 674 (Alas App, 1995), where the Alaska Court of Appeals, after canvassing the other states, concluded that in virtually all other states the requirement to "keep or maintain" requires " 'some degree of continuity' " *id.* at 676 (citation omitted), and, fleshing that out, concluded that "courts have uniformly adopted the position that the prosecution is required to prove, and the jury to find, 'something more than a single, isolated instance of the proscribed activity.' " *Id.*, quoting *Barnes v State*, 255 Ga 396, 402; 339 SE2d 229 (1986). The Alaska court then summarized the prevailing law with respect to the keeping or maintaining element of drug-house statutes as follows:

> The state need not prove that the property was used for the exclusive purpose of keeping or distributing controlled substances, but such use must be a substantial purpose of the users of the property, and the use must be continuous to some degree; incidental use of the property for keeping or distributing drugs or a single, isolated occurrence of drug-related activity will not suffice. The purpose [for] which a person uses property and whether such use is continuous are issues of fact to be decided on the totality of the evidence of each case; the state is not required to prove more than a single specific incident involving the keeping or distribution of drugs if other evidence of continuity exists. [*Dawson, supra* at 678-679.]

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[10] See, generally, anno: *Validity, construction, and application of state or local law prohibiting maintenance of vehicle for purpose of keeping or selling controlled substances*, 31 ALR5th 760 (1995); anno: *Validity and construction of state statutes criminalizing the act of permitting real property to be used in connection with illegal drug activities*, 24 ALR5th 428 (1994).

We find this interpretation persuasive and consistent with the interpretation that we have adopted after analyzing the words of the statute.[11]

With regard to the Court of Appeals *Griffin* test, which held that MCL 333.7405(1)(d) requires a showing that the defendant's actions occurred "continuously for an appreciable period," we believe it likely that the panel was attempting to draw from *Dawson* but mistakenly utilized only one part of the *Dawson* formulation, i.e., that the defendant's actions "must be continuous to some degree." *Dawson, supra* at 678-679. The difficulty with this truncated *Griffin* definition is that it unwarrantedly establishes a higher burden of proof than is justified by the statutory language. While the *Dawson* court's formulation, "continuous to some degree," would be satisfied by a showing of intermittent use, the *Griffin* Court's language, "continuously for an appreciable period," seems to suggest a longer period of use with few or no interruptions. Having said that, we reiterate that "keep or maintain" is not synonymous with "use." Hence, if the evidence only shows that defendant used a vehicle to keep or deliver drugs on one occasion, and there is no other evidence of continuity,

[11] The prosecutor concedes that only one state, Delaware, has adopted a test that would allow a conviction upon proof of a single incident without more. *Priest v State*, 879 A2d 575 (Del, 2005). The Delaware court acknowledged that "most, if not all" other states with similar statutes reject the single-occurrence approach. *Id.* at 580 n 22. The Delaware court's approach is not persuasive because its decision was driven by policy and did not trace the words of the statute. Thus, as we have explained, we reject the Delaware construction and abide by the overwhelming majority view that proof of a single incident, without some other evidence of continuity, is not enough to establish a violation of MCL 333.7405(1)(d). We would not, as would Justice CORRIGAN, have Michigan join the Delaware interpretation because we find the majority view accurately interprets our similarly worded statute.

the evidence is insufficient to establish that defendant kept or maintained a drug vehicle in violation of MCL 333.7405(1)(d).

Having clarified the correct construction of MCL 333.7405(1)(d), and because the Court of Appeals analyzed defendant's claim regarding the evidence that he kept or maintained a drug vehicle under language we have rejected today, we find it appropriate to have the Court of Appeals determine in the first instance whether the evidence supporting defendant's conviction of maintaining a drug vehicle was sufficient in light of the interpretation of the statute set forth in our opinion today. The parties shall be allowed to file supplemental briefs.

IV. RESPONSE TO THE DISSENT

Justice CORRIGAN's partial dissent accuses us of giving offenders a free pass to use a vehicle to keep or sell drugs. We, of course, have done no such thing. Rather, we have simply determined, on the basis of the words of the statute and consistently with the overwhelming majority of other courts that have construed similar statutes, that the Legislature did not intend a conviction for knowingly keeping or maintaining a drug vehicle to obtain if there was only evidence of a single use. Defendants who possess or deliver controlled substances are already subject to felony prosecution for possession or delivery independent of evidence of a vehicle's use. There is no free pass.

IV. CONCLUSION

For the reasons set forth in this opinion, we vacate the judgment of the Court of Appeals and remand the

case to the Court of Appeals for reconsideration of defendant's sufficiency of the evidence argument in light of this opinion.

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

KELLY, J. I concur in the result only.

MARKMAN, J. (*concurring*). I fully join the majority opinion but write separately only to address two provisions of law that are referenced in the majority's analysis, see *ante* at 155 n 9.

First, MCL 333.7121(2) states:

> This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact laws similar to it.

Second, MCL 333.1111(1) states:

> This code is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency.

In light of these provisions, the majority opinion reasonably surveys the decisions of foreign courts that have interpreted the dispositive phrase in this case, "keep or maintain," but concludes that this Court does not construe §§ 7121(2) and 1111(1) as "admonitions that we follow constructions placed on similar statutes in other jurisdictions if those rulings are inconsistent with the words used in our statutes." *Ante* at 155 n 9. I agree with this observation, but also note that if these provisions are, in fact, understood as "admonitions" to that effect, they would be beyond the authority of the Legislature.

This Court has said on innumerable occasions that it is obligated to defer to legislative judgments, even when

such judgments are far afield from our own. This is because the legislative power is the power to undertake policy judgments and to set forth the law. Few judicial bodies have been more deferential toward legislative judgments than this Court.

However, when the Legislature purports to exercise its *legislative* power to dictate a rule of interpretation to this Court, as some might read §§ 7121(2) and 1111(1) as doing, the Legislature exceeds its authority and impinges on the *judicial* power, which is the power to interpret the law and say what that law means. It is this Court's responsibility to exercise the judicial power and to give reasonable meaning to the law by examining its language, structure, organization, and purpose. I do not believe that the Legislature can impose any different rules of interpretation upon this Court. Although on occasions I have acquiesced in the application of legislative rules of interpretation, I am increasingly of the view that such rules are not only incapable of coherent application, but that they trespass upon the authority of the judiciary.

Concerning §§ 7121(2) and 1111(1) in particular, there is certainly no harm, and perhaps value, in our Legislature encouraging this Court to assess the decisions of foreign courts that have interpreted "keep or maintain." However, the limitation of such provisions is manifest in the following questions: Must this Court construe Michigan law to make it uniform with the laws of another state that have been misinterpreted? May this Court take into consideration dissimilarities between the law of Michigan and those of another state? How does this Court render "uniform" its interpretations if there are disagreements to this effect among the other states? Can "uniformity" or "consistency" in the

interpretation of the law be practically achieved by the judiciaries of 50 sovereign jurisdictions?

If it is the Legislature's intent that the law be interpreted in a particular manner, the most reliable means of securing this result is for the Legislature to write the law in that manner. Although I do not doubt that an ancient law that has been given meaning over the centuries by courts of other jurisdictions can sometimes helpfully be referenced by the Legislature, in the final analysis, the constitutional rule must be that the Legislature either say clearly what it intends or else recognize that its less clearly stated intentions will be discerned through traditional methods of interpretation. A court cannot be obligated to say that the law states something other than what it states. This is no less true where a court of another jurisdiction has reached a contrary conclusion.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the majority's ruling that MCL 333.7405(1)(d), which forbids a person from "keep[ing] or maintain[ing]" a vehicle that is used for keeping or selling controlled substances, does not require the prosecution to show that the defendant's actions occurred "continuously for an appreciable period," as stated in *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999).

I part company with the majority because it has violated a cardinal rule of statutory construction. Fundamentally, the majority has disregarded the Legislature's choice of the disjunctive term "or" ("keep or maintain") and effectively substituted the conjunction "and" ("keep and maintain"). It has achieved this override of the Legislature's choice by defining the

common terms "keep" and "maintain" as synonymous when they also have different and distinct dictionary definitions.

I also dissent from the majority's holding that "the statute precludes a conviction for an isolated incident without other evidence of continuity . . . ." *Ante* at 148. By requiring "evidence of continuity" to prove the crime, the majority has essentially adopted the Court of Appeals holding in *Griffin* that the prosecution must show that the defendant's actions occurred "continuously for an appreciable period." It has merely deleted the "appreciable period" component of the continuity requirement. In my view, the majority continues to give offenders a "free pass." Instead, I would hold that evidence of an isolated incident of using a vehicle for keeping or selling controlled substances is sufficient to give rise to criminal liability under the unambiguous language of the statute if the offender keeps the vehicle by retaining it in his possession or power.

The first step we take in determining the Legislature's intent is to examine the plain language of the statute. *People v Anstey*, 476 Mich 436, 442-443; 719 NW2d 579 (2006). MCL 333.7405(1)(d) provides, in pertinent part, that a person "[s]hall not knowingly keep or maintain a . . . vehicle . . . that is used for keeping or selling controlled substances in violation of this article." The words "keep" and "maintain" are common words that can be given distinct meanings. Therefore, a lay dictionary should be used to define these words. See *Horace v City of Pontiac*, 456 Mich 744, 756; 757 NW2d 762 (1998) ("[W]hen considering a nonlegal word or phrase that is not defined within a statute, resort to a layman's dictionary such as *Webster's* is appropriate. This is because the common and approved usage of a nonlegal term is most likely to be

found in a standard dictionary and not a legal dictionary."). In ascertaining the common and ordinary meaning of a statutory term, a court should determine the meaning of the term at the time the statute was enacted, and may consult dictionaries from that time to determine that meaning. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005).

The majority avoids the plain meaning of the text of the statute by declaring that the words "keep" and "maintain" are synonymous. The lay dictionary definition of "maintain" is "to keep in an existing state." *Webster's Ninth New Collegiate Dictionary* (1987), p 718.[1] The majority selects one definition of "keep" from the many available dictionary definitions, and declares that the word "keep" is synonymous with the word "maintain." But construing the terms as synonymous disregards the Legislature's use of the disjunctive term "or."[2] By using the disjunctive, the Legislature defined two separate ways of committing this crime.[3] In order to give meaning to the term the Legislature employed, the statute must be construed to give the words "keep" and "maintain" distinct meanings. To hold otherwise violates " 'the fundamental rule of [statutory] construction that every word should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible.' " *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193

[1] None of the other definitions of "maintain" is appropriate in the context of the statute.

[2] *Webster's Ninth New Collegiate Dictionary* (1987), p 829, offers the following relevant definition of "or": "used as a function word to indicate an alternative."

[3] Had the Legislature intended that the words "keep" and "maintain" have one meaning, it would not have used two words separated by "or," but instead would simply have used one word or the conjunctive word "and."

(2003), quoting *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 364; 459 NW2d 279 (1990). By holding that the words "keep" and "maintain" are interchangeable, the majority fails to give meaning to the Legislature's clear intent to give variant meaning to the two words. Additionally, by using synonymous definitions of "keep" and "maintain," the majority renders one of these two words mere surplusage.[4]

The dictionary also defines "keep" as "to retain in one's possession or power." *Webster's Ninth New Collegiate Dictionary* (1987), p 658. This definition of "keep" is not synonymous with "maintain," is a commonly understood meaning of the word, and is appropriate in the context of the statute. Thus, we should employ this definition in interpreting the statute. Using this definition of "keep," the majority correctly concludes that the Court of Appeals, in *Griffin, supra* at 32, added an element to the statutory language by requiring the prosecution to show that the defendant's actions oc-

[4] This is one of the reasons why cases from sister states, including *Dawson v State*, 894 P2d 672 (Alas App, 1995), are not particularly helpful. These cases, like the majority in the instant case, fail to apply the plain language of the statute and fail to differentiate between the words "keep" and "maintain." Further, many cases from other states also require the prosecution to show that the defendant kept or maintained the vehicle or house *for the purpose* of keeping or selling controlled substances. See, e.g., *Barnes v State*, 255 Ga 396, 402; 339 SE2d 229 (1986) ("[I]n order to support a conviction under § 16-13-42 (a) (5) for maintaining a residence or other structure or place used for keeping controlled substances, the evidence must show that one of the purposes for maintaining the structure was the keeping of the controlled substance."). No language in our own statute requires the prosecution to prove that the vehicle was used *for the purpose* of keeping or selling controlled substances. The only mention of "purpose" in MCL 333.7405(1)(d) refers to the preceding clause of the statute providing that a person may not maintain a vehicle "that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances . . . ." That clause is not at issue in the instant case.

curred "continuously for an appreciable period." But the majority incorrectly holds that the word "keep" requires the prosecution to provide some evidence of continuity. I disagree that the word "keep," as defined above, "implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence . . . ." *Ante* at 155. In arguing that the above definition of "keep" requires continuity, the majority consults *Random House Webster's College Dictionary* (1991), which defines "retain" as "to continue to use." But *Webster's Ninth New Collegiate Dictionary* (1987) defines "retain" as "1 a: to keep in possession or use . . . 2: to hold secure or intact." *Id.* at 1006. Neither of these definitions from *Webster's Ninth New Collegiate Dictionary* (1987) requires continuity. Thus, I cannot agree with the majority that "keep" or "retain" requires continuity.

Under the above definition of "keep," the prosecution need only show that the defendant retained a drug vehicle in his possession or power. This could mean, for instance, that the defendant just began using the vehicle to keep drugs earlier that day. The focus should not be on how long the defendant kept drugs in the vehicle or sold the drugs from the vehicle; if a defendant uses a vehicle even one time for such a purpose, he has retained a drug vehicle in his possession, i.e., "kept" a drug vehicle. The focus should instead be on the degree of the defendant's control or use of the vehicle in connection with the storage or selling of drugs. See *People v Bartlett*, 231 Mich App 139, 152; 585 NW2d 341 (1998) (a person may be deemed to keep or maintain a drug house if that person has the ability to exercise control or management over the house).

I further disagree with the majority's reliance on *People v Gastro*, 75 Mich 127; 42 NW 937 (1889), for the

proposition that "keep or maintain" in MCL 333.7405(1)(d) requires more than an isolated incident. In *Gastro*, the defendant was convicted of unlawfully keeping a house of ill fame. In holding that a single act of prostitution will not always be sufficient to support a conviction under the statute, the *Gastro* Court did not even cite the statutory language, let alone engage in an analysis of the meaning of the word "keep."[5] Rather, the Court discussed the meaning of the statutory phrase "resorted to" and the purpose of the statute. *Id.* at 133. Further, MCL 333.7405(1)(d) is an almost verbatim adoption of a provision of the Uniform Controlled Substances Act (UCSA) effective at the time. It is doubtful that the Legislature considered a nineteenth century case involving a conviction for keeping a house of ill fame when it adopted the UCSA provision that prohibits keeping or maintaining a drug vehicle.

The majority also relies heavily on other states' interpretations of their own similar statutes. By doing so, the majority is distracted from the text of our own statute and led astray by other states' interpretations of their own similar statutes. The majority defends its reliance on cases from other states by pointing to two provisions of the Public Health Code that require other provisions of the code to be construed to achieve uniformity and consistency with other states. MCL 333.7121(2);[6] MCL 333.1111(1).[7] But these statutes do not require us to conform to other states' interpretations of statutes with different language when such

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[5] In fact, the Court referred to the crime as "unlawfully keeping *and maintaining* a house of ill fame," *id.* at 128 (emphasis added), although the statute did not use the words "and maintaining." 1887 PA 34.

[6] MCL 333.7121(2) provides: "This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact laws similar to it."

[7] MCL 333.1111(1) provides: "This code is intended to be consistent

interpretations would be contrary to the plain language of our own statute. Nor do they require us to adopt other states' erroneous interpretations of their own substantially similar statutes. If this were the case, we would simply do a "head count" of decisions from other states and follow the majority of states regardless of whether those decisions are correct. MCL 333.7121(2) or MCL 333.1111(1) does not require such a result.

Further, "[o]nly where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent." *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999). If the language of the statute is unambiguous, this Court applies the statute as written, and judicial construction is neither necessary nor permitted. *Id.* at 284. MCL 333.7121(2) and MCL 333.1111(1) govern judicial construction of statutes in the Public Health Code, which is not permitted when the statute at issue is unambiguous.[8] The majority does not identify an ambiguity in MCL 333.7405(1)(d). Because the language of MCL 333.7405(1)(d) is unambiguous, the above "uniformity" statutory provisions do not apply, and this Court must apply the plain language of MCL 333.7405(1)(d) as written, without regard to how other states have construed their similarly worded statutes.[9]

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with applicable federal and state law and shall be construed, when necessary, to achieve that consistency."

[8] I offer no opinion regarding whether MCL 333.7121(2) or MCL 333.1111(1) violates the separation of powers doctrine by effectively instructing courts regarding how to exercise their judicial power to construe statutes.

[9] The "uniformity" statutory provisions of MCL 333.7121(2) and MCL 333.1111(1) are similar to statutory provisions requiring that a statute be broadly or liberally construed. For example, MCL 333.1111(2) provides that the Public Health Code "shall be liberally construed for the protection of the health, safety, and welfare of the people of this state."

In addition to failing to apply the plain language of the statute, the majority creates practical problems by giving defendants a "free pass" from conviction for keeping or maintaining a drug vehicle. The obvious purpose of the statute is to prevent the use of vehicles to transport or sell drugs. That purpose is not served by exempting individual violations. Under the majority opinion, as long as the suspect is careful not to carry any other drug paraphernalia or other indications of continuity, the suspect need not fear that he will be convicted of keeping or maintaining a drug vehicle if caught for the first time. The majority opinion will encourage the police to allow the use of a vehicle to store or sell drugs until the officers decide that they have enough evidence to sustain a conviction under MCL 333.7401(1)(d) for continuous activity. The language of the statute makes clear that the Legislature did not intend such a result. Rather, the Legislature intended to permit the police to arrest a suspect for violating MCL 333.7405(1)(d) without fear that the arrest came too soon for them to accumulate evidence to support such a conviction.

By holding that the prosecution must show "evidence of continuity," the majority largely reiterates the Court of Appeals holding in *Griffin, supra* at 32, that the prosecution must show that the defendant's actions occurred "continuously for an appreciable period" but without the "appreciable period" component. The *Grif-*

This type of statutory provision does not allow courts to interpret statutes in a manner inconsistent with the plain statutory language, but acts only as a legislative guide to help resolve ambiguous statutory language. See *Paschke v Retool Industries*, 445 Mich 502, 511; 519 NW2d 441 (1994) ("Where the statutory language is clear, the courts should neither add nor detract from its provisions. Nevertheless, *where ambiguity exists*, and judicial interpretation is needed, the act should be liberally construed . . . . [emphasis added].).

fin standard similarly requires evidence of continuity, so how is the majority's standard meaningfully different?[10] I question why this Court has granted leave to appeal and overruled *Griffin* just to reach a legal conclusion almost identical to the case it is overruling. The majority correctly recognizes that *Griffin* was wrongly decided and strikes the erroneous language of that decision, but then falls into the trap of repeating the *Griffin* panel's mistake.

Because evidence of an isolated incident of using a vehicle to keep or sell drugs is sufficient to support a conviction for keeping or maintaining a drug vehicle when the defendant retains the vehicle in his possession or power, and the prosecution clearly presented evidence that defendant kept the vehicle and used it for selling or keeping drugs, there was sufficient evidence to support defendant's conviction. I would vacate the judgment of the Court of Appeals and reinstate defendant's conviction for keeping or maintaining a drug vehicle under MCL 333.7405(1)(d).

YOUNG, J., concurred with CORRIGAN, J.

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[10] The dictionary definition of "continuity" is, in pertinent part, as follows: "1. the state or quality of being continuous. 2. a continuous or connected whole." *Webster's Universal College Dictionary* (1997), p 176.

FLUOR ENTERPRISES, INC v DEPARTMENT OF TREASURY

Docket No. 129149. Argued October 5, 2006 (Calendar No. 12). Decided May 2, 2007.

Fluor Enterprises, Inc., brought an action in the Court of Claims against the Department of Treasury, seeking to recover single business taxes paid under protest. Fluor had performed architectural and engineering services outside Michigan for construction projects in Michigan, and the department had assessed taxes for the out-of-state activities, determining that they were taxable sales under MCL 208.53(c) of the Single Business Tax Act, MCL 208.1 *et seq*. The Court of Claims, Paula J. Manderfield, J., granted summary disposition for the plaintiff on the basis that the out-of-state activities were not taxable sales under the act. The defendant appealed and, in an opinion per curiam, the Court of Appeals, CAVANAGH, P.J., and JANSEN and GAGE, JJ., agreed with the defendant's interpretation of § 53(c), but concluded that the provision violates the Commerce Clause, US Const, art I, § 8, cl 3. After holding that summary disposition was erroneously granted, the Court of Appeals remanded the matter for reconsideration of the tax calculations. 265 Mich App 711 (2005). The Supreme Court granted the defendant's application for leave to appeal and the plaintiff's application for leave to appeal as cross-appellant. 474 Mich 1097 (2006).

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

The receipts in question are taxable under the statute. That part of the judgment of the Court of Appeals must be affirmed. Section 53(c) is constitutional and is enforceable. The part of the judgment of the Court of Appeals holding that § 53(c) is unconstitutional must be reversed and the matter must be remanded to the Court of Claims for further proceedings.

1. Section 53(c) indicates that receipts derived from services performed for planning activities within this state, services performed for design activities within this state, and services performed for construction activities within this state are deemed Michigan receipts.

2. The statute subjects to taxation receipts for services performed in support of planning activities, design activities, or construction

activities, as long as those activities take place within this state. The statute does not state that the services performed must themselves be performed within this state in order for receipts derived from such services to be deemed Michigan receipts.

3. The state may tax the receipts for the plaintiff's architectural and engineering services that were performed in support of construction activities that occurred in Michigan.

4. Section 53 meets the four-pronged test applicable to challenges under the Commerce Clause because it is applied to an activity having a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

Justice KELLY, joined by Justices CAVANAGH and WEAVER, concurring, agreed with the majority's decision to affirm in part and reverse in part the judgment of the Court of Appeals. However, Justice KELLY wrote separately because she disagreed with the majority's statutory interpretation and constitutional analysis. MCL 205.53(c) requires that the receipts derived from services performed out of state for planning, design, or construction activities performed in the state be treated as Michigan receipts. The defendant properly assessed taxes on the revenue for the engineering and design services the plaintiff provided for construction projects in Michigan, regardless of which services occurred outside Michigan. The tax at issue does not violate the Commerce Clause. A substantial nexus exists between Michigan and the activity of the plaintiff that is being taxed, and the tax is fairly apportioned because it is internally consistent.

Reversed in part, affirmed in part, and remanded to the Court of Claims.

1. TAXATION — SINGLE BUSINESS TAX ACT — RECEIPTS FOR SERVICES PERFORMED.

Receipts derived from services performed for planning activities within this state, services performed for design activities within this state, and services performed for construction activities within this state are deemed Michigan receipts under the Single Business Tax Act as long as those activities take place within this state; the act does not require that the services performed must themselves be performed within this state in order for the receipts derived from such services to be deemed Michigan receipts; there is no geographic limit on where the services take place or on what type of services are being performed. (MCL 208.53[c]).

2. TAXATION — CONSTITUTIONAL LAW — SINGLE BUSINESS TAX ACT — COMMERCE CLAUSE.

The section of the Single Business Tax Act that provides that receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts does not violate the fair apportionment prong of the Commerce Clause (US Const, art I, § 8, cl 3; MCL 208.53 [c]).

Honigman, Miller, Schwartz & Cohn LLP (by *Patrick R. Van Tiflin* and *Daniel L. Stanley)* for the plaintiff.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Ross H. Bishop,* Assistant Attorney General, for the defendant.

TAYLOR, C.J. This case requires us to construe the provision of the Single Business Tax Act (SBTA) found at MCL 208.53 that explicates how to allocate sales of intangible personal property so as to determine whether they can be taxed by Michigan. Specifically, we must decide whether receipts for plaintiff's services, performed entirely outside Michigan for construction projects located in Michigan, are deemed taxable sales under the statute and, if they are, whether that interpretation of the statute results in the statute's being unconstitutional as a violation of the Commerce Clause, US Const, art I, § 8, cl 3. The Court of Appeals held that the services were taxable but that this section of the statute violates the Commerce Clause of the constitution and thus is unenforceable. *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711; 697 NW2d 539 (2005). We reverse in part and affirm in part, agreeing that such receipts are taxable under the statute, but holding that this provision is not unconstitutional and thus is enforceable.

I

The Court of Appeals accurately summarized the facts in this case:

> The facts in this case are undisputed. The receipts at issue were received by plaintiff for engineering and architectural services related to real estate improvement projects constructed in Michigan. The services were performed by plaintiff's employees at out-of-state facilities. Plaintiff timely filed single business tax (SBT) returns for the years at issue. However, plaintiff did not report the receipts at issue as Michigan receipts. Following an audit, defendant issued three bills for taxes due (intents to assess) totaling $182,312.
>
> Plaintiff requested an informal conference with defendant's Hearings Division. Following an informal conference, the department referee issued a recommendation to the Commissioner of Revenue. The hearing referee agreed with plaintiff's interpretation of § 53(c). However, the Commissioner of Revenue disagreed with the referee's analysis and directed that the taxes be assessed as originally determined. Following the commissioner's order, defendant issued three bills for taxes due (final assessments) for total tax and interest of $343,340.96, which plaintiff then paid under protest. Plaintiff subsequently paid an additional $3,077.35 in interest.
>
> Plaintiff filed this action in the Court of Claims to recover $346,618.31 paid under protest plus additional statutory interest, costs, and attorney fees. The parties both filed motions for summary disposition. Plaintiff moved for summary disposition pursuant to MCR 2.116(A) (judgment on stipulated facts). Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The Court of Claims concluded that the plain language of the statute supported plaintiff's position and entered judgment in favor of plaintiff, ordering defendant to pay $346,418.31 and interest. [*Id.* at 713-714.]

On appeal, the Court of Appeals reversed with regard to the Court of Claims construction of § 53 of the SBTA and held that the receipts for services performed for a construction project located in Michigan, even if the services were performed in another state, were "Michi-

gan receipts," but that this section of the statute was unconstitutional as a violation of the Commerce Clause.

Defendant sought leave to appeal in this Court, seeking to have the ruling of unconstitutionality reversed. Plaintiff sought leave to cross-appeal, arguing that the Court of Appeals construction of the statute was erroneous. We granted the parties' applications for leave to appeal and cross-appeal.[1]

II

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). Likewise, questions of constitutional and statutory construction are reviewed de novo by this Court. *Id.* When interpreting a statute, we examine the language of the statute itself. "If the statute is unambiguous it must be enforced as written." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004).

III

The SBTA, MCL 208.1 *et seq*., is a business activity tax that was enacted "to provide for the imposition, levy, computation, collection, assessment and enforcement . . . of taxes on certain commercial, business, and financial activities . . . ." 1975 PA 228. As provided by the act:

> "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether

[1] 474 Mich 1097 (2006).

> in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others . . . . [MCL 208.3(2).]

Thus, the act by definition encompasses taxation of services that are performed not only within the state ("engaged in . . . within this state") but also some that are performed out of state, as long as the reason those services are engaged in has its source within this state ("caused to be . . . engaged in [] within this state"). When business activity is partially performed out of state, the statute establishes a system of apportionment, MCL 208.40 *et seq*., so that only those receipts appropriate to be taxed in Michigan are taxed here. Apportioning is based on a formula whereby a fraction reflecting the ratio of Michigan activity to out-of-state activity, i.e., Michigan sales/total sales, is established. *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271, 273 n 1; 639 NW2d 269 (2001). In this case, where the sales factor is at issue, the question is which sales of plaintiff's total sales should be included in its "Michigan sales" numerator.[2]

To ascertain whether receipts for intangible property, such as services, comprise "Michigan sales," we turn to MCL 208.53. It provides:

> Sales, other than sales of tangible personal property, are in this state if:

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[2] See MCL 208.51:

> (1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.
>
> (2) For a foreign person, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer in the United States during the tax year.

(a) The business activity is performed in this state.

(b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.

(c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

Plaintiff asserts, and the Court of Claims agreed, that § 53(c) deems receipts for services taxable as Michigan receipts only if the services are performed within this state. That is, the phrase "within this state" modifies not just "activities" but also "planning," "design," and "construction." Because plaintiff's planning and design services were not performed within this state, plaintiff argues, its receipts for those servives should not be taxable. We respectfully disagree with this approach. Plaintiff is essentially rewriting the statute so that "within this state" modifies "services performed." This is not how the statute reads.

The subject of § 53(c) is "receipts"; the statute states that certain "receipts" "shall be deemed Michigan receipts." Section 53(c) then narrows the category of receipts that will be "deemed Michigan receipts." The term "receipts" is modified by the phrase "derived from services performed." Thus, the statute specifies that to be "deemed Michigan receipts," "receipts" must be "derived from services performed." Section 53(c) further specifies which "services performed" will allow "receipts" to be "deemed Michigan receipts," namely, services performed "for planning, design, or construction activities within this state." The prepositional phrase "for planning, design, or construction activities" modifies "performed," and indicates the purpose for which the services must be performed. The phrase

"within this state" modifies the term "activities." The term "activities" is the object of the preposition "for," and is modified by the preceding phrase "planning, design, or construction." The use of the term "or" in the phrase "planning, design, or construction" indicates that all three terms are correlative to each other. The term "construction" is clearly an adjective modifying the term "activities." Consequently, the terms "planning" and "design" are also adjectives that modify the term "activities." Parsing the grammar otherwise would make "construction" an adjective, and "planning" and "design" nouns, and a grammatical construction that would make correlative terms unequal in this way should be avoided. Therefore, "activities" is modified by each of the terms "planning," "design," and "construction." As a result, the statute indicates that "[r]eceipts derived from" "services performed for planning activities within this state," "services performed for design activities within this state," and "services performed for construction activities within this state" are to be "deemed Michigan receipts." The statute thus subjects to taxation receipts for "services performed" in support of planning activities, design activities, or construction activities, as long as those activities take place "within this state." The statute does not state that the "services performed" must themselves be performed "within this state" in order for "[r]eceipts derived from" such services to be deemed Michigan receipts.[3]

[3] The concurrence finds the statute ambiguous because other interpretations have been proposed, citing *People v Adair*, 452 Mich 473, 479; 550 NW2d 505 (1996), for the rule that ambiguity exists when there can be reasonable disagreement over a statute's meaning. However, our current law is set forth in *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), where this Court held: "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single

Consequently, we must look at whether the receipts are derived from "services performed for" one of the enumerated activities, with no geographic limit on where the services took place, and no limit on what type of services are being performed.[4]

The statute thus establishes a two-part analysis. First, it must be determined whether the actions sought to be taxed were "services performed" for "planning activities," "design activities," or "construction activities." Second, if the actions are "services performed" for such activities, it must be determined whether the activities occurred "within this state." If the activities occurred "within this state," then the actions are taxable under MCL 208.53(c). If the activities did not occur in Michigan, then the actions are not taxable under MCL 208.53(c).

In this case, plaintiff engaged in architectural and engineering services performed for various Michigan construction activities. Because these actions constitute "services performed" for "construction activities," and those "construction activities" took place "within this state," the state may tax plaintiff's architectural and

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meaning." (citation omitted; emphasis in original). "[A] finding of ambiguity is to be reached only after 'all other conventional means of [] interpretation' have been applied and found wanting." *Id*. at 165, quoting *Klapp v United Ins*, 468 Mich 459, 474; 663 NW2d 447 (2003). The meaning of MCL 208.53 can be determined from the text of the statute and by using conventional means of statutory construction. Nothing in the statute irreconcilably conflicts or makes it equally susceptible to more than one meaning.

[4] We note that the phrase "deemed Michigan receipts" itself reinforces the extraterritoriality of this provision, because this phrase suggests that receipts for activities that *would not ordinarily be* considered Michigan receipts will be considered, or treated as, Michigan receipts for purposes of the statute. Because receipts for Michigan activities would *ordinarily be* considered Michigan receipts, this implies that receipts that are "deemed Michigan receipts" are for activities that take place outside the state.

engineering services. Although plaintiff attempts to describe what it did as performing design and planning *activities*, and that those activities took place in California, this ignores language in the statute that indicates receipts are paid for *services*, and services are engaged in *for activities*. It is undisputed that plaintiff performed its architectural and engineering services in support of "construction activities" that occurred in Michigan. Consequently, plaintiff's services fall within the language of MCL 208.53(c), and plaintiff's receipts for such services are taxable in Michigan. Plaintiff's attempt to construe its services as "planning or design activities" fails to recognize that plaintiff performed its services for "construction activities" within the state of Michigan. The receipts, pursuant to MCL 208.53(c), are therefore deemed Michigan receipts.

IV

Having determined that the statute allows plaintiff's receipts for services to be taxed as Michigan receipts, we turn to the question whether such a construction results in a tax that violates the Commerce Clause, US Const, art I, § 8, cl 3. As we have explained before, a state tax withstands scrutiny under a Commerce Clause challenge and will be found constitutionally valid if it meets the four-pronged test articulated in *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). See *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 415; 488 NW2d 182 (1992). A valid tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.*

Plaintiff first argues that it does not have a sufficient nexus with this state to be subject to the tax. "The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State . . . ." *Mobil Oil Corp v Comm'r of Taxes of Vermont*, 445 US 425, 437; 100 S Ct 1223; 63 L Ed 2d 510 (1980). " '[The] fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.' " *Id*., quoting *Wisconsin v J C Penney Co*, 311 US 435, 445; 61 S Ct 246; 85 L Ed 267 (1940). See also *Caterpillar, Inc, supra* at 416-417. The receipts at issue in this case were for services that plaintiff provided for construction projects in Michigan, and therefore "the incidence of the tax as well as its measure is tied to the earnings which the State . . . has made possible . . . ." *J C Penney Co*, *supra* at 446. Thus, there is a substantial nexus between the state and the activity being taxed.

Also at issue in this case is whether the tax imposed by MCL 208.53(c) is fairly apportioned. That is, the tax is not fairly apportioned if it allows Michigan to tax more than its fair share of interstate business activity. *Caterpillar, supra* at 417. A tax is not fairly apportioned if it is not internally consistent. " 'To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result,' . . . or, in other words, no more than one hundred percent of the taxpayer's business activity would be taxed." *Id*. at 419, quoting *Goldberg v Sweet*, 488 US 252, 261; 109 S Ct 582; 102 L Ed 2d 607 (1989).[5] As the United States Supreme Court has said, internal consistency

[5] A taxing statute must also be externally consistent, *Caterpillar, Inc, supra* at 419, but because plaintiff does not challenge this, we examine only its internal consistency.

> simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. [*Oklahoma Tax Comm v Jefferson Lines, Inc,* 514 US 175, 185; 115 S Ct 1331; 131 L Ed 2d 261 (1995).]

In applying the "internal consistency" test, the United States Supreme Court has considered the entire taxing scheme, and not simply the individual tax provision at issue in a specific case. See, e.g., *D H Holmes Co, Ltd v McNamara*, 486 US 24; 108 S Ct 1619; 100 L Ed 2d 21 (1988) (considering a provision of the larger tax scheme). If the entirety of MCL 208.53 is considered, the statute is internally consistent. When we survey the statute as a whole, we conclude that § 53(c) is a more specific exception to the general subsections that precede it (§§ 53[a] and 53[b]). See, e.g., *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) (" '[W]here a statute contains a general provision and a specific provision, the specific provision controls.' " [Citation omitted.]). In other words, § 53(a) applies to business activity that is solely performed in Michigan; § 53(b) applies to business activity that occurs both in and outside Michigan; and § 53(c) applies a special rule to planning, design, and construction activities, which is that as long as the services are performed for one of those activities, and the activity is located within this state, the receipts for the services are taxable regardless of where the services are performed. This language excepts certain receipts from the broad rules of § 53(a) and (b). It is, then, a specific exception to a general rule and falls within the *Jones* test. Therefore, if California

had a tax statute identical to MCL 208.53, in order to determine whether California could tax plaintiff's receipts for the services in this case, it would first have to consider whether the services were performed for planning activities, design activities, or construction activities. Because the services in this case were performed for construction activities, California would be precluded from considering whether its counterpart to either § 53(a) or (b) allowed the receipts for the services to be taxed, because the more specific provisions of § 53(c) would govern. Having determined that the services were performed for "construction activities," California would then consider whether these activities occurred within that state. Because the construction activities, in fact, occurred in Michigan, California would be unable to tax these under its counterpart statute. Consequently, because the planning activity, design activity, or construction activity can take place only in one state at a time, only one state can tax the receipts for the "services performed for" those activities. Therefore, if every state had a counterpart statute to MCL 208.53, interstate commerce would not be unfairly burdened or placed at any disadvantage. Therefore, because MCL 208.53 does not discriminate against interstate commerce, the statute does not violate the "internal consistency" test.

V

We conclude that MCL 208.53 is not ambiguous and that plaintiff's receipts for the services are taxable, regardless of where the services occurred, because they were performed for construction projects located in Michigan. We also hold that this interpretation does not violate the "fair apportionment" prong of the Commerce Clause because the statute is internally consis-

tent. Likewise, we hold that plaintiff and its taxed activity have a substantial nexus with this state. We therefore affirm in part the Court of Appeals judgment but reverse it in part with regard to the analysis of fair apportionment, and we remand the case to the Court of Claims for further proceedings not inconsistent with this opinion.

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

KELLY, J. (*concurring*). This case involves the Michigan single business tax (the SBT). There are two issues. The first is whether the Single Business Tax Act (SBTA), at MCL 208.53(c), allows the defendant Department of Treasury to characterize receipts from planning and design services rendered entirely outside Michigan as Michigan sales. If it does, we must also address whether this interpretation renders the statute unconstitutional as violative of the Commerce Clause. US Const, art I, § 8, cl 3. I conclude that MCL 208.53 is ambiguous and that plaintiff's receipts for services are taxable. I conclude, also, that the statute does not violate the Commerce Clause.

Although I agree with the majority's decision to affirm in part and reverse in part the judgment of the Court of Appeals, I write separately because I disagree with the majority's statutory interpretation. In addition, I see flaws in its analysis of the constitutional issue.

FACTS AND PROCEDURAL HISTORY

This case concerns the SBT imposed on plaintiff for the fiscal years ending October 31, 1989, through October 31, 1994. Plaintiff is a multinational engineering,

construction, and technical service company having its principal place of business in Irvine, California. At issue are services plaintiff undertook for Michigan construction projects.[1] Plaintiff performed construction management and material procurement activities in Michigan for these projects. It also conducted engineering and architectural services for the projects at facilities outside Michigan.

Plaintiff timely filed its SBT annual returns for the years in issue. However, it did not attribute to Michigan, as Michigan sales, the receipts for engineering and architectural services that occurred outside the state but were performed for Michigan projects. Following an audit, defendant issued plaintiff three bills, called "intents to assess," for taxes due for the years in issue. The intents to assess were based on defendant's position that the receipts for the engineering and architectural services should have been reported as having come from Michigan sales.

Plaintiff requested and was granted a departmental informal conference on its objections to the intents to assess. Following the informal conference, the hearing referee recommended that all three bills be canceled in their entirety. The referee determined that the receipts should not be considered as coming from Michigan sales for SBT apportionment purposes. The Commissioner of Revenue disagreed with the referee's recommendation and ordered the intents to assess made final as originally prepared. The commissioner affirmed the assessment in conformity with the department's long-held interpretation of § 53 of the SBTA.

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[1] The Michigan projects for which plaintiff performed services include the cogeneration plant in Midland, a refinery modification for Marathon Oil Company in Detroit, and a steam building expansion for what was then the Upjohn Company in Kalamazoo.

Plaintiff paid the taxes under protest and filed an appeal in the Court of Claims. When the parties filed cross-motions for summary disposition, the Court of Claims denied the defendant's motion and granted plaintiff's. The court adopted plaintiff's construction of § 53 of the SBTA that limited Michigan sales to services performed in Michigan for construction projects in Michigan.

Defendant appealed as of right in the Court of Appeals, which reversed the judgment of the Court of Claims in a published opinion. It held that the Court of Claims incorrectly determined that § 53 of the SBTA limits Michigan sales to services performed in Michigan, but that the statute was unconstitutional. The Court of Appeals decided that the tax violated the Commerce Clause because it was not fairly apportioned. After holding that summary disposition had been erroneously granted, the Court of Appeals remanded for reconsideration of the tax calculations.

Defendant applied for leave to appeal in this Court, seeking to reverse the ruling of unconstitutionality. Plaintiff applied for leave to cross-appeal, seeking to reinstate the Court of Claims statutory interpretation. This Court granted both parties' applications. 474 Mich 1097 (2006).

STANDARD OF REVIEW

An interpretation of a statute is a question of law that this Court reviews de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 72 (2000). Constitutional questions are also reviewed de novo. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006). Likewise, this Court reviews de novo

a trial court's decision on a motion for summary disposition. *Ostroth v Warren Regency, GP, LLC,* 474 Mich 36, 40; 709 NW2d 589 (2006).

When interpreting a statute, this Court must give effect to the intent of the Legislature. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). At times, it is possible to discern that intent from the language used. *Id.* However, where a statute is ambiguous, it is necessary to engage in judicial construction to ascertain intent. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). A statute is ambiguous when there can be reasonable disagreement over its meaning. *People v Adair,* 452 Mich 473, 479; 550 NW2d 505 (1996).

THE SINGLE BUSINESS TAX ACT

The SBT is a value-added tax imposed on any person undertaking business activity in the state of Michigan. MCL 208.31. This includes companies that do all their business in Michigan as well as companies, like plaintiff, whose business activity is predominantly outside Michigan. A value-added tax measures a firm's total business activity. *Trinova Corp v Michigan Dep't of Treasury*, 498 US 358, 364; 111 S Ct 818; 112 L Ed 2d 884 (1991). "The tax is on what a business has added to the Michigan economy, not on what the business has derived from this state's economy." *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 666-667; 649 NW2d 760 (2002).

In order to determine the proper SBT for a multistate taxpayer, the tax base must be apportioned to Michigan. MCL 208.41. The formula used for apportioning the tax base consists of the sum of the sales factor, the payroll factor, and the property factor, divided by

three.[2] At issue in this case is the calculation of plaintiff's sales factor. "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year." MCL 208.51(1).

Section 52 of the SBTA, MCL 208.52, dictates when the sale of tangible personal property is in Michigan, while § 53 covers other sales, such as the sale of services. This case involves the application of § 53, which provides as follows:

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.

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[2] The apportionment factor for the tax years beginning before January 1991 was the average of three factors each weighted at 33 1/3 percent. See *Corning, Inc v Dep't of Treasury*, 212 Mich App 1, 3; 537 NW2d 466 (1995). For the tax years beginning after December 31, 1990, and before January 1, 1993, the apportionment formula consisted of the sum of the following percentages:

> (a) The property factor multiplied by 30%.
>
> (b) The payroll factor multiplied by 30%.
>
> (c) The sales factor multiplied by 40%. [MCL 208.45(2), as amended by 1991 PA 77, § 1.]

And for the years at issue beginning after December 31, 1992:

> (a) The property factor multiplied by 25%.
>
> (b) The payroll factor multiplied by 25%.
>
> (c) The sales factor multiplied by 50%. [MCL 208.45(4), as amended by 1991 PA 77, § 1.]

> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts. [MCL 208.53.]

It is subsection c that controls the disposition of this case.

INTERPRETING THE STATUTE

The first task is to decide whether subsection c of MCL 208.53 allows defendant to characterize receipts from planning and design services rendered entirely outside Michigan as Michigan sales. Four separate entities have interpreted this provision in the course of these proceedings.

The hearing referee and the Court of Claims adopted the interpretation advocated by plaintiff and found that § 53(c) does not allow defendant to characterize the out-of-state services as Michigan sales. The Commissioner of Revenue and the Court of Appeals agreed with defendant's interpretation and determined that § 53(c) does allow defendant to characterize the out-of-state services performed for Michigan construction projects as Michigan sales. The nonuniformity of these conclusions signals that the correct construction of this statute is not obvious.[3]

When the correct construction of a statute is unclear and reasonable minds differ about its interpretation, it is necessary to engage in judicial construction to ascer-

[3] The drafting of this statute is awkward and renders the meaning of subsection c less clear than it might be if it stood alone. The statute's parallel structure is flawed. Subsection c was grafted onto a standard provision from the Uniform Division of Income for Tax Purposes Act, § 1 *et seq.* (UDITPA). 7A, part I, ULA, p 141. However, its wording does not conform to the structure of the UDITPA provision. The introduction to all three subsections is a conditional definition of sales receipts as Michigan receipts, using the word "if." The wording of subsections a and b naturally completes the conditional phrase. However, subsection c does not.

tain the Legislature's intent.[4] *In re MCI*, 460 Mich at 411. In construing a statutory provision, courts must reconcile the provision with other provisions of the statute, if possible. And one part of a statute should not be construed so as to render another part nugatory or ineffective. See, e.g., *Altman v Meridian*, 439 Mich 623, 635; 487 NW2d 155 (1992); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993).

According to plaintiff, receipts derived from planning activities, design activities, or construction activities are deemed Michigan sales only if the activities occur in this state. This interpretation must be rejected. Subsection a expressly addresses services performed in Michigan. If § 53(c) were to be interpreted to mean that the services had to be performed in Michigan in order to be considered Michigan sales, then subsection c would be reduced to a redundancy.

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[4] The majority proceeds as if the statutory provision is unambiguous and needs no interpretation. It is a bizarre notion that the language of a statute can have only one reasonable meaning when four separate independent entities have split on its correct interpretation.

The majority claims that my definition of ambiguity is inconsistent with current law. The majority is within its rights to disagree with the definition I use for that word. But it is off base in suggesting that its definition of "ambiguity" is the current law of the state. It appears that the majority believes that only the definition of "ambiguity" that it favors may be used for statutory interpretation. I know of no legal authority that supports that position. The majority appears to confuse the binding effect of a legal holding necessary for the determination of a case with the nonbinding effect of the statutory analysis used to reach it. The justices who comprise the majority are entitled to favor one form of analysis or one definition of a word used in analysis over another. But they cannot mandate that all other justices use only their chosen approach or definitions for these words. "Ambiguous" is one such word. Differing modes of analysis and definitions may be considered disfavored in the sense that the majority prefers others. But, the minority's definitions, when acceptable in current dictionaries, cannot be banned.

By finding that services performed for construction projects located in Michigan are Michigan sales, each provision of the statute is given effect. When the statute is interpreted in this fashion, § 53(a) provides that when the business activity is in Michigan, the sales of other than tangible personal property are Michigan sales. Section 53(b) covers the situation where business activities are both in Michigan and outside Michigan. If a greater proportion of the business activity is in Michigan, then the sales of other than tangible personal property are characterized as Michigan sales. Section 53(c) addresses the situation where services are performed for planning, design, or construction projects in Michigan.

Another consideration that weighs in my determination is that a construction that nullifies the effectiveness of a statute should be avoided if possible. *In re Petition of State Hwy Comm*, 383 Mich 709, 714-715; 178 NW2d 923 (1970). Rather, when engaging in judicial construction, a court must bear in mind the purpose of the statute. "When faced with two alternative reasonable interpretations . . . , we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute." *Adair*, 452 Mich at 479-480.

Apparently, the Legislature added subsection c in response to a concern advanced by Michigan-based engineering and architectural firms that, without it, they would be at a competitive disadvantage with out-of-state firms. They feared that out-of-state architects and engineers would gain a competitive advantage when bidding on Michigan construction projects if their services for in-state projects were not treated as Michi-

gan sales.[5] The interpretation advocated by defendant addresses the concerns that appear to have prompted the enactment of this statute.

Finally, we defer to the construction given a statute by the agency chosen to enforce it. *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278, 283; 389 NW2d 85 (1986). Defendant has historically interpreted § 53(c) as ascribing services performed for construction projects to the state in which the construction occurs.[6] I give weight to this interpretation.

ANALYZING THE COMMERCE CLAUSE

The decision that the statute allows the revenues at issue to be taxed is not the end of the inquiry. It is also necessary to decide whether the tax violates the Commerce Clause of the United State Constitution.[7]

The Commerce Clause provides that "Congress shall have Power . . . [t]o Regulate Commerce . . . among the several States . . . ." US Const, art I, § 8, cls 1 and 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the

[5] A July 17, 1975, letter from the Consulting Engineers Council of Michigan, Inc., to Senator John Bowman proposed the addition of § 53(c). The letter and circumstances surrounding the adoption of the subsection demonstrate the intent in enacting it. It was enacted so that all the services performed for construction projects would be attributed to the state where the services are consumed.

[6] Defendant instructs its audit staff that services related to Michigan construction activities are by statute Michigan receipts. Defendant does not attribute to Michigan similar receipts received by a Michigan-based company for construction activities in other states.

[7] I cannot join the majority's constitutional analysis because I find it to be incomplete and conclusory.

interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Oregon Dep't of Environmental Quality*, 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

The United States Supreme Court has held that a state tax will survive a Commerce Clause challenge when the tax (1) is applied to an activity having a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). Plaintiff claims that the tax at issue violates the first two prongs of this test.[8]

Several principles should be kept in mind when analyzing the constitutionality of a tax. States have great latitude when enacting tax provisions. See *Trinova Corp,* 498 US at 386. Also, a statute is presumed constitutional absent a clear showing to the contrary. *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973). This presumption of constitutionality is especially strong with respect to taxing statutes. *Washtenaw Co v State Tax Comm*, 422 Mich 346, 371; 373 NW2d 697 (1985), citing *Thoman v City of Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946).

Plaintiff argues that the construction defendant gives to this statutory provision permits the imposition of a tax on activities that do not have a substantial nexus with Michigan. It claims that no substantial nexus exists in this case because plaintiff's activities occurred outside Michigan, and a state cannot tax

[8] Plaintiff also claims that the tax discriminates against interstate commerce because the tax is not fairly apportioned. Because this argument is based on the tax violating fair apportionment, plaintiff really argues only that the tax violates the first two prongs of the test.

activities that occur outside that state. I find that plaintiff misconstrues the connection necessary for a state to have a substantial nexus with the taxpayer and the activity being taxed.

"[I]n the case of a tax on an activity, there must be a connection to the activity itself, [and] a connection . . . to the actor the State seeks to tax . . . ." *Allied-Signal, Inc v Director, Div of Taxation*, 504 US 768, 778; 112 S Ct 2251; 119 L Ed 2d 533 (1992). Accordingly, two different inquiries may arise in determining whether the substantial nexus prong is satisfied. *Id.* First, the state must have the authority to tax. *Id.* For this authority to exist the taxpayer must have a physical presence in the taxing jurisdiction. See *Quill Corp v North Dakota*, 504 US 298, 311; 112 S Ct 1904; 119 L Ed 2d 91 (1992). Second, the state must not exceed its legitimate power to tax. *Allied-Signal, Inc*, 504 US at 778. "[T]he State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." *Id*., quoting *Wisconsin v J C Penney Co*, 311 US 435, 444; 61 S Ct 246; 85 L Ed 267 (1940).

In this case, the parties stipulated that plaintiff performed construction management and material procurement activities in Michigan. On the basis of this presence, the state clearly has the power to tax plaintiff. The question becomes whether the state exceeded the legitimate reach of its power.

A taxpayer arguing that a tax lacks a substantial nexus to the activity taxed cannot rely on the argument that the source of the income is attributable to another state. *Mobil Oil Corp v Vermont Comm'r of Taxes*, 445 US 425, 438; 100 S Ct 1223; 63 L Ed 2d 510 (1980). Rather, to mount a successful challenge on this ground,

the taxpayer must show that the income taxed was "earned in the course of activities unrelated to [the taxing] State." *Id.* at 439.

Plaintiff cannot make this showing. Because the receipts at issue arose from services that plaintiff provided for Michigan construction projects, there is a substantial nexus between the state and the activity being taxed. As long as plaintiff has some physical presence in the state, the state may tax services that plaintiff performs out of state but that are generally consumed within Michigan. See *Trinova Corp,* 498 US at 374-377.

Plaintiff also claims that the interpretation advocated by defendant violates the Commerce Clause requirement of fair apportionment. According to plaintiff, the tax is not internally consistent. It reasons that, under this interpretation, every state with a similar statute could tax all of a business's receipts for planning and design activities. The result would be duplicative taxation, unconstitutionally putting interstate commerce at a competitive disadvantage.

In 1992, this Court ruled that "[f]air apportionment requires that each state tax only its fair share of interstate business activity." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 417; 488 NW2d 182 (1992). Before that, the United States Supreme Court ruled that, to ascertain whether a tax is fairly apportioned, it must be examined for both internal and external consistency. *Goldberg v Sweet*, 488 US 252, 261-262; 109 S Ct 582; 102 L Ed 2d 607 (1989). Plaintiff does not challenge the external consistency of the tax; therefore, in deciding whether this tax is fairly apportioned, it is examined for internal consistency only.

The United States Supreme Court discussed internal consistency in *Oklahoma Tax Comm v Jefferson Lines, Inc,* 514 US 175; 115 S Ct 1331; 131 L Ed 2d 261 (1995). It stated:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. [*Id.* at 185.]

Applying these principles to MCL 208.53, I conclude that the tax is internally consistent. Subsection c of the statute specifically deals with construction projects. When a construction project is involved, subsection c, being the more specific provision, applies and subsections a and b do not. Subsection c ascribes the business activity[9] for construction projects to the state where the construction occurs. Therefore, when a construction project is involved, only the state where the construction occurs taxes the business activity, and there is no double taxation.

An example is helpful to illustrate why there is no internal-consistency problem. Consider the situation where a company performed services both in Michigan

[9] When I speak of business activity, I refer not just to the physical labor that goes into building the project but also to the planning and design that take place beforehand.

and Ohio for a construction project in Michigan. If Ohio adopted the same tax apportionment formula as Michigan, both states would ascribe all the business activity to the state where the construction occurs. Because the construction occurred in Michigan, only Michigan would tax the services. As a result, only one state would tax the business activity and there would be no internal-consistency problem.[10]

CONCLUSION

MCL 208.53(c) allows defendant to characterize receipts from services performed for construction projects in Michigan as Michigan sales. Accordingly, defendant properly assessed taxes on the revenue for the engineering and design services plaintiff provided for construction projects in Michigan, regardless of which services occurred outside Michigan. Because a substantial nexus exists between Michigan and the activity of plaintiff that is being taxed, and because the tax is fairly apportioned, the tax is constitutional. As a result, I concur in affirming in part and reversing in part the judgment of the Court of Appeals.

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

[10] The Court of Appeals applied the internal-consistency test as if other states that adopted the same statute would ascribe construction activities under subsections a or b. This was error. When a construction project is involved, Michigan ascribes all business activity to the state where construction occurs. Therefore, for purposes of the test, other states that adopt the same statute would also ascribe all business activity to the state where construction occurs. Subsections a and b would be inapplicable. Admittedly, it is possible that another state could enact a statute that would allow for double taxation, which seems to be what the Court of Appeals was concerned about. However, the internal-consistency test does not say a taxpayer shall never be subject to double taxation. It says that, if every state emulates the state tax at issue, a taxpayer shall not be subject to double taxation.

ROWLAND v WASHTENAW COUNTY ROAD COMMISSION

Docket No. 130379. Argued October 4, 2006 (Calendar No. 13). Decided May 2, 2007.

Joanne Rowland brought an action in the Washtenaw Circuit Court against the Washtenaw County Road Commission, seeking damages for injuries sustained when the plaintiff fell while crossing a street under the defendant's jurisdiction. The notice of the claimed injuries and highway defect was served on the defendant on the 140th day after the accident and the suit was subsequently filed. The defendant moved for summary disposition on the basis that the plaintiff failed to give it notice of her injury and the alleged highway defect within 120 days from the time the injury occurred, as required by MCL 691.1404(1). The trial court, David S. Swartz, J., denied the motion on the basis of *Hobbs v Dep't of State Hwys*, 398 Mich 90 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), which held that, absent a showing of actual prejudice to the governmental agency, the notice provision of MCL 691.1404(1) is not a bar to claims filed pursuant to the highway exception to governmental immunity, MCL 691.1402. The Court of Appeals, DONOFRIO, P.J., and ZAHRA, J. (KELLY, J., concurring), affirmed in an unpublished opinion per curiam, issued December 13, 2005 (Docket No. 253210), on the basis that it was bound to follow *Hobbs* and *Brown*. The Supreme Court granted the defendant's application for leave to appeal. 474 Mich 1099 (2006).

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

The plain language of MCL 691.1404(1) must be enforced as written. The statute requires notice of injuries sustained and highway defects to be given to the governmental agency within 120 days of the injury. *Hobbs* and *Brown*, which were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the governmental agency was not prejudiced, were wrongly decided. The notice provision has a rational basis and is constitutional. There are insufficient reliance interests to prevent the overruling of *Hobbs* and *Brown*. The decision to overrule *Hobbs* and *Brown* must be given full retroactive effect. The judgments of the trial court

and the Court of Appeals must be reversed and the matter must be remanded to the trial court for the entry of an order dismissing the plaintiff's complaint.

Justice MARKMAN, concurring, joined the majority's opinion in this case except for footnotes 8 and 14. Justice MARKMAN disputed the criticisms by Justice KELLY of the Court's majority with regard to their attitudes toward precedent. He attached a chart summarizing the precedents that have been reversed by the Court's majority since 2000, and drew a number of conclusions therefrom in disagreement with Justice KELLY.

Reversed and remanded to the trial court.

Justice WEAVER, concurring in part and dissenting in part, agreed with parts I and II of Justice KELLY's opinion except for footnotes 8, 10, 12, and 13.

Justice KELLY, concurring in part and dissenting in part, concurred with the determination by the majority that the defendant was entitled to the entry of an order granting it summary disposition and, therefore, the judgment of the Court of Appeals and the order of the trial court must be reversed and the matter must be remanded to the trial court for the entry of an order granting summary disposition for the defendant. However, the majority errs in considering the issue whether the defendant must show actual prejudice, because the plaintiff failed to supply the defendant with sufficient notice under MCL 691.1404(1). The defendant should have been granted summary disposition on this basis and, therefore, it is unnecessary for the majority to overturn *Hobbs v Dep't of State Hwys* and *Brown v Manistee Co Rd Comm*. No special justification exists in this case to disregard the precedent created by *Brown* and *Hobbs*. Even if *Brown* and *Hobbs* should be considered, they should not be overturned because they accurately divined the intent of the Legislature in enacting the notice provision in MCL 691.1404(1). Application of the factors to be considered in overturning stare decisis, which are stated in *Robinson v Detroit*, 462 Mich 439 (2000), mandates that *Brown* and *Hobbs* should not be overturned. Application of the factors stated in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), for determining whether judicial decisions should be given retroactive effect mandates that this decision should be applied prospectively.

Justice CAVANAGH, dissenting, stated that the Supreme Court more than 30 years ago correctly decided in *Hobbs*, and reaffirmed more than ten years ago in *Brown*, that the government must show actual prejudice resulted from a lack of notice within the 120-day period of MCL 691.1404(2) before a defective highway claim can be barred for untimely notice of a highway defect and

resulting injury. None of the factors that must be considered for overruling established precedent supports an overruling of *Hobbs* and *Brown*. By its inaction, the Legislature has acquiesced in the *Hobbs* interpretation of § 1404(2). The majority's decision represents a departure from an established rule of law that was not foreshadowed. The decision therefore should be given prospective, rather than retroactive, application.

HIGHWAYS — GOVERNMENTAL IMMUNITY — NOTICE OF INJURY.

The plain language of MCL 691.1404(1) requires as a condition to any recovery for injuries sustained as a result of a defective highway, that notice of injuries sustained and highway defects be given to the appropriate governmental agency within 120 days of the injury; notice is adequate under the statute if it is served within 120 days, no matter how much prejudice is actually suffered by the governmental agency; the notice provision is not satisfied if notice is served more than 120 days after the injury, even where there is no prejudice suffered by the governmental agency.

Thomas, Garvey, Garvey & Sciotti, P.C. (by *James McKenna*), for the plaintiff.

Fordney, Prine & Coffey (by *Andrew W. Prine, P.C.*) and *Smith Haughey Rice & Roegge* (by *Jon D. Vander Ploeg* and *William L. Henn*) for the defendant.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Patrick F. Isom*, Assistant Attorney General, for the state of Michigan.

Hicks, Mullett & Gregg, PLLC (by *Liisa R. Speaker*), for Michigan Trial Lawyers Association.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), for Michigan Municipal League, Michigan Municipal League Liability & Property Pool, and Michigan Townships Association.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Marcelyn A. Stepanski*), for Michigan Municipal Risk Management Authority.

TAYLOR, C. J. The issue in this case is whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written. This statute provides in pertinent part:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury. This Court previously held in *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. Those cases are overruled.

Accordingly, the order of the trial court denying summary disposition to defendant on the basis of *Hobbs*/*Brown* is reversed, the judgment of the Court of Appeals affirming the trial court's order is also reversed, and the case is remanded to the trial court for the entry of an order granting defendant summary disposition because plaintiff failed to provide notice

within 120 days "[a]s a condition to any recovery" for injuries she claims she sustained by reason of a defective highway.

I. FACTS AND PROCEDURAL HISTORY

On February 6, 2001, plaintiff Joan Rowland fell and was injured while crossing Jennings Street at its intersection with Main Street in Northfield Township in Washtenaw County. Plaintiff alleged that she tripped and fell on "broken, uneven, dilapidated, depressed and/or potholed areas."

Plaintiff served her notice on defendant Washtenaw County Road Commission on the 140th day after the accident and subsequently filed a lawsuit against defendant asserting the applicability of the defective highway exception to governmental immunity. MCL 691.1402. Defendant road commission filed an answer and affirmative defenses that raised MCL 691.1404 (failure to serve notice within 120 days) as a defense. Defendant subsequently moved for summary disposition pursuant to MCR 2.116(C)(7) (immunity granted by law) and 2.116(C)(10) (no genuine issue of material fact), arguing, among other things, that plaintiff's failure to comply with MCL 691.1404(1) entitled it to summary disposition.

Relying on *Hobbs*/*Brown* (defendant must show prejudice before the statute can be enforced) the trial court determined that there was a genuine issue of material fact concerning whether defendant had shown prejudice and thus denied the road commission's motion for summary disposition.

The Court of Appeals affirmed the order of the trial court.[1] Defendant urged the panel to disregard the

[1] Unpublished opinion per curiam, issued December 13, 2005 (Docket No. 253210).

Hobbs and *Brown* construction of MCL 691.1404 on the basis that those cases were wrongly decided. The Court of Appeals, however, noted that it was duty-bound to follow this Court's construction of MCL 691.1404 and that the decisions were binding unless the Supreme Court overruled them.

The road commission filed an application for leave to appeal, which this Court granted.[2]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to deny a motion for summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). Questions of statutory interpretation are also reviewed de novo. *Id.* When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999).

III. ANALYSIS

a. GOVERNMENTAL IMMUNITY AND THE DEFECTIVE HIGHWAY EXCEPTION

It is well understood, and not challenged here, that governmental agencies, with a few exceptions, are generally statutorily immune from tort liability. The governmental tort liability act (GTLA), MCL 691.1401 *et seq.,* broadly shields a governmental agency from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL

[2] 474 Mich 1099 (2006).

691.1407(1). The act enumerates several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency.[3] Our decision in this case requires us to examine MCL 691.1404. As previously indicated, the statute provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3)[4] shall serve a notice on the governmental agency of the occurrence of the injury

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[3] The Legislature codified the following six exceptions in the GTLA: the defective 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. Further, as we recognized in *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002), there are other areas outside the GTLA where the Legislature has allowed specific actions against a governmental agency notwithstanding governmental immunity, such as the Civil Rights Act. MCL 37.2103(g) and 37.2202(1)(a).

[4] Subsection 3 provides:

> If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations.

One amicus curiae argues in its brief that requiring notice after only four months is unreasonable because injured persons may still be incapacitated. But, this concern is addressed by subsection 3, which allows someone who is physically or mentally incapable of giving notice to serve notice not more than 180 days after the termination of the disability.

> and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [MCL 691.1404(1).]

Plaintiff, having served her notice 140 days after her fall, acknowledges that she did not serve a notice on the road commission within 120 days of her accident. Given that the plain language of the statute requires such notice as a condition for recovery for injuries sustained because of a defective highway, one merely reading the statute might assume that plaintiff's complaint would have been dismissed. Because this Court's decisions in *Hobbs* and *Brown* engrafted an actual prejudice component onto the statute, the trial court could not dismiss the case.[5] It is valuable in considering the defensibility of this interpretation of the statute to first survey this Court's cases concerning notice provisions, including the provision at issue here.

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[5] Justice KELLY contends in her partial dissent that we should avoid revisiting *Hobbs* and *Brown* by holding that plaintiff's notice itself was defective because it did not identify the nature of the defect of the highway, not because it was not served within 120 days. We disagree because the first question is whether the Legislature can even enact a notice provision with a hard and fast deadline. If it can, an issue we examine in this opinion, then there is no need to determine the second question of whether the late-filed notice in this case would have been adequate if it had been filed in a timely manner. While Justice KELLY accuses us of reaching unnecessary constitutional rulings, we believe it is more accurate to say that we have merely engaged in statutory analysis. But, to be able to apply the statute to the case at bar we have to dispatch the erroneous constitutional readings that were erected by the *Hobbs*/*Brown* courts to prevent us from engaging in a statutory analysis. Moreover, defendant specifically argued that plaintiff failed to comply with the 120-day notice provision of MCL 691.1404(1) in its motion for summary disposition and the trial court and the Court of Appeals relied on *Hobbs*/*Brown* to not enforce the statute. Under such circumstances, it is entirely proper for this Court to review whether *Hobbs* and *Brown* were properly decided.

b. HISTORY OF THIS COURT'S CASELAW INVOLVING NOTICE STATUTES

From its earliest years this Court, evidently detecting no constitutional impediments, if indeed any were even urged, enforced governmental immunity mandatory notice provisions according to their plain language. See, e.g., *Davidson v City of Muskegon,* 111 Mich 454; 69 NW 670 (1897); *Holtham v Detroit*, 136 Mich 17; 98 NW 754 (1904); *Wilton v Detroit*, 138 Mich 67; 100 NW 1020 (1904); *Barribeau v Detroit*, 147 Mich 119; 110 NW 512 (1907); *McAuliff v Detroit*, 150 Mich 346; 113 NW 1112 (1907); *Ridgeway v Escanaba,* 154 Mich 68; 117 NW 550 (1908); *Moulter v Grand Rapids,* 155 Mich 165; 118 NW 919 (1908); *Northrup v City of Jackson*, 273 Mich 20; 262 NW 641 (1935); *Sykes v Battle Creek*, 288 Mich 660; 286 NW 117 (1939); *Trbovich v Detroit*, 378 Mich 79; 142 NW2d 696 (1966); *Morgan v McDermott*, 382 Mich 333; 169 NW2d 897 (1969).

The leading cases upholding notice provisions are *Moulter*, *Trbovich,* and *Morgan.* In *Moulter,* this Court held that the right to recover for injuries arising from the lack of repair to sidewalks, streets, highways, and so forth, was purely statutory and that it was discretionary with the Legislature whether it would confer upon injured persons a right of action. Moreover, any rights given to sue the government could be subject to limitations the Legislature chose. The implicit theory was that such notice provisions were economic or social legislation and that, because the Legislature had a rational basis for the notice requirements—the most obvious being facilitating meaningful investigations regarding the conditions at the time of injury and allowing for quick repair so as to preclude other accidents—the statutes were constitutionally permissible. Further, in *Trbovich* the Court indicated that for the Court to

not accede to the Legislature's authority in this fashion would be to unconstitutionally usurp legislative authority. Finally, in *Morgan* the Court reaffirmed that the then 60-day notice requirement in defective highway cases was simply a condition of liability and that, unless it was fulfilled, there was no liability.[6]

As of 1969, therefore, the enforceability of notice requirements and the particular notice requirements in governmental immunity cases was well settled and had been enforced for almost a century. In 1970, however, there was an abrupt departure from these holdings in the Court's decision in *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970). In *Grubaugh* the Court discerned an unconstitutional due process deprivation if plaintiffs suing governmental defendants had different rules than plaintiffs suing private litigants. As a result, *Moulter* was not followed.[7]

Two years later, in *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972), the Court took *Grubaugh* one step further and held that an earlier version of MCL 691.1404, which included a 60-day notice provision, was unconstitutional, but this time because it violated equal protection guarantees. The analysis again was that the constitution forbids treating those injured by governmental negligence differently from those injured by a

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[6] See also *Kraus v Kent Co Bd of Rd Comm'rs*, 385 F2d 864 (CA 6, 1967), upholding dismissal of an action in a diversity case because of noncompliance with the notice statute.

[7] Actually, the lead opinion in *Grubaugh* stated that *Moulter* was overruled. But, the lead opinion was only signed by three justices and two other justices only concurred in the result. Under such circumstances, *Grubaugh* was not binding precedent. As this Court explained in *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976), decisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis.

private party's negligence. Leaving aside the unusual switch from one section of the constitution to another to justify an adjudication of unconstitutionality, this claim is simply incorrect. Private and public tortfeasors can be treated differently in the fashion they have been treated here by the Legislature. It does not offend the constitution to do so because with economic or social regulation legislation, such as this statute, there can be distinctions made between classes of persons if there is a rational basis to do so. As we explained in *Phillips v Mirac, Inc*, 470 Mich 415, 431-433; 685 NW2d 174 (2004), legislation invariably involves line drawing and social legislation involving line drawing does not violate equal protection guarantees when it has a "rational basis," i.e., as long as it is rationally related to a legitimate governmental purpose. The existence of a rational basis here is clear, as we will discuss more fully, but even the already cited justification, that the road be repaired promptly to prevent further injury, will suffice.

Considering the same point, Justice BRENNAN in his dissent in *Reich* pithily pointed out the problems with the majority's analysis:

> The legislature has declared governmental immunity from tort liability. The legislature has provided specific exceptions to that standard. The legislature has imposed specific conditions upon the exceptional instances of governmental liability. The legislature has the power to make these laws. This Court far exceeds its proper function when it declares this enactment unfair and unenforceable. [386 Mich at 626.]

The next year, in *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), the Court retreated from *Grubaugh* and *Reich* and, in a novel ruling, held that application of the six-month notice provision in the Motor Vehicle Accident Claims Act (MVACA), MCL

257.1118, was constitutional, and that the provision was thus enforceable, only where the failure to give notice resulted in prejudice to the party receiving the notice, in that case the Motor Vehicle Accident Claims Fund (MVACF). The reasoning was that while some notice provisions may be constitutionally permitted some may not be, depending on the purpose the notice serves. Thus, if notice served a permissible purpose, such as to prevent prejudice, it passed constitutional muster. But, if it served some other purpose (the Court could not even imagine any other) then the notice required by the statute became an unconstitutional legislative requirement. Thus, the Court concluded that in order to save the statute from being held unconstitutional, it had to allow notice to be given after six months and still be effective unless the governmental agency, there the MVACF, could show prejudice. Whatever a court may do to save a statute from being held to be unconstitutional, it surely cannot engraft an amendment to the statute, as was done in *Carver*. See, e.g., *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 408 n 14; 578 NW2d 267 (1998). Notwithstanding these problems, they went unnoticed and the rule now was "only upon a showing of prejudice by failure to give such notice, may the claim against the fund be dismissed." *Carver,* 390 Mich at 100.

Returning to the *Carver* approach in 1976, this Court in *Hobbs,* 398 Mich at 96, held regarding the notice requirement in the defective highway exception to governmental immunity:

> The rationale of *Carver* is equally applicable to cases brought under the governmental liability act. Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the

> notice provision contained in [MCL 691.1404] is not a bar to claims filed pursuant to [MCL 691.1402].

Finally, in 1996, in *Brown*, this Court reassessed the propriety of the *Hobbs* decision and declined to overrule it on the basis of stare decisis and legislative acquiescence.[8]

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[8] Justices RILEY and BOYLE dissented from the Court's holding. Justice WEAVER did not participate, presumably because she had participated in the case as a Court of Appeals judge.

Justice KELLY and Justice CAVANAGH argue that legislative acquiescence should save *Hobbs* and *Brown*'s erroneous construction of the notice statute. But, it has been the rule in Michigan since at least *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), that the doctrine of legislative acquiescence is not recognized in this state. As we noted in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 177-178 n 33; 615 NW2d 702 (2000), the legislative acquiescence doctrine " 'is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence.' " (Citation omitted; emphasis omitted.) Justice KELLY's professed fealty to stare decisis apparently would not prevent her from overruling sub silentio all the cases where we rejected the legislative acquiescence doctrine. See, e.g., *Donajkowski*; *People v Borchard-Ruhland,* 460 Mich 278, 286; 597 NW2d 1 (1999); *Robinson v Detroit,* 462 Mich 439, 466; 613 NW2d 307 (2000); *Nawrocki, supra*; *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502; 638 NW2d 396 (2002); *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 760; 641 NW2d 567 (2002); *People v Hawkins*, 468 Mich 488, 506-507; 668 NW2d 602 (2003); *Neal v Wilkes*, 470 Mich 661, 668 n 11; 685 NW2d 648 (2004); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 592; 702 NW2d 539 (2005); *Grimes v Dep't of Transportation*, 475 Mich 72, 84; 715 NW2d 275 (2006); *People v Anstey*, 476 Mich 436, 445; 719 NW2d 579 (2006); *Paige v Sterling Hts*, 476 Mich 495, 516; 720 NW2d 219 (2006).

Furthermore, in a circumstance such as here, where the Court has said the constitution precludes the Legislature from doing as it wishes (thus making the desired legislative action impossible) a legislative acquiescence argument is entirely misbegotten. Justice KELLY claims that the Legislature could have simply reenacted the statute after identifying an additional intent. We disagree. First, the *Hobbs* Court said the "only" legitimate reason it could surmise for the notice statute was to prevent prejudice to the government. Inescapably this must be read to mean that

c. *HOBBS* AND *BROWN* WERE WRONGLY DECIDED AND POORLY REASONED

The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced. This reasoning has no claim to being defensible constitutional theory and is not rescued by musings to the effect that the justices " 'look askance' " at devices such as notice requirements, *Hobbs,* 398 Mich at 96, quoting *Carver,* 390 Mich at 99, or the pronouncement that other reasons that could supply a rational basis were not to be considered because in the Court's eyes the "only legitimate purpose" of the notice provisions was to protect from "actual prejudice." *Hobbs*, 398 Mich at 96.

Perceiving the error of the majority, Justice RILEY explained in her dissent in *Brown* that this notice statute is social legislation that is constitutional because it has a rational basis. She stated:

> I note that "[w]hen scrutinizing economic and social legislation, this Court applies the rational basis standard of review." *Downriver Plaza Group v Southgate*, 444 Mich

other reasons would not be found legitimate. Thus, adding another reason would hardly be seen as a viable option for the Legislature. In any event, the Legislature is not required to indicate in a statute what its motivations are. Rather, it is a court's duty in "rational basis" cases such as this to find constitutionality if " ' "any state of facts either known or which could reasonably be assumed affords support" ' " for the statute. *Brown, supra* at 362 (citations omitted). Justice KELLY herself has said this. *Harvey v Michigan* 469 Mich 1, 13-14; 664 NW2d 767 (2003).

Justice KELLY also argues that the Legislature could have amended the statute to include a presumption of prejudice. Revising the statute in such a manner, however, would not have produced what the Legislature wanted—a statute with a clearly identified and readily enforceable deadline that does not require a showing of prejudice or anything else to be enforceable.

> 656, 666; 513 NW2d 807 (1994). The only inquiry, then, is whether this social legislation creating a 120-day notice requirement has a rational basis.
>
> This particular legislation passes the minimal rational basis test, and the Court in *Hobbs* was without authority to require a showing of prejudice in each and every case. Notice provisions rationally and reasonably provide the state with the opportunity to investigate and evaluate a claim. [452 Mich at 370.]

Because the statute was constitutional, no "saving construction" was necessary or allowed. Thus, the engrafting of the prejudice requirement onto the statute was entirely indefensible.

Further, in the search for a legitimate purpose for notice provisions, the holding in *Ridgeway v Escanaba*, 154 Mich 68, 72-73; 117 NW 550 (1908), is also instructive. It was there that this Court gave a full-throated statement of the purpose it discerned:

> We must say that the legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation.

It is also useful to consider as possible legislative reasons for the notice statute the purposes discussed in the consolidated cases of *Lisee v Secretary of State* and *Howell v Lazaruk*, 388 Mich 32; 199 NW2d 188 (1972).

In those cases, while the majority suggested that the purpose of the notice statute was to afford an opportunity to investigate a claim and to determine the possible liability of the MVACF, Justices BRENNAN and BLACK dissented in part, pointing out additional reasons, beyond those mentioned by the majority, for requiring notice. These included allowing time for creating reserves for the Fund, reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed. Because these apply in the context of the MVACF, they could also have been in the minds of the Legislature at the time MCL 691.1404 was enacted.

These likely or even possible reasons cited above must be considered as supplying the rational basis that assures constitutionality, because, as Justice CAVANAGH pointed out in *Brown, supra* at 362, reciting the venerable rule in such matters, it is our duty in rational basis cases to find constitutionality if " 'any state of facts either known or which could reasonably be assumed affords support' " for the statute. (Citation omitted.) It is the case then that there is unquestionably now, and there was then, a "rational basis" for finding, even as Justice RILEY did earlier, a rational basis for this statute and the distinctions it draws.

Moreover, common sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits. As this Court stated in *Moulter*:

> It being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose. [155 Mich at 168-169.]

In sum, *Moulter* and the other cases previously cited were decided in accordance with the constitution. The notice provision passes constitutional muster. We reject the hybrid constitutionality of the sort *Carver*, *Hobbs,* and *Brown* engrafted onto our law.[9] In reading an "actual prejudice" requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible. *Hobbs* and *Brown* are remarkable in the annals of judicial usurpation of legislative power because they not only seized the Legislature's amendment powers,[10] but also made

[9] Justice CAVANAGH argues that a minority of courts have made similar rulings. We acknowledge as much, but note that the vast majority of jurisdictions that have considered such a constitutional challenge has concluded that notice-of-claim and statute-of-limitations rules placed on persons bringing tort actions against governmental entities are rationally related to reasonable legislative purposes and thus do not violate equal protection. See, e.g., *Tammen v San Diego Co*, 66 Cal 2d 468; 426 P2d 753; 58 Cal Rptr 249 (1967); *Fritz v Regents of Univ of Colorado*, 196 Colo 335; 586 P2d 23 (1978); *McCann v City of Lake Wales*, 144 So 2d 505 (Fla, 1962); *Newlan v State,* 96 Idaho 711; 535 P2d 1348 (1975); *King v Johnson*, 47 Ill 2d 247; 265 NE2d 874 (1970); *Johnson v Maryland State Police*, 331 Md 285; 628 A2d 162 (1993); *Campbell v City of Lincoln*, 195 Neb 703; 240 NW2d 339 (1976); *Espanola Housing Auth v Atencio*, 90 NM 787; 568 P2d 1233 (1977); *Herman v Magnuson*, 277 NW2d 445 (ND, 1979); *Reirdon v Wilburton Bd of Ed*, 611 P2d 239 (Okla, 1980); *James v Southeastern Pennsylvania Transp Auth*, 505 Pa 137; 477 A2d 1302 (1984); *Budahl v Gordon & David Assoc*, 287 NW2d 489 (SD, 1980); *City of Waco v Landingham*, 138 Tex 156; 157 SW2d 631 (1941); *Sears v Southworth*, 563 P2d 192 (Utah, 1977). We agree with the majority rule.

[10] As United States Supreme Court Justice John Marshall Harlan stated in his famous dissent in *Plessy v Ferguson*, 163 US 537, 558; 16 S Ct 1138; 41 L Ed 256 (1896):

> [T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives.

any reversing amendment by the Legislature impossible. Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed.[11] Accordingly, we must next consider if considerations of stare decisis should cause us to retain this poorly reasoned precedent.

IV. STARE DECISIS

In determining whether to overrule a prior case, this Court first considers whether the earlier case was wrongly decided. *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000).[12] As we have previously explained, we are persuaded that *Hobbs* and *Brown*

In a more recent iteration of the rule, we stated in *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000), that courts may not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature." Accord *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004). In short, this Court had no authority to add words or conditions to the statute.

[11] In her dissent Justice KELLY repeats the error of the *Hobbs* and *Brown* courts in concluding that the only rational basis supporting the statute is that which the *Hobbs* and *Brown* courts fixed upon: prejudice to the government tortfeasor. One can only ask, why is this the only allowable rational basis? Must we not use, as the majority has here, the rule that Justice KELLY herself used in *Harvey v Michigan,* that a court must find constitutionality if any state of facts either known or which can reasonably be assumed affords support? Because there are such reasons, beyond what the *Hobbs* and *Brown* courts themselves found, as discussed in this opinion, why does this rule not apply here? Indeed, if as Justice KELLY apparently concludes, it does not, what is her test for when the rule is inapplicable? She gives none. This is not how a court should analyze matters because it makes future application of the law, should her view prevail, entirely without predictability. This is a prescription for chaos and injustice.

[12] See, also, *Halfacre v Paragon Bridge & Steel Co*, 368 Mich 366, 377; 118 NW2d 455 (1962) (Courts have the "right and duty to re-examine *and re-examine again, if need be*, statutory enactments already judicially construed."). (Emphasis added.)

were wrongly decided.[13] *Robinson* next instructs that if a case was wrongly decided, the Court should then examine reliance interests: whether the prior decision defies "practical workability"; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; whether changes in the law or facts no longer justify the prior decision; and whether the prior decision misread or misconstrued a statute. *Robinson, supra* at 464-467.

We are convinced, as previously set forth, that the prior decisions did in fact misread and misconstrue the statute and left it less workable, assuming that the goal was to provide notice so as to facilitate investigation, claims resolution, and rapid road repairs, as well as the creation of reserves and the like for self-insured governmental entities. When prompt notice is not provided, the entire legislative scheme is accordingly less workable.

As for reliance, we find insufficient reliance interests to prevent us from overruling *Hobbs* and *Brown*. When one focuses on the practical effect of *Hobbs* and *Brown,* it becomes quite evident that injured plaintiffs, otherwise able to file lawsuits, were highly unlikely to have delayed filing their lawsuits for periods longer than 120

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[13] Justice KELLY argues that the principle of stare decisis should prevent this Court from overruling *Hobbs* and *Brown*. We note that Justice KELLY'S fealty to precedent is quite selective. She shows no concern that *Hobbs* disregarded 75 years of precedent that had upheld governmental immunity notice provisions. Indeed, each of the criticisms Justice KELLY sends our way is actually more applicable to the *Hobbs* Court. If 30 years of precedent should not be lightly ignored, what of the *Hobbs* Court ignoring 75 years of precedent? In any event, we have applied the *Robinson* stare decisis factors and concluded that they do not counsel against overruling *Hobbs* and *Brown*.

days in reliance on these cases. After all, what plaintiff would take the chance that the defendant could actually show prejudice after the 120th day and thus lose his or her cause of action when before that time it would be irrelevant whether there was prejudice? Accordingly, we doubt that any plaintiff, because of the inevitable perils such a delay entails, actually decided to not serve notice within 120 days in reliance on *Hobbs* and *Brown*.

Further, while the rule of *Hobbs* has been uncontradicted for 30 years, any lawyer following the decisions of this Court for the last seven years would know that the "text ignoring" approach manifested in the holdings of *Hobbs* and *Brown* has been repudiated repeatedly in the recent past by this Court. Nowhere was this more forcefully stated than in *Nawrocki, supra*, itself a governmental immunity case involving the defective highway exception, where we said that a court is most strongly justified in overruling precedent when adherence to the precedent would perpetuate a plainly incorrect interpretation of language in a statute. *Nawrocki,* 463 Mich at 181.

Robinson also held that any statutory reliance analysis has to be considered in light of the plain language of the statute. We stated:

> Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather

> than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Robinson, supra* at 467-468.]

This language from *Robinson* fully supports overruling *Hobbs* and *Brown* because this Court in those cases confounded legitimate citizen expectations by misreading and misconstruing a statute.[14] Accordingly, it was this Court in *Hobbs* and *Brown* that disrupted the

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[14] We note that Justice KELLY repeats in her partially dissenting opinion the canard that this Court has overruled cases at an alarming rate. As we most recently said in *Paige v Sterling Hts, supra* at 514, the fallacy of these statistical false alarms was demonstrated in *Sington v Chrysler Corp*, 467 Mich 144, 166-170; 648 NW2d 624 (2002), and *Mack v Detroit*, 467 Mich 186, 211; 649 NW2d 47 (2002). Moreover, an article by Victor E. Schwartz, *A critical look at the jurisprudence of the Michigan Supreme Court*, 85 Mich B J 38, 41 (January, 2006), shows the methodological failures of these various "the sky is falling" arguments.

Justice KELLY claims that a study by Todd C. Berg in Michigan Lawyer's Weekly shows that this Court has overruled cases at a rate four times that of previous courts (41 cases overruling precedent out of 13,923 dispositions between 2000 and 2005—1/3 of one percent—versus 15 cases overruling precedent out of 16,729 dispositions between 1994-1999—1/21 of one percent). Leaving aside Justice KELLY's incorrect math, when the actual figures are cited it seems obvious that during both periods the number of cases that were overruled was miniscule when compared with the number of dispositions. The difference between 1/21 of one percent and 1/3 of one percent is an inconsequential statistical difference. It can only be made to look arresting if one stretches for the most alarming way

to describe it. That is what Justice KELLY has done here. We invite scrutiny of the study by Mr. Berg because it reinforces, we believe, the point we are making.

In further evaluating Justice KELLY's claim that this Court has overruled more cases than is usual, we would call attention to the difficulties in relying on earlier statistics regarding overruled cases. As explained in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 567 n 6; 702 NW2d 539 (2005), it was not uncommon for this Court in earlier years to fail to state that cases it was clearly overruling were being overruled. A good example of this practice is set forth in *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 708; 614 NW2d 607 (2000). In *Mudel* this Court expressly overruled *Goff v Bil-Mar Foods, Inc (After Remand),* 454 Mich 507; 563 NW2d 214 (1997), which was decided five years after *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992). But, *Goff* had failed to acknowledge that it was overruling *Holden*. As we stated in *Mudel*: "Therefore, unlike the unstated but effective overruling of *Holden* in *Goff,* we expressly overrule *Goff*, insofar as it contradicts the statutory language and departs from our decision in *Holden*." 462 Mich at 708. Indeed, Justice KELLY would apparently continue with this approach of not clearly identifying overruled cases. She refers to numerous cases in this Court that rejected the doctrine of legislative acquiescence as "rogue" decisions. *Post* at 261-262 n 17. But, then she asserts that she would not be overruling such cases if she could persuade three other justices to approve of the discredited legislative acquiescence doctrine. Again, this illustrates the fact that Justice KELLY would not include cases she actually overruled in the list of cases she admitted overruling.

Next, Justice KELLY, to discredit the above analysis, indicates that she would not count cases where we denied leave to appeal in calculating how frequently cases were overruled. Why not? Each case presumably relied on earlier precedent, and when this Court denies leave to appeal, it leaves a precedent intact. See further Justice MARKMAN's concurrence, which provides an excellent and even more thorough response to Justice KELLY's meritless claim.

Finally, in response to Justice MARKMAN's challenge to give her standards for overruling cases, she responds not with an approach, but with a puzzling indication that she would rely on interpretive tools such as the absurd results rule. Whatever the merits of those rules, and they have been discussed at length by this Court in recent years, they have nothing to do with determining when precedent should be overruled. In short, her response is a response to a question not asked. The reader need not be without resources in this situation because Justice KELLY has already tendered an answer. In *Sington v Chrysler Corp*, 467 Mich 144,

citizens' reliance interest that statutes mean what they say. We refuse to perpetuate the error of *Hobbs* and *Brown*.[15]

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*.[16] Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice*.

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184 n 9; 648 NW2d 624 (2002), she said she would not reexamine precedent unless the prior decision was "utterly nonsensical," or reflected a "drastic error." We discussed the unworkability of this approach in our response to her in *Sington*.

[15] In dissent Justice KELLY derides our effort to properly construe the statute after previous judicial deconstructions as "second-guessing." Does she really think that we comply with the oaths we took when we do not follow the clear directions of the Legislature in statutes and when we ignore past cases adhering to those directions? We do not. We believe the most defensible approach is to overrule cases when the criteria set forth in *Robinson v Detroit* are satisfied.

[16] Indeed, in *Brown* the road commission was prejudiced because it, unaware that there had been an accident, repaved the road where the accident happened before the 120-day notice period expired. This made no difference in the ability of the plaintiff to proceed with his lawsuit. 452 Mich at 360 n 11.

V. RETROACTIVITY

The final question is whether our decision to overrule *Hobbs* and *Brown* should have retroactive effect. As this Court held in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002):

> Although the general rule is that judicial decisions are given full retroactive effect, *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986), a more flexible approach is warranted where injustice might result from full retroactivity. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). For example, a holding that overrules settled precedent may properly be limited to prospective application.

The threshold question is whether "the decision clearly established a new principle of law." *Id.* at 696. If so, the factors to be considered in determining whether the general rule should not be followed are

> (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. [*Id.*]

In *Pohutski*, this Court gave prospective effect to its decision overruling *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). The Court expressed its concern that the "trespass-nuisance" exception to governmental immunity recognized in *Hadfield* had induced reliance by both governmental agencies and the public, insofar as "municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same." *Pohutski,* 465 Mich at 697. Further, the Court noted that the then-recently enacted MCL 691.1407, which provided for recovery for a "sewage disposal system event," was prospective only and, therefore, would leave an entire class of homeowners

without a remedy. Given these unique considerations, the Court applied *Pohutski* prospectively.

However, in *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), this Court overruled *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981), and applied the decision retroactively. The Court explained that "[o]ur decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963." *Hathcock*, 471 Mich at 484.

Likewise, a decision overruling *Hobbs* and *Brown* will return our law to that which existed before *Hobbs* and which was mandated by MCL 691.1404(1). In *Hathcock*, *supra* at 484-485 n 98, this Court further explained its determination to apply the decision retroactively:

> First, this case presents none of the exigent circumstances that warranted the "extreme measure" of prospective application in *Pohutski* . . . . Second, there is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions.

Likewise, in the instant case, there exist no exigent circumstances that would warrant the "extreme measure" of prospective application. Unlike in *Pohutski*, no one was adversely positioned, we believe, in reliance on *Hobbs* and *Brown*.

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), this Court overruled *Lewis v Detroit Automobile Inter-Ins Exch,* 426 Mich 93; 393 NW2d 167 (1986), and also applied the decision retroactively. This Court explained:

> As we reaffirmed recently in *Hathcock*, prospective-only application of our decisions is generally " 'limited to decisions which overrule clear and uncontradicted case law.' "

> *Lewis* is an anomaly that, for the first time, engrafted onto the text of [MCL 500.3145(1)] a tolling clause that has absolutely no basis in the text of the statute. *Lewis* itself rests upon case law that consciously and inexplicably departed from decades of precedent holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms.
>
> Thus, *Lewis* cannot be deemed a "clear and uncontradicted" decision that might call for prospective application of our decision in the present case. Much like *Hathcock*, our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority—here, the "one-year-back" limitation of MCL 500.3145(1). [*Devillers,* 473 Mich at 587 (citations and emphasis omitted).]

Likewise, in the instant case, *Reich* was an anomaly that, for the first time, held that notice requirements violated the constitution. *Carver*, decided one year later, made the contradictory conclusion that such notice requirements did not violate the constitution, but it still invented an "actual prejudice" requirement out of whole cloth. *Hobbs* and *Brown* adopted the "actual prejudice" requirement from *Carver*, despite the clear lack of that requirement in the statute itself. As in *Devillers* and *Hathcock*, "our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority"—enforcing the language of MCL 691.1404(1).[17] Further, overruling precedent that usurped legislative power restores legitimacy to the law.

Finally, like the *Ridgeway* Court almost 100 years ago, we are mindful of the fact that the public fisc is at

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[17] Thus, we reject Justice KELLY's claim that our decision today is tantamount to a new rule of law.

risk in these cases.[18] The decision to expand the class of those entitled to seek recovery against the government should be in the hands of the Legislature. This Court does not have the authority to waive the government's immunity from suit, and tax dollars should only be at risk when a plaintiff satisfies all the prerequisites, including a notice provision, set by the Legislature for one of the exceptions to governmental immunity.

Accordingly, we determine that our decision today to overrule *Hobbs* and *Brown* shall be given full retroactive effect because this decision simply restores due constitutional deference to the language of the statute.

VI. CONCLUSION

Having overruled *Hobbs* and *Brown* with full retroactivity, we reverse the order of the trial court and the judgment of the Court of Appeals and remand the case to the trial court for the entry of an order dismissing plaintiff's complaint.

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

MARKMAN, J. (*concurring*). Justice KELLY has asserted once more her view that the majority is insufficiently respectful of the precedents of this Court.[1] I believe it is

[18] As we noted in *Mack v Detroit*, 467 Mich at 203 n 18, a central purpose of governmental immunity is to prevent a drain on the state's resources by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity. Accord *Ridgeway v Escanaba*, 154 Mich at 73.

[1] This opinion constitutes my exclusive response to Justice KELLY's criticisms concerning this Court's approach to precedent for I do not join footnotes 8 and 14 of the majority opinion. In her criticisms, Justice KELLY claims that the majority overturns precedent at an "alarming and unprecedented rate," the majority "exhibits disrespect for stare decisis,"

important to respond. To assist in this, I have attached a chart that summarizes the 40 cases during the past seven terms in which a precedent of this Court has been overruled and in which the Court majority has been aligned against Justice KELLY.[2] From this chart and from the cases that are referenced therein, I draw the following observations concerning precedent and the current Court:

(1) The dispute between the Court majority and Justice KELLY in these 40 cases is less about attitudes toward precedent than about the substantive merits of the opinions being overruled. That is, Justice KELLY agrees with the opinions being overruled and the justices in the majority do not. There is no evidence in these 40 cases that Justice KELLY, out of regard for stare decisis, has ever sustained a precedent with which she disagrees, merely that Justice KELLY agrees with these precedents.[3] The majority, on the other hand, for rea-

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the majority is "intent on overturning precedent," the majority has declared itself "more capable of understanding the law . . . than any justice who sat before," the majority has "ordained itself master [of a] higher law," the majority "damages the integrity of the judicial process," and the majority is "alarmingly activist."

[2] In three other cases during this same period, the Court overruled precedent, but with a different alignment of justices. *People v Starks*, 473 Mich 227; 701 NW2d 136 (2005); *People v Lively*, 470 Mich 248; 680 NW2d 878 (2004); *People v Moore,* 470 Mich 56; 679 NW2d 41 (2004). These 40 cases occurred against a backdrop of 543 published opinions issued during this same period and more than 18,500 dispositions of applications for leave to appeal.

[3] Justice KELLY asserts that I imply that she would "not have the same respect for stare decisis if majority control of the Court switched" during her tenure. *Post* at 257 n 12. She further asserts that I suggest that she has "refused to overturn precedent merely because [she agrees with it]." *Post* at 264 n 20. Neither of these assertions is accurate. Rather, what I state is that there is simply no evidence one way or the other that Justice KELLY is any more averse to overruling precedent than the majority; there is merely evidence that Justice KELLY is more approving of the precedents that have been overruled by this Court than the majority. A justice's

sons summarized in the chart,[4] believes that these 40 cases each overrules a precedent of this Court in which the clear language of the law was misconstrued, or in which the policy preferences of the justices were substituted for those of the lawmaker. Thus, the differences among the justices reflected in these cases are focused less on the role of precedent than on the role of the judge in interpreting the law.

(2) Moreover, it is noteworthy that the present majority, over Justice KELLY's dissent, issued the first-ever opinion of this Court that identified a clear standard for determining when a wrongly decided precedent warrants overruling, and recognized that a variety of considerations, including individual reliance interests and the extent to which a past decision has become embedded in the legal fabric, must be evaluated.[5] In anticipation of the day when her own judicial philosophy once again prevails in this Court and she is confronted with the 40 precedents of the present majority, Justice KELLY would do well to share her *own* standards concerning when she would or would not overrule such obviously distasteful precedents.[6]

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perspective on stare decisis is not evidenced by her willingness to maintain precedents with which she *agrees*, but by her willingness to maintain precedents with which she *disagrees*. As the most recent example of Justice KELLY's willingness to reverse precedents with which she actually disagrees, see her opinion in *Haynes v Neshawat*, 477 Mich 29; 729 NW2d 488 (2007), overruling *Kassab v Michigan Basic Prop Ins Assn*, 441 Mich 433; 491 NW2d 545 (1992).

[4] The summaries obviously cannot do full justice to the issues involved in these cases. These are designed simply to identify the essential issue in controversy in these 40 cases.

[5] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[6] In response to this inquiry, Justice KELLY now posits a standard that would assess whether a precedent is " 'free from absurdity, not mischievous in practice, and consistent with one another.' " *Post* at p 255 n 8

(3) Perhaps the most significant point of the chart is that no meaningful discussion of a court's attitude toward precedent can be based solely on an arithmetical analysis in which raw numbers of overrulings are simply counted. Such an analysis obscures that not all precedents are built alike, that some are better reasoned than others, that some are grounded in the exercise of discretionary judgments and others in the interpretation of plain language, that some are thorough in their analyses and others superficial. The chart demonstrates that the overrulings of precedent occurring during the past seven terms have overwhelmingly come in cases involving what the justices in the majority view as the misinterpretation of straightforward words and phrases in statutes and contracts, in which words that were *not* there were read into the law or words that *were* there were read out of the law.[7] Where such misinterpretation occurs, not only does this Court disregard its duty to interpret the law, eroding the constitutional separation of powers in the process, the Court also overturns compromises made in the legislative process, second-guesses judgments of the lawmaker, and renders the law increasingly arbitrary and unpredictable.

(4) The chart also makes clear that the present court majority has been disciplined in stating expressly when a precedent has been overruled. The majority has never

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(citation omitted). While at least this is a standard of sorts, it is hard to imagine a standard more deferential to judges and less deferential to the law.

[7] The instant case illustrates this proposition well for Justice KELLY, unlike the justices in the majority, would effectively engraft onto MCL 691.1404 language upholding its 120-day notice requirement only if there was "prejudice caused to the government by the failure to supply notice within such time." Thus, the 120-day notice requirement would sometimes mean what it says and would sometimes not. Whatever the policy merits of Justice KELLY's amendments from the bench, such language nowhere appears within the actual statute enacted by the Legislature.

attempted to obscure when a precedent was overruled or to minimize the number of such precedents by dubious "distinguishings" of prior caselaw. Rather, it has been forthright in identifying and critiquing precedents that were viewed as wrongly decided and warranting overruling. As the chart demonstrates, on a significant number of past occasions, the Court left *intact* precedents that were inconsistent with new decisions, essentially allowing future litigants to choose among inconsistent precedents as in columns A and B of a Chinese restaurant menu. For this reason in particular, while it may well be that the present majority has overruled more precedents than its predecessors during some selected equivalent period, this cannot be stated with confidence by Justice KELLY or by anyone else for it has not been demonstrated.[8]

(5) The debate in which Justice KELLY wishes to participate is one in which an overruling of precedent, any overruling of precedent, is a "bad" thing and is to be deplored. She is less interested in the far more significant and nuanced debate of when precedents ought to be sustained and when they ought not to be. How does a justice thoughtfully apply the standards set forth in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000)? How does a justice balance the need to respect precedents with his or her oath in support of the United States and Michigan constitutions? When does a justice weigh his or her obligation to follow the opinions of his or her prede-

[8] Justice KELLY identifies 61 overruled precedents during the years in question, rather than the 40 (or 43) we identify. This is because, in several instances, she treats as multiple overrulings an opinion overruling a single proposition of law that has been reiterated by the Court. Thus, for example, a decision to overrule the standard for granting summary judgment— a standard articulated in countless opinions of this Court— might count as an overruling of each of these opinions.

cessors with his or her obligation to get the law "right"?[9] There are no simple or pat answers to these questions. The people of Michigan, whose law it is that this Court upholds, may read the decisions contained in this chart and determine for themselves whether Justice KELLY or the justices in the majority have served better as stewards of the judicial power under the Michigan Constitution.

	Case	Which Overruled	Which in Turn Overruled	Case Holding
1	*Paige v City of Sterling Hts*, 476 Mich 495; 720 NW2d 219 (2006)	*Hagerman Group v Gencorp Automotive*, 457 Mich 720; 579 NW2d 347 (1998)	*Hagerman* failed to follow *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913).	The language "the proximate cause," MCL 418.375(2), means "the" proximate cause, not "a" proximate cause.
2	*People v Anstey,* 476 Mich 436; 719 NW2d 579 (2006)	*People v Koval,* 371 Mich 453; 124 NW2d 274 (1963)		Dismissal is not the proper remedy for a violation of the statutory right to an independent chemical test because MCL 257.625a(6) does not specify such a remedy.

[9] Justice KELLY makes light of what she describes as this Court's belief in its "solemn duty" to "rewrite Michigan caselaw to 'get the law "right." ' " *Post* at p 256 n 10 . Although as *Robinson*, *supra* at 463-468 makes clear, a variety of factors must be considered in evaluating whether to overrule a precedent, I do confess to thinking that "getting the law right" is a rather significant part of this Court's constitutional responsibilities. For Justice KELLY, however, a misreading of the law is apparently acceptable as long as it is "free from absurdity." A rather tolerant standard. I would prefer to hold this Court to a higher standard in interpreting the will of the people and their elected representatives. See also *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 756; 641 NW2d 567 (2002), observing that a legal system in which "the public may read the plain words of its law and have confidence that such words mean what they say" serves many of the same goals as stare decisis.

3	*Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006)	*Geiger v Detroit Automobile Inter-Ins Exch*, 114 Mich App 283; 318 NW2d 833 (1982); *Geiger* relied on *Lambert v Calhoun*, 394 Mich 179; 229 NW2d 332 (1979)	*Lambert* overruled *Holland v Eaton*, 373 Mich 34; 127 NW2d 892 (1964).	The language "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action commenced," MCL 500.3145(1), means that a claimant may only recover for damages suffered within 1 year of filing suit.
4	*Grimes v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006)	*Gregg v State Highway Dep't*, 435 Mich 307; 458 NW2d 619 (1990)	*Gregg* ignored *Scheurman v Dep't of Transportation*, 434 Mich 619; 456 NW2d 66 (1990), and failed to follow *Roy v Dep't of Transportation*, 428 Mich 330; 408 NW2d 783 (1987), and *Goodrich v Kalamazoo Co*, 304 Mich 442; 8 NW2d 130 (1943).	The language "improved portion of the highway designed for vehicular traffic," MCL 691.1402(1), does not include the shoulder because a shoulder is not designed for vehicular traffic.
5	*Joliet v Pitoniak*, 475 Mich 30; 715 NW2d 60 (2006)	*Jacobson v Parda Fed Credit Union*, 457 Mich 318; 577 NW2d 81 (1998)	*Jacobson* failed to follow *Champion v Nationwide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996).	The language "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results," MCL 600.5827,

				means that a claim for a violation of the Civil Rights Act accrues on the actual date the alleged discriminatory acts occur.
6	*People v Hawthorne*, 474 Mich 174; 713 NW2d 724 (2006)	*People v Jones*, 395 Mich 379; 236 NW2d 461 (1975); *People v Lester*, 406 Mich 252; 277 NW2d 633 (1979), and their progeny		The language "[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury . . . unless . . . it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice," MCL 769.26, means that a trial court's failure to instruct on the defense of accident does not require automatic reversal of a defendant's conviction.
7	*Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005)	*Lewis v Detroit Automobile Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986)	*Lewis* failed to follow *Dahrooge v Rochester-German Ins Co*, 177 Mich 442; 143 NW 608 (1913).	The language "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the

				date on which the action commenced," MCL 500.3145(1), means that a plaintiff may only recover for damages suffered within 1 year of filing suit.
8	*Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005)	*Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976); *Camelot Excavating Co v St Paul Fire & Marine*, 410 Mich 118; 301 NW2d 275 (1981); *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14; 564 NW2d 857 (1997)	*Tom Thomas* failed to follow *Dahrooge v Rochester-German Ins Co*, 177 Mich 442; 143 NW 608 (1913); *McIntyre v Michigan State Ins Co*, 52 Mich 188; 17 NW 781 (1883); *Law v New England Mut Accident Ass'n*, 94 Mich 266; 53 NW 1104 (1892); *Turner v Fidelity & Cas Co*, 112 Mich 425; 70 NW 898 (1897); *Harris v Phoenix Accident & Sick Benefit Ass'n*, 149 Mich 285; 112 NW 935 (1907); *Friedberg v Ins Co of North America*, 257 Mich 291; 241 NW 138 (1932); *Hall v Metropolitan Life Ins Co*, 274 Mich 196; 264 NW 340 (1936); *Barza v Metro-*	The language "a claim or suit must be brought within 1 year from the date of the accident" means that a claim or suit must be brought within 1 year from the date of the accident.

			politan Life Ins Co, 281 Mich 532; 275 NW 238 (1937); and *Bashans v Metro Mut Ins Co*, 369 Mich 141; 119 NW2d 622 (1963). *Herweyer* implicitly overruled *State Farm Mut Automobile Ins Co v Ruuska,* 412 Mich 335; 314 NW2d 184 (1982).	
9	*People v Bell*, 473 Mich 275; 702 NW2d 128 (2005)	*People v Miller*, 411 Mich 321; 307 NW2d 335 (1981); *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998)		Dismissal is not the proper remedy for a violation of the statutory right to a peremptory challenge because MCL 768.13 does not specify such a remedy.
10	*Garg v Macomb Community Mental Health*, 472 Mich 263; 696 NW2d 646 (2005)	*Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986)		The language "[t]he claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results," MCL 600.5827, as applied to the three-year period of limitations in MCL 600.5805(10), means that a plaintiff must commence an action within

				three years of a claimed violation of the Civil Rights Act.
11	*Echelon Homes, LLC v Carter Lumber Co,* 472 Mich 192; 694 NW2d 544 (2005)	*People v Tantenella*, 212 Mich 614; 180 NW 474 (1920)		The ability of a person to collect trebled damages from "[a]nother person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted," MCL 600.2919a, means that the buyer must have actual knowledge that the property in question was "stolen, embezzled, or converted."
12	*People v Davis*, 472 Mich 156; 695 NW2d 45 (2005)	*People v Cooper*, 398 Mich 450; 247 NW2d 866 (1976)	*Cooper* failed to follow *Bartkus v Illinois,* 359 US 121; 79 S Ct 676; 3 L Ed 2d 684 (1959).	An "offense" is a violation of the law of a sovereign. Where a defendant by the commission of one act vio-

				lates the law of two sovereigns, the language "[n]o person shall be subject for the same offense to be twice put in jeopardy," Const 1963, art 1, § 15, does not prohibit two separate sovereigns from prosecuting a defendant for that act.
13	*People v Young*, 472 Mich 130; 693 NW2d 801 (2005)	*People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974)		The language "[t]he court shall instruct the jury as to the law applicable to the case . . . as in his opinion the interests of justice may require," MCL 768.29, means that the trial court has discretion to give a cautionary accomplice instruction, but is not mandated to do so.
14	*Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004)	*Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987)		The language "a cause of action shall not arise for injuries to a person who is on the land of another . . . for the purpose of . . . outdoor recreational use- . . .against the

				owner . . . of the land . . . ," MCL 324.73301(1), applies to all land used for outdoor recreational use, not just "large tracts of undeveloped land."
15	*People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004)	*People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973)		The language "[i]n every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense," Const 1963, art 1, § 20, means that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial proceedings.
16	*Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004)	*Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000)		The language "[t]he statutes of limitations or repose are tolled," MCL 600.5856, does not toll the additional period permitted under MCL 600.5852 for filing wrongful death actions because it is not a statute of limitations or repose.

17	*People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004)	*People v White*, 390 Mich 245; 212 NW2d 222 (1973)	*White* expressly overruled *People v Grimmett*, 388 Mich 590, 607; 202 NW2d 278 (1972); *People v Parrow*, 80 Mich 567; 45 NW 514 (1890); and *People v Ochotski*, 115 Mich 601; 73 NW 899 (1898).	The language prohibiting successive prosecutions of the "same offense," Const 1963, art 1, § 15, means that successive prosecutions are prohibited only where the charged offenses share identical elements.
18	*Rakestraw v Gen Dynamics Land Systems, Inc,* 469 Mich 220; 666 NW2d 199 (2003)	*Carter v Gen Motors Corp,* 361 Mich 577; 106 NW2d 105 (1960)		The language "personal injury arising out of and in the course of employment," MCL 418.301(1), means that a claimant must establish both an injury "arising out of" his or her employment and that any symptom, such as pain, complained of by the claimant must be causally linked to such injury, and, thus, where a claimant claims to have suffered an injury whose symptoms are consistent with a preexisting condition, he or she must establish the exist-

				ence of a work-related injury that extends beyond the manifestation of symptoms of the underlying preexisting condition.
19	*Wilkie v Auto-Owners Ins Co,* 469 Mich 41; 664 NW2d 776 (2003)	*Powers v Detroit Automobile Inter-Ins Exch*, 427 Mich 602; 398 NW2d 411 (1986); *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991)	*Powers* failed to follow *Raska v Farm Bureau Mut Ins Co,* 412 Mich 355; 314 NW2d 440 (1982). *Vanguard* failed to follow *Powers* and *Michigan Millers Mut Ins Co v Bronson Plating Co,* 445 Mich 558; 519 NW2d 864 (1994).	The language "total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile" means the total amount available to the owner, not the amount actually received by the claimant.
20	*Jones v Dep't of Corrections,* 468 Mich 646; 664 NW2d 717 (2003)	*In re Lane*, 377 Mich 695; 387 NW2d 912 (1966); *Stewart v Dep't of Corrections*, 382 Mich 474; 170 NW2d 16 (1969)		The relinquishment of the parole board's authority to revoke parole is not the proper remedy for a violation of the statutory right to a hearing within 45 days after the parolee is "returned or is available for return" to prison for a parole violation because MCL 791.240a(1) does not specify such a remedy.

21	*People v Hawkins*, 468 Mich 488; 664 NW2d 717 (2003)	*People v Sherbine*, 421 Mich 502; 364 NW2d 658 (1984); *People v Sloan*, 450 Mich 160; 538 NW2d 380 (1995)		An application of the exclusionary rule is not the proper remedy for the seizure of evidence based on either a search warrant issued in violation of MCL 780.653(b) or a bench warrant issued in violation of MCR 3.606(A) because neither the statute nor the court rule contemplates such a remedy.
22	*Haynie v Michigan*, 468 Mich 302; 664 NW2d 129 (2003)	*Koester v Novi*, 458 Mich 1; 580 NW2d 835 (1998)		The language "unwelcome sexual advances, requests for favors, and other verbal or physical conduct of a sexual nature," MCL 37.2103(i), means that conduct or communication that is gender-based but not sexual in nature does not constitute "sexual harassment" under the Civil Rights Act.
23	*Rednour v Hastings Mut Ins Co*, 468 Mich 241; 661 NW2d 562 (2003)	*Nickerson v Citizens Mut Ins Co*, 393 Mich 324; 224 NW2d 896 (1975)	*Nickerson* predated the no-fault act.	The language "in, upon, getting in, on, out or off" a vehicle does not include mere physical

				contact with a vehicle.
24	*Taylor v Smithkline Beecham Corp*, 468 Mich 1; 658 NW2d 127 (2003)	*Dearborn Independent, Inc v Dearborn*, 331 Mich 447; 49 NW2d 370 (1951)		MCL 600.2946(5), which states that a drug is not "defective or unreasonably dangerous" if "the drug was approved for safety and efficacy by the United States food and drug administration (FDA), and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller," does not improperly delegate the legislative power to a federal agency because the FDA's determination regarding the safety and efficacy of drugs has independent significance to, and is made independently of any consideration of, the impact of Michigan tort law.

25	*Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002)	*McCummings v Hurley Med Ctr*, 433 Mich 404; 446 NW2d 114 (1989)	*McCummings* overruled *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223; 393 NW2d 847 (1986), and *McCann v Dep't of Mental Health*, 398 Mich 65; 247 NW2d 52 (1976).	The language "[e]xcept as otherwise provided in [the governmental tort liability] 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), means that because the governmental tort liability act does not include a sexual orientation discrimination exception to governmental immunity, the government is immune from tort liability for claims of sexual orientation discrimination.
26	*Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002)	*Haske v Transport Leasing Inc*, 455 Mich 628; 566 NW2d 896 (1997)	*Haske* overruled *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201 (1995).	The definition of "disability" in MCL 418.301(4) as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related

				disease" means that a workers' compensation magistrate must determine both that the claimant suffered a work-related injury and that the injury has actually resulted in a loss of wage-earning capacity in work suitable to the employee's training and qualifications in the ordinary job market.
27	*People v Petit*, 466 Mich 624; 648 NW2d 193 (2002)	*People v Berry*, 409 Mich 774; 298 NW2d 434 (1980)	*Berry* interpreted the former GCR 1963, 785.8, which differs from the current MCR 6.425(D)(2)(c).	The language "the court must, on the record . . . give the defendant . . . an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence," MCR 6.425(D)(2)(c), means that the court must give the defendant an "opportunity" to address the court before sentence is imposed; it does not mean that the court must specifically ask the defendant

				whether he or she has anything to say on his or her behalf.
28	*People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002)	*People v Atley*, 392 Mich 298; 220 NW2d 465 (1974).		Under MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and, thus, so long as evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences.
29	*People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002)	*People v Jones*, 395 Mich 379; 236 NW2d 461 (1975); *People v Chamblis*, 395 Mich 408; 236 NW2d 473 (1975); *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975); *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982)	*Jones* and its progeny failed to follow *Hanna v People*, 19 Mich 316 (1869).	The language "the jury . . . may find the accused . . . guilty of a degree of that offense inferior to that charged in the indictment . . .," MCL 768.32(1), means that a requested instruction on a necessarily included lesser of-

				fense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.
30	*Koontz v Ameritech*, 466 Mich 304; 645 NW2d 34 (2002)	*White v McLouth Steel Products*, decided sub nom *Corbett v Plymouth Twp*, 453 Mich 522; 556 NW2d 478 (1996)		An employee who had taken a pension benefit in a lump sum has "received" a retirement benefit as defined by MCL 421.27(f)(1) and, therefore, the statute mandates coordination of the employee's unemployment benefits with his or her pension benefits.
31	*Robertson v Daimler-Chrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002)	*Gardner v Van Buren Pub Schools*, 445 Mich 23; 517 NW2d 1 (1994)		The language "[m]ental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof," MCL 418.301(2), means that, in order to recover workers' compensation benefits, a claimant

				must demonstrate both that there has been an actual employment event leading to the disability and that the claimant's perception of such actual employment event was reasonably grounded in fact or reality.
32	*Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002)	*Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988); *Li v Feldt*, 434 Mich 584; 456 NW2d 55 (1990)		The language "this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965," MCL 691.1407, means that the state, not a municipality, may be subject to liability under a common-law exception to governmental immunity.
33	*Brown v Genesee Co Bd of Comm'rs*, 464 Mich 430; 628 NW2d 471 (2001)	*Green v Dep't of Corrections*, 386 Mich 459; 192 NW2d 491 (1971)		The language "members of the public," MCL 691.1406, does not include jail inmates who are legally compelled to be in jail.
34	*MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001)	*Mason v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997)	*Mason* failed to follow *Williams v Cunningham Drug Stores, Inc,* 429 Mich	Generally, a merchant has no obligation to anticipate and prevent crimi-

			495; 418 NW2d 381 (1988), and *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993).	nal acts against its invitees; rather, a merchant's only duty is to respond reasonably to a specific situation occurring on the premises that poses a risk of imminent and foreseeable harm to identifiable invitees.
35	*People v Glass*, 464 Mich 266; 627 NW2d 261 (2001)	*People v Duncan*, 388 Mich 489; 201 NW2d 629 (1972)		The power granted to this Court under Const 1963, art 6, § 5, to "establish, modify, amend and simplify the practice and procedure in all courts of this state" does not extend to enacting court rules that establish, abrogate, or modify the substantive law.
36	*Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000)	*Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996)	*Pick* failed to follow *Scheurman v Dep't of Transportation*, 434 Mich 619; 456 NW2d 66 (1990).	The language "improved portion of the highway designed for vehicular travel," MCL 691.1402(1), does not include traffic control devices, such as traffic signs, that are not part of the actual roadbed itself.

37	*Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000)	*Goff v Bil-Mar Foods, Inc*, 454 Mich 507; 563 NW2d 214 (1997); *Layman v Newkirk Electric Ass'n Inc*, 458 Mich 494; 581 NW2d 244 (1998)	*Goff* implicitly overruled *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992).	The language "the findings of fact made by the commission acting within its power, in the absence of fraud, shall be conclusive," MCL 418.861a(14), does not require the judiciary to examine the magistrate's decision to determine whether that decision is supported by substantial evidence.
38	*Stitt v Holland Abundant Life,* 462 Mich 591; 614 NW2d 88 (2000)	*Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970)		Under the common law, an invitee's status is dependent on a visit associated with a "commercial purpose" and "mutuality of interest" concerning the reason for the visit. Where a person is on church premises for purposes other than "commercial purposes," he or she is a licensee and not an invitee.
39	*Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000)	*Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983); *Rogers v Detroit*, 457 Mich 125; 579 NW2d	*Dedes* failed to follow *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913).	The language "the proximate cause," MCL 691.1405, means "the" proximate cause, not "a"

		840 (1998); *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994)		proximate cause.
40	*People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000)	*People v Taylor*, 454 Mich 580; 564 NW2d 24 (1997)	*Taylor* misconstrued *Taylor v United States*, 286 US 1, 6; 52 S Ct 466; 76 L Ed 951 (1932), and *Johnson v United States*, 333 US 10, 13; 68 S Ct 367; 92 L Ed 436 (1948).	The smell of marijuana emanating from a motor vehicle detected by an officer qualified to identify that odor may establish a "substantial basis" for inferring a "fair probability" that the vehicle contains marijuana and, therefore, the probable cause necessary to justify a search without a warrant of that motor vehicle, pursuant to the motor vehicle exception to the warrant requirement.

KEY: This chart represents cases decided after January 1, 2000, in which Justice KELLY dissented and in which a majority of the Court voted to overrule a decision. The reasoning of the Court majority is set forth in highly summary form; the reader should refer to the opinion as a whole for clarifying detail.

WEAVER, J. (*concurring in part and dissenting in part*). I agree with Justice KELLY's well-reasoned opinion concurring in part and dissenting in part and join parts I and II of her opinion, excluding footnotes 8, 10, 12, and 13.

KELLY, J. (*concurring in part and dissenting in part*). I agree with the majority's conclusion that defendant was entitled to summary disposition in this case. But my agreement stops there. The majority unnecessarily reaches the issue whether defendant must show actual prejudice in order to bar a claim filed more than 120 days after the date of the injury.

Plaintiff failed to supply defendant with the statutorily required notice specifying "the exact location and nature of the defect, the injuries sustained, and the names of the witnesses known at the time by the claimant." MCL 691.1404(1). Therefore, defendant did not need to show actual prejudice arising from untimeliness of the notice. The lower courts erred in reaching the actual prejudice issue, as does the majority in this Court. The matter should be decided only on the basis of the deficiency of the contents of the notice. By stretching to entertain the timeliness-of-notice issue and, in doing so, by needlessly overturning two more precedents, the majority invites renewed accusations of judicial activism.

I. THE SPECIFIC NOTICE IN THIS CASE WAS INSUFFICIENT

MCL 691.1404(1) provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Plaintiff sent the following notice to defendant by certified mail:

Re:	My Client	Joanne Rowland
	Date of Accident:	February 6, 2001
	Location:	Intersection of Jennings and Main Street Northfield Township
	My File No.	4803

Dear Sir/Madam:

Please be advised that I have been retained by Mr. [sic] Joanne Rowland to investigate and evaluate a claim for personal injuries that arose out of an incident that occurred on February 6, 2001. This incident occurred at the intersection of Jennings and Main Street in Northfield Township, County of Washtenaw, State of Michigan. Please be advised that I will continue my investigation and if the same is warranted, will pursue a claim for money damages against the responsible agency for jurisdiction [sic] of this roadway. If I do not hear from you within the near future, I will be forced to place this matter into litigation.

To support the notice required by MCL 691.1404(1), plaintiff relies also on a Freedom of Information Act (FOIA)[1] request made by plaintiff's attorney. It provides:

Re:	My Client	Joanne Rowland
	Date of Accident:	February 6, 2001
	Location:	Intersection of Jennings and Main Street Northfield Township
	My File No.	4803

Dear Sir/Madam:

Please be advised that I represent Joanne Rowland who was injured at the above location. Please produce or make available for viewing and copying, any photo logs or video logs maintained by the Washtenaw County Road Commission showing the intersection of Jennings and Main Street.

[1] MCL 15.231 *et seq*.

> Please be advised that this letter is being sent to you pursuant to the Freedom of Information Act.

To be sufficient under MCL 691.1404(1), notice must include four components: (1) the exact location of the defect; (2) the exact nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time of the notice. The above quoted letters do not satisfy all four requirements. Glaringly absent is the second requirement. Nowhere in the material provided to defendant did plaintiff indicate the nature of the defect.

Reference to the defect appears in her complaint, where plaintiff claims that she was injured when she tripped and fell on "broken, uneven, dilapidated, depressed and/or potholed areas"[2] in the roadway and crosswalk. But no such information is included in either the notice or the FOIA request. In fact, the notice does not even hint at the conditions alleged in the lawsuit. Nothing found there gives rise to an inference that plaintiff encountered a pothole, and nothing indicates that plaintiff's injuries were caused by broken pavement.

MCL 691.1404(1) specifies that the notice contain an "exact" statement of the defect. Because plaintiff's notice contains no reference at all to the defect, it certainly does not rise to the level of an exact statement. MCL 691.1404(1) utilizes the mandatory word "shall" in setting forth the four required components of notice.[3] Plaintiff's failure to meet one of the four statutory requirements cannot be excused. Consequently, her claim must be dismissed. I would reverse the Court of Appeals decision and remand the case to the trial court for entry of summary disposition in favor of defendant.

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[2] Plaintiff's Complaint and Demand for Trial by Jury, ¶ 8.

[3] Use of the word "shall" sets forth a mandatory directive, whereas use of the term "may" is permissive. See *Oakland Co v Michigan*, 456 Mich 144, 154 n 10; 566 NW2d 616 (1997) (opinion by KELLY, J.).

II. IT IS UNNCESSARY TO REACH *HOBBS*[4] AND *BROWN*[5]

The Michigan Supreme Court in *Hobbs* found that the only purpose of the statutory notice provision is to avoid actual prejudice arising from a lack of notice within 120 days. *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976). *Hobbs* concluded, "[A]bsent a showing of such prejudice the notice provision contained in MCLA 691.1404; MSA 3.996(104) is not a bar to claims filed pursuant to MCLA 691.1402; MSA 3.996(102)." *Id*. In *Brown*, the Court specifically addressed whether *Hobbs* should be overturned. *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356; 550 NW2d 215 (1996). After due consideration, we retained *Hobbs*'s interpretation of the 120-day requirement:

> We are not convinced that *Hobbs* was wrongly decided. Further, we believe that more injury would result from overruling it than from following it. The rule in *Hobbs* has been an integral part of this state's governmental tort liability scheme for almost two decades. It should not be lightly discarded. Although the law of governmental tort liability in this state has changed over the years, the continued validity of the *Hobbs* rule will not result in injustice. Rather, a reaffirmance of the rule will maintain the uniformity, certainty, and stability in the law of this state.
>
> Further, we emphasize that the Legislature has not changed the language of § 4 since *Hobbs* was decided. [*Id*. at 366-367.]

In this case, the majority does not direct itself to the contents of the notice. Rather, it jumps directly to the fact that plaintiff provided the notice more than 120 days after the date of injury. However, given that the notice was deficient, the date that plaintiff provided it is inconsequential. Even if plaintiff had given notice

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[4] *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976).

[5] *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996).

within 120 days, under MCL 691.1404(1) defendant would have been entitled to summary disposition.

It is an exception to the rule of governmental immunity that a government agency can be liable in tort for its failure to properly maintain a highway under its jurisdiction. In order to safeguard an agency that might fall within this exception, the Legislature created the precondition of notice in MCL 691.1404(1). *Brown*, 452 Mich at 359. The information in the notice assists the agency in determining what evidence it needs to evaluate the claim. *Id*. at 362. The 120-day requirement ensures that the agency has an opportunity to investigate while the evidence it needs is still available. This is why both *Brown* and *Hobbs* concluded that actual prejudice to the agency because of a lack of timely notice is the only legitimate purpose of the notice provision. *Id*. at 366; *Hobbs*, 398 Mich at 96. Conversely, if the agency can gather the needed evidence and evaluate the claim even though notice is late, the agency is not prejudiced, and the purpose of MCL 691.1404(1) is effectuated.

Therefore, when a court reviews a notice, it must first examine its contents. If the contents do not provide the agency with the information necessary for an investigation and evaluation of the claim, the notice is insufficient. This would be true even if the notice were given on the first day after the claimed damage occurred. In this case, the lower courts failed to consider this point and proceeded directly to the final step of the inquiry. There was no need or justification for doing so, given the fatal flaws in the contents of the notice. The lower courts erred in even considering the timeliness issue.

The majority here makes the same error. It does not conduct an individualized review of the contents of the

notice. Rather, it focuses on the timeliness issue, reconsiders *Brown* and *Hobbs*, and overturns them.[6]

In order to set these decisions aside, the majority must discuss the constitutional implications of MCL 691.1404. It is a well-accepted rule that an appellate court should not reach a constitutional issue if a case can be decided on other grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). There would be no need to reach the constitutional question if the majority properly focused on plaintiff's failure to provide adequate notice.

The result it reaches exhibits disrespect for stare decisis. While we can all agree that the doctrine of stare decisis is not an inexorable command, we also all know that it is the backbone of American justice. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991).[7]

The United States Supreme Court has observed that " '[t]he doctrine carries such persuasive force that we

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[6] Regrettably, this action is consistent with the alarming and unprecedented rate at which this majority overturns precedent. See Todd C. Berg, Esq., *Overruling Precedent and the MSC*, Michigan Lawyers Weekly <http://www.michiganlawyersweekly.com/subscriber/archives.cfm?page=MI/06/B060691.htm&recID=389963> (accessed November 10, 2006).

[7] The majority disagrees with my assessment of which issue should be reached first in this case. The respect for stare decisis and the avoidance of unnecessary constitutional issues provide ample reasons to deal with the simple issue of the sufficiency of the notice first. The majority offers no explanation why the first question must be the continued validity of *Hobbs* and *Brown*.

have always required a departure from precedent to be supported by some "special justification." ' " *United States v IBM*, 517 US 843, 856; 116 S Ct 1793; 135 L Ed 2d 124 (1996), quoting *Payne*, 501 US 842 (Souter, J., concurring), quoting *Arizona v Rumsey*, 467 US 203, 212; 104 S Ct 2305; 81 L Ed 2d 164 (1984). Former United States Attorney General Jeremiah S. Black eloquently stated the justification for adherence to precedent when he sat on the Supreme Court of Pennsylvania:

> It is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may fairly be said to have no law; for law is a fixed and established *rule*, not depending in the slightest degree on the caprice of those who may happen to administer it. I take it that the adjudications of this Court, when they are free from absurdity, not mischievous in practice, and consistent with one another, are the law of the land. It is this law which we are bound to execute, and not any "higher law," manufactured for each special occasion out of our own private feelings and opinions. If it be wrong, the government has a department whose duty it is to amend it, and the responsibility is not in any wise thrown upon the judiciary. The inferior tribunals follow our decisions, and the people conform to them because they take it for granted that what we have said once we will say again. There being no superior power to define the law for us as we define it for others, we ought to be a law unto ourselves. If we are not, we are without a standard altogether. The uncertainty of the law—an uncertainty inseparable from the nature of the science—is a great evil at best, and we would aggravate it terribly if we could be blown about by every wind of doctrine, holding for true to-day what we

> repudiate as false to-morrow. [*McDowell v Oyer*, 21 Pa 417, 423 (1853) (emphasis in original).][8]

No special justification exists in this case to attack the precedent created by *Brown* and *Hobbs*. Rather, the case can be decided on other grounds without upsetting established law or rejecting precedent. When courts stretch to overturn precedent, they destroy the very certainty and stability that stare decisis is designed to protect. Such actions bring disrespect to our Court.

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[8] Justice MARKMAN challenges me to develop my "own standards" concerning when I would overturn precedent. But I have no need to create my own standards when well-reasoned standards have been established in the laws of this country for over 150 years. As noted in *McDowell*, when precedents are "free from absurdity, not mischievous in practice, and consistent with one another," they should be retained. *McDowell*, 21 Pa at 423. I would not lightly adopt new rules to guide my judicial philosophy when traditional tools used by courts throughout their history continue to serve well. In this line, I willingly apply interpretive aids such as the absurd results rule and the legislative acquiescence doctrine to guide my decisions. I regret that the justices constituting the current majority on this Court have abandoned these tools.

The majority states that I fail to respond to Justice MARKMAN's challenge to develop my own standard for overturning cases. In questioning what standard I would prefer, the majority shifts the discussion's focus from where it belongs: on its own lack of respect for the rule of stare decisis.

The majority apparently misses the point of my reference to interpretive aids. Quite simply, it dismisses traditional tools and interpretative processes and shows disrespect for the judicial minds that came before it. It then overturns precedent at an unparalleled rate. One discarded tool, legislative acquiescence, is especially relevant to this discussion. If one accepts the premise that the Legislature can and will change the law when it disagrees with a court's interpretation, a court is not tempted to act in its place.

The majority claims that the standard I would apply to decide if stare decisis should be retained is "unworkable." To justify this conclusion, it mischaracterizes and misquotes my dissenting opinion in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). In fact, the majority uses the same mischaracterization it made in the majority opinion in *Sington*. I will reiterate my point: when precedents are "free from absurdity, not mischievous in practice, and consistent with one another," they should be retained. *McDowell*, 21 Pa at 423.

The majority's decision to reject stare decisis in this case conflicts with even its own statement about when such action is appropriate. The majority has indicated that the reasoning of stare decisis should be reexamined only where a holding is " ' "fairly called into question." ' " *Sington v Chrysler Corp*, 467 Mich 144, 161; 648 NW2d 624 (2002), quoting *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Mitchell v W T Grant Co*, 416 US 600, 627-628; 94 S Ct 1895; 40 L Ed 2d 406 (1974) (Powell, J., concurring). When the Court need not reach an issue in order to make its decision in a case, then that issue has not been fairly called into question.

This Court addressed *Brown* a mere ten years ago. What has changed in that decade to warrant a complete reversal in this law? There is but one answer, the makeup of the Court. The law has not changed. Only the individuals wearing the robes have changed.[9] It is amazing how often the members of this majority have declared themselves more capable of understanding the law and reaching the "right" result than any justice who sat before.[10] "It is this law which we are bound to execute, and not any 'higher law,' manufactured for each-

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[9] Ironically, so little else has changed that the very same attorney who argued in Brown to overturn *Hobbs* returned to argue this case.

[10] This is a theme throughout Justice MARKMAN's concurring opinion. He seems to believe that it is the solemn duty of this majority to rewrite Michigan caselaw to "get the law 'right.' " *Ante* at 228. This predisposition to find so much caselaw wrongly decided contributes to the majority's seeming wholesale second-guessing of earlier decisions and renders the law increasingly arbitrary and unpredictable. Appropriate respect for stare decisis and for those who sat on this Court before us would greatly contribute to ending such instability.

I do not fault the majority for wanting to get the law "right." I fault it for repeatedly deciding matters as if only it can reach a correct interpretation of the law. This case provides an example. Two prior incarnations of this Court reviewed the same issue and came to the same decision. The Legislature had decades to change the statute if it believed that *Hobbs* and *Brown* were incorrectly decided, yet it did nothing. But this majority still concludes that the Court's interpretation of the law was

special occasion out of our own private feelings and opinions." *McDowell*, 21 Pa at 423. The majority has ordained itself master of such "higher law."[11] In doing so, it undermines the stability of Michigan's courts and damages the integrity of the judicial process. *Payne*, 501 US at 827.[12] I must strenuously dissent from such activity.[13]

"wrong" this entire time. Surely it is not only the four justices currently making up the majority of this Court who are capable of correctly discerning what the Legislature meant.

[11] A quote from Justice EUGENE BLACK seems apropos for this case:

> At one time students and citizens, lay and professional, were taught that everyone is presumed to know the law, and hence is duty bound to act in accord therewith. But how may even skilled lawyers, and correspondingly skilled subordinate court judges, "know the law" when they are taught that the law in the books is not law at all, unless upon litigatory test a bare majority of this very ordinary Supreme Court happens to like it? Former Justice VOELKER's latest epigram comes to mind at this point. I quote it from "Laughing Whitefish", p 239 (McGraw-Hill 1965):
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> "Clapping a black nightshirt on a lawyer and packing him off to the state capital and thenceforth calling him "Mister Justice" makes him no less fallible and uncertain than he was when he was back home drawing five-dollar wills." [*Autio v Proksch Constr Co*, 377 Mich 517, 542-543; 141 NW2d 81 (1966) (BLACK, J., dissenting).]

[12] Justice MARKMAN implies that I would not have the same respect for stare decisis if majority control of the Court switched during my tenure. This amounts to little more than a circumstantial ad hominem logical fallacy. (see <http://en.wikipedia.org/wiki/Ad_hominem> [accessed March 9, 2007]). Nothing in my decade-long tenure as a judge before the current majority was installed substantiates the conjecture that I would indulge in wholesale reversal of precedent if the opportunity arose. In the end, I am willing to put my "fealty" to stare decisis to the test. I encourage all who read this opinion to compare my record of adherence to precedent with the majority's. For assistance in this, I refer the reader to Todd C. Berg, Esq., *Overruling Precedent and the MSC, The Justices' Scorecard*, Michigan Lawyers Weekly,<http://www.michiganlawyersweekly.com/subscriber/archives_FTS.cfm?page=MI/06/B060691.htm&recID=389963&QueryText=overruling%20and%20precedent%20and%20msc> (accessed December 22, 2006).

[13] The majority characterizes my discussion of their disrespect for stare decisis as a "canard." Those familiar with this Court know that the

III. EVEN IF THEY SHOULD BE REACHED, *HOBBS* AND *BROWN* SHOULD NOT BE OVERTURNED

Even if it were proper to reach the 120-day notice requirement in this case, it would not be appropriate to overturn *Hobbs* and *Brown*. Together, these cases represent 30 years of precedent on the proper meaning and application of MCL 691.1404. Such a considerable history cannot be lightly ignored. And the Legislature's failure to amend the statute during this time strongly indicates that *Hobbs* and *Brown* properly effectuated its intent when enacting MCL 691.1404(1).

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majority's unprecedented attack on stare decisis is not a mere groundless rumor. The numbers do not lie. The present majority has overturned more than three times as many precedents as did those who immediately preceded it (61 precedents overturned in five years by this majority compared to 18 by its predecessor). This is despite the fact that the earlier incarnation of the Court disposed of almost 3,000 more cases (13,923 total dispositions by this majority in five years as compared to 16,729 total dispositions by its predecessor). See Todd C. Berg, Esq., *Overruling Precedent and the MSC, The "Pre-1999 Court" vs. The "Majority Court"*, Michigan Lawyers Weekly, <http://www.michiganlawyersweekly.com/subscriber/archives_FTS.cfm?page=MI/06/B060691.htm&recID=389963&QueryText=overruling%20and%20precedent%20and%20msc> (accessed December 22, 2006). This disparity is astounding. Also astounding is the majority's repeated claim that nothing unusual is happening. If any "canard" exists in this case, it is the majority's insistence that it is not overturning the precedent of this Court at an alarming rate.

The majority denies that it is overturning precedent willy-nilly. And it takes comfort in comparing the number of precedents the current majority has overturned to the total number of cases the Court has disposed of. These statistics should offer the majority no solace. In fact, they should be taken *cum grano salis*. It is true that the majority overturned only one-third of one percent of total dispositions between 2000 and 2005. But this percentage rate is four times greater than the immediately preceding majority on the Court whose rate of overturning precedent compared to total dispositions was $^{1}/_{22}$ of one percent. Berg, *supra*. Beyond this, reference to the overall dispositions is a red herring. The bulk of the Court's dispositions are simple denial orders. This fact makes the total disposition percentage irrelevant. The majority should not receive credit for not overturning precedent when it simply denies leave to appeal. It would have to overturn nearly every precedent in the history of the Court to make this number appear significant in any way. The Todd Berg article makes a strong showing that the current majority on this Court is alarmingly activist.

The primary goal of statutory interpretation is to give effect to legislative intent. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). In both *Hobbs* and *Brown*, the Court identified the intent behind the notice provision as being to prevent prejudice to a governmental agency. "[A]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision . . . ." *Hobbs*, 398 Mich at 96. For 20 years, the Legislature knew of this interpretation[14] but took no action to amend the statute or to state some other purpose behind MCL 691.1404(1). The Court then readdressed the statute in *Brown* and came to the same conclusion regarding the purpose behind MCL 691.1404(1).

Another ten years have passed, but still the Legislature has taken no action to alter the Court's interpretation of the intent behind the statute. This lack of legislative correction points tellingly to the conclusion that this Court properly determined and effectuated the intent behind MCL 691.1404(1). If the proper intent is effectuated, the primary goal of statutory interpretation is achieved. *In re MCI*, 460 Mich at 411.[15]

The majority makes the point that prior incarnations of this Court failed to make explicit when they were overturning precedent. Ironically, in support, the majority cites *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). In *Mudel*, the majority claimed that *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997), implicitly overturned *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992). As I pointed out in my concurrence/dissent in *Mudel*, *Goff* and *Holden* did not conflict. *Mudel*, 462 Mich at 734 (KELLY, J., concurring in part and dissenting in part). Of those three cases, it was only the majority's decision in *Mudel* that overturned precedent. Far from support for the majority's position, *Mudel* is just another example of the low esteem in which the majority holds stare decisis.

[14] The Legislature is presumed to be aware of judicial interpretations of existing law. *Ford Motor Co v Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006).

[15] The majority accuses me of creating "chaos and injustice" because it believes I do not consistently apply a rational basis analysis. Its heated

The majority heavily criticizes *Brown* for its use of legislative acquiescence as a tool of statutory construction. But these criticisms are not well founded, either logically or legally. The United States Supreme Court recently reaffirmed the use of legislative acquiescence:

> [T]he claim to adhere to case law is generally powerful once a decision has settled statutory meaning, see *Patterson* v *McLean Credit Union*, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L Ed 2d 132 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done"). In this instance, time has enhanced even the usual precedential force[.] [*Shepard v United States*, 544 US 13, 23; 125 S Ct 1254; 161 L Ed 2d 205 (2005).]

This tool of construction has a long history in the law. In 1880, the United States Supreme Court wrote:

> After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. [*Douglass v Pike Co*, 101 US (11 Otto) 677, 687; 25 L Ed 968 (1880).]

There also exists a consistent and long history of the use of this tool in Michigan. See *Brown*, 452 Mich at 367-368; *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505; 475 NW2d 704 (1991); *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989); *Wikman v City of Novi*, 413

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words on this subject seem designed to distract from the real point: the question is whether *Hobbs* and *Brown* properly effectuated the intent behind the statute. The fact that the Legislature has not taken action to rewrite the law strongly suggests that these cases did properly effectuate this intent. Therefore, they properly arrived at the rational basis behind the notice provision.

Mich 617, 638; 322 NW2d 103 (1982); *Smith v Detroit*, 388 Mich 637, 650; 202 NW2d 300 (1972); *Magreta v Ambassador Steel Co*, 380 Mich 513, 519-520; 158 NW2d 473 (1968); *In re Clayton Estate*, 343 Mich 101, 106-107; 72 NW2d 1 (1955); and *Twork v Munsing Paper Co*, 275 Mich 174, 178; 266 NW 311 (1936).

The concept of legislative acquiescence is reasonable and logical. The Legislature is presumed to know the law, including the decisions of this Court. *Ford Motor Co*, 475 Mich at 439-440. Acquiescence in failing to amend a statute is a proper manner by which the Legislature accepts a court's interpretation of that statute.

Our goal in interpreting statutes is to give effect to the purpose behind them. We should not limit ourselves in the use of any tool that gets us to that goal. "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded." Frankfurter, *Some 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. Legislative acquiescence is one useful tool in ascertaining the intent of a statute.[16] Adequate reasons do not exist to discard it.[17]

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[16] The majority cites constitutional rational basis analysis when assailing my use of the theory of legislative acquiescence. But the case it cites, *Harvey v Michigan*, 469 Mich 1; 664 NW2d 767 (2003), did not deal with a court overturning a prior court's interpretation of a statute. An entirely different question entirely arises when, as here, the issue presented is whether a settled statutory interpretation should be overturned.

[17] The majority claims that my support for legislative acquiescence undermines my "fealty" to stare decisis. It supports this by providing a list of decisions made by this majority that reject legislative acquiescence. I dissented from all of those decisions, and I have consistently supported legislative acquiescence as a proper tool for arriving at legislative intent. As I indicated earlier, I would never reach the constitutional issue in

The majority argues that *Brown*'s reliance on legislative acquiescence was inappropriate because *Hobbs*'s discussion of the 120-day notice requirement was based, in part, on the requirement's constitutionality. It claims that the Legislature was left incapable of revising the statute even if it desired to do so. This is not accurate. The Legislature was free to amend MCL 691.1404(1).

Hobbs's analysis centered on the fact that the Court could identify only one possible reason for the notice requirement: preventing prejudice to a government agency. *Hobbs*, 398 Mich at 96. If the Legislature had another intent in mind, it had only to write it into the statute.[18] A revised statute would create an entirely new question for the Court. If the Legislature made a revision, the constitutionality of the revision would be an open question. It would not be controlled by *Hobbs*. *Hobbs* merely dealt with a notice provision that had one known intent, fair notice to prevent actual prejudice.

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deciding this case. Hence, if my view prevailed, I would not find it necessary to consider legislative acquiescence here. But I maintain that this rogue line of cases unnecessarily hamstrings the Court's efforts at arriving at the intent of the Legislature. This position in no way undermines my adherence to stare decisis. There is a significant difference between precedent interpreting a statute relied on for decades and tools used to interpret statutes. I know of no authority that stands for the proposition that stare decisis attaches to analytical tools used in judicial interpretation. Hence, the rule of stare decisis binds us to follow the holdings of past caselaw. It does not bind us to use or refrain from using analytical tools such as the doctrine of legislative acquiescence because an earlier Court chose to do so.

[18] The majority claims that *Hobbs*'s statement that it could posit only one legitimate reason for the notice provision necessarily means that no other legitimate reason could possibly exist. This is not the case. The Court's statement that it could think of only one reason for the statute means what it says. It leaves open the possibility that other reasons might occur to people at a later date. If the Legislature had a different intent in mind, it could have, and should have, made that clear to the Court. It has never attempted to do so. This indicates that the Court's determination of the Legislature's intent was correct.

Moreover, if the Legislature truly desired a hard and fast 120-day limit, it could have rewritten the statute to contain a presumption of prejudice.[19] Alternatively, it could have defined actual prejudice in the statute to be more restrictive than *Hobbs* found it to be. There was the possibility of change. Because it did not occur, it is reasonable to deduce that the Legislature's inaction has been intentional.

This is especially true in light of *Brown,* which specifically provided the Legislature with a road map showing how it could change the law to effectuate some other intent.

> The difficulty we experienced in *Hobbs* was that we could not posit another purpose for the notice provision other than to prevent prejudice to the state. If the Legislature was not happy with our presumption, it could have responded in some fashion to the *Hobbs* decision. It could have further articulated the notice provision's purpose and possibly have created a presumption of prejudice to the governmental agency from the plaintiffs' failure to give notice within 120 days. However, not only has the Legislature not attempted to revise the statute to respond to *Hobbs*, it also has not even criticized *Hobbs* in later legislative enactments or amendments in the almost twenty years since it was decided. [*Brown*, 452 Mich at 367 n 18.]

If the Legislature disagreed with *Hobbs* but was unsure how to act, *Brown* not only provided the impetus for change but the means to reach that goal. Despite what can fairly be characterized as the Court's guide for

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[19] If, as the majority claims, the Legislature wanted the 120 days to be an absolute deadline, it could have added an irrebuttable presumption of prejudice. This would have satisfied even the most restrictive reading of *Hobbs* while, at the same time, making clear the legislative intent. The Legislature knows how to create irrebuttable presuppositions. See MCL 207.1026(1), MCL 205.94q, and MCL 399.157(2). It did not write one into this statute.

possible legislative amendments, the Legislature still has not repudiated *Brown* and *Hobbs*.[20] Given that ten years have passed since *Brown*, this inaction is particularly meaningful. It evidences that *Brown* and *Hobbs* accurately divined the intent of the Legislature.

IV. THE *ROBINSON*[21] FACTORS

This Court laid out the factors to consider in overturning stare decisis in *Robinson*. The first consideration is whether the earlier decision was wrongly decided. *Id*. at 464. As discussed above, the Legislature has acquiesced in *Hobbs*'s and *Brown*'s interpretation of MCL 691.1404(1). This certainly suggests that the Court's interpretation properly identified the intent of the Legislature as being to prevent prejudice to a government agency. The central goal of statutory construction is to effectuate the Legislature's intent. *In re MCI*, 460 Mich at 411. It appears that *Hobbs* and *Brown* were correctly decided.

The other *Robinson* factors are: (1) whether the decision at issue defies "practical workability"; (2) whether reliance interests would work an undue hardship if the authority is overturned; and (3) whether

[20] The majority postulates that my argument for adherence to stare decisis would have been better made to the *Hobbs* and *Brown* courts. Of course, I was not on the Court when either *Hobbs* or *Brown* was decided. I can only decide the case before me. Reviewing the case before me now, I would maintain my strong predisposition to adhere to precedent. The majority's "two-wrongs-make-a-right" argument carries little weight. It is also grossly unfair to assert, as Justice MARKMAN does, that I have repeatedly refused to overturn precedent merely because I agreed with the precedent. Whether in agreement or not, I have in each case given heavy weight to the disruption that a reversal would cause to the state's jurisprudence. Frequently, the disruptive effect would have been reason enough for me to refuse to overturn the precedent.

[21] *Robinson*, 462 Mich at 439.

changes in the law or facts make the decision no longer justified. *Robinson*, 462 Mich at 464.

Hobbs and *Brown* do not defy practical workability. Rather, they have been an integral part of the law on governmental immunity for 30 years. The bench and bar have had no difficulty applying the actual prejudice requirement to the cases before them. Actual prejudice is not a complicated concept to apply. As such, there is no practical workability problem.

Brown addressed the reliance interests a decade ago. It noted:

> [W]e believe that more injury would result from overruling it than from following it. The rule in *Hobbs* has been an integral part of this state's governmental tort liability scheme for almost two decades. It should not be lightly discarded. [*Brown*, 452 Mich at 366.]

Now, another decade has passed. And the rule in *Hobbs* has become even more entwined with the law of governmental liability. Many plaintiffs likely shaped the processing of their cases in reliance on this law. For instance, a plaintiff could take more than 120 days to carefully assess his or her case and assure that the notice provided contains everything required by MCL 691.1404. Attorneys surely have relied on *Hobbs* and *Brown* to decide what cases to accept. This necessarily entails adjusting the attorney's resources to properly handle the cases.

The majority claims that no one would properly rely on *Hobbs* or *Brown* because they are "text ignoring." As I discussed in detail earlier, this is not true. *Hobbs* and *Brown* properly effectuated the intent of the Legislature. But also implicit in this discussion is the majority's contention that attorneys should not rely on precedent predating the present Court. At its core, this statement suggests that one should not rely on any-

thing predating the current majority. The disrespect it pays to past justices of the Michigan Supreme Court is unfortunate. Rather than justifying overturning *Hobbs* and *Brown*, it demonstrates that the majority fails to respect the rule of stare decisis as applied to cases that predate this majority.

The final consideration under *Robinson* is whether changes in the law or facts make the decision no longer justified. *Robinson*, 462 Mich at 464. There have been no changes in the law or facts in question. Although the *Hobbs* ruling is 30 years old and the *Brown* ruling provides a road map for the Legislature to overturn *Hobbs*, the Legislature took no action. This favors retention of the precedents.

Considering all the *Robinson* factors, *Hobbs* and *Brown* should not be overturned. Rather, they should be retained, thereby respecting stare decisis, a doctrine that carries such persuasive force that courts have traditionally required a departure from it to be supported by special justification. *IBM*, 517 US at 856. After consideration and application of the *Robinson* factors, it is apparent that no special justification exists to overturn *Hobbs* and *Brown*, and the majority's decision to do so is erroneous.[22]

V. RETROACTIVITY

Generally, judicial decisions are given full retroactive effect. *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). But there are well-established exceptions to this rule. The courts should consider the equities involved and, if injustice would result from full

[22] The majority believes that *Robinson* presents the most defensible approach to deciding when to overturn cases. I would note that even the *Robinson* factors support retaining *Hobbs* and *Brown*.

retroactivity, should adopt a more flexible approach. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). Court decisions should have the goal of reaching justice. *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984), quoting *Williams v Detroit*, 364 Mich 231, 265; 111 NW2d 1 (1961) (opinion by EDWARDS, J., for reversal). Prospective application is appropriate where the holding overrules settled precedent. *Lindsey*, 455 Mich at 68.

> This Court adopted from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731, 14 L Ed 2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. In the civil context, a plurality of this Court noted that *Chevron Oil* [*Co*] *v Huson*, 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. [*Pohutski*, 465 Mich at 696 (citation omitted).]

When the threshold question is applied, it becomes apparent that this case states a new rule of law. When a court overturns precedent interpreting a statute, the decision is equivalent to, and is treated as, a new rule of law. *Id*. at 696-697. Because this case overturns decades of precedent, it is a newly created rule of law that warrants prospective application.

The majority characterizes its decision as a return to the correct interpretation of the statute and, as such, not a new rule. This argument does not ring true. *Hobbs* was decided 30 years ago. And, as the majority concedes, *Hobbs* was built, in part, on *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972). Therefore, the majority is treating almost 35 years of precedent as if it never existed. But decades of reliance on this line of

cases have elapsed, and these cases have shaped modern governmental immunity law. Because of it, prospective application is appropriate. *Pohutski*, 465 Mich at 696-697; *Lindsey*, 455 Mich at 68.

The majority also characterizes *Hobbs* as a rogue decision, a departure from the proper interpretation of the law. As I have discussed, the Legislature chose not to amend MCL 691.1404 despite ample opportunity to do so. This indicates that *Hobbs* effectuated legislative intent. But, beyond this, *Hobbs* is not a rogue decision. Supporting this is the fact that the Court took a second look at *Hobbs* in *Brown*. Decades apart, two incarnations of this Court looked at the same question and reached the same conclusion. *Hobbs* cannot fairly be characterized as some anomaly in the law.

The 30 years of precedent offered by *Hobbs* and the affirmance of *Hobbs* in *Brown* demonstrate that the majority is overturning a well-established rule of law. As such, this case creates new law. *Pohutski*, 465 Mich at 696-697. And prospective application is appropriate. *Id.*; *Lindsey*, 455 Mich at 68.

Given that the threshold has been met, we must address the underlying factors. Turning to the first *Pohutski* factor, the Court must decide the purpose served by the new rule. The majority's goal is to correct a statutory interpretation that it believes to be incorrect. Prospective application furthers such a purpose. *Pohutski*, 465 Mich at 697.

The second factor is the extent of reliance on the rule. *Pohutski*, 465 Mich at 696. Given that the rule has been in existence and applied for over 30 years, reliance is significant. *Hobbs* has shaped how attorneys handle cases. Under *Hobbs,* attorneys understand that they have increased time to investigate and perfect their

knowledge of a case before taking legal action. This is important given the detail needed to comply with MCL 691.1404(1).

The majority contends that people have not relied on *Hobbs* given the recent decisions of this Court. But I question that contention. As Justice JEREMIAH S. BLACK noted over 150 years ago:

> The inferior tribunals follow our decisions, and the people conform to them because they take it for granted that what we have said once we will say again. There being no superior power to define the law for us as we define it for others[.] [*McDowell*, 21 Pa at 423.]

To hold otherwise is to disregard the importance of this Court. " 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.' " *Chevron Oil Co*, 404 US at 107, quoting *Griffin v Illinois*, 351 US 12, 26; 76 S Ct 585; 100 L Ed 891 (1956) (Frankfurter, J., concurring). The majority engages in such a legal fiction in this case. It is inappropriate.

The third factor is the effect of retroactivity on the administration of justice. *Pohutski*, 465 Mich at 696. In *Pohutski,* the Court determined that the third factor weighed in favor of prospective application. The reason for this is that retroactivity would create a distinct class of litigants being denied relief because of an unfortunate circumstance of timing. *Id*. at 698-699. In the instant case, the majority's decision to overturn *Hobbs* and *Brown* will not have such a devastating effect on a distinct group of litigants. But the effect will be considerable. There will be a significant number of plaintiffs who will lose their remedy due to their failure to anticipate this change in the reading of MCL 691.1404(1). And it will cause attorneys to reevaluate

and amend their handling of governmental immunity cases. Because of this significant impact, I believe this factor favors prospective application.

The overturning of *Hobbs* and *Brown* is a more significant change in the law than the majority wishes to admit. Application of the *Pohutski* factors indicates as much. Consideration of these factors supports only prospective application of this decision.

VI. CONCLUSION

The majority unnecessarily reaches the issue whether defendant must show actual prejudice to bar a claim filed more than 120 days from the date the injury occurred. Plaintiff failed to supply sufficient notice to defendant. She did not provide an "exact" description of the nature of the defect. Because of that, defendant did not need to show actual prejudice. It was entitled to summary disposition no matter when the notice was given. The lower courts erred in considering the issue of actual prejudice, as does the majority of this Court.

In reaching to overturn *Hobbs* and *Brown,* the majority fails to pay proper respect to the doctrine of stare decisis and to the precedent of this Court. This continues a disturbing trend that the current majority has initiated and fostered. *Hobbs* and *Brown* properly effectuated the intent of the Legislature. As such, they should be retained.

CAVANAGH, J. (*dissenting*). Today this Court overrules a portion of our governmental immunity law that has been in place for over 30 years. Because I am not convinced that *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), were wrongly decided, I dissent from the majority's decision

to overrule these cases. I believe that the principles of stare decisis mandate that we continue to interpret MCL 691.1404(1) in accordance with *Hobbs* and *Brown*.

HOBBS AND *BROWN* SHOULD BE REAFFIRMED

It is well established that overruling precedent must be undertaken with caution. This Court does not lightly overrule settled decisions construing any section of a standing statute. *Smith v Lawrence Baking Co*, 370 Mich 169, 177; 121 NW2d 684 (1963). Adhering to decided cases is generally " 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). Before this Court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that overruling it will result in less injury than in following it. *McEvoy v Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904).

Before overruling established precedent, this Court must decide whether: "(1) the earlier case was wrongly decided, (2) the earlier case defies practical workability, (3) reliance interests would work an undue hardship if the earlier case was overruled, and (4) changes in the law or facts no longer justify the earlier decision." *Robinson v Detroit,* 462 Mich 439, 464-465; 613 NW2d 307 (2000). Under *Robinson*, the first conclusion this Court must reach before overruling precedent is that the earlier case was wrongly decided. A majority of this Court considered this very issue 11 years ago and concluded that *Hobbs* was not wrongly decided. *Brown*,

supra at 366. I continue to agree with the conclusion reached in *Brown*. These cases are part of a 30-year-old line of decisions. The line of cases preceding *Hobbs* and *Brown* provide the proper context in which to evaluate them.

The cases leading up to *Hobbs* and *Brown* represent thoughtfully made, deliberate decisions. I disagree with the majority's implication that before 1970, the constitutionality of notice provisions was firmly established. *Ante* at 206. According to the majority, *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970), represented an "abrupt departure" in finding that a 60-day notice provision violated due process where a plaintiff had been incapacitated during the notice period because of the allegedly tortious conduct of the defendant. *Ante* at 206; 384 Mich at 175-176. In fact, *Grubaugh* afforded us the first opportunity to consider the constitutionality of the notice provision—this issue had not been squarely presented in previous cases. *Id.* at 167. Two cases that closely preceded *Grubaugh*, *Boike v City of Flint*, 374 Mich 462; 132 NW2d 658 (1965), and *Trbovich v Detroit*, 378 Mich 79; 142 NW2d 696 (1966), make clear that their decisions to enforce the notice provisions as written were not constitutionally based. "The constitutionality of section 8, [which is the provision requiring that notice of injury be given to a city within 60 days,] insofar as it applies to infants or others under legal disability, has not as yet been put to test." *Boike*, *supra* at 464 n*. Similarly, Justice BLACK's supplemental opinion in *Trbovich* remarked that the Court was bound to apply plainly written notice statutes as written, given that no constitutional question had been raised below. *Trbovich*, *supra* at 88.

It is disingenuous for the majority to characterize *Grubaugh* as an aberration, while implying that the

previous decisions of this Court had endorsed the constitutionality of the notice statutes with an "implicit" rational basis review. *Ante* at 205. This Court does not ordinarily rule on the constitutionality of a statute if the question of its constitutionality was not raised in the lower court or this Court. *Ridenour v Bay Co*, 366 Mich 225, 243; 114 NW2d 172 (1962). The question presented in *Moulter v Grand Rapids*, 155 Mich 165; 118 NW 919 (1908), was one of statutory construction, not constitutionality; while the appealing party claimed that the notice provision was unreasonable and void, we disclaimed any authority to decide the statute's reasonableness. *Id.* at 169. If we had actually engaged in a rational basis review of the notice statute in *Moulter*, the reasonableness of the statute would have been a fundamental part of the inquiry. The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective. *Shavers v Attorney General*, 402 Mich 554, 612; 267 NW2d 72 (1978).

Unlike *Moulter* and its successors, *Grubaugh* undertook a thorough constitutional analysis of the notice requirements of the general highway statute.[1] This Court concluded that the notice provision of the general highway statute violated due process where it extinguished the claim of a plaintiff who was mentally or physically incapacitated during the notice period due to the alleged tortious act of a state or municipal defendant. *Grubaugh*, *supra* at 176. Because the case was disposed of on due process grounds, the equal protection argument was not examined. *Id.* at 176-177.

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[1] Specifically, *Grubaugh* concerned a predecessor to MCL 691.1401 *et seq.*: 1948 CL 242.8, repealed and superseded by 1964 PA 170.

Shortly after *Grubaugh*, we considered a broader constitutional challenge to a 60-day notice provision of the general highway statute[2] in *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972). This Court followed *Grubaugh* in holding that the statute violated due process as applied to minors. *Reich*, *supra* at 622. As for the remaining plaintiffs, who were presumably competent adults, we held that the notice provision violated equal protection because it arbitrarily and unreasonably split victims into two differently treated subclasses: victims of governmental negligence and victims of private negligence. *Id.* at 623.

This Court subsequently held that notice requirements are not necessarily unconstitutional if there is a legitimate purpose and the period is not unreasonably short. *Carver v McKernan*, 390 Mich 96, 100; 211 NW2d 24 (1973). The reasonableness of a period depends in part on the purpose served by the notice requirement. *Id.* We noted that failure to give notice may result in prejudice to the government relating to the purpose served by the notice provision. *Id.* Thus, the government is required to show prejudice before a claim can be dismissed on the basis of failure to meet the notice requirement. *Id.*

We should be mindful of this history when considering the *Hobbs* and *Brown* decisions. When this Court addressed the 120-day notice requirement of MCL 691.1404 in *Hobbs*, we examined the notice provision and the reasons justifying it in light of the *Grubaugh*, *Reich*, and *Carver* decisions. This Court deliberately concluded that actual prejudice to the state from lack of notice within 120 days was the only legitimate purpose it could posit for the notice provision of § 1404. *Hobbs*, *supra* at 96. Accordingly, unless actual prejudice is

[2] *Reich* concerned the notice requirement of 1964 PA 170.

shown, the plaintiff's claim is not barred by failure to give notice within the required period. *Id.* In *Brown*, we invalidated a statute on equal protection grounds because it imposed a 60-day notice requirement for claims involving county road commissions when MCL 691.1404, providing a 120-day notice period, also potentially governed the claim. *Brown*, *supra* at 363-364. After deciding that the 120-day period of § 1404 applied, we reaffirmed *Hobbs*'s interpretation of that provision. *Id.* at 368.

The majority contends that the notion that notice provisions are or may be unconstitutional has "no claim to being defensible constitutional theory." *Ante* at 210. But it is this Court's role to construe statutes to avoid unconstitutionality, if possible, by a reasonable construction of the statutory language. *United States v Harriss*, 347 US 612, 618; 74 S Ct 808; 98 L Ed 989 (1954). The validity of the *Hobbs* and *Brown* decisions must be evaluated in view of our earlier constitutional rulings in *Grubaugh*, *Reich*, and *Carver*. With due consideration of this Court's precedent in the area of government notice provisions, the *Hobbs* Court made a reasoned decision that the 120-day notice provision might be unconstitutional if dismissal did not serve the posited purpose of avoiding prejudice. Like *Hobbs* and its predecessors, the primary concern in *Brown* was the constitutionality of a legislative scheme that draws arbitrary distinctions between litigants.

Michigan is not the only jurisdiction that has invalidated notice provisions on constitutional grounds. While it certainly represents a minority position, decisions in Nevada, Iowa, Minnesota, West Virginia, and Washington have also held governmental immunity notice provisions constitutionally infirm.[3] Still others have enforced notice

[3] *Turner v Staggs*, 89 Nev 230, 234-235; 510 P2d 879 (1973); *Miller v Boon Co Hosp*, 394 NW2d 776, 781 (Iowa, 1986); *Kelly v City of Rochester*, 304 Minn 328, 333; 231 NW2d 275 (1975); *O'Neil v City of Parkersburg*,

provisions after "engrafting" exceptions for minority or incapacity to avoid unconstitutionality. In *Schumer By and Through Schumer v City of Perryville*, 667 SW2d 414, 418 (Mo, 1984), the court noted that it had previously held the application of the notice provision to incapacitated persons unconstitutional; in the case at hand, it extended this rationale to people who were under the legal disability of minority during the notice period. As evidenced by these decisions, these states, as well as Michigan before the instant case, certainly considered the idea that notice provisions may be unconstitutional to be a defensible constitutional theory.

Further, as Justice KELLY discusses at length, the Legislature has acquiesced with our construction of MCL 691.1404 since the *Hobbs* decision, including our presumption of the statute's sole purpose. *Ante* at 258-261. If the Legislature did not agree with our presumption, in the 31 years since *Hobbs* was decided, it could have easily responded by elaborating on the other governmental interests served by the notice provision. The *Hobbs* decision did not foreclose the possibility that the notice provision served other legitimate state interests other than prejudice; it merely stated that this Court could only posit one purpose. *Hobbs*, *supra* at 96. If the Legislature had responded in any way to our inference, we would have had reason to reevaluate the constitutionality of MCL 691.1404 in light of the Legislature's action.

THE REMAINING *ROBINSON* FACTORS SUPPORT UPHOLDING *HOBBS* AND *BROWN*

Even if a majority of this Court disagrees with the reasoning of *Hobbs* and *Brown*, a mere belief that these

160 W Va 694, 701-702; 237 SE2d 504 (1977); *Hunter v North Mason High School*, 85 Wash 2d 810, 818-819; 539 P2d 845 (1975).

cases were wrongly decided is insufficient to justify overruling them. Other considerations must be weighed before departing from precedent. In particular, under *Robinson*, this Court must also decide whether *Hobbs* and *Brown* defy practical workability, whether reliance interests would cause an undue hardship, and whether changes in the law or facts no longer justify *Hobbs* and *Brown*. *Robinson*, *supra* at 464. A study of these remaining *Robinson* factors shows that they weigh in favor of upholding *Hobbs* and *Brown*.

The rule that the government must show actual prejudice was suffered from lack of notice does not defy practical workability. Indeed, this rule has been followed and enforced for over 30 years. In that span, litigants, attorneys, and courts have been able to apply *Hobbs* and *Brown* to the cases before them. Reliance interests of these parties also support upholding these cases. While a plaintiff is unlikely to deliberately withhold notice longer than 120 days for the sheer purpose of using the *Hobbs* rule, these plaintiffs should not be our only concern. We must also consider the effect of our decision on injured parties who have sought legal counsel to determine whether they have a valid claim. For example, reliance interests are involved when a plaintiff consults with an attorney and initiates a claim more than 120 days after an injury, having been informed by his attorney that the claim may survive if the government has suffered no prejudice from the delay. Similarly, attorneys who have counseled clients that their claims may still be valid have relied on *Hobbs* and *Brown* in accepting cases and dispensing advice.

Finally, there have been no changes in the law or factual circumstances that render *Hobbs* and *Brown* unjustifiable. The Legislature has not amended § 1404 since 1972. The *Hobbs* rule has been an established part

of the governmental tort liability scheme for over three decades. *Brown* examined *Hobbs* and upheld its rule just over ten years ago. Any relevant changes are entirely internal to this Court.

Applying the *Robinson* factors here shows that the principles of stare decisis outweigh the arguments for overruling *Hobbs*. "Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent and should not be lightly departed." *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990). Absent the rarest circumstances, we should remain faithful to established precedent. *Brown*, *supra* at 365. Reaffirming *Hobbs* and *Brown* would promote uniformity, certainty, and stability in the law.

TODAY'S DECISION SHOULD APPLY PROSPECTIVELY

Given that *Hobbs* and *Brown* have become ingrained in our governmental tort liability scheme, the majority's decision to overrule these cases should be applied prospectively. While the general rule is that judicial decisions are given complete retroactive effect, decisions that overrule clear and uncontradicted caselaw have been given prospective application. *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999). A more flexible approach is warranted where injustice might result from full retroactivity. *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). To determine whether to depart from the general rule of retroactivity, this Court has recognized a threshold question of whether the decision clearly established a new principle of law, in addition to considering several other factors. *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). These factors include: (1) the purpose to be

served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Id.*

Since *Hobbs* was decided, the law in Michigan has been that claimants may maintain claims against governmental agencies, despite failure to give notice within 120 days, if the agency cannot show that it was prejudiced by the lack of notice. Today's decision represents a departure from an established rule of law. We have not foreshadowed any change of this particular rule—on the contrary, it was specifically reaffirmed by *Brown* ten years ago. Further, parties who have relied on *Hobbs* in pursuing claims against governmental agencies will now find their claims dismissed. Attorneys who have taken clients and developed cases with *Hobbs* in mind will have lost the time and effort expended, as well as the confidence of their clients. Under these circumstances, prospective application of today's decision is appropriate.

CONCLUSION

In conclusion, I dissent from the majority's decision to overrule *Hobbs* and *Brown*. I would not disturb these decisions in light of the principles of stare decisis. Further, overruling these cases presents a new rule of law, thus I would apply the majority's decision prospectively.

AL-SHIMMARI v DETROIT MEDICAL CENTER

Docket No. 130078. Decided May 2, 2007. Rehearing denied, 478 Mich 1201.

Abdul Al-Shimmari brought an action in the Wayne Circuit Court against Detroit Medical Center; Harper-Hutzel Hospital; University Neurosurgical Associates, P.C.; and Setti Rengachary, M.D., alleging negligence, battery, and lack of informed consent against all the defendants and vicarious liability against Harper-Hutzel Hospital, Detroit Medical Center, and University Neurosurgical Associates relating to surgery performed on the plaintiff by Rengachary. Rengachary sought summary disposition under MCR 2.116(C)(2), (3), and (8), claiming that he had not been properly served before the period of limitations expired, and under MCR 2.116(C)(7) and (8), alleging that he had not been served within the period of limitations. The plaintiff disputed the allegations in the motions and offered evidence indicating proper and timely proof of service. The trial court, Edward M. Thomas, J., conducted a hearing to determine when service of process occurred, concluded that Rengachary had not been served within the period of limitations, and granted Rengachary summary disposition with prejudice under MCR 2.116(C)(7). The court then granted the remaining defendants summary disposition under MCR 2.116(C)(7) of the vicarious liability claims, ruling that the dismissal of the claims against Rengachary extinguished those claims against the remaining defendants. The plaintiff appealed in the Court of Appeals by leave granted the order granting summary disposition in favor of Rengachary and as of right the order granting summary disposition in favor of the remaining defendants, and the appeals were consolidated. The Court of Appeals, OWENS, P.J., and FITZGERALD and SCHUETTE, JJ., reversed the orders of the trial court and remanded for further proceedings. Unpublished opinion per curiam, issued November 1, 2005 (Docket Nos. 259363, 262655). The Court of Appeals held that the plaintiff, who had requested a jury trial, was entitled to a jury trial on the disputed question of when Rengachary was served and that the grant of summary disposition to Rengachary had not been on the merits of the claims and, therefore, the claims against the remaining defendants should not have been dismissed. The Court of

Appeals also held that the defendants' attorneys' stipulation for the admission of the plaintiff's medical records was not an action sufficient to constitute a general appearance by Rengachary, and that a party may waive the right to object to service of process by entering a general appearance and contesting the suit on the merits. The defendants sought leave to appeal, and the plaintiff sought leave to appeal as cross-appellant, and the Supreme Court ordered and heard oral argument on whether to grant the applications or take other peremptory action. 475 Mich 861 (2006).

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

The Court of Appeals erred in holding that a jury trial was required to determine when service of process occurred, that a waiver of objections to service of process under MCR 2.116(C)(3) could result from a general appearance, and that the vicarious liability claims should not have been dismissed. Those parts of the judgment of the Court of Appeals must be reversed, and the matter must be remanded to the trial court for the reinstatement of the orders of summary disposition in favor of all the defendants.

1. Rengachary's motion for summary disposition under MCR 2.116(C)(3), which claimed that the service of process was insufficient, did not require the trial court to conduct a jury trial because MCR 2.116(I)(3) provides that a trial court has the discretion to conduct a bench trial to resolve disputed factual questions related to motions based on MCR 2.116(C)(1) through (6). The issue raised in Rengachary's motion under MCR 2.116(C)(7) fully hinged on the determination of whether he had been sufficiently served under MCR 2.116(C)(3). MCR 2.116(I)(3) does not require a jury trial of the C(7) motion where the question raised in the C(7) motion was resolved through the C(3) motion.

2. Rengachary did not waive the claim under MCR 2.116(C)(3) as a result of the stipulation to admit medical records. Under MCR 2.116(D)(1), a party generally waives an objection to the service of process under MCR 2.116(C)(3) unless the party complies with MCR 2.116(D)(1). Rengachary complied with MCR 2.116(D)(1) by raising the C(3) issue in his first motions for summary disposition.

3. The dismissal of the claims against Rengachary operated as an adjudication of those claims on the merits under MCR 2.504(B)(3) because the court did not specify otherwise and the dismissal was not for lack of jurisdiction or failure to join a party under MCR 2.205. Because the remaining defendants could only be vicariously liable on the basis of the imputed negligence of

Rengachary, the plaintiff is unable to show that the remaining defendants were vicariously liable for Rengachary's allegedly negligent acts.

Reversed and remanded to the trial court.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, stated that the issue whether a jury trial is required to resolve a dispute over service of process need not be reached because Reganchary waived his right to challenge the sufficiency of service of process. The instructions contained in MCR 2.116(D)(1) pertaining to when a defense regarding service of process must be raised in no way excludes the possibility that the right to raise such a defense can be waived in a manner other than failing to raise the defense in a motion or first responsive pleading. A party that enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service-of-process objections. Reganchary, through his attorney, entered an appearance by expressing knowledge of the pending proceedings and an intent to appear. Thus, Reganchary waived the right to challenge the sufficiency of service of process, and the plaintiff should be allowed to proceed on his claims against all defendants. The judgment of the Court of Appeals should be reversed in part, and the case remanded for trial.

1. MOTIONS AND ORDERS — SUMMARY DISPOSITION — QUESTIONS OF FACT — BENCH TRIAL — JURY TRIAL.

A trial court has the discretion to conduct a bench trial to resolve disputed factual questions related to motions for summary disposition based on MCR 2.116(C)(1) through (6) and must conduct a jury trial only if the grounds asserted in a motion for summary disposition are based on MCR 2.116(C)(7), a jury trial has been demanded, and the issue raised by the motion is an issue as to which there is a right to trial by jury; a jury trial is not required with regard to a motion based on MCR 2.116(C)(7) where resolution of the motion depends solely on a determination of an issue raised under MCR 2.116(C)(1) through (6) (MCR 2.116 [I][3]).

2. MOTIONS AND ORDERS — WAIVERS OF OBJECTION.

A defendant must raise an objection to the sufficiency of service of process under MCR 2.116(C)(3) in his or her first motion or responsive pleading to avoid waiver of the objection; a defendant may make a general appearance and still avoid waiver of an objection to service of process under MCR 2.116(C)(3) where the defendant raises the objection in his or her first motion or responsive pleading (MCR 2.116 [D][1]).

3. NEGLIGENCE — MASTER AND SERVANT — VICARIOUS LIABILITY.

Vicarious liability rests on the imputation of the negligence of an agent to a principal; vicarious liability cannot be found where a court dismisses negligence claims against an agent for the plaintiff's failure to comply with the court rules or a court order, unless the negligence claims have been dismissed for lack of jurisdiction or for failure to join a party under MCR 2.205 or the court otherwise specifies that the dismissal was something other than a dismissal on the merits; such a dismissal operates as an adjudication on the merits and prevents the plaintiff from demonstrating that the agent was negligent in order to impute the agent's negligence to the principal (MCR 2.504 [B][3]).

Law Offices of Andre M. Sokolowski, P.C. (by *Andre M. Sokolowski*), *Law Offices of Michael S. Daoudi, P.C.* (by *Michael S. Daoudi*), and *Turner & Turner, P.C.* (by *Matthew L. Turner*), for the plaintiff.

Saurbier & Siegan, P.C. (by *Debbie K. Taylor, Scott A. Saurbier*, and *Bart P. O'Neill*), for the defendants.

MARKMAN, J. We heard oral argument on whether to grant the application and cross-application for leave to appeal in order to consider whether MCR 2.116(I)(3) requires a trial court to conduct a jury trial to determine whether service of process was sufficient, whether a general appearance by a defendant waives an objection to the sufficiency of service of process under MCR 2.116(C)(3), and whether a plaintiff may proceed with a vicarious liability claim against various medical entities after the claim against the allegedly negligent doctor has been dismissed. Because we conclude that MCR 2.116(I)(3) does not require a jury trial to determine whether service of process was sufficient, we reverse the part of the Court of Appeals judgment that required such a trial. Because MCR 2.116(D)(1) states that a party waives an objection to service of process under MCR 2.116(C)(3) unless the objection is raised in a party's first motion or responsive pleading, we further

conclude that a general appearance does not waive objections to service of process under MCR 2.116(C)(3) if the party properly raises such objections under MCR 2.116(D)(1). Accordingly, we reverse the part of the Court of Appeals judgment that held otherwise. Finally, because the dismissal of the claim against the doctor based on the expiration of the period of limitations operated as an adjudication on the merits under MCR 2.504(B)(3), we reverse the part of the Court of Appeals judgment that allowed the suit to proceed on the basis of vicarious liability against defendant medical entities.

I. FACTS AND PROCEDURE

Plaintiff Abdul Al-Shimmari was treated by defendant Dr. Setti Rengachary for back pain. After examining the plaintiff, Rengachary recommended that plaintiff undergo back surgery, and he performed the surgery on September 17, 2001. After the surgery, plaintiff continued to feel pain, and in July 2002 a different doctor concluded that plaintiff had suffered nerve injury as a result of the surgery.

Because the surgery took place on September 17, 2001, the two-year period of limitations expired on September 17, 2003. MCL 600.5805(6).[1] On September 16, 2003, plaintiff served a notice of intent to bring this action on defendants Rengachary, Harper-Hutzel Hospital, Detroit Medical Center, and University Neurosurgical Associates, P.C. The notice of intent tolled the statute of limitations for 182 days, until March 16, 2004. MCL 600.5856(d). Plaintiff then had until March 17, 2004, to file a complaint properly. At the time this complaint was filed, MCL 600.5856 stated:

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[1] "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice."

> The statutes of limitations or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.[2]

Therefore, plaintiff had to serve the defendants by March 17, 2004. Plaintiff filed the complaint charging medical malpractice on March 10, 2004, alleging negligence, battery, and lack of informed consent against all defendants,[3] and vicarious liability against Harper-Hutzel Hospital, Detroit Medical Center, and University Neurosurgical Associates. On April 6, 2004, defendants' counsel signed a stipulation for the admission of plaintiff's medical records. This stipulation was made on behalf of all defendants, including Rengachary, in exchange for an extension to file responsive pleadings.

The parties dispute when Rengachary was served. On April 16, 2004, Rengachary filed two separate motions for summary disposition. In the first motion, Rengachary sought dismissal under MCR 2.116(C)(2), (3), and (8), claiming that he had not been properly served pursuant to the applicable court rules before the expiration of the period of limitations. In the second motion, Rengachary sought summary disposition under MCR 2.116(C)(7) and (8), alleging that he had not been served within the statute of limitations period. Rengachary claimed that he was not served until March 18, 2004, after the statute of limitations period had run. Plaintiff disputed Rengachary's contentions and submitted a proof of service stating that Rengachary had been served on March 11, 2004, within the statute of limitations period.

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[2] Effective April 22, 2004, MCL 600.5856(a) was revised by 2004 PA 87, and now provides that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules."

[3] Plaintiff did not allege that University Neurological Associates was negligent.

To determine when service of process occurred, the trial court ordered that an evidentiary hearing be held. At the hearing, plaintiff's process server testified that on March 11 she found Rengachary, who was wearing a white coat, at his place of work, inquired if he was Rengachary, and served him when he responded, "Yes." However, the process server did not obtain Rengachary's signature, and did not sign a proof of service until April 9, 2004. In response, Rengachary denied that he had been served on March 11, testified that he did not dress in a white coat at work, and stated he had not been served until March 18. On the basis of this testimony, the trial court concluded that Rengachary had not been served until March 18 and granted him summary disposition with prejudice under MCR 2.116(C)(7). The remaining defendants then moved for summary disposition of the vicarious liability claims, arguing that because Rengachary had been dismissed, the remaining defendants could not be held vicariously liable for his actions. The remaining defendants also filed a supplemental brief, alleging that the claims of vicarious liability should also be dismissed under MCR 2.116(C)(10) because plaintiff had not shown that Rengachary was an agent of the hospital. The trial court agreed that the dismissal of the claims against Rengachary extinguished the claims against the remaining defendants and granted summary disposition for the remaining defendants under MCR 2.116(C)(7).

Plaintiff appealed by leave granted the order granting summary disposition in favor of Rengachary and as of right from the order granting summary disposition for the remaining defendants, and the appeals were consolidated. The Court of Appeals reversed the orders of the trial court and remanded for further proceedings. Unpublished opinion per curiam, issued November 1, 2005 (Docket Nos. 259363 and 262655). The Court of Appeals held that plaintiff was entitled to a jury trial on the disputed

question of when the defendant doctor was served, and concluded that the claims against the other defendants should not have been dismissed because the grant of summary disposition to Rengachary had not been on the merits of the claims. The Court of Appeals also held that defendants' attorneys' actions with regard to the stipulation were not sufficient to constitute a general appearance and also held that a party may waive the right to object to service by entering a general appearance and contesting the suit on the merits. Defendants sought leave to appeal and plaintiff sought leave to appeal as cross-appellant.[4] This Court directed the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. 475 Mich 861 (2006).

II. STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of summary disposition de novo. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 60; 718 NW2d 784 (2006). The interpretation of court rules is a question of law, which is reviewed de novo. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

III. ANALYSIS

A. TRIAL BY JURY

Defendant Rengachary moved for summary disposition under MCR 2.116(C)(2), (3), (7), and (8).[5] MCR

[4] Plaintiff's application to cross-appeal raises two issues: (1) whether Rengachary's stipulation to admit medical records constituted a general appearance, thereby preventing Rengachary from arguing that service of process was inadequate; and (2) whether equitable estoppel barred Rengachary from objecting to service of process.

[5] In the motion based on (C)(2), (3), and (8), Rengachary solely argued that service of process was insufficient. Therefore, this motion was

2.116(C)(3) specifies that summary disposition should be granted if "[t]he service of process was insufficient," and MCR 2.116(C)(7) specifies that summary disposition should be granted if "[t]he claim is barred because of . . . statute of limitations . . . ." Plaintiff argues that because Rengachary moved for summary disposition under MCR 2.116(C)(7), and because plaintiff timely moved for a jury trial, plaintiff was entitled under MCR 2.116(I)(3) to a jury trial on the issue of when service of process occurred. MCR 2.116(I)(3) states:

> A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. *An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6)*, or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. *If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.* [Emphasis added.]

Thus, MCR 2.116(I)(3) states that a trial court may hold a trial to determine disputed issues of fact in motions based on MCR 2.116(C)(1) through (7). By providing that "[a]n immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6)," and then establishing the circumstances under which a jury trial would be required if the grounds asserted are based on subrule (C)(7), MCR 2.116(I)(3) indicates that a trial court has the discretion to conduct a bench trial to resolve

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essentially based on (C)(3) and discussion of (C)(2) and (8) is unnecessary. In the motion based on (C)(7) and (8), Rengachary solely argued that he had not been served before the expiration of the period of limitations. Therefore, this motion was essentially based on (C)(7) and discussion of (C)(8) is unnecessary.

disputed factual questions relating to motions based on (C)(1) through (C)(6). However, a jury trial is required when: (1) the motion is based on MCR 2.116(C)(7); (2) a jury trial has been demanded; and (3) the issue raised by the motion is an issue "as to which there is a right to trial by jury." Unless each of these three conditions is satisfied, a trial court is never *required* to afford a jury trial under MCR 2.116(I)(3).

Rengachary's motions for summary disposition did not permit a jury trial because the (C)(3) motion only allows the trial court the discretion to order a bench trial, and the (C)(7) motion fully hinged on a determination of whether Rengachary had been sufficiently served under (C)(3). Rengachary's motion under (C)(7) stated that the period of limitations had expired because "Dr. Rengachary was not properly served with the Complaint and was not on notice of the lawsuit until after the running of the statute of limitations." Thus, the issue arising from the (C)(7) motion concerned only the sufficiency of service before the expiration of the period of limitations. In his (C)(3) motion, Rengachary claimed that he had been insufficiently served under MCR 2.105(A), which requires that service be made either "personally," or by "sending a summons and a copy of the complaint by registered or certified mail." Rengachary alleged that neither of these circumstances occurred. Plaintiff contended that a white-coated doctor who said he was Rengachary was served on March 11, 2004, while Rengachary claimed that he had not been served until March 18, when a man "barged in" at the clinic and left a summons on a desk. If Rengachary was not personally served on March 11, this alleged service on March 18 would be insufficient under MCR 2.105(A). Thus, resolution of the (C)(7) motion depended solely on a determination of the sufficiency of service under (C)(3). Because MCR 2.116(I)(3) allows a trial court to conduct a bench trial to determine whether the service was suffi-

cient, the Court of Appeals erred by holding that a jury trial was required in the instant case.[6]

The Court of Appeals relied on this Court's decision in *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004), to conclude that plaintiff possessed a right to trial by jury. Regarding the proper role of a jury, *Phillips* stated: "It is for the jury to assimilate the facts presented at trial, draw inferences from those facts, and determine what happened in the case at issue." *Id*. at 428. The Court of Appeals misinterpreted *Phillips*. Although *Phillips* recognized, unremarkably, that a jury's role is defined by the determination of factual issues, it nowhere follows from this that *every* factual issue must be determined by a jury. It is sufficient for present purposes to observe that such a conclusion transgresses the language of MCR 2.116(I)(3) that a trial court "may," but is not required to, conduct a bench trial to determine disputed issues of fact in motions for summary disposition brought under MCR 2.116(C)(1) through (6). Nothing stated in *Phillips* requires that a trial court conduct a jury trial on every disputed factual question raised in motions under MCR 2.116(C)(3) and (7).

The Court of Appeals and plaintiff also cite *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500

[6] The fact that Rengachary brought a motion under (C)(7) does not necessitate a jury trial. Under MCR 2.116(I)(3), a trial court must provide a jury trial with regard to a (C)(7) motion if a jury trial has been demanded— which it was here— and there is a question of fact in the issue raised by the motion "as to which there is a right to trial by jury." Because MCR 2.116(I)(3) expressly does not require a trial by jury to resolve disputed factual questions arising from (C)(3) motions, and the factual issue in this case was resolved through the (C)(3) motion, we do not believe the (C)(7) motion can be said to pertain to a factual issue "as to which there is a right to trial by jury." There is simply no "right to trial by jury" in the present context because once it was determined that the service was insufficient under (C)(3), there was no disputed factual question that service had occurred within the period of limitations.

(1991), and *Moss v Pacquing*, 183 Mich App 574; 455 NW2d 339 (1990), in support of their position that a jury trial is required in the present circumstances. However, both those cases involved entirely different disputes concerning when a plaintiff should have discovered a cause of action and therefore the dates on which the period of limitations started and expired. In the instant case, the parties do not dispute when the period of limitations started or expired. Rather, the parties acknowledge that the period of limitations expired on March 17, 2004, because of the tolling of the statute of limitations under MCL 600.5856(d). The instant dispute centers on whether service of process was sufficient before the expiration of the period of limitations, and not on the term of the statute of limitations. Neither *Kermizian* nor *Moss*, in our judgment, is relevant to whether a jury trial is required in the instant case.

B. GENERAL APPEARANCE

Plaintiff next contends that Rengachary had entered a general appearance before contesting the service of process, thereby granting the trial court jurisdiction over Rengachary regardless of when service occurred. Plaintiff states that Rengachary had entered a general appearance when his counsel signed a stipulation to introduce medical records in exchange for plaintiff's agreement to a two-week extension to file responsive pleadings. On the basis of this stipulation, plaintiff asserts that Rengachary may not object to the sufficiency of the service.

The rule to avoid waiver of service of process objections under MCR 2.116(C)(3) is found in MCR 2.116(D)(1), which provides that a defendant waives the ability to object to service of process under MCR

2.116(C)(3) unless the objection is raised in the defendant's first motion or responsive pleading:

> The grounds listed in subrule (C)(1), (2), and (3) must be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived. [MCR 2.116(D)(1).]

Thus, under the actual language of MCR 2.116(D)(1), a party generally waives objections to service of process under MCR 2.116(C)(3) unless the party complies with the court rule. In the instant case, Rengachary complied with MCR 2.116(D)(1) by raising the (C)(3) issue in his first motions for summary disposition, filed on April 16, 2004. Therefore, Rengachary's stipulation to the admission of medical records was irrelevant to whether he complied with MCR 2.116(D)(1). By raising the (C)(3) issue in his first motion for summary disposition, Rengachary successfully avoided waiver of the issue of the sufficiency of service of process under MCR 2.116(C)(3).[7]

Plaintiff cites *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178; 511 NW2d 896 (1993), for the proposition that "[a] party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections." *Id*. at 181.

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[7] The dissent asserts that we provide "no sound reason" for our decision, *post* at 300, and that MCR 2.116(D)(1) "in no way excludes the possibility that the right to raise [a service of process] defense can be waived in a manner other than failing to raise the defense in a motion or first responsive pleading." *Post* at 299. To the contrary, MCR 2.116(D)(1) establishes that a defense under MCR 2.116(C)(3) will be waived *unless* MCR 2.116(D)(1) is complied with. That is, MCR 2.116(D)(1) creates a general rule of waiver of (C)(3) objections, and then provides the only exception to that general rule. For this reason, whether a party "submits to the court's jurisdiction," *post* at 299, is irrelevant in determining whether a party has waived a (C)(3) objection.

Plaintiff asserts that Rengachary's stipulation to admit medical records constituted a general appearance, which prevents him from subsequently objecting to the sufficiency of service.

However, the rule stated in *Penny* clearly sweeps beyond the scope of MCR 2.116(D)(1), because *Penny* would hold that a defendant waives service of process objections simply by making a general appearance. Under MCR 2.116(D)(1), a defendant might make a general appearance and still not waive a (C)(3) objection to service of process. The holding in *Penny* therefore conflicts with the language of MCR 2.116(D)(1). Indeed, *Penny* did not even consider MCR 2.116(D)(1) because the trial court in *Penny* had dismissed the defendant under MCR 2.102(E).[8] The holding in *Penny* that a party making a general appearance thereby waives objections to service of process is broad enough to encompass motions under MCR 2.116(C)(3), and thus the holding in *Penny* is contrary to MCR 2.116(D)(1). To the extent *Penny* conflicts with MCR 2.116(D)(1), it must be overruled.[9]

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[8] On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction. [MCR 2.102(E)(1).]

MCR 2.102(D) states that, generally, a summons expires "91 days after the date the complaint is filed."

[9] Plaintiff also argues that equitable estoppel bars Rengachary from objecting to service of process because Rengachary signaled that he would contest the case on the merits by stipulating the admission of medical records. However, equity cannot "trump an unambiguous and constitutionally valid statutory enactment." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005). Parties are bound to follow the court rules in the same manner that parties are bound to follow statutory enactments. See MCR 1.102 (stating that the court rules "govern all proceedings in actions brought on or after [March 1, 1985]"). Therefore,

C. VICARIOUS LIABILITY

The remaining defendants, Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, contest the Court of Appeals conclusion that plaintiff could proceed with his vicarious liability claims even if the claims against defendant Rengachary were dismissed. This Court has defined vicarious liability as " 'indirect responsibility imposed by operation of law.' " *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002), quoting *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). "[T]he principal 'is only liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done.' " *Cox*, *supra* at 11, quoting *Smith v Webster*, 23 Mich 298, 300 (1871). This Court has also stated:

> " 'Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other.' " [*Theophelis*, *supra* at 483, quoting *Dessauer v Mem Gen Hosp*, 96 NM 92, 108; 628 P2d 337 (Ct App, 1981), quoting *Nadeau v Melin*, 260 Minn 369, 375-376;110 NW2d 29 (1961).]

Vicarious liability thus rests on the imputation of the negligence of an agent to a principal. Nothing in the nature of vicarious liability, however, requires that a judgment be rendered against the negligent agent. Rather, to succeed on a vicarious liability claim, a

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equity cannot prevail over an unambiguous court rule. Moreover, this Court preconditions the exercise of equitable power on the existence of "fraud, mutual mistake, or any other 'unusual circumstance[s] . . . .' " *Devillers*, *supra* at 591. Because Rengachary's (C)(3) motion complied with MCR 2.116(D)(1), and no indication of fraud, mutual mistake, or unusual circumstances has been shown, we decline to apply equitable estoppel in this case.

plaintiff need only prove that an agent has acted negligently. At issue in this case is the effect of the dismissal of the claims against Rengachary on the vicarious liability claims against the remaining defendants.

MCR 2.504(B)(3) is dispositive of this issue. MCR 2.504(B) provides:

> (1) If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant.
>
> * * *
>
> (3) Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, *operates as an adjudication on the merits*. [Emphasis added.]

Because Rengachary moved for summary disposition under MCR 2.116(C)(3) and (C)(7), MCR 2.504(B)(3) applies. Moreover, the trial court did not dismiss for "lack of jurisdiction or for failure to join a party under MCR 2.205," or "otherwise specif[y]" that the order of dismissal was something other than a dismissal on the merits. Rather, the trial court stated in its order that the dismissal was "with prejudice." Therefore, under MCR 2.504(B)(3), the dismissal of the claims against Rengachary "operates as an adjudication on the merits."

Because the remaining defendants may only be vicariously liable on the basis of the imputed negligence of Rengachary, plaintiff must demonstrate that Rengachary was negligent in order for the remaining defendants to be found vicariously liable. However, the dismissal of the claims against Rengachary operates as an adjudication on the merits of the claims against Rengachary. Plaintiff consequently is unable to show that the remaining defendants are vicariously liable for the acts of

Rengachary, because the dismissal of the claims against Rengachary prevents plaintiff from arguing the merits of the negligence claim against Rengachary. Therefore, the Court of Appeals erred by concluding that the vicarious liability claims against the remaining defendants could proceed if the claims against Rengachary were dismissed for failure to be served process within the statute of limitations period.

Plaintiff cites *Rogers v Colonial Fed S & L Ass'n*, 405 Mich 607; 275 NW2d 499 (1979), to argue that a summary disposition motion on statute of limitations grounds does not address the merits of a case. *Rogers* said, "An accelerated judgment based on the three-year statute of limitations is not an adjudication on the merits of a cause of action." *Id*. at 619 n 5. *Rogers* cited *Nordman v Earle Equip Co*, 352 Mich 342; 89 NW2d 594 (1958), in support of this proposition, and *Norman* cited *McKinney v Curtiss*, 60 Mich 611; 27 NW 691 (1886). The latter two cases were decided before the adoption of the General Court Rules of 1963. Because the cited holdings in those cases were superseded by the General Court Rules of 1963, they provide little support for the holding in *Rogers*. Moreover, *Rogers* failed altogether to address the effect of then-applicable GCR 1963, 504.2, which stated:

> For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

GCR 1963, 504.2 was substantially similar to the current MCR 2.504(B)(3). Because the holding of *Rogers* was not in accord with the applicable General Court Rules of 1963, *Rogers* was wrongly decided to the extent that it suggests that a motion for summary disposition

on statute of limitations grounds does not operate as an adjudication on the merits.[10]

Because MCR 2.504(B)(3) indicates that the dismissal of the claims against defendant Rengachary operates as an adjudication on the merits, and because, in our judgment, *Rogers* was wrongly decided, the remaining defendants cannot be held vicariously liable for Rengachary's acts. Therefore, the remaining defendants should be granted summary disposition on plaintiff's vicarious liability claims.

D. OTHER CLAIMS

The trial court dismissed the plaintiff's remaining claims against defendants Detroit Medical Center and Harper-Hutzel Hospital. Plaintiff did not appeal these dismissals in the Court of Appeals or in this Court. Therefore, plaintiff is deemed to have abandoned these claims.

IV. CONCLUSION

The Court of Appeals judgment is reversed insofar as it required a jury trial to determine the sufficiency of

[10] Before overruling prior precedent, this Court must not only determine— as we do here— that an earlier decision of this Court was wrongly decided, but also that overruling the earlier decision is in all other respects appropriate. *Robinson v Detroit*, 462 Mich 439, 464-466; 613 NW2d 307 (2000). We conclude that there are no factors identified in *Robinson* that would justify retaining *Rogers* as the law of Michigan despite its inconsistency with the written law of our state, in this case MCR 2.504(B)(3). In particular, we hold that there is no reasonable reliance interest on plaintiff's part, or on the part of similarly situated plaintiffs, that would be undermined by the overruling of *Rogers*. We do not believe that any plaintiff would have risked late service of process, and hence lack of compliance with the statute of limitations, on the basis that such lack of compliance, although it might result in the dismissal of a lawsuit against an agent, would not constitute an adjudication on the merits against the agent and therefore would not require the dismissal of a lawsuit against a principal based on vicarious liability.

service of process before the expiration of the statute of limitations period. Moreover, Rengachary's alleged general appearance did not waive his objection to service of process under MCR 2.116(C)(3), which was properly raised under MCR 2.116(D)(1). Therefore, the Court of Appeals judgment is reversed insofar as it held that such a waiver may occur as a result of a general appearance. Finally, the Court of Appeals judgment is reversed insofar as it allowed plaintiff to pursue vicarious liability claims against the remaining defendants. This case is remanded to the trial court for reinstatement of summary disposition for all defendants.

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

CAVANAGH, J. (*dissenting*). Although I agree with the majority's analysis in part III(A) of its opinion, I do not believe that we need to reach the issue regarding whether a jury trial is required to resolve a dispute over service of process. Rather, this case can and should be decided on the ground that defendant Setti Rengachary, M.D., waived his right to challenge the sufficiency of service of process when his counsel, before disputing sufficiency, participated in an action that resulted in the trial court issuing an order. For these reasons, I would reverse the judgment of the Court of Appeals in part and remand this case for trial.

The majority apparently concludes that because MCR 2.116(D)(1) describes the manner in which a service of process dispute must be raised, then as long as a party raises the issue in that manner, his ability to raise the issue cannot be challenged. But the majority completely ignores fundamental principles regarding waiver.

The instructions contained in MCR 2.116(D)(1) pertaining to when a defense regarding service of process must be raised in no way excludes the possibility that the right to raise such a defense can be waived in a manner other than failing to raise the defense in a motion or first responsive pleading. Namely, a waiver of the right to raise that defense occurs when a party submits to the court's jurisdiction before raising the defense.

Because waiver can occur in ways other than failing to comply with the cited court rule, it is important to examine the general rules behind appearances and the consequences of appearing before a court. MCR 2.117(B), the court rule governing appearances of attorneys before the trial court, outlines the following rules:

> (1) In General. An attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party.
>
> (2) Notice of Appearance.
>
> (a) If an appearance is made in a manner not involving the filing of a paper with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. The attorney's address and telephone number must be included in the appearance.
>
> (b) If an attorney files an appearance, but takes no other action toward prosecution or defense of the action, the appearance entitles the attorney to service of pleadings and papers as provided by MCR 2.107(A).

In *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993), the

Court of Appeals explained the corollary principles surrounding appearances by attorneys, which principles accord with the court rule:

> A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985). Generally, any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance. Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. *Ragnone v Wirsing*, 141 Mich App 263, 265; 367 NW2d 369 (1985). A party that submits to the court's jurisdiction may not be dismissed for not having received service of process. MCR 2.102(E)(2).

These principles can be traced in this Court's jurisprudence as far back as 1929. See *Najdowski v Ransford*, 248 Mich 465, 471-472; 227 NW 769 (1929). And the principles have not varied over time. See, e.g., *Macomb Concrete Corp v Wexford Corp*, 37 Mich App 423, 425; 195 NW2d 93 (1971) (holding that "[o]ne of the effects of submitting to the court's jurisdiction by making a general appearance is that a party waives any objection to service of process"); *Ragnone*, *supra* at 265-266 (holding that when the defendant "communicated with plaintiff for the purpose of negotiating a settlement, wrote a letter seeking an extension of time for filing an answer, and even attended the scheduled meeting," the defendant "appeared" before the court). The majority provides no sound reason for ignoring the dispositive effect of a party submitting himself to the jurisdiction of a court *before* contesting that court's jurisdiction over him. Under the majority's novel rationale, a party can fully participate in a case and such

participation will have no consequence as long as the party challenges service of process in his first motion or first responsive pleading. This new rule, accomplished by unjustifiably overruling *Penny*, *supra*,[1] turns the concepts of jurisdiction and waiver on their heads, for a party can ask for relief from the court, get such relief, and then successfully argue that the court had no jurisdiction to rule in the matter.

In fact, that is precisely what occurred in the present case. Defendant Rengachary, through his attorney, submitted himself to the jurisdiction of the court and, thus, waived his right to challenge the sufficiency of service of process, when he expressed knowledge of the pending proceedings and an intent to appear. After the date on which plaintiff claims defendant Rengachary was given notice of the lawsuit by being served a summons and complaint, plaintiff's counsel communicated with Bart O'Neill of Saurbier & Siegan, P.C., who maintained that he represented all defendants in the matter. Then, O'Neill represented each of the defendants' interests by participating in formulating and executing a stipulation and order. Plaintiff's counsel and O'Neill negotiated a deal in which they stipulated admitting all of plaintiff's medical records in exchange for plaintiff granting a two-week extension for defendants to file responsive pleadings. At no time did defense counsel intimate any problem with service of process or suggest that he would be asserting that one defendant, Rengachary, was

[1] The majority contends that the concepts in *Penny* are inconsistent with MCR 2.117(B). But the *Penny* Court's analysis of waiver is far broader than the court rule governing appearances, and the court rule in no way obviates the *Penny* reasoning. The majority fails to explain or provide any sound justification regarding why a court rule dictating when a defense involving service of process must be raised abrogates widely accepted notions of submitting oneself to the jurisdiction of a court by appearing before it and, thus, waiving certain defenses.

not served. Rather, O'Neill signed a stipulation that contained this statement:

> Plaintiff's counsel has contacted and spoken with Counsel for the Defendants SETTI S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, AND UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C., with this information and both hereby stipulate and agree to the above request in the above referenced matter.

And O'Neill's signature was "on behalf of all Defendants," as also reflected in that document.

Further, the parties, through their respective attorneys, then submitted a proposed order to the trial court, which order formalized the parties' agreement that plaintiff's medical records would be admitted at trial. The trial court signed the order, and it was entered in the court file.

These actions on the part of defendant Rengachary's attorney constituted "an act indicating that the attorney represents a party in the action," which, under MCR 2.117(B)(1), is an appearance. And the appearance clearly met the test set forth in *Penny*, demonstrating that defendant had "knowledge of the pending proceedings" and "an intent to appear." *Penny*, *supra* at 182. Anyone reading the stipulation—most importantly, the court—would have no reason to conclude anything other than that O'Neill represented and was speaking on behalf of defendant Rengachary, who would be presumed to have knowledge of that representation. An attorney speaks for his client. Thus, defendant Rengachary had knowledge of the pending proceedings and an intent to appear, and, in fact, did appear. At that time, the court assumed jurisdiction over defendant Rengachary. And because he appeared before first asserting a service-of-process defense through the measures set

forth in MCR 2.116(D)(1), and jurisdiction was obtained over him at that time, defendant Rengachary waived his right to thereafter contest whether he had been properly served.

My conclusion on this issue would render the remaining issue moot. Thus, I would not reach the issue whether dismissal of plaintiff's claim against an agent necessitates dismissal of plaintiff's claims against the agent's principals. Instead, I would hold that plaintiff may proceed in his claim against all defendants because defendant Rengachary submitted to the jurisdiction of the court and, thus, waived his right to challenge service of process.

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

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied September 8, 2006:

In re CORBEAU (DEPARTMENT OF HUMAN SERVICES v COONS), No. 131872; Court of Appeals No. 264747.

In re DEGG (DEPARTMENT OF HUMAN SERVICES v MURPHY), No. 131904; Court of Appeals No. 267243.

Leave to Appeal Granted September 14, 2006:

BARNETT v HIDALGO, Nos. 130071, 130073. The parties shall include among the issues to be briefed whether *Brewer v Payless Stations, Inc*, 412 Mich 673 (1982), and *Clery v Sherwood*, 151 Mich App 55 (1986), have continuing vitality in light of MCL 600.6304 and MCL 600.2957, which require the finder of fact to determine and apportion the liability of nonparties. The Michigan Trial Lawyers Association and 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. Reported below: 268 Mich App 157.

PEOPLE v FRAZIER, No. 131041. The application for leave to appeal is granted. The parties are directed to include among the issues to be briefed: (1) whether the exclusionary rule applies to fruits of a confession extracted not by police misconduct, but by the abandonment of retained counsel during the interrogation, a critical stage of proceedings, in violation of *United States v Cronic,* 466 US 648 (1984); and, if so, (2) whether the inevitable discovery doctrine of *Nix v Williams,* 467 US 431 (1984), applies in such circumstances; and, if so, (3) whether the exclusionary rule should be applied narrowly as suggested in *United States v Ceccolini,* 435 US 268 (1978), when the information derived from the confession is the identity of witnesses. 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. 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. Reported below: 270 Mich App 172.

Summary Dispositions September 14, 2006:

PEOPLE v GULLETT, No. 130373. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals

for consideration, as on leave granted, of defendant's claim that the trial court improperly assessed ten points for offense variable 9. In all other respects leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 266528.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v LATTING, No. 130463. 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 Genesee Circuit Court for further proceedings consistent with the trial court's ruling of May 10, 2004. The Secura policy affords coverage because plaintiff Latting and defendant Clay were engaged in "farming" when the accident in which plaintiff was injured occurred. Third-party defendant HBE Equestrian Center is listed in the Secura policy's declarations as a joint owner and operator, along with third-party defendants David and Shelly Pennell, who are listed as insureds and who, as insureds, are listed as operators in the policy. When preparing to attach a wagon to a tractor for the purpose of gathering baled hay from nearby fields leased to third-party defendants Pennell, plaintiff Latting and defendant Clay were engaged in use of the insured premises for the production of crops and the raising or care of "livestock" within the meaning of the Secura policy's definition of "farming." The policy's definition of "insured premises" includes the part of other premises acquired during the policy period that the insured intends to use as a farm. Under the policy, "business" does not mean "farming." Moreover, the hay was to be gathered for use as feed for horses stabled on the insured premises, which included both the Pennells' own horses and those of defendant Clay (for which Clay paid the Pennells no boarding fees), as well as those belonging to fee-paying boarders. Thus, even if boarding horses is a "business" under the policy's definition, that is, "any full or part-time trade, profession, occupation or service done for monetary or other compensation [not including] farming," it is clear that, as to the horses belonging to defendant Clay and third-party defendants Pennell, plaintiff Latting and defendant Clay were engaged in "farming" when the accident that injured plaintiff occurred. Therefore, the policy's exclusion of coverage for bodily injury arising out of business pursuits of an insured does not apply, nor does the policy's motor vehicle exclusion apply, because it is expressly inapplicable to farm tractors under the plain and ordinary meaning of the policy. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1 (1991). Court of Appeals No. 255964.

PEOPLE v ARNOLD, No. 130888. The motion for immediate consideration is granted. The application for leave to appeal the February 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 Tuscola Circuit Court for resentencing. A defendant facing incarceration has the right to counsel at all critical stages of the criminal process. *People v Williams*, 470 Mich 634, 641 (2004). Sentencing is a critical stage. *People v Pubrat*, 451 Mich 589, 594 (1996). The complete denial of counsel at a critical stage of a criminal proceeding, as occurred in this

case, is structural error requiring automatic reversal. See *Gideon v Wainwright*, 372 US 335, 344-345 (1963); *People v Duncan*, 462 Mich 47, 51-52 (2000). We do not retain jurisdiction. Court of Appeals No. 266906.

PEOPLE v MCNEIL, No. 131132. 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. 266815.

WILLIAMSON v CITY OF LIVONIA, No. 131255. The application for leave to appeal the April 11, 2006, judgment of the Court of 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 reverse the judgment of the Court of Appeals and reinstate the decision of the Workers' Compensation Appellate Commission, mailed December 15, 2004, for the reasons stated in that decision. The Court of Appeals erred by finding res judicata inapplicable because plaintiff's first petition pertained to a psychological condition and his second petition pertained to cardiovascular disease. A workers' compensation award is an adjudication as to the condition of the injured employee at the time it is entered, and conclusive of all matters adjudicable at that time. *Gose v Monroe Auto Equipment Co,* 409 Mich 147, 160-161 (1980). Court of Appeals No. 260274.

KELLY, J. I would deny leave to appeal.

PEOPLE v JAMBOR, No. 131325. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The exhibits were sufficiently authenticated as fingerprint cards relating to the offense, containing complaint number, address, signature of the preparing officer, and were referenced and described in a report prepared by the officer as confirmed by a witness whose credibility was not questioned, thereby satisfying MRE 901. We remand this case to the Court of Appeals for consideration of the remaining issues raised by the parties in the appeal and cross-appeal filed in the Court of Appeals. We do not retain jurisdiction. Reported below: 271 Mich App 1.

WEAVER, J. I would grant leave to appeal.

WILLIAMS v AAA MICHIGAN, Nos. 131511, 131512. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the March 31, 2006, order of the Court of Appeals and remand this case to the Court of Appeals for plenary consideration. Because the February 2, 2006, order of the Montcalm Circuit Court is a postjudgment order awarding attorney fees and costs, it is a final order under MCR 7.202(6)(a)(iv) that is appealable as a matter of right under MCR 7.203(A)(1). We do not retain jurisdiction. Court of Appeals Nos. 268429, 268430.

EPPS v AUTO CLUB INSURANCE ASSOCIATION, No. 131756. The motion for immediate consideration is granted. The application for leave to appeal the July 10, 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 Wayne 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. 271250.

Leave to Appeal Denied September 14, 2006:

PEOPLE v KRIS THOMAS, No. 130093; Court of Appeals No. 264096.

PEOPLE v LONSBY, No. 130356; reported below: 268 Mich App 375.

PEOPLE v CLARK, No. 130558; Court of Appeals No. 256190. CAVANAGH and KELLY, JJ. We would grant leave to appeal.

FIRST TENNESSEE BANK v OTTOMAN, No. 130974; Court of Appeals No. 266141.

BRADFIELD v MEIJER, INC, No. 131074; Court of Appeals No. 258458. CAVANAGH and KELLY, JJ. We would reverse the judgment of the Court of Appeals.

STOP OVERSPENDING INITIATIVE v BOARD OF STATE CANVASSERS, No. 132066. The motions for immediate consideration, to intervene, and to file brief amicus curiae are granted. Court of Appeals No. 272886.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 15, 2006:

KNUE v SMITH, No. 130377. 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 submit supplemental briefs within 28 days of the date of this order addressing whether attorney fees and costs may be assessed pursuant to MCR 2.405(D) in a case involving an equitable claim to quiet title, and whether the $3,000 offer in plaintiffs' counsel's letter of May 16, 2003, was an offer of judgment under MCR 2.405(A)(1), in light of that rule's requirement of a "sum certain," and given the plaintiffs' additional demand for a quitclaim deed. The parties should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 269 Mich App 217.

LANZO CONSTRUCTION COMPANY v WAYNE STEEL ERECTORS, No. 130992. 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: (1) the admission by Fernando Agueros at his deposition that he misjudged the distance to the column when he swung around the rebar that he was carrying and the leading ends of the rebar struck the column, causing his fall and (2) whether that admission establishes that Agueros was negligent, such that the accident was not the result of the sole negligence of the plaintiff, thereby rendering MCL 691.991 inapplicable. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid

submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 264165.

BANKS v EXXON MOBIL CORPORATION, No. 131036. 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: (1) whether the lower courts erred in ruling that the defendants are entitled to summary disposition on the issue of whether the defendants knew or should have known of the dangerous condition of the gasoline pump and (2) whether the Oakland Circuit Court's ruling that the jury would be instructed that it could infer that the missing videotape would be adverse to the defendants should play any role in the determination of whether summary disposition is warranted under MCR 2.116(C)(10) and, if so, how the adverse inference affects the summary disposition proceedings. 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. 257902.

HOSEY v BERRY, No. 131213. 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 MCR 2.116(G)(6) permits a trial court, in deciding a motion for summary disposition, to consider unsworn statements or opinions of potential witnesses contained in documents that may be inadmissible at trial. 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 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. 257709.

Summary Dispositions September 15, 2006:

PEOPLE v MILESKI, No. 127457. By order of June 17, 2005, we granted leave to appeal the November 4, 2004, judgment of the Court of Appeals and ordered that this case be argued and submitted together with the case of *People v Walker* (Docket No. 128515), 472 Mich 927 (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 cases having been decided on June 19, 2006, *Davis v Washington*, __ US __; 126 S Ct 2266; 165 L Ed 2d 224 (2006), we vacate our June 17, 2005, order granting leave to appeal and the November 4, 2004, judgment of the Court of Appeals, and remand this case to the Court of Appeals for reconsideration in light of *Davis*. We direct the Court of Appeals' attention to the fact that we have also remanded *People v Walker* to the Court of Appeals for reconsideration in light of *Davis*. We do not retain jurisdiction. Court of Appeals No. 248038.

KELLY, J. I would vacate the June 17, 2005, order granting leave to appeal and would deny leave to appeal.

PEOPLE V WALKER, No. 128515. By order of June 17, 2005, we granted leave to appeal the March 24, 2005, judgment of the Court of Appeals and ordered that this case be argued and submitted together with the case of *People v Mileski* (Docket No. 127457), 472 Mich 928 (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 cases having been decided on June 19, 2006, *Davis v Washington*, __ US __; 126 S Ct 2266; 165 L Ed 2d 224 (2006), we vacate our June 17, 2005, order granting leave to appeal and we vacate in part the March 24, 2005, judgment of the Court of Appeals. We remand this case to the Court of Appeals for reconsideration of the defendant's Confrontation Clause issue in light of *Davis*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. We direct the Court of Appeals' attention to the fact that we have also remanded *People v Mileski* to the Court of Appeals for reconsideration in light of *Davis*. We do not retain jurisdiction. Reported below: 265 Mich App 530.

KELLY, J. I would not vacate the June 17, 2005, order granting leave to appeal and would hear oral argument on the case.

WATTS V NEVILS, No. 131109. 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 that Court for plenary consideration. Defendants had a right to an appeal under MCR 7.202(6)(a)(v) and 7.203(A)(1) because the circuit court order denied governmental immunity to these defendants. Whether there were factual issues remaining was irrelevant. See *Walsh v Taylor*, 263 Mich App 618, 625 (2004). We overrule *Newton v Michigan State Police*, 263 Mich App 251 (2004), to the extent that it is inconsistent with this order and *Walsh*. Court of Appeals No. 267503.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Denied September 15, 2006:

WILLIAMS V AAA OF MICHIGAN, No. 130018; Court of Appeals No. 265827.

KELLY, J. (*concurring*). I concur in the decision to deny leave to appeal. But I would tax appellate costs and attorney fees against defendant. Its appeal was completely frivolous.

The matter began in 1996, when an automobile accident rendered plaintiff a quadriplegic. Defendant was his first-party no-fault insurer. A controversy arose because defendant would not pay all of plaintiff's necessary personal injury protection benefits, and plaintiff brought suit. In March 1998, the parties entered into a partial settlement agreement requiring that defendant purchase a handicapped-equipped van for plaintiff every five years.

But, after five years passed, defendant did not purchase a new van for plaintiff. Plaintiff again resorted to litigation. In January 2004, he filed a

motion to compel defendant to purchase a new van. Defendant responded that it was willing to purchase a new van, but it wanted plaintiff to sign a new agreement. The trial court granted plaintiff's motion from the bench in February 2004. Defendant's attorney apparently drafted the order. The last sentence stated: "THIS ORDER RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE." (Emphasis in original.) The order was entered in April 2004.

But defendant still failed to buy the new van. In May, plaintiff sought to hold defendant in contempt of court. He also obtained writs of garnishment against defendant. Defendant objected, claiming that the April order was not a final order. In August, the trial court ruled that the order was final.

Still, defendant did not buy the van. The parties came into court on plaintiff's contempt motion in September. The court ordered defendant to purchase the new van within 30 days. It threatened to jail defendant's counsel if defendant did not comply. In its order, the court also found that defendant's answer to the motion for contempt had been frivolous and allowed plaintiff costs and attorney fees. Defendant then purchased the van, but it appealed from the order. The Court of Appeals denied leave to appeal for lack of merit. Defendant appealed to the Supreme Court. Its position on appeal is that the April 2004 order was not a final order.

MCR 2.114(F) and MCR 2.625(A)(2) subject a party that brings a frivolous defense to sanctions from the Court. And MCR 7.219 and MCR 7.318 allow the Court to assess costs. This is a case in which the Court certainly should exercise these powers.

In support of its position that the April order was not final, defendant asserts that the order did not set a dollar amount that defendant had to pay for plaintiff's van. It must be remembered that defendant's counsel drafted, or at least participated in the drafting of, this order. There is no indication in the record that defendant tried to include in it a dollar amount for the van. The order appears merely to have enforced the parties' earlier 1998 settlement agreement. That agreement, freely entered into by defendant, did not state the amount to be paid. Yet defendant purchased the first van without an agreed-to purchase price. Moreover, it seems unlikely that the agreement and the April 2004 order enforcing it could contain an exact dollar amount. This is because of the changing costs of new vans and the fact that defendant had to purchase a new one every five years.

Moreover, the order specifically stated that it resolved the pending claim and closed the case. The language of the order closely tracks the court rule defining a final order. MCR 7.202(6)(a)(i) indicates what constitutes a final order in a civil case: "the first judgment or order *that disposes of all the claims* and adjudicates the rights and liabilities of all the parties . . . ." (Emphasis added.) For defendant's claim to have merit, one would have to assume that this language was accidentally included *and* emphasized. Yet, defendant brought no motion to amend or clarify the order.

Random House Webster's College Dictionary (2001) defines "frivolous" as "characterized by lack of seriousness or sense." Defendant's argument before this Court fits this definition. Given the language

included in the April 2004 order, defendant's claim that the order was incomplete makes no sense. The appeal is frivolous. Accordingly, the case should be remanded to the Montcalm Circuit Court[1] for assessment against defendant of the costs and attorney fees incurred by plaintiff during this appeal.

CAVANAGH and WEAVER, JJ. We join the statement of Justice KELLY.

LIGGETT RESTAURANT GROUP, INC v CITY OF PONTIAC, No. 130287; Court of Appeals No. 256571.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J., did not participate.

Summary Dispositions September 20, 2006:

LEONARD v BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, No. 130415. 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. 264061.

KELLY, J. I would deny leave to appeal.

SAHR v WAL-MART STORES, INC, No. 131133. 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 decision of the magistrate. The Court of Appeals erred by finding that the Workers' Compensation Appellate Commission (WCAC) had offered adequate reasons for rejecting the magistrate's reliance on and interpretation of the testimony of plaintiff's treating neurosurgeon. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691, 703 (2000). The WCAC rejected all of the reasons provided by the magistrate for finding that plaintiff had failed to meet her burden of proving workplace causation for her back complaints because the treating doctor did not directly relate plaintiff's disability to her smoking. Because the magistrate did not base her decision on any such alleged opinion by the treating doctor, the WCAC did not provide an adequate reason for rejecting the magistrate's comprehensive findings as unsupported by competent, material, and substantial evidence. Court of Appeals No. 262952.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J., did not participate.

Leave to Appeal Denied September 20, 2006:

PEOPLE v DECARLOSE SMITH, No. 126837; Court of Appeals No. 254724.

PEOPLE v COE, No. 128192; Court of Appeals No. 258047.

PEOPLE v MAVITY, No. 130069; Court of Appeals No. 263914.

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[1] The Montcalm court has already assessed costs and attorney fees against defendant because its defense in that court was frivolous. Defendant has appealed from that decision as well.

GOICHAI v LENDER LTD, No. 130306; Court of Appeals No. 262823.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DONKO, No. 130619; Court of Appeals No. 267700.

HADDAD v ADECCO USA, INC, No. 130654; Court of Appeals No. 265639.

PEOPLE v HODGES, No. 130707; Court of Appeals No. 267224.

PEOPLE v WARSHAW, No. 130791; Court of Appeals No. 257589.

HARRIS v SEARS, ROEBUCK AND COMPANY, No. 130805; Court of Appeals No. 253546.

LUTZ v MERCY MT CLEMENS CORPORATION, No. 130849; Court of Appeals No. 261465.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v WITCHER, No. 130850; Court of Appeals No. 256562.

PEOPLE v GREISSEL, No. 130879; Court of Appeals No. 268380.
KELLY, J. I would remand to the trial court to allow defendant to withdraw his plea.

FOSTER-SMITH v SPRATT, No. 130918; Court of Appeals No. 262483.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

LEZELL v HILLER, INC, Nos. 130943, 130944; Court of Appeals Nos. 256415, 257384.

PEOPLE v ROUNDS, No. 131328; Court of Appeals No. 268734.
KELLY, J. I would grant leave to appeal.

JAMES v CHUCK E CHEESE'S, No. 131581. We are not persuaded that the questions presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. The motion to stay is denied as moot. Court of Appeals No. 265693.

SOWERS v MORRISSETT, Nos. 131682, 131940; Court of Appeals Nos. 269861, 269909.
KELLY, J. I would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied September 20, 2006:

TOOSON v AMERITECH CORPORATION, INC, No. 131072. The motion to file brief amicus curiae is granted. Court of Appeals No. 265570.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 22, 2006:

CLERC v CHIPPEWA COUNTY WAR MEMORIAL HOSPITAL, Nos. 129438, 129482. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule

oral argument on whether to grant the applications or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether: (1) when the trial court conducts an evidentiary hearing consistent with the gatekeeping obligation of MRE 702, described in both *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004), and *Craig v Oakwood Hosp*, 471 Mich 67 (2004), and satisfies the requirements of MCL 600.2955, but determines that the proponent of the expert has not put forth sufficient evidence that the expert's proposed testimony is "the product of reliable principles and methods," the trial court is nevertheless required to conduct a more "searching inquiry," *Gilbert* at 782, before the court may exclude the expert testimony; (2) if a qualified medical expert testifies that ethical considerations preclude a scientific study that would yield supporting data for the expert's opinion, the expert's own knowledge and experience, without such corroborating evidence, is sufficient to establish a reliable basis for this opinion in satisfaction of MRE 702, as described in *Gilbert, supra,* and *Craig, supra*; and (3) if the trial court finds the expert's anecdotal evidence based on the expert's own knowledge and experience insufficient to show a reliable basis for the expert's opinion and permits the expert's proponent an opportunity to provide additional corroborating evidence, the proponent's failure to provide additional corroborating evidence constitutes a waiver of any further "searching inquiry." Reported below: 267 Mich App 597.

PEOPLE v HOLT, No. 128034. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCL 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether there was a violation of the 180-day rule, MCL 780.131, in this case in light of *People v Williams,* 475 Mich 245 (2006), and whether the time limitation set forth in MCL 780.131 is subject to waiver or extension for any reason, such as prosecutor good faith, mutual agreement of the parties, or time attributable to the defendant, including requests for adjournment. 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. 250580.

Summary Dispositions September 22, 2006:

PEOPLE v POWELL, No. 131385. 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 Livingston Circuit Court's order denying the motion to suppress. The Court of Appeals failed to apply the proper standard, which required it to review the circuit court's factual findings for clear error. *People v Jenkins*, 472 Mich 26, 31 (2005). Whether defendant's side yard was landscaped in a manner so as to indicate that visitors were excluded

was a question of fact, and the trial court's finding that it was not so landscaped was not clearly erroneous. Thus, the trial court's decision should have been affirmed.

Moreover, the Court of Appeals misapplied the test announced in *United States v Dunn*, 480 US 294, 301 (1987), under which the primary inquiry is whether "the area harbors the intimate activity associated with the sanctity of . . . [the] home and the privacies of life." 480 US at 300 (internal quotation omitted). The record demonstrates that the area was not enclosed and was in plain view of defendant's neighbors. There is no principled reason for distinguishing between people passing by the front of the house and people passing by the back. It is clear from the record that defendant expended no effort whatsoever to protect her claimed expectation of privacy in the area. Finally, "[g]rowing large [marijuana] plants in a totally unobstructed and open area is not one of those 'intimate activities' whose presence defines the curtilage for Fourth Amendment purposes." *United States v Smith*, 783 F2d 648, 652 (CA 6, 1986). Examining all of the *Dunn* factors together, defendant failed to demonstrate the existence of a reasonable expectation of privacy in the backyard. *Kyllo v United States*, 533 US 27, 33 (2001); *California v Ciraolo*, 476 US 207, 211 (1986). Accordingly, we remand this case to the trial court for further proceedings. We do not retain jurisdiction. Court of Appeals No. 256878 (on remand).

KELLY, J. (*dissenting*). The Court of Appeals has twice considered this case and twice decided that the police violated defendant's Fourth Amendment protections. This Court has now peremptorily reversed those findings, erroneously. I disagree that the Court of Appeals failed to apply the proper standard of review. Also, I believe that the Court of Appeals did not misapply the United States Supreme Court's test announced in *Dunn*.[1] The record, including a photograph of defendant's backyard, does not disclose "plants in a totally unobstructed and open area" visible to people passing by the back. There was no alleyway behind defendant's house along which people could pass. It is not clear that any of defendant's neighbors could have seen the plants or seen what they were. The Court of Appeals correctly concluded that the backyard of defendant's home was within the curtilage of her residence under the test in *Dunn* and that it was under Fourth Amendment protection. I agree that "any reasonable person would intuitively know that proceeding beyond the garage service door would constitute an invasion of an area immediately adjacent to this residence that is intended to provide a barrier to accessing the otherwise private backyard." The Court of Appeals decision should be affirmed.

CAVANAGH, J. I join the statement of Justice KELLY.

PEOPLE V THURMAN JONES, No. 130948. 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. 268421.

KELLY, J. I would deny leave to appeal.

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[1] *United States v Dunn*, 480 US 294 (1987).

Leave to Appeal Denied September 22, 2006:

JACOBS v TECHNIDISC, INC, No. 128715. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our orders of November 3, 2005, and July 21, 2006. The application for leave to appeal the February 22, 2005, order of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 258271.

CORRIGAN, J. (*concurring*). I concur with the order to dismiss this case because leave to appeal was improvidently granted. I agree with the majority that we should not reopen this ancient case, which involves the enforcement of a 1993 consent judgment. But I write separately because I believe that intervenor-appellant Michigan Mutual Insurance Company's (MMIC) point is correct regarding the circuit court's authority to settle workers' compensation claims in conjunction with third-party cases, an issue MMIC first raised in its postargument supplemental brief.

I. FACTS AND PROCEDURAL POSTURE

After plaintiff suffered a work-related injury in 1988, MMIC, plaintiff's employer's workers' compensation carrier, commenced payment of $397 a week in workers' compensation benefits. When plaintiff subsequently filed a third-party tort action against defendants, Technidisc, Inc., and Producer's Color Services, Inc., MMIC intervened to assert its right to reimbursement of past and future payments. The third-party action was resolved by a December 1993 consent judgment awarding plaintiff $612,500. The judgment also ordered plaintiff to reimburse MMIC $65,000 for the workers' compensation payments it already made, and reduced plaintiff's future benefits from $397 a week to $211 a week to account for ongoing reimbursement rights and MMIC's future credit from the third-party tort judgment. MMIC continued to make benefit payments according to this judgment.

In 2003, when plaintiff turned 65 and began to receive old-age social security benefits, MMIC began coordination of its payments to plaintiff.[1] This coordination reduced MMIC's weekly payments to $52.03. Plaintiff objected to this reduction in workers' compensation payments and filed a motion in the circuit court to enforce the 1993 consent judgment. In response, MMIC argued that the circuit court lacked jurisdiction to resolve a dispute relating to the payment of workers' compensation benefits, given that MCL 418.841(1) provides that such questions are reserved for resolution within the workers' compensation system. The circuit court rejected MMIC's argument and ordered MMIC to pay

[1] Under MCL 418.354(1)(a), workers' compensation employers and carriers are permitted to coordinate 50 percent of old-age social security benefits payments. This coordination is permitted automatically, without prior approval of the Workers' Compensation Agency (WCA).

plaintiff $211 a week as provided in the consent judgment. The Court of Appeals denied MMIC's application for leave to appeal.

II. ANALYSIS

MMIC argues that MCL 418.827(2) does not provide the authority for circuit court settlement of a workers' compensation claim in conjunction with a third-party case. MCL 418.827(2) provides as follows:

> Prior to the entry of judgment, either the employer or carrier or the employee or the employee's personal representative may settle their claims as their interest shall appear and may execute releases therefor.

This subsection allows the settlement of workers' compensation claims, but it does not specify *where* the settlement may occur. The Worker's Disability Compensation Act (WDCA) provides that an employer may settle a workers' compensation claim by "redeeming" its liability. MCL 418.835; MCL 418.837. The Court of Appeals explained this process in *Stimson v Michigan Bell Tel Co*, 77 Mich App 361, 364 n 2 (1977):

> An employer may redeem its liability under the act subject to the approval of a hearing referee. MCLA 418.835; MSA 17.237(835). At a redemption hearing, the referee passes on the propriety of the redemption rather than the legitimacy of the claim. *Farrell v Campbell, Wyant & Cannon Foundry Co,* 392 Mich 344; 220 NW2d 450 (1974). Voluntary compromises under the first sentence of MCLA 418.835; MSA 17.237(835) are final settlements of an employer's liability under the act and foreclose a determination of whether a claimant's disabilities arose out of and in the course of employment. *White v Weinberger Builders, Inc,* 49 Mich App 430; 212 NW2d 307 (1973), *aff'd* 397 Mich 23; 242 NW2d 427 (1976). *See, Wehmeier v W E Wood Co,* 377 Mich 176; 139 NW2d 733 (1966). The parties may, however, settle any part of the controversy by a redemption agreement and leave other issues for further litigation. *Bugg v Fairview Farms, Inc,* 385 Mich 338; 189 NW2d 291 (1971).

When the parties agree to redeem workers' compensation obligations by a lump sum settlement, the proposed redemption agreement must be approved by a magistrate. MCL 418.827(1); *Chrysler Corp v Workers' Compensation Appeal Bd*, 174 Mich App 277, 281 (1988). The reason workers' compensation claim settlements must be approved by a workers' compensation magistrate is because the public bears the cost of compensation protection in the price of a product, and the public interest is thwarted when a workers' compensation settlement unnecessarily

increases the cost of the product by giving the worker more than his or her due. 8 Larson's Workers' Compensation Law, § 132.04, pp 132-7 to 132-8. Thus, redemption of liability under MCL 418.835; MCL 418.837 is the *only* way an employer's responsibility for workers' compensation obligations can be completely terminated. Welch, Worker's Compensation in Michigan: Law & Practice, (4th ed), § 22.8, p 22-7.

Further, MMIC successfully refutes any notion that the phrase "settle their claims" in MCL 418.827(2) must contemplate the settlement of workers' compensation claims in the circuit court. The phrase "[p]rior to the entry of judgment" in MCL 418.827(2) does not assume that the third-party claims have already been resolved, because the "settle their claims" phrase refers to the third-party action itself and the claims made upon that recovery before the entry of the third-party judgment. This interpretation is supported by subsections 3 and 4 of § 827, which refer to the "claim" as the third-party action.[2] Further, this interpretation is supported by *Drapefair, Inc v Beitner*, 89 Mich App 531, 538 (1979), where the panel explained that "[u]nder paragraph 2 of this section, the right of an injured employee to settle his *claim against third-party tortfeasors* is recognized." (Emphasis added.) Thus, the circuit court in the instant case did not have the authority to settle the workers' compensation claims.

In re VANZANDT (DEPARTMENT OF HUMAN SERVICES v VANZANDT), Nos. 131996, 131997; Court of Appeals Nos. 267182, 267183.

Summary Dispositions September 26, 2006:

DAVIDSON v DAIMLERCHRYSLER MOTORS COMPANY, LLC, No. 126556. By order of June 10, 2005, the application for leave to appeal was held in abeyance pending the decision in *Radeljak v DaimlerChrysler Corp* (Docket No. 127679). On order of the Court, the case having been decided on July 19, 2006, 475 Mich 598 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for reconsideration of the motion for dismissal on forum non conveniens grounds in light of *Radeljak*. We do not retain jurisdiction. Court of Appeals No. 254400.

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[2] MCL 418.827(3) and (4) provide:

> (3) Settlement and release by the employee is not a bar to action by the employer or carrier to proceed *against the third party for any* interest or *claim* it might have.
>
> (4) If the injured employee or his or her dependents or personal representative settle their *claim* for injury or death or commence proceedings thereon *against the third party* before the payment of worker's compensation, such recovery or commencement of proceedings shall not act as an election of remedies and any moneys so recovered shall be applied as herein provided. [Emphasis added.]

SCHILLER v FARM BUREAU MUTUAL INSURANCE COMPANY, No. 127794. By order of September 21, 2005, the application for leave to appeal the December 2, 2004, order of the Court of Appeals was held in abeyance pending the decision in *Cameron v Auto Club Ins Ass'n* (Docket No. 127018). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 55 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on July 29, 2005, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 258344.

PEOPLE v PIESKE, No. 131169. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the Washtenaw Circuit Court properly imposed court costs and attorney fees on the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 268737.

GILLESPIE v RUSSELL FILTRATION, INC, No. 131457. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for an explanation of the conclusion that the defendants' application for leave to appeal grossly disregarded the requirements of a fair presentation of the issues to the court. We retain jurisdiction. Court of Appeals No. 268263.

Leave to Appeal Denied September 26, 2006:

FORD MOTOR COMPANY v BRUCE TOWNSHIP, No. 127733. By order of October 19, 2005, the application for leave to appeal was held in abeyance pending the decisions in *Ford Motor Company v City of Woodhaven, City of Sterling Heights, and Township of Bruce* (Docket Nos. 127422, 127423, 127424). On order of the Court, the case having been decided on June 28, 2006, 475 Mich 425 (2006), the application is again considered, and it is denied as moot. Court of Appeals No. 247186.

PEOPLE v EDGAR, No. 129777. The motion for appointment of counsel is denied. Court of Appeals No. 263780.

KOUTZ v FARM BUREAU INSURANCE, No. 130226. By order of May 30, 2006, the application for leave to appeal the November 17, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Cameron v Auto Club Ins Ass'n* (Docket No. 127018). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 55 (2006), the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 255903.

CAVANAGH, J. I would grant leave to appeal.

WEAVER, J. I would grant leave to appeal to reconsider *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006).

PEOPLE v EVON, No. 130426; Court of Appeals No. 266742.

MILHOUSE v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, No. 130453; Court of Appeals No. 257701.

PEOPLE v LINT, No. 130522; Court of Appeals No. 256743.

BELL v REN-PHARM, INC, No. 130557; reported below: 269 Mich App 464.

PEOPLE v ASKIA HILL, No. 130576; Court of Appeals No. 256497.

PEOPLE v AKINS, No. 130720; Court of Appeals No. 257772.

PEOPLE v KYLE JONES, No. 130821; reported below: 270 Mich App 208.

PEOPLE v HAMBRICK, No. 130828; Court of Appeals No. 264819.

PEOPLE v CORTLAND KING, No. 130883. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264725.

PEOPLE v MASADA KING, No. 130899; Court of Appeals No. 257980.

PEOPLE v EDDIE THOMPSON, No. 130908. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.502(G). The motion for appointment of counsel is denied. Court of Appeals No. 268881.

PEOPLE v PLAIR, No. 130932; Court of Appeals No. 257517.

PEOPLE v JENNINGS, No. 130934. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263912.

PEOPLE v MILLS, No. 130979. The motion to add issue is granted. The motion to remand is denied. Court of Appeals No. 258071.

PEOPLE v MAURICE WILLIAMS, No. 130981. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264713.

PEOPLE v PLUMMER, No. 130986. 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. 264876.

PEOPLE v PURCELL, No. 131005; Court of Appeals No. 268162.

PEOPLE v COURTNEY WILLIAMS, No. 131027; Court of Appeals No. 267438.

PEOPLE v HERNANDEZ, No. 131044; Court of Appeals No. 258491.

PEOPLE v ANDREWS, No. 131058; Court of Appeals No. 268728.

PEOPLE v ANTHONY GRAHAM, No. 131060. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264487.

BUREK v HURON VALLEY SINAI HOSPITAL, No. 131065; Court of Appeals No. 266463.

PEOPLE v BAUBLITZ, No. 131066. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263118.

PEOPLE v HEPBURN, No. 131081. The motion to remand is denied. Court of Appeals No. 258288.

ELLEHAF v TARRAF, No. 131099; Court of Appeals No. 257222.

PEOPLE v RIX, No. 131123; Court of Appeals No. 268469.

PEOPLE v KACZMAREK, No. 131126; Court of Appeals No. 268348.

PEOPLE v CLARENCE JONES, No. 131129; Court of Appeals No. 258631.

PEOPLE v EDWARDS, No. 131131; Court of Appeals No. 258147.

PEOPLE v CAVER, No. 131157; Court of Appeals No. 258740.

NAIMOU v PHILIP F GRECO TITLE COMPANY, No. 131164; Court of Appeals No. 264503.

SHARP v MONTCALM COUNTY JUDGE, No. 131172. The motion to remand is denied. Court of Appeals No. 266380.

MCCRAY v DEPARTMENT OF CORRECTIONS, No. 131183; Court of Appeals No. 269581.

PEOPLE v ALPHONSO STEWART, No. 131196; Court of Appeals No. 269339.

PEOPLE v KENNETH JACKSON, No. 131198; Court of Appeals No. 268014.

PEOPLE v ANDRES, No. 131201; Court of Appeals No. 267891.

PEOPLE v DEGRAFFENREID, No. 131215; Court of Appeals No. 258577.

PEOPLE v JOHNIGAN, No. 131216; Court of Appeals No. 258961.

PEOPLE v JESSE HAYES, No. 131218; Court of Appeals No. 259299.

PEOPLE v MANDELL TURNER, No. 131242; Court of Appeals No. 259069.

PEOPLE v MINNEY, No. 131252; Court of Appeals No. 268334.

PEOPLE v LOPEZ-LORZA, No. 131256; Court of Appeals No. 254689.

PEOPLE v JUSTIN WOOD, No. 131263; Court of Appeals No. 260154.

WALKER v DEPARTMENT OF CORRECTIONS, No. 131265; Court of Appeals No. 269935.

DIETRICH & ASSOCIATES v MCQUADE ESTATE, No. 131266; Court of Appeals No. 258283.

VOLLMAR v LAURA, No. 131277; Court of Appeals No. 262658.

PEOPLE v DEON JOHNSON, No. 131278; Court of Appeals No. 258284.

PEOPLE v BURGDORF, No. 131279; Court of Appeals No. 268159.

KENDALL v WALKER, No. 131282; Court of Appeals No. 268247.

CHURCH MUTUAL INSURANCE COMPANY v CONSUMERS ENERGY COMPANY, No. 131283; Court of Appeals No. 267524.

PEOPLE v LUCIER, No. 131288; Court of Appeals No. 259207.

PT TODAY, INC v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES, No. 131298; reported below: 270 Mich App 110.

PEOPLE v BRADLEY, No. 131300; Court of Appeals No. 268704.

PEOPLE v PRYOR, No. 131307. The motion for immediate consideration is denied. The motions to remand are denied. Court of Appeals No. 268627.

PEOPLE v SNYDER, No. 131309; Court of Appeals No. 265342.

GALENSKI v ALLSTATE INSURANCE COMPANY, No. 131312. The application for leave to appeal as cross-appellant is moot and is denied. Court of Appeals No. 255604.

PEOPLE v O'DELL JOHNSON, No. 131330; Court of Appeals No. 260308.

PEOPLE v GAITHER, No. 131333; Court of Appeals No. 258670.

PEOPLE v SWEET, No. 131334; Court of Appeals No. 259608.

ALEXANDER PRINCE, LLC v METWEST MORTGAGE SERVICES, Nos. 131364, 131365; Court of Appeals Nos. 259448, 260021.

PEOPLE v LARAMIE, INC, No. 131371; Court of Appeals No. 266402.

DUBRIWNY v MCQUEEN, No. 131373; Court of Appeals No. 264279.

TOBEY v DEPARTMENT OF CORRECTIONS, No. 131375; Court of Appeals No. 267805.

PEOPLE v CRABLE, No. 131378; Court of Appeals No. 268292.

PEOPLE v MADDOX-EL, No. 131379; Court of Appeals No. 257981.

PEOPLE v RENODDA HICKS, No. 131380; Court of Appeals No. 259720.

JELONEK v EMERGENCY MEDICINE SPECIALISTS, PC, Nos. 131388-131391. The application for leave to appeal as cross-appellant is also denied. Court of Appeals Nos. 257974, 257975, 258418, 258419.

PEOPLE v HAHL, No. 131392; Court of Appeals No. 268272.

PEOPLE v NERO, No. 131393; Court of Appeals No. 269430.

PEOPLE v COCHRAN, No. 131395; Court of Appeals No. 260550.

PEOPLE v MACIEJEWSKI, No. 131397; Court of Appeals No. 259085.

PEOPLE v CARR, No. 131399; Court of Appeals No. 259187.

WONG v LEE, No. 131411; Court of Appeals No. 266803.

LEWIS v HARPER HOSPITAL, No. 131412; Court of Appeals No. 258777.

PEOPLE v ROBERT SMITH, No. 131415; Court of Appeals No. 269303.

PEOPLE v SCHUH, No. 131416; Court of Appeals No. 268913.

PEOPLE v YAGER, No. 131417; Court of Appeals No. 268190.

PEOPLE v JEREMIAH JOHNSON, No. 131418; Court of Appeals No. 269182.

PEOPLE v CELLEY, No. 131420; Court of Appeals No. 268116.

PEOPLE v MCFADDEN, No. 131426; Court of Appeals No. 269867.

PEOPLE v GUINN, No. 131427; Court of Appeals No. 268892.

PEOPLE v WARTLEY, No. 131428; Court of Appeals No. 258816.

PEOPLE v BUSCH, No. 131434; Court of Appeals No. 258819.

PEOPLE v GUYTON, No. 131456; Court of Appeals No. 269496.

FROEHLICH v FROEHLICH, No. 131461; Court of Appeals No. 264616.

PEOPLE v HARDY, No. 131468; Court of Appeals No. 259971.

ARGUE v DEPARTMENT OF CORRECTIONS, No. 131470; Court of Appeals No. 267271.

PEOPLE v RIDER, No. 131471. The motion to remand is denied. Court of Appeals No. 268996.

PEOPLE v CHRISTOPHER HENRY, No. 131476; Court of Appeals No. 258573.

MURRAY AVIATION, INC v GRINNELL CORPORATION, No. 131487; Court of Appeals No. 257298.

DHUE v KASLE STEEL CORPORATION, No. 131488; Court of Appeals No. 266818.

PEOPLE v EADY, No. 131492; Court of Appeals No. 268787.

PEOPLE v BLAIR, No. 131505; Court of Appeals No. 269305.

BOMER v DEPARTMENT OF CORRECTIONS, No. 131507; Court of Appeals No. 269026.

BOWMAN v SOUTHWICK, No. 131509; Court of Appeals No. 267381.

PEOPLE v PARASKI, No. 131510; Court of Appeals No. 260978.

PEOPLE v POUNCY, No. 131514; Court of Appeals No. 270069.

PEOPLE v REUBEN JACKSON, No. 131515; Court of Appeals No. 269492.

PEOPLE v LOFTON, No. 131516; Court of Appeals No. 270223.

PEOPLE v COFFEL, No. 131521; Court of Appeals No. 269557.

PEOPLE v HARDEN, No. 131537; Court of Appeals No. 269318.

PEOPLE v WILLIAM JONES, No. 131542; Court of Appeals No. 269110.

PEOPLE v FITZGERALD, No. 131559; Court of Appeals No. 260548.

PEOPLE v TERRELL JOHNSON, No. 131571; Court of Appeals No. 268847.

PEOPLE v DAVID WILSON, No. 131612; Court of Appeals No. 269559.

PEOPLE v JOHNNY HALL, No. 131614; Court of Appeals No. 269525.

PEOPLE v GROSSNICKLE, No. 131643. The motion for immediate consideration is granted. Court of Appeals No. 269952.

Interlocutory Appeals

Leave to Appeal Denied September 26, 2006:

MAWRY v FARES, No. 131329; Court of Appeals No. 265428.

YOUNG v NATIONWIDE INSURANCE COMPANY OF AMERICA, No. 131764. The motion for stay of proceedings is denied. Court of Appeals No. 269187.

Reconsiderations Denied September 26, 2006:

HARBOUR v CORRECTIONAL MEDICAL SERVICES, INC, No. 129153. Leave to appeal denied at 475 Mich 859. Reported below: 266 Mich App 452.

J W HOBBS CORPORATION v DEPARTMENT OF TREASURY, No. 129688; reported below: 268 Mich App 38.

PEOPLE v MICHAEL WILSON, No. 130049. Leave to appeal denied at 475 Mich 859. Court of Appeals No. 265311.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case for resentencing.

PEOPLE v FERWORN, No. 130490. Leave to appeal denied at 475 Mich 895. Court of Appeals No. 266592.

CAVANAGH, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

KELLY, J. (*dissenting*). I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons given in my dissenting statement to the order denying leave to appeal in *People v Ferworn*, 475 Mich 895 (2006).

CASTELLON v DELPHI AUTOMOTIVE SYSTEMS CORPORATION, No. 130700. Leave to appeal denied at 475 Mich 898. Court of Appeals No. 265650.

WEAVER, J. I would grant reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand to the magistrate for the reasons given in my previous statement in this case, *Castellon v Delphi Automotive Systems Corporation*, 475 Mich 898 (2006).

In re KIRCHER (KIRCHER v WASHTENAW CIRCUIT JUDGE), No. 130754. Leave to appeal denied at 475 Mich 888. Court of Appeals No. 262153.

DILORENZO v KIRKPATRICK, No. 130800. Leave to appeal denied at 475 Mich 889. Court of Appeals No. 261748.

SCHWEGMAN v SCHWEGMAN, No. 130807. Leave to appeal denied at 475 Mich 889. Court of Appeals No. 264942.

MOORE v EGAN, No. 130965. Leave to appeal denied at 476 Mich 859. Court of Appeals No. 262390.

Summary Dispositions September 27, 2006:

MALOY v ST JOHN DETROIT RIVERVIEW HOSPITAL, No. 130610. 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. 267229.

GOCH PROPERTIES, LLC v C VAN BOXELL TRANSPORTATION, INC, No. 130995. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for reconsideration of plaintiff's motion to set aside its acceptance of the case evaluation. The circuit court erred in holding that it did not have discretion to consider the motion. See *State Farm Mut Automobile Ins Co v Galen*, 199 Mich App 274 (1993). Nothing in *CAM Construction v Lake Edgewood Condo Ass'n*, 465 Mich 549 (2002), which holds that a case is fully settled when both parties accept a case evaluation award, precludes a party from filing a motion to set aside a case evaluation award. We do not retain jurisdiction. Court of Appeals No. 269014.

PETERSEN v MAGNA CORPORATION NO 1, No. 131245. 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 application for leave to appeal as cross-appellant is also considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 266037.

PETERSEN v MAGNA CORPORATION NO 2, No. 131247. 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, limited to the issues regarding insurance coverage and division of liability for payment of the workers' compensation benefits awarded to plaintiff, and the issue

of awarding attorney fees on unpaid medical expenses. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 266177.

CORRIGAN, J. (*concurring*). I concur in the order of remand, but I continue to adhere to the views that I expressed in my concurring statement in *Donoho v Wal-Mart Stores, Inc*, 474 Mich 1057 (2006).

PEOPLE v SCHNEIDER, No. 131893. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for stay is granted. Trial court proceedings 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. 269194.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v ANTONIO DAVIS, No. 131971. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Trial court proceedings 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. 271813.

Leave to Appeal Denied September 27, 2006:

PEOPLE v ANTHONY MILLER, No. 129150; Court of Appeals No. 261314.

RAZMUS v MICHIGAN STATE POLICE, No. 130022; Court of Appeals No. 256082.

BRZOZOWSKI v WONDRASEK, Nos. 130191, 130192; Court of Appeals Nos. 256701, 259098.

PEOPLE v GERMIRA CARTER, No. 130223; Court of Appeals No. 262998.

PEOPLE v LARRY HARRIS, No. 130475; Court of Appeals No. 257104.

PEOPLE v AUSTIN, No. 130489; Court of Appeals No. 256612.

KELLY, J. I would grant leave to appeal.

PEOPLE v TORIAL BROWN, No. 130491; Court of Appeals No. 257256.

PEOPLE v SHEPARD, No. 130512; Court of Appeals No. 251742.

FEDERATED MUTUAL INSURANCE COMPANY v EMPIRE FIRE & MARINE INSURANCE COMPANY, No. 130540; Court of Appeals No. 264553.

MICHIGAN REHABILITATION CLINIC, INC v CITY OF DETROIT, No. 130548; Court of Appeals No. 263837.

WEAVER, J. I would grant leave to appeal.

PEOPLE v ARIAS, No. 130556; Court of Appeals No. 255428.

PEOPLE v BONILLA, No. 130598; Court of Appeals No. 255426.

JACKSON COUNTY DRAIN COMMISSIONER v VILLAGE OF STOCKBRIDGE, No. 130615; reported below: 270 Mich App 273.

KELLY, J. I would grant leave to appeal.

PEOPLE v PATTERSON, No. 130734; Court of Appeals No. 268158.

ATTORNEY GENERAL v ALTERNATIVE FUELS, LC, No. 130755; Court of Appeals No. 264075.

PEOPLE v LEVARIO, No. 130792; Court of Appeals No. 266457.

PEOPLE v SANDERS, No. 130911; Court of Appeals No. 261993.

KELLY, J. I would remand to the Court of Appeals for reconsideration in light of *Halbert v Michigan*, 545 US 605 (2005).

PEOPLE v RAYMOND MOORE, No. 130924; Court of Appeals No. 268117.

KELLY, J. I would grant leave to appeal.

PEOPLE v SRAN, No. 130958; Court of Appeals No. 268208.

PEOPLE v CEDRIC GILMORE, No. 130991; Court of Appeals No. 258334.

PEOPLE v GREGORY JOHNSON, No. 131087. The motion for miscellaneous relief is denied. Court of Appeals No. 255258.

FODERA v VAN LOBBS, No. 131090; Court of Appeals No. 259097.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

RINK v RATCLIFF, No. 131110; Court of Appeals No. 265517.

LLOYD v CROOM, No. 131212; Court of Appeals No. 265763.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

PEOPLE v HAVENS, No. 131232; Court of Appeals No. 268323.

KELLY, J. I would remand for resentencing.

PEOPLE v ROBERT J JACKSON, No. 131289; Court of Appeals No. 268042.

Reconsiderations Denied September 27, 2006:

CHAMBERS v LEHMANN, No. 129775. Leave to appeal denied at 475 Mich 856. Court of Appeals No. 262502.

CAVANAGH and KELLY, JJ. We would grant reconsideration.

WINKLER v CAREY, No. 130300. Summary disposition entered at 474 Mich 1118. Court of Appeals No. 255193.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ. We would grant reconsideration.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal September 29, 2006:

STURGIS BANK AND TRUST COMPANY v HILLSDALE COMMUNITY HEALTH CENTER, No. 130045. 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 submit supplemental briefs within 42 days of the date of this order addressing whether the requirements of MCL 600.2912d(1)(a)-(d) are satisfied if: (1) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under MCL 600.2169 to address the standard of care, but who is not also qualified to address causation; or (2) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under § 2169 to address causation, but who is not also qualified to address the standard of care. The parties shall also address whether § 2912d(1) permits or requires a plaintiff to file multiple affidavits, signed by different health professionals, when a single health professional is not qualified under § 2169 to testify about both the standard of care and causation. The parties should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 268 Mich App 484.

Summary Dispositions September 29, 2006:

ALLSTATE INSURANCE COMPANY v DEMPSEY, No. 130523. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of summary disposition in favor of the plaintiff. On the existing record, there was no genuine issue of material fact. Coverage was excluded under the intentional or criminal acts exclusion as defined in the policy of insurance. The plaintiff was therefore entitled to summary disposition under MCR 2.116(C)(10) as a matter of law. We do not retain jurisdiction. Court of Appeals No. 253373.

MARKMAN, J. (*concurring*). I concur fully in the majority's order reversing the Court of Appeals. Defendant hit Harris, causing him to fall, hit the back of his head, and die. Defendant pleaded no contest to a charge of manslaughter, claiming that he was acting in self-defense. His insurer, Allstate, then filed this declaratory judgment action claiming that there was no "occurrence" to give rise to coverage and that even if there was an "occurrence," the intentional or criminal acts exclusion in the policy bars coverage. The trial court denied Allstate's motion for summary disposition, but granted defendant's similar motion. The Court of Appeals affirmed the denial of Allstate's motion, but vacated the summary disposition granted to Dempsey.

Even assuming that there was an "occurrence" within the meaning of the policy that gave rise to coverage, the intentional/criminal acts

exclusion bars coverage. The policy at issue states, "We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, an insured person." The policy further states that "[t]his exclusion applies even if . . . such bodily injury or property damage is of a different kind or degree than intended or reasonably expected."

First, there is no question that defendant intentionally punched Harris. Second, even if death was not the reasonably expected result of defendant's intentional act, some bodily injury was certainly the reasonably expected result. Therefore, the intentional/criminal acts exclusion bars coverage here.

This conclusion is not at all inconsistent with our decision in *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 289-290 (2004). In *McCarn*, this Court applied the same policy language that is at issue here. *McCarn* involved a sixteen-year-old boy who aimed what he thought was an unloaded gun at his sixteen-year-old friend and pulled the trigger. Tragically, the gun was in fact loaded and the friend was killed. In that case, as well as in this case, there was no question that the insured acted intentionally. The only question was whether a reasonable person would have reasonably expected an injury to result from the intentional act. In *McCarn*, this Court held that a person would not reasonably expect injury to result from the intentional act of aiming and pulling the trigger of what was believed to be an unloaded gun. Therefore, coverage was not barred in that case. The instant case is distinguishable because a reasonable person *would* reasonably expect an injury to result from the intentional act of punching someone.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. I would grant leave to appeal.

PEOPLE v OTTERBRIDGE, No. 130798. 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 vacate only the defendant's conviction and sentence for felonious assault. We agree with the Court of Appeals that the Kent Circuit Court erred by convicting the defendant of felonious assault. As the appeals court stated, felonious assault is a cognate lesser offense of the charged offense of which the defendant was acquitted, assault with intent to murder, and not a lesser-included offense of the charged offense. See *People v Cornell*, 466 Mich 335, 353-359 (2002). However, unlike the Court of Appeals, we conclude that the defendant has satisfied his burden under *People v Carines*, 460 Mich 750 (1999), to establish that this unpreserved error amounts to plain error. Under the circumstances of this case, the defendant could not lawfully be convicted of the crime of felonious assault; such an error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id*. at 763. The defendant's conviction for felonious assault, and the sentence imposed for that conviction, must be vacated. Court of Appeals No. 256739.

WEAVER, J. (*dissenting*). I dissent and would deny leave to appeal. I would not peremptorily reverse because defendant has suffered no prejudice.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the majority's peremptory order vacating defendant's conviction and sentence for felonious assault, MCL 750.82.

The majority is correct that the trial court erred in considering felonious assault at defendant's bench trial. *People v Cornell*, 466 Mich 335 (2002), and its progeny establish that a trier of fact may not consider uncharged cognate offenses. The prosecutor here charged defendant with assault with intent to commit murder, not with felonious assault. Thus, because felonious assault is a cognate lesser offense of assault with intent to commit murder, the court should not have considered this uncharged offense at trial.

Defendant, however, failed to object to the error at trial, and the Court of Appeals correctly determined that he has not satisfied the plain-error standard that must be met to avoid forfeiture of unpreserved errors, as set forth in *People v Carines*, 460 Mich 750 (1999). In particular, defendant has not demonstrated that he was prejudiced by the error.

The evidence at trial reflected that defendant pointed a gun at the victim and demanded money. After he shot the victim, defendant fled while still pointing the gun at the victim. Defendant denied that he committed the offense. The trial court found that defendant lacked the specific intent to kill, but otherwise found that defendant used a weapon, as reflected by his convictions of armed robbery, MCL 750.529; possession of a firearm during the commission of a felony, MCL 750.227b; and being a felon in possession of a firearm, MCL 750.224f. *The presence and use of a weapon was at issue at all points of the trial*.

In light of these facts, I am not certain how or why the majority has concluded that defendant was prejudiced. Neither defendant nor the majority has offered any explanation regarding how the defense at trial would have been any different if he had been formally charged with felonious assault.

Moreover, defendant's sentence for armed robbery is $14\frac{1}{2}$ to 30 years, which is *longer* than his concurrent sentence of two to eight years for felonious assault. This fact reinforces the conclusion that the *Cornell* error has not prejudiced defendant.

For these reasons, I conclude that the Court of Appeals did not err in its application of the *Carines* standard, and I would deny leave to appeal.

ROMANS V HIGHLAND CHARTER TOWNSHIP, No. 130914. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Oakland Circuit Court granting summary disposition to the defendant. As this Court explained in *Horace v City of Pontiac*, 456 Mich 744, 757 (1998), "[a] danger of injury caused by the area in front of an entrance or exit is not a danger that is presented by a physical condition of the building itself." In *Fane v Detroit Library Comm*, 465 Mich 68, 78 (2001), this Court held that "in determining whether an item or area outside the four walls of a building is 'of a public building,' the courts should consider whether the item or area where the injury occurred is physically connected to and not intended to be removed from the building." Here, the alleged defect is the lack of a physical connection between the sidewalk and the covered

entryway; thus, the area complained of is not physically connected to the building. Accordingly, the trial court correctly concluded that the gap between the sidewalk and the entryway is not a defect "of the public building." Court of Appeals No. 256251.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v WILLIS, No. 131111. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a new trial. In the circumstances of this case, the defendant was denied his due process right to a fair trial when the circuit court refused to admit the complete statement the defendant made to the first police officer at the scene. Court of Appeals No. 243439.

WEAVER, J. (*dissenting*). I dissent and would deny leave to appeal because defendant has suffered no injustice.

Leave to Appeal Denied September 29, 2006:

PEOPLE v CARL HALL, No. 130274; Court of Appeals No. 254615.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). Defendant was convicted following a bench trial of assault with intent to commit great bodily harm (habitual offender, fourth offense) and possession of a firearm during the commission of a felony (second offense). The trial judge departed from the guidelines range (19 to 76 months) and sentenced defendant to life in prison. The Court of Appeals reversed, finding the sentence disproportionate, and remanded for resentencing. On remand, the trial judge again imposed a life sentence. A different panel of the Court of Appeals affirmed.

Defendant argues that the trial judge violated the law-of-the-case doctrine. The trial judge gave as a substantial and compelling reason for his departure from the guidelines the fact that defendant had prior convictions. The first panel of the Court of Appeals found, based on this reason, that the sentence was disproportionate. On remand, the trial judge again gave the fact of defendant's prior convictions as a substantial and compelling reason for departure and again imposed a life sentence.

Since the first panel of the Court of Appeals had already decided that defendant's prior convictions did not constitute a substantial and compelling reason for a life sentence, it is questionable whether the trial judge could impose a life sentence without articulating additional reasons. By doing so, he may have taken action that was inconsistent with the judgment of the appellate court, violating the law-of-the-case doctrine.

I would grant leave to appeal to consider this issue.

PEOPLE v ZUDELL, No. 130778; Court of Appeals No. 267861.

KELLY, J. (*dissenting*). The Court should grant leave to appeal in this case. The sentence imposed on defendant was not legal. A person should not be required to serve a sentence that is legally impermissible.

The trial court sentenced defendant to 17 to 30 months in prison. The sentencing guidelines provided a sentencing range of two to 17 months. The sentencing range requires an intermediate sanction unless the trial

court articulates substantial and compelling reasons to depart upwards. MCL 769.34(4)(a). An intermediate sanction cannot include a prison sentence. MCL 769.31(b). As a consequence, defendant could not be legally sentenced to prison unless, at sentencing, the court articulated acceptable reasons for the sentence. But the court failed to do so.

This issue was not preserved in the trial court, but defendant did not forfeit it by failing to timely assert it for the reason that the error constitutes plain error. *People v Carines*, 460 Mich 750, 763 (1999). That is, the court clearly committed an error; the error affected defendant's substantial right to have reasons given for the sentence departure. Because no reasons were given, defendant was unable on appeal to challenge the reasons for the sentence departure. Hence, he was legally prejudiced. The error also affected defendant's right to be free from an illegal sentence.

By imposing a prison sentence, the trial court imposed a sentence specifically rejected by the Legislature. MCL 769.34(4)(a), MCL 769.31(b). This plain error requires reversal because it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich 763. If trial courts are allowed to impose sentences not sanctioned by law, the people of this state will lose their trust in the court system. They will come to view it as arbitrary, capricious, and unworthy of respect.

PEOPLE v MICHAEL JOSEPH KING, No. 130817; Court of Appeals No. 267777.

MARKMAN, J. I would direct the clerk to schedule oral argument on the application for leave to appeal to consider the circumstances in which offense variable 10 is properly scored.

PEOPLE v ULLMER, No. 130941; Court of Appeals No. 267702.

KELLY, J. (*dissenting*). I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

MARKMAN, J. (*dissenting*). I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006).

PEOPLE v AXLEY, No. 131108; Court of Appeals No. 268866.

YOUNG, J. (*concurring*). I concur in the order denying leave to appeal. In her application for leave to appeal, defendant argued that the extent of the sentencing court's upward departure from the sentencing guidelines was an abuse of discretion. Defendant did not raise the issue whether the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296 (2004), applied to Michigan's intermediate sentencing guidelines scheme. MCL 769.34(4)(a). Generally, appeals are limited to those issues raised in the application for leave to appeal, MCR 7.302(G)(4), and arguments not raised and preserved for review are deemed waived. *People v Stanaway*, 446 Mich 643 (1994).

CORRIGAN, J. I join the statement of Justice YOUNG.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). I dissent and would instead remand this case to the Court of Appeals for consideration as on leave granted. This case

squarely raises the question whether, and to what extent, the United States Supreme Court's decision in *Blakely v Washington,* 542 US 296 (2004), applies to Michigan's intermediate sentencing guidelines scheme. MCL 769.34(4)(a). The trial court based its sentencing departure on facts that were not part of defendant's criminal history, admitted by defendant, or proven to a jury beyond a reasonable doubt. Thus, this case presents an appropriate vehicle for determining whether, when the guidelines call for an intermediate sanction, *Blakely* precludes the imposition of a prison sentence based on such other facts.

In re SCHILL (DEPARTMENT OF HUMAN SERVICES V HARDING), Nos. 132048, 132049; Court of Appeals Nos. 267501, 267526.

Summary Dispositions October 4, 2006:

POWELL V DEPARTMENT OF TRANSPORTATION, No. 129043. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Court of Claims for entry of an order granting the defendant's motion for summary disposition. The plaintiff's claim is barred by governmental immunity. The highway exception to governmental immunity does not apply because the shoulder of a highway 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), and is not "designed for vehicular travel." *Grimes v Dep't of Transportation*, 475 Mich 72, 73 (2006). Court of Appeals No. 261541.

CAVANAGH, J. I would deny leave to appeal.

PRICE V DEPARTMENT OF TRANSPORTATION, No. 130699. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Grimes v Dep't of Transportation*, 475 Mich 72 (2006). Court of Appeals No. 257577.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE V BISGEIER, No. 131191. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. The Court of Appeals shall then remand the case to the Oakland Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), on the defendant's claim that the failure to timely seek appellate review was caused by ineffective assistance of counsel. If the trial court finds in favor of the defendant's claim, the Court of Appeals shall treat the defendant's application as having been timely filed. It shall then either grant or deny the application. Court of Appeals No. 266882.

URBIS V DEPARTMENT OF TRANSPORTATION, No. 131303. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Court of Claims for entry of an order granting the defendant's motion for summary disposition. The plaintiff's claim is barred by governmental immunity. The highway exception to governmental immunity does not apply be-

cause the shoulder of a highway 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), and is not "designed for vehicular travel." *Grimes v Dep't of Transportation*, 475 Mich 72, 73 (2006). Court of Appeals No. 266354.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied October 4, 2006:

PEOPLE v DANIEL, No. 129256. By order of December 28, 2005, the application for leave to appeal the June 21, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Robinson* (Docket No. 126379). On order of the Court, the case having been decided on May 31, 2006, 475 Mich 1 (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. Court of Appeals No. 255727.

KELLY, J. I would grant leave to appeal.

PEOPLE v LLOYD, No. 129629. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260506.

KELLY, J. I would hold this case in abeyance for *Whorton v Bockting*, cert gtd 126 S Ct 2017; 164 L Ed 2d 778 (2006) (No. 05-595).

PEOPLE v SANTIAGO, No. 130243; Court of Appeals No. 245582.

KELLY, J. I would grant leave to appeal.

TAYLOR v LEAR SEATING CORPORATION, No. 130449; Court of Appeals No. 265039.

PEOPLE v FULLER, No. 130635; Court of Appeals No. 255961.

PEOPLE v BRADDOCK, No. 130892; Court of Appeals No. 256619.

STINNETT v SPALJ CONSTRUCTION, No. 130927; Court of Appeals No. 266756.

PEOPLE v POSTON, No. 130937; Court of Appeals No. 256837.

FISCHER v GKN SINTER METALS, INC-ROMULUS, No. 131021; Court of Appeals No. 264959.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v COUMARBATCH, No. 131341; Court of Appeals No. 268915.

In re TASKER (DEPARTMENT OF HUMAN SERVICES v TASKER), No. 131906; Court of Appeals No. 268181.

Reconsideration Denied October 4, 2006:

INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA v DORSEY, No. 129880. Summary disposition entered at 474 Mich 1097. Reported below: 268 Mich App 313.

TAYLOR, C.J. (*concurring*). This Court reversed the Court of Appeals "for the reasons stated in the partial dissent" at the Court of Appeals. Defendants have filed affidavits and a docket sheet which call into question one of the reasons stated in the Court of Appeals partial dissent. I concur with the order denying the motion for reconsideration because the second reason stated in the Court of Appeals partial dissent is an independent reason supporting our earlier reversal of the Court of Appeals.

Summary Disposition October 5, 2006:

SOUTHERLAND v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 131899. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for stay is granted. Trial court proceedings 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. 269143.

CAVANAGH, J. I would deny leave to appeal.

Summary Dispositions October 6, 2006:

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v FIEGER, No. 130456. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to rule on the following issues: (1) whether, and if so on what basis, the defendants were entitled to deduct a portion of the plaintiff's lien recovery for attorney fees and costs incurred in obtaining recovery; and (2) on what basis the plaintiff is entitled to interest, if any. The Wayne Circuit Court's ruling must contain specific findings of fact and conclusions of law and should be submitted to the clerk of this Court within 42 days of the date of this order. We retain jurisdiction. Court of Appeals No. 254461.

WEAVER, J. (*concurring in part and dissenting in part*). While I concur in the order remanding this case to the Wayne Circuit Court, I dissent from the majority's decision to limit the issues to those specified in the majority's order. I would instead include among the issues the first issue that the Court of Appeals directed the trial court to address on remand: "(1) whether plaintiff has waived its claim against defendants due to its failure to appeal and/or contest the January 6, 1999, order of distribution in *Rogers v City of Detroit, et al,* Wayne County Circuit Court, Docket No. 90-016936." *State Auto Mut Ins Co v Fieger,* unpublished order of the Court of Appeals, entered November 8, 2005 (Docket No. 254461).

Further, I dissent from the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case, where Mr. Fieger is a party. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting).

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BLOCKTON, No. 131423. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court to amend the judgment of sentence to reflect the correct maximum sentence of 48 months for felonious assault, MCL 750.82. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 266239.

YOUNG, J. (*concurring*). I concur in the order remanding to the circuit court to amend the judgment of sentence, and otherwise denying leave to appeal. In his application for leave to appeal, defendant argued that the trial court's decision to upwardly depart from the sentencing guidelines was not supported by substantial and compelling factors that were objective and verifiable. Defendant did not raise the issue whether the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296 (2004), applied to Michigan's intermediate sentencing guidelines scheme. MCL 769.34(4)(a). Generally, appeals are limited to those issues raised in the application for leave to appeal, MCR 7.302(G)(4), and arguments not raised and preserved for review are deemed waived. *People v Stanaway*, 446 Mich 643 (1994).

CORRIGAN, J. I join the statement of Justice YOUNG.

KELLY, J. I would grant leave to appeal.

MARKMAN, J. (*dissenting).* I dissent and would instead remand this case to the Court of Appeals for consideration as on leave granted. This case squarely raises the question whether, and to what extent, the United States Supreme Court's decision in *Blakely v Washington,* 542 US 296 (2004), applies to Michigan's intermediate sentencing guidelines scheme. MCL 769.34(4)(a). The trial court based its sentencing departure on facts that were not part of defendant's criminal history, admitted by defendant, or proven to a jury beyond a reasonable doubt. Thus, this case presents an appropriate vehicle for determining whether, when the guidelines call for an intermediate sanction, *Blakely* precludes the imposition of a prison sentence based on such other facts.

CAVANAGH, J. I join the statement of Justice MARKMAN.

Leave to Appeal Denied October 6, 2006:

PEOPLE v PROVIENCE, No. 130637. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions for the appointment of counsel and for an evidentiary hearing are denied. The denial of the motion for an evidentiary hearing is without prejudice to the defendant's ability to seek similar relief in the trial court in a successive motion for relief from judgment, filed pursuant to MCR 6.502(G)(2).

WEAVER, J. I concur in the decision to deny leave to appeal.

KELLY, J. I would remand this case for resentencing.

PEOPLE v WELSH, No. 130826; Court of Appeals No. 252561 (on remand).

MARKMAN, J. I would grant leave to appeal.

Reconsideration Denied October 10, 2006:

PEOPLE v SESSIONS, No. 126514. Summary disposition entered at 474 Mich 1120. Reported below: 262 Mich App 80.

WEAVER, J. I vote to grant the prosecutor's motion for reconsideration and, further, I would grant leave to appeal to hear full argument on this question.

Leave to Appeal Denied October 11, 2006:

PEOPLE v GORDON, No. 132193. The motion for immediate consideration is granted. Court of Appeals No. 261724.

Leave to Appeal Denied October 13, 2006:

PEOPLE v GURK, No. 130913; Court of Appeals No. 257339.

CORRIGAN, J. (*concurring*). I agree with the Court's order to deny defendant's application for leave to appeal. I write separately to underscore the Court of Appeals' appropriate refusal to rely on *Valentine v Konteh*, 395 F3d 626 (CA 6, 2005). The Court of Appeals correctly held that lower federal court decisions are not binding on state courts when it distinguished *Valentine* from the present case. *People v Gurk,* unpublished opinion per curiam of the Court of Appeals, issued February 16, 2006 (Docket No. 257339), slip op at 2. Further, more than simply being distinguishable, I conclude that *Valentine* was wrongly decided. I agree with Judge Ronald Gilman's partial dissent in *Valentine* that "no Supreme Court case has ever found the use of identically worded and factually indistinguishable indictments *unconstitutional*." 395 F3d at 639 (emphasis in original).

> Under a rule restricting prosecutions to exceedingly narrow and precise charges, a sex-abuse charge would presumptively be limited to a single instance of abuse, despite clear evidence of multiple occasions, unless the child can remember the specific time and place details for each occurrence. Such an outcome is contrary to judicial precedent and is not constitutionally required. [*Id.* at 641.]

Additionally, defendant made no motion challenging the specificity of the charges in the circuit court. Reviewing for plain error under *People v Carines*, 460 Mich 750, 764 (1999), the Court of Appeals correctly held that defendant "failed to show that the information or his convictions for five counts of CSC II [second-degree criminal sexual conduct] violated any of his due process rights because the information, paired with the preliminary examination, provided him with constitutionally adequate notice of the charges against him . . . ." *Gurk, supra*, slip op at 3.

Moreover, under *Carines*, the alleged error was not outcome-determinative. During the bench trial, defendant contended that nothing of a sexual nature ever occurred with his 11-year-old stepdaughter. His

defense did not depend on a differentiation of the counts. Because the information, combined with the proofs at the preliminary examination, gave defendant constitutionally sufficient notice of the charges, I join the order denying leave to appeal.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I would grant leave to appeal because this case involves an important constitutional question. Contrary to Justice CORRIGAN's contentions, the Sixth Circuit Court of Appeals decision in *Valentine v Konteh*[1] was well reasoned. And, because this case and *Valentine* both concern the application of the Sixth and Fourteenth amendments of the federal constitution,[2] we should give careful consideration to the federal court's reasoning.

In this case, defendant was charged with and convicted of five counts of second-degree criminal sexual conduct. But the complainant was not able to indicate when the alleged abuse occurred. The extent of her specificity was that it occurred five or six times while she was in the fifth grade. The complaints against plaintiff were identical. There was no distinction between the various charges.

Valentine dealt with a strikingly similar situation. The court stated:

> The problem in this case is not the fact that the prosecution did not provide the defendant with exact times and places. If there had been singular counts of each offense, the lack of particularity would not have presented the same problem. Instead, the problem is that within each set of 20 counts, there are absolutely no distinctions made. Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts. In its charges and in its evidence before the jury, the prosecution did not attempt to lay out the factual bases of forty separate incidents that took place. Instead, the 8-year-old victim described "typical" abusive behavior by Valentine and then testified that the "typical" abuse occurred twenty or fifteen times. Outside of the victim's estimate, no evidence as to the number of incidents was presented.
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> Given the way Valentine was indicted and tried, it would have been incredibly difficult for the jury to consider each count on its own. The jury could not have found Valentine guilty of Counts 1-5, but not Counts 6-20. Nor could the jury have found him guilty of Counts 1, 3, 5 and 7, but not the rest. Such a result would be unintelligible, because the criminal counts were not connected to distinguishable incidents. The jury could have found him "not guilty" of some of the counts only if they reached the conclusion that the child victim had overestimated the number of abusive acts. Just as courts should not permit abuse prosecutions to be

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[1] 395 F3d 626 (CA 6, 2005).

[2] US Const, Ams VI and XIV.

> defeated due to the limited ability of child victims to remember precise temporal details, they should for similar reasons not permit multiple convictions to stand based solely on a child's numerical estimate. [*Valentine, supra* at 632-633.]

The court concluded:

> The prosecutors in this case, however, abused this wide latitude by piling on multiple identical counts. Numerous charges cannot be made out through estimation or inference. Instead, if prosecutors seek multiple charges against a defendant, they must link those multiple charges to multiple identifiable offenses. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction. [*Id*. at 636-637.]

Valentine was correctly decided. When applying that decision to the case before us, we see that the prosecution has done little more than prove a single offense. But defendant received five convictions and penalties as a result of this single proof. Contrary to Justice CORRIGAN's claim, this does rise to the level of plain error. Due process concerns are present. The case concerns defendant's ability to submit a defense to the charges against him.

The Sixth and Fourteenth amendments require adequate notice of a charge against a defendant. *People v Jones*, 395 Mich 379, 388 (1975). Without adequate notice of each alleged offense, defendant could not raise a defense against each of them. If the claims against him contained more specificity, perhaps defendant could have presented specific alibi defenses or could have explained why an individual claim was improbable. Because of the lack of specificity, the only defense that defendant could assert was that no abuse ever occurred. That is, this error pushed defendant into an all-or-nothing box. Nearly all other defenses were cut off.[3]

Defendant's convictions for indistinguishable offenses raise serious double jeopardy concerns. The prosecution was able to bring as many charges against him for the period in question as it chose. In the future, if the complainant remembers a specific incident during the time she was in the fifth grade, the prosecution is free to bring a new charge against defendant. Because of the lack of specificity in the earlier charges, defendant could never prove that he had already been convicted of the crime alleged in the new charge. His convictions offer him no protection. He could be convicted of the same charge over and over again.

No one is claiming that extreme specificity is required in child abuse charges. All that is claimed is that there must be enough specificity to distinguish one charge from another. The prosecution should not be

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[3] In fact, because of the lack of specificity, defendant could never explain what other defenses he lost.

allowed to pile on charges that it could not prove in separate proceedings. There must be a line drawn between unnecessary specificity and a complete lack of specificity in charges. I would grant leave to appeal to enable the court to draw that line.

PEOPLE v FERRIS, No. 131001; Court of Appeals No. 256439.

TAYLOR, C.J. (*concurring*). I concur in the order denying leave to appeal. Even if the evidence was erroneously admitted under MRE 404(b) and MRE 403, defendant has not met his burden of showing that the error was outcome determinative in light of the other evidence against him. *People v Lukity*, 460 Mich 484, 495-496 (1999).

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I would grant leave to appeal. It appears to me that the trial court and the Court of Appeals refused to apply the law of the case doctrine. This Court should grant leave to appeal to clarify this important doctrine for the lower courts.

As a general rule, an appellate court's final determination on a matter of law binds both the lower court on remand and the appellate courts on subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260 (2000). The law of the case doctrine is intended to promote efficiency, comity, and finality in the law. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 (1991). The doctrine is also a recognition that an appellate court lacks jurisdiction to modify its own judgment in a particular case except on rehearing. *Johnson v White*, 430 Mich 47, 53 (1988). This Court has recognized its importance for well over 100 years. See *Pierce v Underwood*, 112 Mich 186 (1897); *Mynning v Detroit, L & N R Co*, 67 Mich 677 (1888).

But, of course, there are exceptions to the doctrine, as there are to most general rules. If a case involves an individual's constitutional rights, the "doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts." *Locricchio*, 438 Mich 109-110. The Court of Appeals has also recognized an exception for instances where there is an intervening change in the law. *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38 (1995).[1] It is the latter exception that the Court of Appeals applied in this case. But the exception was inapplicable.

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[1] I would note that there is conflicting law on whether this exception to the law of the case doctrine is properly recognized in Michigan. See *People v Russell*, 149 Mich App 110, 117-118 (1985). There is also a strong argument that this exception contradicts the often repeated rule that the law of the case doctrine applies regardless of the correctness of the prior determination. *Driver v Hanley* (*After Remand*), 226 Mich App 558, 565 (1997); *Reeves v Cincinnati, Inc* (*After Remand*), 208 Mich App 556, 559 (1995); *Muilenberg v Upjohn Co*, 169 Mich App 636, 641 (1988); see also *Damon v DeBar*, 94 Mich 594 (1893). The conflict presents yet another reason for this Court to grant leave to appeal in this case. The bench, the bar, and the people of Michigan deserve clarity on the proper exceptions to the fundamental doctrine of the law of the case.

A jury convicted defendant of first-degree felony murder. On appeal, the Court of Appeals reversed the conviction and remanded the matter for a new trial. *People v Ferris*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1999 (Docket No. 193744). It found that the trial court improperly admitted evidence at trial of defendant's prior abuse of his former spouse. The Court of Appeals reached this conclusion for two reasons. First, it found the evidence inadmissible under MRE 404(b)(1) as interpreted by this Court in *People v VanderVliet*, 444 Mich 52 (1993), and *People v Golochowicz*, 413 Mich 298 (1982). *Ferris*, *supra,* slip op pp 4-5. Second, it concluded that, even if the evidence were admissible under MRE 404(b)(1), it would be inadmissible under MRE 403. The Court of Appeals found that its probative value substantially outweighed the unfair prejudice it caused. *Id*., p 5.

On remand, the second trial resulted in a mistrial. At the third trial, the prosecution sought and was permitted to use the same prior-bad-acts evidence that the Court of Appeals had rejected. The third jury convicted defendant of first-degree felony murder. On appeal, defendant argued that the law of the case barred the bad-acts evidence. A second Court of Appeals panel found that this Court's intervening decision in *People v Sabin* (*After Remand*), 463 Mich 43 (2000), sufficiently changed the law regarding MRE 404(b) to make the law of the case doctrine no longer controlling. The Court concluded:

> In this Court's previous opinion, the majority analyzed the admissibility of defendant's ex-wife's other acts testimony under the test stated in *VanderVliet*, *supra*, but did not have the benefit of the clarifications provided by *Sabin*. We agree with the trial court that *Sabin* represented a significant intervening development of the law applicable to MRE 404(b), which removed this issue from the application of the law of the case doctrine. Therefore, the trial court could properly reconsider the admissibility of the other acts evidence. [*People v Ferris*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 256439), slip op p 8.]

The flaws in this reasoning are glaring. First, a mere "clarification" of existing law has never been held sufficient to disregard the law of the case. *Sabin* did not overrule *VanderVliet*. Far from it, *Sabin* relied and built on that decision. *Sabin* is merely an extension of *VanderVliet*. If a clarification of the law constitutes sufficient grounds to disregard the law of the case doctrine, then that well-accepted doctrine is rendered a shadow of its former self.

Second, and most importantly, the second Court of Appeals panel failed to address the first panel's ruling regarding MRE 403. The first panel specifically found that the evidence was inadmissible under MRE 403 regardless of whether it was admissible under MRE 404(b). The second panel paid no attention to this ruling. In fact, it failed even to discuss the law of the case as it related to MRE 403. *Sabin* assuredly did

not change MRE 403. The law on this evidentiary rule remained the same. This fact mandates that the law of the case doctrine be followed. *Lopatin*, 462 Mich 259-260.

Chief Justice TAYLOR claims that the lower courts' disregard for the law of the case doctrine was harmless. I cannot agree. The only other evidence against defendant was circumstantial at best and far from substantial. Adding to this is the fact that the inadmissible prior-bad-acts evidence was overwhelmingly distracting. It must be remembered that the first Court of Appeals panel found that the admission of that evidence created *substantial* prejudice. This Court has now inexplicably transformed this substantial prejudice into harmless error.

Moreover, it is not clear that a harmless error analysis should be applied to an issue governed by the law of the case. This Court has specifically stated that the law of the case doctrine removes the jurisdiction of the lower courts to readdress the issue. *Johnson*, 430 Mich 53. Hence, in this case, if the trial court and the Court of Appeals both lacked jurisdiction to allow the admission of the evidence, its admission is arguably structural error. Structural errors require automatic reversal and cannot be subjected to a harmless error analysis. *People v Duncan*, 462 Mich 47, 51 (2000). But I would note that some courts have applied a harmless error analysis to a law of the case issue. See *United States v Jiminez-Lopez*, 437 F2d 791 (CA 9, 1971), and *State v Bradford*, ___Ohio App 3d ___; 2005 WL 1009821 (2005), lv pending 106 Ohio St 3d 1532 (2005). The uncertainty about whether a harmless error analysis may be applied to failures to follow the law of the case is yet another reason for this Court to grant leave to appeal.

In its silence, the majority of this Court condones the error of the second Court of Appeals panel. I call on it to explain what justifies ignoring the law of the case in this matter. Two significant legal questions exist: (1) what degree of change in the law suffices to permit disregarding the law of the case doctrine and (2) can a failure to apply the doctrine be a harmless error. This Court should grant leave to address these problems. I must dissent from the majority's decision not to do so.

DEWAN v KHOURY, No. 131054; Court of Appeals No. 265020.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

KELLY, J. (*dissenting*). I would grant leave to appeal in this case. The lower courts, in disregarding the intent of the Legislature, have created a trap for the unwary. Under their reasoning, a person could comply with all necessary statutory requirements and yet lose his or her cause of action. This interpretation is both inequitable and absurd.

This is a medical malpractice case. Plaintiff claims that defendants negligently performed reconstructive surgery on her knee. She claims that she was injured to such an extent that she now requires a total knee replacement. The surgery occurred on June 4, 2002. Plaintiff sent a notice of intent to sue as required by MCL 600.2912b(1)[1] within the statutory period of limitations, on June 4, 2004. She then waited the required 182 days to file her complaint. She filed it on the first business day

[1] MCL 600.2912b(1) provides:

after the 182 days passed.[2] The trial court found that the period of limitations had run and granted summary disposition to defendants. The Court of Appeals affirmed. It reasoned that plaintiff had to file her notice of intent on or before June 3, 2004. Otherwise, the tolling provision of MCL 600.5856 would provide no remaining time after the 182 days in which to file suit elapsed. *Dewan v Khoury*, unpublished opinion per curiam of the Court of Appeals, issued March 28, 2006 (Docket No. 265020).

The lower courts' decisions disregard the intent of the Legislature. MCL 600.5805(6) specifically provides a two-year statutory period of limitations for malpractice claims. But, under the lower courts' reasoning, the limitations period is actually one year and 364 days. An individual could never take full advantage of the two-year period in a medical malpractice case. He or she would always have to file a notice of intent one day early in order to meet the new rule that the lower courts created in this case. This contradicts MCL 600.5805(6) which specifically states that the "period of limitations is 2 years."

In effect, the lower courts have rewritten MCL 600.5805(6). The fundamental rule of statutory construction is to give effect to the Legislature's intent, not to amend it. If the intent is clear, and the statute is unambiguous, the statute must be read as the Legislature wrote it. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347 (2003). Because the Court of Appeals disregarded this rule and rewrote the statute, its decision should be reversed.

The Court of Appeals reasoned that there was no time left in which to file a claim after the 182-day waiting period ran. It viewed the statutory period as having been exhausted on the day plaintiff filed the notice of intent. This is not factually accurate. June 4, 2004, was within the two-year statutory period. The period of limitations would have run on the next day, June 5, 2004. But plaintiff beat the deadline. Because she filed her notice of intent before the statutory period ran, she had time left on the clock to file her complaint. Either the notice of intent was late or it was not. And either the period of limitations had run or it had not. Plaintiff's notice of intent was not late and the statutory period had not run. Therefore, she had every right to file her complaint on the first business day after 182 days passed. Because she did so, her claim should not have been dismissed.

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

[2] The 182nd day was Friday, December 3, 2004. Plaintiff filed her complaint on Monday, December 6, 2004, the next business day.

To read the statutes in question as the lower courts have read them creates an absurd result.[3] Plaintiff complied with the time periods provided in each of the two statutes. "[W]e must keep in mind the fundamental rule of statutory construction that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question." *Salas v Clements*, 399 Mich 103, 109 (1976). It is a ridiculous conclusion that a plaintiff could comply with both the 182-day waiting period and the two-year statute of limitations, yet lose her cause of action because of untimeliness. I find it incredible that the Legislature intended that this could occur.

The Court of Appeals effectively concluded that the Legislature intended to create a trap when it wrote the 182-day waiting provision. Without this provision, a plaintiff could file her complaint on the same day she filed her notice of intent. In this case, but for the 182-day provision, plaintiff could have, and likely would have, filed her complaint on June 4, 2004. But, because of MCL 600.2912b(1), she had to wait to file the complaint. Because of this necessity to wait, under the lower courts' reasoning, she could never file her complaint on time. Despite complying with the words of the statute, she was trapped.

Can it really be assumed that the intent behind this waiting period was to trap plaintiffs into losing their day in court? It seems unlikely that any legislator had this in mind when voting to enact MCL 600.2912b(1) or MCL 600.5805(6). Because the lower courts' reading of these statutes is unjust and inconsistent with any reasonable legislative intent, it is absurd. *Salas*, 399 Mich 109. We should grant leave to appeal. We should correct the disregard shown here for the fundamental rule of statutory construction that courts are to effectuate the intent of the Legislature when construing a statute.

GROSSE ILE TOWNSHIP v GROSSE ILE BRIDGE COMPANY, No. 131185. The motion for miscellaneous relief is granted. The application for leave to appeal the April 4, 2006, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are denied, although on a basis different than that articulated by the Court of Appeals.

As a township, plaintiff has the statutory authority to acquire property by condemnation for public purposes and public service pursuant to MCL 41.2(3) and MCL 41.411(3). Here, plaintiff adopted a resolution statement of necessity, expressing several reasons for condemning defendant's property. The Uniform Condemnation Procedures Act permits a resisting property owner to "challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint." MCL 213.56(1). The statutory provision permits judicial

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[3] A majority of justices of this Court recently approved the validity of an absurd results analysis in Michigan. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006). For a more complete discussion of the history of absurd results, see my dissenting opinion in that case.

review of the necessity of acquiring the property for the purposes stated in the complaint. It does not, however, permit judicial review of the purposes stated in the complaint. See *State Hwy Comm v Vanderkloot*, 392 Mich 159, 176 (1974) ("There can be no judicial review of the decision to make such an 'improvement'. But the determination of the property on which such 'improvement' is made is subject to judicial review for 'fraud or abuse of discretion'.") By independently reviewing plaintiff's rationale for condemning defendant's property, the Court of Appeals erroneously reevaluated the prudence of plaintiff's decision to make the improvement.

However, plaintiff cannot exercise its condemnation power beyond its limits in the absence of statutory authorization permitting as much. *Detroit v Oakland Circuit Judge*, 237 Mich 446 (1927); *City of Coldwater v Tucker*, 36 Mich 474 (1877). In this case, plaintiff has revealed no authority that would allow the township to acquire property by extraterritorial condemnation. Because plaintiff enjoys no statutory prerogative to condemn the property it seeks, the Court of Appeals properly affirmed the Wayne Circuit Court's order dismissing plaintiff's condemnation petition.

Accordingly, leave to appeal the April 4, 2006, judgment of the Court of Appeals is denied. Court of Appeals No. 255759.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant both the application for leave to appeal and the application for leave to appeal as cross-appellant.

Summary Dispositions October 18, 2006:

PEOPLE v QUADA, No. 130425. By order of April 28, 2006, the application for leave to appeal the January 10, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Anstey* (Docket No. 128368). On order of the Court, the case having been decided on July 31, 2006, 476 Mich 436 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the defendant's conviction because dismissal is not a proper remedy for a violation of MCL 257.625a(6)(d). Court of Appeals No. 256068.

KELLY, J. I would deny leave to appeal.

PEOPLE v DAVID GONZALES, No. 130839. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon Circuit Court for a factual determination of whether the prosecutor's office served defense counsel with written notice of fourth-offense habitual offender sentence enhancement within 21 days of the date that defendant waived his circuit court arraignment. We retain jurisdiction. Court of Appeals No. 267316.

PEOPLE v BERZSENYI, No. 131408. 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. Contrary to the statement of the panel, defendant is entitled to early parole eligibility under MCL 791.234(12). *People v Kelly*, 474 Mich 1026 (2006). In all other respects, leave to appeal is denied, because

we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 258698.

PEOPLE v NILL, No. 131616. 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. 267491.

Leave to Appeal Denied October 18, 2006:

POLICEMEN AND FIREMEN RETIREMENT SYSTEM v CITY OF DETROIT, No. 130904; reported below: 270 Mich App 74.

CORRIGAN, J. I would grant leave to appeal.

CAPITOL CITY LODGE NO 141 OF THE FRATERNAL ORDER OF POLICE v INGHAM COUNTY BOARD OF COMMISSIONERS, No. 132216. The motion for immediate consideration is granted. Court of Appeals No. 272202.

KELLY, J. I would remand this case to the Court of Appeals for an explanation of its order.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 20, 2006:

MICHIGAN CITIZENS FOR WATER CONSERVATION v NESTLÉ WATERS NORTH AMERICA, INC, Nos. 130802, 130803. The motions for leave to file briefs amicus curiae are granted. The application for leave to appeal the November 29, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing only whether the plaintiffs have standing under *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), to bring claims related to the Osprey Lake impoundment and wetlands 112, 115, and 301. The parties should avoid submitting mere restatements of the arguments made in their application papers. Amicus curiae are invited to submit supplemental briefs on the issue described above. Other persons or groups interested in the determination of the issue presented may move the Court for permission to file briefs amicus curiae. Reported below: 269 Mich App 25.

WEAVER, J. On the question whether to grant the applications or to take other peremptory action under MCR 7.302(G)(1), I would include argument on whether *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608 (2004), was correctly decided.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

Summary Dispositions October 20, 2006:

PEOPLE v CASCHERA, No. 130244. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of sentence and

remand this case to the Oakland Circuit Court for resentencing. Under *People v Johnson*, 474 Mich 96 (2006), the trial court erred in its scoring of offense variable 11. Although defendant entered a plea agreement pursuant to *People v Cobbs*, 443 Mich 276 (1993), to be sentenced at the bottom of the guidelines range, which was then believed to be 84 months, that was not the correct guidelines minimum in light of *Johnson*, *supra*. Because the defendant's sentence was based on an inaccurate calculation of the guidelines range, he is entitled to be resentenced. *Johnson*, 474 Mich at 103. Court of Appeals No. 265346.

WEAVER and CORRIGAN, JJ. We would deny leave to appeal.

WERDLOW V CITY OF DETROIT POLICEMEN AND FIREMEN RETIREMENT SYSTEM BOARD OF TRUSTEES, No. 130564. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the Court of Appeals judgment and we remand this case to the Wayne Circuit Court for entry of an order granting summary disposition to defendants. The Court of Appeals correctly held that the circuit court lacked jurisdiction to grant the relief requested by plaintiffs. Section 10 of 1969 PA 312 (Act 312), MCL 423.240, provides that arbitration awards are final and binding on the parties to the arbitration. Here, the defendant unions were not parties to the arbitration imposing the 12-member board of trustees. Further, the Court of Appeals correctly held that the circuit court lacked jurisdiction to interpret the provisions of the collective bargaining agreements between the parties because such review falls outside the scope of review by the circuit court under § 12 of Act 312, MCL 423.242. Defendants' motion for summary disposition should have been granted on these limited grounds.

Section III of the Court of Appeals judgment is vacated because constitutional issues should be avoided where a case can be resolved adequately on non-constitutional grounds. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 632 (2004). The portion of the Court of Appeals judgment purporting to interpret the collective bargaining agreements between the parties is vacated because, as noted above, such review falls outside the scope of review under § 12 of Act 312, MCL 423.242. The portion of the judgment remanding for clarification is vacated as moot because, on remand, the trial court shall enter an order granting defendants' motion for summary disposition on the limited grounds identified in this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Reported below: 269 Mich App 383.

CORRIGAN, J. (*concurring*). I concur in the Court's order. I write separately to urge the circuit court to review its docket and consolidate any cases between the city of Detroit and the pension board for the members of the Detroit Fire Fighters Association Local 344, IAFF (DFFA), the Detroit Police Command Officers Association (DPCOA), the Detroit Police Officers Association (DPOA), and the Detroit Police Lieutenants and Sergeants Association (DPLSA). The trial court should consider such cases together, so it can make a definitive ruling regarding

the composition of the pension board as it applies to all four unions. Consolidation of such cases would promote consistency and judicial efficiency.

VILLAGE OF OXFORD v NATHAN GROVE FAMILY, LLC, No. 131053. 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 Oakland Circuit Court for further proceedings consistent with this order.

Here, plaintiff adopted a resolution declaring a need for free public parking. MCL 213.56(1) permits a property owner to "challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint." While the statute permits judicial review of the necessity of acquiring all or part of the property for the purposes stated in the complaint, it does not permit judicial review of the purposes stated in the complaint.

As this Court recognized over 30 years ago in *State Hwy Comm v Vanderkloot*, 392 Mich 159, 176 (1974):

> There can be no judicial review of the decision to make such an "improvement". But the determination of the property on which such "improvement" is made is subject to judicial review for "fraud or abuse of discretion".

By independently reconsidering the village's decision that the public parking had to be free of charge, the Court of Appeals and circuit court erroneously reviewed the wisdom of plaintiff's decision to make the improvement, rather than review the necessity of acquiring defendant's property to accomplish the improvement.

Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for further proceedings consistent with this order. We do not retain jurisdiction. Reported below: 270 Mich App 685.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v COMMAND, No. 131386. Pursuant to MCR 7.302(G)(1), and for the reasons stated in the Court of Appeals partially dissenting opinion, we reverse only that portion of the Court of Appeals judgment that precluded on retrial evidence that defendant had previously committed a nonconsensual sexual penetration of a prior complainant. Court of Appeals No. 259296.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 25, 2006:

BATES v GILBERT, Nos. 129564-129567, 129569-129572. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the requirements of MCL 600.2912d(1)(a)-(d) are satisfied if: (1) a plaintiff files a single affidavit of merit that is

signed by a health professional who plaintiff's counsel reasonably believes is qualified under MCL 600.2169 to address the standard of care, but who is not also qualified to address causation; or (2) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under § 2169 to address causation, but who is not also qualified to address the standard of care. The parties shall also address whether § 2912d(1) permits or requires a plaintiff to file multiple affidavits, signed by different health professionals, when a single health professional is not qualified under § 2169 to testify about both the standard of care and causation. 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 Nos. 252022, 252047, 252792, and 252793.

Summary Disposition October 25, 2006:

BANASZAK v NORTHWEST AIRLINES, INC, No. 130901. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Wayne Circuit Court granting summary disposition to defendant Otis Elevator Company. Otis entered into a contract to install moving walkways in a new airport terminal. As part of that contract, Otis was required to provide a cover over the "wellway," an opening at the end of the moving walkway that contains the mechanical elements. The purpose of the cover was to protect persons using that area. The plaintiff was injured when she stepped on an inadequate piece of plywood covering the "wellway." This hazard was the subject of the Otis contract. As a result, Otis owed no duty to plaintiff that was "separate and distinct" from its duties under the contract. *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004). Court of Appeals No. 263305.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied October 25, 2006:

KRUSCHKE v LOVELL, No. 130030; Court of Appeals No. 259601.

CORRIGAN, J. I would reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion.

MACOMB COUNTY PROSECUTING ATTORNEY v MASTERS, No. 130331; Court of Appeals No. 262716.

CAVANAGH, J. I would remand this case to the Court of Appeals for plenary consideration.

FRY v GODOSHIAN, No. 130858; Court of Appeals No. 257644.

WEAVER and CORRIGAN, JJ. We would grant leave to appeal.

In re BROWN (BROWN v KENT CIRCUIT COURT JUDGE), No. 130921; Court of Appeals No. 267648.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for reconsideration in light of its decision in *People v James*, 272 Mich App __ (Docket No. 266521, decided August 29, 2006).

PEOPLE v BEAUCHAMP, No. 130999; Court of Appeals No. 257025.

KELLY, J. I would grant leave to appeal.

PEOPLE v DUNN, No. 131187; Court of Appeals No. 267220.

PEOPLE v MCBRIDE, No. 131295; Court of Appeals No. 259326.

PEOPLE v BEAVERS, No. 131441; Court of Appeals No. 269651.

PEOPLE v JAMES, No. 131460; Court of Appeals No. 269700.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v POUNCY, No. 131506; Court of Appeals No. 270070.

KELLY, J. I would remand this case to the trial court for resentencing.

PEOPLE v BLASENGAME, No. 131536; Court of Appeals No. 268888.

Reconsideration Denied October 25, 2006:

PEOPLE v HIRSCHI, No. 130950. Leave to appeal denied at 475 Mich 908. Court of Appeals No. 267703.

Summary Disposition October 27, 2006:

PEOPLE v LOVE, No. 131173. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Bay Circuit Court to consider defendant's claim for 100 days of additional sentence credit under MCL 769.11b. The defendant avers that credit for 267 days should have been applied to his sentence instead of 167 days. If the court determines that an error was made in the number of jail credit days stated in the presentence report, it shall prepare and forward an amended judgment of sentence to the Michigan Department of Corrections. 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. 268389.

Leave to Appeal Denied October 27, 2006:

WIATER v GREAT LAKES RECOVERY CENTERS, INC, No. 128139. Court of Appeals No. 250384.

WEAVER, J. (*dissenting*). I dissent from the decision to deny leave to appeal. I would grant leave to appeal and ask the parties to brief whether *Mann v Shusteric Enterprises, Inc*, 470 Mich 320 (2004), was correctly decided.

MARKMAN, J. (*dissenting*). I dissent and would grant defendant's application for leave to appeal. This case and *Robertson v Blue Water Oil Co* (Docket No. 130100) squarely raise the issue whether the "avoidability" or "unavoidability" of a hazard, specifically in this case open and obvious snow and ice, is relevant in determining the existence of a "special aspect" that can serve to impose liability upon a premises owner when an invitee slips and falls. In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519 (2001), this Court held that "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." The Court illustrated what constituted a "special aspect" as follows:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id*. at 518.]

In the instant case, the trial count found that the evidence demonstrated the existence of an alternative parking lot lacking the same alleged hazard from which plaintiff could have accessed the sidewalk leading to the entrance to defendant's building. I would grant leave to appeal to determine what effect, if any, the existence of the alternative parking lot had on the "avoidability" or "unavoidability" of the open and obvious snow and ice in defendant's other parking lot.

The crux of the "open and obvious hazard" doctrine is that an invitee has the personal responsibility to protect himself or herself from open and obvious dangers. I would grant leave to appeal to clarify whether the "avoidability" or "unavoidability" of a hazard posing an alleged "special aspect" is relevant to the exercise of such personal responsibility.

ROBERTSON v BLUE WATER OIL COMPANY, No. 130100; reported below: 268 Mich App 588.

WEAVER, J. (*dissenting*). I dissent from the decision to deny leave to appeal. I would grant leave to appeal and ask the parties to brief whether *Mann v Shusteric Enterprises, Inc*, 470 Mich 320 (2004), was correctly decided.

MARKMAN, J. (*dissenting*). I would grant defendant's application for leave to appeal to address the issues of "avoidability" and "unavoidability" raised in my statement in *Wiater v Great Lakes Recovery Centers, Inc* (Docket No. 128139).

PEOPLE v BRIAN HILL, No. 130546; reported below: 269 Mich App 505.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). Defendant was charged with multiple counts involving child sexually abusive material; only one of these is at issue in this case. The Court of Appeals determined that under MCL 750.145c(2) a person "arranges for, produces, makes, or finances" child sexually

abusive material when he downloads such material from the Internet and "burns" it onto a CD. I would grant leave to appeal to determine (a) whether the more reasonable meaning of this language is to sanction persons who *originate* such material; (b) whether the Court of Appeals interpretation would essentially render nugatory the prohibition in MCL 750.145c(4) on the "possession" of child sexually abusive materials because it would impose the same penalty on a person who downloads such material as the person who actually entices the child to pose for the material; and (c) whether the Court of Appeals interpretation of "makes" has legal consequences in other digital contexts. For example, does a person who downloads a pirated movie "make" such a movie and would the person be subject to the same penalty as the person who originally pirated the movie? Does a person who downloads a pirated song "make" such a song and would the person be subject to the same penalty as the person who originally made available the song? Does a person who downloads a defamatory article from the Internet "make" such an article and would the person be subject to the same penalty as the original publisher of the defamation?

PEOPLE v COLFER, No. 131645; Court of Appeals No. 268740.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Defendant pleaded guilty to three counts of armed robbery and two counts of possession of a firearm during the commission of a felony. The trial court sentenced defendant to five to 20 years for the armed robbery convictions, a consecutive two-year sentence for one of the felony-firearm convictions, and a consecutive five-year sentence for the other felony-firearm conviction. However, the trial court subsequently granted defendant's motion to amend the judgment of sentence and reduced the five-year sentence for felony-firearm to a two-year sentence, to run consecutively to the armed robbery sentences but concurrently with the other two-year sentence for felony-firearm. The Court of Appeals denied the prosecutor's application for leave to appeal.

MCL 750.227b(1) states, "Upon a second conviction under this section [for felony-firearm], the person shall be imprisoned for 5 years." In *People v Sawyer,* 410 Mich 531, 536 (1981), this Court held that "the Legislature intended that a five-year term of imprisonment for a second [felony-firearm] conviction should only be imposed when the second offense is subsequent to the first conviction." The prosecutor argues that *Sawyer* should be overruled.

Here, this was defendant's second conviction of felony-firearm and, thus, it would seem that he should be imprisoned for five years according to the straightforward language of the statute. Contrary to the holding in *Sawyer*, MCL 750.227b(1) does not say that a five-year sentence is only appropriate where the second conviction arises from an offense committed *after the imposition of the sentence for the first conviction*. Therefore, I would grant the prosecutor's application for leave to appeal to reconsider *Sawyer.*

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v HEDEEN, No. 131712; Court of Appeals No. 259798.

WEAVER, J. (*dissenting*). I dissent from the majority's order denying the prosecutor's application for leave to appeal. I would reverse the Court of Appeals majority's ruling and, for the reasons stated by Court of Appeals dissenting Judge FORT HOOD, I would reinstate the sentence imposed by the trial court.

The defendant in this case was 32 years old when he began having sexual relations with the 15-year-old victim. The presentence report indicates that the defendant met the victim in June 2002 and that they started engaging in sexual relations in August 2002. The victim told the police that defendant knew that she was 15 and that defendant told her he would take care of her. Evidently the victim's home life was unstable. Her parents were divorced and her father had been out of the picture for some time. The victim's mother was inattentive and, when the mother's boyfriend kicked the victim out of the house, the victim began living with defendant in his home.

Defendant admitted that he knew the victim was 15, but that he had sexual intercourse with her anyway, approximately every other week, from August 2002 until April 2003, a period of nine months. The victim told the police that because defendant did not use a condom, she became impregnated by defendant first in September 2002, and then again in February 2003. Both times, the victim endured abortions, yet defendant continued to engage in sexual relations with the victim.

Defendant pleaded guilty to one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d (1)(a), in exchange for dismissal of two additional counts of CSC III. In departing from the sentencing guidelines minimum range of 24 to 40 months, and instead sentencing defendant to the highest minimum term possible, ten to 15 years, the trial court made the following observations:

> [Y]ou know, Mr. Hedeen is 32 years old and this child is only 15 years old. She really was unprotected. She didn't have any protection from anybody. I mean she didn't have any protection from her parent, her mom, her guardian, the person that was in charge of her, and she certainly didn't have any protection from Mr. Hedeen.
>
> * * *
>
> This child was 15 years at the time. The crime has affected her greatly. Her behavior has changed dramatically. She has been, this was the thing, I made a note to myself. She became pregnant two times by this Defendant and then aborted two times. She aborted a fetus two times. I'm going to try not to cry, but I think this is gross. This is beyond, this is animalistic.
>
> * * *
>
> But this is outside of any box that I've, I've ever been involved with, and it's whatever 30 years or 40 years where, where a 32 year

> old impregnates a 15 year old who becomes pregnant and aborts that child and then lo and behold a second time. That is certainly a pattern of behavior that is just aberrant, and I'm not sure the guidelines take that into consideration.
>
> Well, those are the reasons that I'm going to impose a sentence that will represent two-thirds of the maximum 15 years, which would be from ten years to 15 years in prison. That's the sentence.[1]

Defendant appealed his sentence, and a majority of the Court of Appeals reversed, determining that while the trial court had a "substantial and compelling" reason for the upward sentencing departure in accord with *People v Babcock,* 469 Mich 247, 264-265 (2003), the trial court had not satisfied the principle of proportionality: "whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record . . . ." *Id.* at 262. In so holding, the majority noted that because defendant had no prior felony convictions, and his last misdemeanor conviction occurred in 1991, defendant's prior record did not support the departure. On this basis, a majority of the Court of Appeals reversed and remanded for resentencing.

Judge FORT HOOD dissented from the majority's conclusion that the principle of proportionality had not been satisfied under *Babcock*. Because I agree with Judge FORT HOOD's dissent, I adopt it as the basis for my dissent from the majority's decision to deny the prosecutor's application for leave to appeal the Court of Appeals majority's order reversing and remanding for resentencing:

FORT HOOD, J. (*concurring in part and dissenting in part*).

> I concur in the majority opinion's conclusions that: (1) substantial and compelling reasons existed to justify a departure from the guidelines; (2) the record contains no indication that the sentence imposed was the result of partiality based on the sentencing court's religious beliefs; and (3) defendant's scoring and sentence did not violate Michigan sentencing laws. However, I respectfully dissent from the majority's conclusion that the sentence violates the principle of proportionality.
>
> As an initial matter, it should be noted that defendant did not allege that the principle of proportionality was violated by imposing the ten to fifteen year sentence for third-degree criminal sexual conduct, MCL 750.520d(1)(a), in his appellate brief. When a defendant fails to argue how his sentence for the convicted offense is disproportionate, the issue is waived. *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997).

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[1] Trial court sentencing transcript, September 15, 2003, pp 10-11, 15.

Moreover, appellate review of the sentence is not reviewed de novo, but is limited. The structure of the legislative sentencing guidelines and the appellate system itself recognize that "the trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case." *People v Babcock*, 469 Mich 247, 267; 666 NW2d 231 (2003). Therefore, the trial court may depart from the sentencing range when a substantial and compelling reason exists for the departure. *Id*. The decision to depart may be based on an offense characteristic or an offender characteristic previously incorporated into the guidelines if the sentencing court finds that the characteristic has been given inadequate or disproportionate weight. *Id*., at 267-268; see also MCL 769.34(3)(b).

The Legislature gave the sentencing court the responsibility of making the difficult determination of rendering the appropriate sentence "largely on the basis of what has taken place in its direct observation."*Babcock, supra* at 268. "Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *Id*. Review de novo would allow appellate judges to substitute their own judgment for that of the trial court. *Id*. Therefore, an abuse of discretion standard is applied to sentencing decisions, which acknowledges that there will be no single correct outcome because there may be more than one reasonable and principled outcomes [sic]. *Id.,* at 269. "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. That is, when the sentencing court chooses an outcome falling outside the principled range of outcomes, an abuse of discretion occurs. *Id*.

On this record, I cannot conclude that the trial court abused its discretion. That is, the sentence imposed was within the range of principled outcomes. The victim in this case was particularly vulnerable because her mother essentially abandoned her. Although defendant did not allocute at sentencing, his defense counsel opined that the victim was "left in his lap" when her mother's boyfriend threw her out of the family home. The victim's family instability gave defendant unlimited access to the victim, and instead of calling the appropriate authorities or attempting to locate the victim's birth father, he preyed upon her despite knowing her age. After the victim had one abortion, she reported that defendant was angry with her, yet he continued to engage in unprotected sexual activities with her. Based on the unique ability of the trial court to assess the factual information presented in the

lower court, I cannot conclude that an abuse of discretion occurred. Therefore, I would affirm the sentence.[2]

Notwithstanding his fairly unremarkable prior criminal record, this 32-year-old man should not have taken advantage of this 15-year-old girl. The fact that he would continue to engage in repeated sexual relations when he knew she was only 15, and after she endured not just one abortion, but two, is indicative of that kind of aberrant criminal behavior that " 'keenly' or 'irresistibly' grab[s] our attention"[3] and that therefore justifies a departure from the sentencing guidelines.

The Court of Appeals majority's conclusion that the sentence was disproportionate because defendant could have committed third-degree criminal sexual conduct in a more abhorrent, deviant fashion produces no reliable calculus for a trial court to know whether a sentence properly expresses community outrage or whether it offends proportionality. For example, if defendant had impregnated the victim a third time, would three pregnancies warrant the ten-year minimum sentence? Perhaps not, because defendant could have impregnated the victim a fourth time, or could have engaged in sexual relations with the victim with more frequency. The Court of Appeals majority failed to identify what level of aberrant criminal behavior would have merited the minimum sentence imposed by the trial court, which otherwise articulated substantial and compelling reasons to depart upwardly.

For these reasons, I would reverse the Court of Appeals majority decision and reinstate the trial court's original sentence of ten to 15 years.

CORRIGAN and YOUNG, JJ. We join the statement of Justice WEAVER.

Summary Dispositions October 31, 2006:

PEOPLE v BRYANT, No. 127249. By order of June 17, 2005, the application for leave to appeal the August 24, 2004, judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Mileski* (Docket No. 127457) and *People v Walker* (Docket No. 128515). By order of September 15, 2006, this Court vacated our June 17, 2005, orders granting leave to appeal, and remanded *Mileski* and *Walker* to the Court of Appeals for reconsideration in light of *Davis v Washington*, ___ US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006). On order of the Court, the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *Davis*. We do not retain jurisdiction. Court of Appeals No. 247039.

PEOPLE v RODRIGUEZ, No. 131046. The motion to amend is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we

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[2] *People v Hedeen,* unpublished opinion per curiam of the Court of Appeals, issued June 6, 2006 (Docket No. 259798), slip op pp 1-2.

[3] *Babcock* at 257, quoting *People v Fields,* 448 Mich 58, 67 (1995).

remand this case to the Oakland Circuit Court to determine whether the changes to the defendant's presentence investigation report ordered by the circuit court at the defendant's December 12, 1997, sentencing hearing have been made and, if not, for the amendment of the report. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction. Court of Appeals No. 265073.

KENNEDY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 131206. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006). Court of Appeals No. 259453.

WEAVER, J. I would grant leave to appeal to reconsider *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006).

PEOPLE v CORN, No. 131606. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon 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 605 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the circuit court's order appointing counsel, in accord with the deadlines in effect at the time defendant was denied counsel. See MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. Counsel may, but is not required to, include those issues defendant raised in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. Court of Appeals No. 267870.

Leave to Appeal Denied October 31, 2006:

PEOPLE v JOEL ALLEN, No. 127531. By order of July 14, 2005, the application for leave to appeal the October 12, 2004, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Robinson* (Docket No. 126379). On order of the Court, the case having been decided on May 31, 2006, 475 Mich 1 (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. Court of Appeals No. 246419.

MCGUIRE v WASVARY, No. 128618. By order of November 9, 2005, the application for leave to appeal the January 25, 2005, judgment of the Court of Appeals was held in abeyance pending the decisions in *Woodard v Custer* (Docket Nos. 12494-95) and *Hamilton v Kuligowski* (Docket No. 126275). On order of the Court, the consolidated cases having been decided on July 31, 2006, 476 Mich 545 (2006), the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 248309.

PEOPLE v CHILDRESS, No. 128697. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257314.

PEOPLE v HARTFORD, No. 128747. The motion to amend the application is granted. The application for leave to appeal the April 7, 2005, order of the Court of Appeals is considered, and it 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. 258877.

PEOPLE v WHITTAKER, No. 128998. By order of October 31, 2005, the application for leave to appeal the May 12, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Mileski* (Docket No. 127457). On order of the Court, the case having been decided on September 15, 2006, 477 Mich ___ (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. Court of Appeals No. 254012.

PEOPLE v DWAYNE JONES, No. 129289. By order of January 27, 2006, the prosecuting attorney was directed to answer the application for leave to appeal the June 24, 2005, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 258676.

HALLMAN v DELA CRUZ, Nos. 129398, 129531; Court of Appeals No. 253363.

PEOPLE v CAMPBELL, No. 129533. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260150.

PEOPLE v JURICH, No. 129536. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for miscellaneous relief and the motion to add issues are granted. Court of Appeals No. 260263.

COLEMAN-BEY v DEPARTMENT OF CORRECTIONS, Nos. 129602, 129603; Court of Appeals Nos. 260670, 260671.

WILSON v DEPARTMENT OF CORRECTIONS, No. 129607; Court of Appeals No. 264810.

PEOPLE v INGRAM, No. 129633. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260169.

KELLY, J. I would hold this case in abeyance for *Whorton v Bockting*, cert gtd ___ US ___; 126 S Ct 2017; 164 L Ed 2d 778 (2006).

KASBEN v KASBEN, No. 129896; Court of Appeals No. 253345.

PEOPLE v STAFFNEY, No. 129983; Court of Appeals No. 264567.

PEOPLE v WALTER MILLER, No. 130358. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions for appointment of counsel, to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), and for miscellaneous relief are denied. Court of Appeals No. 261528.

ROWE v CHILDREN'S HOSPITAL OF MICHIGAN, No. 130534; Court of Appeals No. 264379.

PEOPLE v JENNINGS, No. 130650; Court of Appeals No. 267563.

PEOPLE v RONALD MOORE, No. 130741. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262857.

PEOPLE v TUSCANO, No. 130765; Court of Appeals No. 253609.

PEOPLE v ROBERT J JACKSON, No. 130874. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264999.

PEOPLE v CLEE JACKSON, No. 130877. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264521.

PEOPLE v ERIC GALLOWAY, No. 130897; Court of Appeals No. 257850.

PEOPLE v HENDERSON, No. 130900; Court of Appeals No. 257771.

PEOPLE v GILBERT THOMPSON, No. 130925. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264982.

PEOPLE v MITCHELL, No. 130926. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand and the motion for resentencing are also denied. Court of Appeals No. 263708.

PEOPLE v CURTIS WOOD, No. 130928. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 263884.

PEOPLE v SIKORSKI, No. 130940. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264944.

PEOPLE v MARR, No. 130947; Court of Appeals No. 258399.

PEOPLE v DARNELL PARKS, No. 130949. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264389.

PEOPLE v BOLTON, No. 130961. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264139.

PEOPLE v RONALD BENNETT, No. 130964. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267742.

PEOPLE v EDWARD TAYLOR, No. 130978. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269190.

PEOPLE v FLANDERS, No. 130980. 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. 264739.

PEOPLE v BRADDOCK, No. 130989. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265030.

PEOPLE v BRAYBOY, No. 131029. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264951.

PEOPLE v LUMSDEN, No. 131030. 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. 263572.

PEOPLE v PEEVEY, No. 131050. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265173.

PEOPLE v PARPART, No. 131057. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269268.

PEOPLE v PARHAM, No. 131063. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264492.

PEOPLE v DWIGHT HILL, No. 131064. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264342.

PEOPLE v GREENLEAF, No. 131068. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264280.

PEOPLE v SEYMORE, No. 131069. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263724.

PEOPLE v GLOVER, Nos. 131071, 131529. 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 Nos. 264945, 266108.

PEOPLE v CHRISTINE HARRIS, No. 131076. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264123.

PEOPLE v GARLAND, No. 131079. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263673.

PEOPLE v ALEXANDER, No. 131082. 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. 264490.

PEOPLE v ESPIE, No. 131083. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263620.

TITAN INSURANCE COMPANY v NORTH POINTE INSURANCE COMPANY, No. 131084; reported below: 270 Mich App 339.

PEOPLE v LARRY SMITH, No. 131088. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263683.

PEOPLE v STAPLE, No. 131089. 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. 264115.

PEOPLE v CURRY, No. 131095. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264907.

LITTLE v TRIVAN, No. 131102; Court of Appeals No. 257781.

PEOPLE v DERRICK THOMAS, No. 131104. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265450.

PEOPLE v SKIEF, No. 131105. 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. 265166.

PEOPLE v WINBUSH, No. 131107. 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. 265441.

PEOPLE v JOSEPH BENNETT, No. 131114. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265351.

PEOPLE v SCOTT KING, No. 131115; Court of Appeals No. 266978.

BEYER v VERIZON NORTH, INC, No. 131128; reported below: 270 Mich App 424.

PEOPLE v MILTON, No. 131141. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263771.

PEOPLE v JEFFREY HICKS, No. 131142. 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. 267797.

PEOPLE v RADEMACHER, No. 131143; Court of Appeals No. 258149.

PEOPLE v FULTON, No. 131144. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265076.

PEOPLE v HAMPTON, No. 131146. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265467.

PEOPLE v SIMPSON, No. 131147. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264658.

PEOPLE v MORRIS, No. 131154. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264493.

PEOPLE v MACON, No. 131174. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269753.

PEOPLE v ABBATE, No. 131175; Court of Appeals No. 269004.

PEOPLE v LAPORTE, No. 131179. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265453.

PEOPLE v PALMER, No. 131181. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264949.

VALENTE v VALENTE, No. 131192; Court of Appeals No. 266638.

PEOPLE v FOWLER, No. 131193; Court of Appeals No. 256845.

PEOPLE v DOUGLAS JONES, No. 131194. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265615.

PEOPLE v MOENING, No. 131195; Court of Appeals No. 268724.

PEOPLE v TRAVIS SCOTT, No. 131197. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269165.

PEOPLE v CEASAR, No. 131199. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264817.

PEOPLE v FIELDS, No. 131200. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267871.

PEOPLE v MCQUIRTER, No. 131203. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion for appointment of counsel, motion to remand, and motion for miscellaneous relief are denied. Court of Appeals No. 269121.

PEOPLE v REEVES, No. 131205. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265256.

PEOPLE v JAMES JOHNSON, No. 131214. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motions to remand and for appointment of counsel are denied. Court of Appeals No. 268726.

PEOPLE v ROBERT REED, No. 131217; Court of Appeals No. 267352.

PEOPLE v CARRUTH, No. 131221. 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. 265308.

PEOPLE v RIVERA, No. 131222. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265165.

PEOPLE v MARTIN, No. 131227. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266403.

PEOPLE v NEAL, No. 131228. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265216.

PEOPLE v KAUFMAN, No. 131230. The motion for miscellaneous relief is granted. Court of Appeals No. 268154.

PEOPLE v PETTWAY, No. 131260. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265470.

MORAN v VAC-ALL SERVICES, INC, No. 131261. The motion for miscellaneous relief is granted. Court of Appeals No. 258770.

PEOPLE v ANTHONY GONZALES, No. 131262; Court of Appeals No. 259302.

PEOPLE v STEPHEN ALLEN, No. 131273. 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. 264978.

PEOPLE v TERVARES WILLIAMS, No. 131290; Court of Appeals No. 260638.

PEOPLE v BERNARD SMITH, No. 131291. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265404.

PEOPLE v HARVEY, No. 131294. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266287.

PEOPLE v WALLACE JOHNSON, No. 131299; Court of Appeals No. 264372.

PEOPLE v ABSOLEM THOMAS, No. 131308; Court of Appeals No. 269171.

PEOPLE v CANIFF, No. 131310; Court of Appeals No. 258146.

PEOPLE v ACOSTA, No. 131313. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266042.

PEOPLE v TRAINI, No. 131320. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265466.

PEOPLE v RANUM, No. 131327; Court of Appeals No. 269091.

PEOPLE v DARREN BROWN, No. 131331. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269653.

PEOPLE v WHITWORTH, No. 131332; Court of Appeals No. 268091.

PEOPLE v STANFILL, No. 131335. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265454.

PEOPLE v VILLAVICENCIO, No. 131338; Court of Appeals No. 259437.

PEOPLE v KENNETH WILLIAMS, No. 131340. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265436.

PEOPLE v STINSON, No. 131342. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265204.

PEOPLE v DECHAUN SMITH, No. 131343; Court of Appeals No. 258200.

PEOPLE v STURM, No. 131345; Court of Appeals No. 256570.

PEOPLE v FOCKLER, No. 131346; Court of Appeals No. 268883.

PEOPLE v DERAY SMITH, No. 131347; Court of Appeals No. 254523.

PEOPLE v MAGGARD, No. 131348; Court of Appeals No. 268988.

PEOPLE v HOLBROOKE, No. 131349; Court of Appeals No. 256368.

PEOPLE v COOPER, No. 131350. The motion for miscellaneous relief is granted. The application for leave to appeal 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. 266135.

PEOPLE v WARREN, No. 131352; Court of Appeals No. 258487.

PEOPLE v HARRY HILL, No. 131353; Court of Appeals No. 259717.

PEOPLE v TELLO, No. 131354. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269269.

DECKER v DECKER, No. 131355; Court of Appeals No. 266446.

KAUFFMAN v UNIVERSITY OF MICHIGAN REGENTS, No. 131359; Court of Appeals No. 257711.

ATTICA TOWNSHIP v KIRKLIN, No. 131360; Court of Appeals No. 258234. CAVANAGH, J., did not participate.

PEOPLE v SISLER, No. 131362. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265705.

PEOPLE v JOEL WILLIAMS, No. 131366. The motion to remand is denied. Court of Appeals No. 257142.

PEOPLE v DORSEY, No. 131374; Court of Appeals No. 269404.

PEOPLE v LARRY CARTER, No. 131377. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269054.

PEOPLE v GARY FRANKLIN, No. 131381. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269951.

COLEMAN v OAKLAND CIRCUIT JUDGE, No. 131383; Court of Appeals No. 268607.

PEOPLE v JEFFREY BROWN, No. 131387; Court of Appeals No. 258825.

PEOPLE v COATS, No. 131396. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265861.

PEOPLE v ANTRELL BROWN, No. 131398; Court of Appeals No. 255255.

PEOPLE v JAMES RENAUD, No. 131400. The motion for immediate consideration is granted. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand is denied. Court of Appeals No. 258574.

PEOPLE v FORTNEY, No. 131407. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265433.

PEOPLE v CHERRY, No. 131413. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265540.

PEOPLE v ERIC HUDSON, No. 131414. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265321.

PEOPLE v MOCERI, No. 131421. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266559.

PEOPLE v NICHOLS, No. 131425; Court of Appeals No. 267050.

PEOPLE v IBRAHIM, No. 131429; Court of Appeals No. 259835.

PEOPLE v PETER BROWN, No. 131431. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265946.

PEOPLE v PRINTZ, No. 131432. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265769.

PEOPLE v LEWIS, No. 131433; Court of Appeals No. 269226.

PEOPLE v BONNIE WILLIAMS, No. 131435; Court of Appeals No. 259440.

PEOPLE v PATMORE, No. 131436; Court of Appeals No. 269058.

PEOPLE v WALTER GALLOWAY, No. 131438. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 265340.

PEOPLE v ARTHUR YOUNG, No. 131442. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265721.

PEOPLE v MEYERS, No. 131443; Court of Appeals No. 259144.

PEOPLE v RUFFNER, No. 131444; Court of Appeals No. 269420.

PEOPLE v KEVIN ALLEN, No. 131447; Court of Appeals No. 258820.

HAMADE v SUNOCO, INC, No. 131448; reported below: 271 Mich App 145.

PEOPLE v BUCHANAN, No. 131451. The motion to remand is denied. Court of Appeals No. 258575.

PEOPLE v NOBLES, No. 131453; Court of Appeals No. 258353.

HOBBY v DEPARTMENT OF CORRECTIONS, No. 131454; Court of Appeals No. 268354.

PEOPLE v RANDY HAYNES, Nos. 131455, 131481; Court of Appeals Nos. 268710, 269307.

PEOPLE v GEARY GILMORE, No. 131458. 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. 265879.

PEOPLE v HARWOOD, No. 131467; Court of Appeals No. 269056.

PEOPLE v HULING, No. 131469; Court of Appeals No. 258821.

PEOPLE v MELVIN CARTER, No. 131472; Court of Appeals No. 258435.

PEOPLE v GIMEL MORGAN, No. 131477; Court of Appeals No. 269057.

PEOPLE v TOWER, No. 131482. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265652.

PEOPLE v PEREZ-BECERRA, No. 131486. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266477.

PEOPLE v HOLLOWAY, No. 131491; Court of Appeals No. 258671.

PEOPLE v ROWE, No. 131493. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266596.

PEOPLE v HUFFMAN-KING, No. 131495. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265835.

PEOPLE v RICHARD MORGAN, No. 131496; Court of Appeals No. 269173.

PEOPLE v ROBERT L JACKSON, No. 131497. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265850.

MSX INTERNATIONAL ENGINEERING SERVICES, INC v LINDSAY FAMILY LIMITED PARTNERSHIP, Nos. 131501, 131502. The motion for miscellaneous relief is granted. The application for leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals Nos. 259096, 259561

FLAGSTAR BANK v HARBOR NORTHWESTERN — 30800, No. 131503; Court of Appeals No. 266198.

PEOPLE v GONZALEZ, No. 131504. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266758.

PEOPLE v MINLEY, No. 131519. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265878.

PEOPLE v FENWICK, No. 131520; Court of Appeals No. 268829.

PEOPLE v DURANT, No. 131522. The motion for remand is denied. Court of Appeals No. 260546.

PEOPLE v WOJNICZ, No. 131523. 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. 269434.

PEOPLE v HAROLD WILLIAMS, No. 131524. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions to remand and for appointment of counsel are denied. Court of Appeals No. 266800.

LYONS v JIM MOCERI & SONS, INC, No. 131533; Court of Appeals No. 254575.

PEOPLE v GAYLE ROBERSON, No. 131535. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265742.

PEOPLE v SHEFFIELD, No. 131540; Court of Appeals No. 268589.

PEOPLE v SHINHOLSTER, No. 131541; Court of Appeals No. 270021.

ROZENBERG v RETRIEVAL METHODS, INC, No. 131544; Court of Appeals No. 259217.

PEOPLE v DAVID JOHNSON, No. 131545; Court of Appeals No. 261096.

PEOPLE v NELSON, No. 131550. The issues raised in the application are now moot. Court of Appeals No. 269922.

PEOPLE v JAMES MOORE, No. 131551; Court of Appeals No. 269335.

PEOPLE v BOBO, No. 131552. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266283.

PEOPLE v SCHEWE, No. 131553; Court of Appeals No. 268711.

PEOPLE v MATTFIELD, No. 131555; Court of Appeals No. 269923.

PEOPLE v OUELLETTE, No. 131556; Court of Appeals No. 261602.

PEOPLE v MIDDLETON, No. 131560. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266246.

PEOPLE v CHAROBEE, No. 131565; Court of Appeals No. 269466.

PEOPLE v MUSSER, No. 131566; Court of Appeals No. 268669.

PEOPLE v STEVEN WILSON, No. 131568; Court of Appeals No. 261371.

KINNEY v DEPARTMENT OF CORRECTIONS, No. 131569; Court of Appeals No. 266875.

PEOPLE v JEMISON, No. 131570; Court of Appeals No. 268708.

PEOPLE v DANIEL THOMPSON, No. 131573; Court of Appeals No. 269394.

PEOPLE v PETERSON, No. 131575. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for miscellaneous relief is denied. Court of Appeals No. 264377.

MARIOTTI v JOHNSON, No. 131582; Court of Appeals No. 269634.

PEOPLE v WYNSMA, No. 131585; Court of Appeals No. 270071.

PEOPLE v DERRICK HUDSON, No. 131590. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266448.

CAMPBELL v SULLINS, No. 131592; Court of Appeals No. 266305.

PEOPLE v LEMIEUX, No. 131596. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266318.

PEOPLE v HUBBARD, No. 131610; Court of Appeals No. 269749.

PEOPLE v GILLESPIE, No. 131613; Court of Appeals No. 268377.

PEOPLE v PAUL DAVIS, No. 131615; Court of Appeals No. 259463.

NAPIER v MNP CORPORATION, No. 131617; Court of Appeals No. 267154.

PEOPLE v LOCKLEAR, No. 131620; Court of Appeals No. 268509.

PEOPLE v ERIC HARRIS, No. 131622. The motion for immediate consideration is denied. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266310.

PEOPLE v BRADFORD, No. 131624; Court of Appeals No. 269539.

PEOPLE v BRYAN, No. 131626. The motion to adjourn sentencing and withdraw plea is denied. Court of Appeals No. 269859.

HEAPHY v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 131627. The motion for leave to file brief amicus curiae is granted. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 257941.

PEOPLE v BRITTON, No. 131629; Court of Appeals No. 259700.

PEOPLE v BARNES, No. 131633; Court of Appeals No. 269361.

PEOPLE v WILLETT, No. 131637; Court of Appeals No. 260759.

PEOPLE v PEAPHON, No. 131641; Court of Appeals No. 269742.

HICKORY HOLLOW COOPERATIVE v WARREN-WHITE, No. 131642; Court of Appeals No. 267178.

PEOPLE v JAMES HAYES, No. 131646. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 268848.

PEOPLE v JESSE JOHNSON, No. 131648; Court of Appeals No. 261603.

PEOPLE v PETERS, No. 131649; Court of Appeals No. 269768.

PEOPLE v JIMMY THOMAS, No. 131650. The motion for immediate consideration is granted. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 266532.

PEOPLE v MOTLEY, No. 131657; Court of Appeals No. 258281.

PEOPLE v ROHNER, No. 131659; Court of Appeals No. 268321.

PEOPLE v NAVARRO, No. 131660; Court of Appeals No. 259292.

PEOPLE v MICHAEL BROWN, No. 131666; Court of Appeals No. 259191.

PEOPLE v SOULE, No. 131667; Court of Appeals No. 255583.

PEOPLE v GUTIERREZ, No. 131671; Court of Appeals No. 267795.

PEOPLE v ELLIS, No. 131672; Court of Appeals No. 269853.

JUSTICE v DEPARTMENT OF CORRECTIONS, No. 131675; Court of Appeals No. 266924.

PEOPLE v HARAJLI, No. 131676; Court of Appeals No. 269031.

PEOPLE v CAMACHO, No. 131679; Court of Appeals No. 269341.

LYONS v WAL-MART STORES, INC, No. 131683; Court of Appeals No. 269276.

PEOPLE v DEANTE YOUNG, No. 131687; Court of Appeals No. 268384.

PEOPLE v JOHNNY HUDSON, No. 131688; Court of Appeals No. 259902.

In re JOYCE (DEPARTMENT OF HUMAN SERVICES v JOYCE), No. 131690; Court of Appeals No. 266686.

PEOPLE v CRUMSEY, No. 131695; Court of Appeals No. 269340.

BRADSTREET v DEPARTMENT OF CORRECTIONS, Nos. 131696, 131697. The motion for miscellaneous relief is granted. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals Nos. 268736, 268867.

DEGAIN v FISHER & COMPANY, INC, No. 131704; Court of Appeals No. 266705.

PEOPLE v CASTEEL, No. 131713; Court of Appeals No. 270351.

GILL v CITY OF KALAMAZOO, No. 131714; Court of Appeals No. 267078.

BURKACKI v BARR, No. 131715; Court of Appeals No. 266669.

SCOTTI v SCOTTI, No. 131716; Court of Appeals No. 269556.

PEOPLE v MCCALLUM, No. 131718; Court of Appeals No. 260285.

PEOPLE v FOSTER, No. 131721; Court of Appeals No. 261601.

PEOPLE v SHAVERS, No. 131723; Court of Appeals No. 270309.

PEOPLE v WOLFGANG, No. 131724; Court of Appeals No. 269868.

PEOPLE v LARRY HOWELL, No. 131727; Court of Appeals No. 269654.

PEOPLE v KOLODZIEJ, No. 131728; Court of Appeals No. 270279.

PEOPLE v CRANDALE BROWN, No. 131730; Court of Appeals No. 270872.

SHAW AVIATION, INC v DEPARTMENT OF TREASURY, No. 131733; Court of Appeals No. 259413.

PEOPLE v BARRY, No. 131737; Court of Appeals No. 259435.

PEOPLE v AHMOD JONES, No. 131738. The motion to add issue is denied. Court of Appeals No. 269706.

PEOPLE v DUPUIS, No. 131741; Court of Appeals No. 269974.

PEOPLE v COLLINS, No. 131743. The motion for immediate consideration is denied. Court of Appeals No. 269435.

PEOPLE v LABARON DAVIS, No. 131745; Court of Appeals No. 261557.

PEOPLE v DAVID TAYLOR, No. 131746; Court of Appeals No. 261722.

PEOPLE v JENKINS, No. 131752. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266710.

PEOPLE v CRY, No. 131754; Court of Appeals No. 259901.

PEOPLE v RUCKER, No. 131755; Court of Appeals No. 261730.

CASEY v HASTINGS MUTUAL INSURANCE COMPANY, No. 131768; Court of Appeals No. 258203.

PEOPLE v MOFFAT, No. 131769; Court of Appeals No. 259365.

PEOPLE v MACINTOSH, No. 131780; Court of Appeals No. 260187.

PEOPLE v DIXON, No. 131781; Court of Appeals No. 270126.

ACORN INVESTMENT COMPANY v MCKELTON, No. 131787; Court of Appeals No. 259662.

PEOPLE v NICKLES, Nos. 131788; Court of Appeals No. 258850, 263448.

PEOPLE v GREER, No. 131791; Court of Appeals No. 259749.

PEOPLE v STRAHAM, No. 131799; Court of Appeals No. 271512.

PEOPLE v WHEELER, No. 131801; Court of Appeals No. 269130.

PEOPLE v MABINS, No. 131805; Court of Appeals No. 260627.

PEOPLE v COUCH, No. 131806. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267737.

PEOPLE v GRIFFIN, No. 131811; Court of Appeals No. 269971.

PEOPLE v GRECH, No. 131818; Court of Appeals No. 270246.

PEOPLE v HAISLIP, No. 131839; Court of Appeals No. 259464.

PEOPLE v SHEPHERD, No. 131861; Court of Appeals No. 270345.

PEOPLE v VINING, No. 131868; Court of Appeals No. 270628.

PEOPLE v THOMKINS, No. 131870; Court of Appeals No. 270925.

PEOPLE v DUCKETT, No. 131874; Court of Appeals No. 260311.

PEOPLE v KEVIN DAVIS, No. 131876; Court of Appeals No. 261987.

PEOPLE v EVANS, No. 131880; Court of Appeals No. 261600.

HOLMAN v GENESEE CIRCUIT JUDGE, No. 131882; Court of Appeals No. 270674.

PEOPLE v ANDREW GRAHAM, No. 131883; Court of Appeals No. 260641.

PEOPLE v BARBARA STEWART, No. 131895; Court of Appeals No. 270921.

PEOPLE v RUSSELL, No. 131911; Court of Appeals No. 270186.

PEOPLE v WHITE, No. 131912; Court of Appeals No. 268863.

PEOPLE v ESPIE, No. 131945; Court of Appeals No. 270710.

PEOPLE v BARLOW, No. 131975; Court of Appeals No. 270970.

Interlocutory Appeals

Leave to Appeal Denied October 31, 2006:

TINMAN v BLUE CROSS AND BLUE SHIELD OF MICHIGAN, No. 130816; Court of Appeals No. 268448.

MEYER v ROTHENBERG, No. 131640. The motion for immediate consideration is granted. The application for leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. The motion for stay is denied. Court of Appeals No. 269382.

NAJI v CITY OF DEARBORN, No. 131773; Court of Appeals No. 264712.

PEOPLE v HARAJLI, No. 131807; Court of Appeals No. 270255.

Reconsiderations Denied October 31, 2006:

PICKETT-HOLMES v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 129623. Leave to appeal denied at 474 Mich 1119. Court of Appeals No. 253058.

CAVANAGH and WEAVER, JJ. We would grant reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

VILLADSEN v MASON COUNTY ROAD COMMISSION, No. 129672. Summary disposition entered at 475 Mich 857. Reported below: 268 Mich App 287.

CAVANAGH, J. I would grant reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

K & K CONSTRUCTION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 129761. Leave to appeal denied at 475 Mich 856. Reported below: 267 Mich App 523.

CITY OF SOUTH LYON v OAKLAND COUNTY DRAIN COMMISSIONER, No. 130179. Leave to appeal denied at 475 Mich 907. Court of Appeals No. 254571.

CAVANAGH, J. I would grant reconsideration.

PEOPLE v LAWRENCE, No. 130430. Leave to appeal denied at 476 Mich 855. Court of Appeals No. 255574.

PEOPLE v BRIAN JOHNSON, No. 130511. Leave to appeal denied at 476 Mich 855. Court of Appeals No. 253692.

PEOPLE v FRANK MILLER, No. 130590. Leave to appeal denied at 475 Mich 908. Court of Appeals No. 267331.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v MCELHANEY, No. 130740. Leave to appeal denied at 476 Mich 857. Court of Appeals No. 265543.

MILLER v BOTSFORD HOSPITAL, No. 130829. Leave to appeal denied at 476 Mich 858. Court of Appeals No. 265980.

PEOPLE v VICTORIA JONES, Nos. 130919, 130922. Leave to appeal denied at 476 Mich 865. Court of Appeals Nos. 257458, 261414.

PEOPLE v GOVER, No. 131028. Leave to appeal denied at 476 Mich 866. Court of Appeals No. 263575.

FOUNTAIN v ARROW UNIFORM RENTAL, No. 131043. Leave to appeal denied at 476 Mich 860. Court of Appeals No. 266583.

In re CONTEMPT OF MURDOCK (AMERICAN AXLE & MANUFACTURING v MURDOCK), Nos. 131664, 131665. Leave to appeal denied at 476 Mich 869. Court of Appeals Nos. 262786, 265111.

Leave to Appeal Granted November 1, 2006:

GOLDSTONE v BLOOMFIELD TOWNSHIP PUBLIC LIBRARY, No. 130150. On October 11, 2006, the Court heard oral argument on the application for leave to appeal the November 8, 2005, judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is granted. MCR 7.302(G)(1). The Attorney General, the Michigan Association of Counties, the Michigan Municipal League, and the Michigan Library Association 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: 268 Mich App 242.

LASH v CITY OF TRAVERSE CITY, No. 131632. The application for leave to appeal the June 1, 2006, judgment of the Court of Appeals is granted. The motions for leave to file briefs amicus curiae and the motion for miscellaneous relief are granted. Reported below: 271 Mich App 207.

Summary Dispositions November 1, 2006:

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 126088-126090. By order of December 28, 2005, the application for leave to appeal the April 1, 2004, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the applications are again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration of whether the 46th Circuit Trial Court is entitled to recover reasonable attorney fees, in light of this Court's decision in *46th Circuit Trial Court v Crawford Co*. 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.

The motions for immediate consideration and for peremptory reversal are denied. The remaining motions for miscellaneous relief are granted. A public question being involved, and in light of the relationships between the parties, no costs are awarded. Court of Appeals Nos. 246823, 248593, 251390.

KELLY, J. I would deny leave to appeal.

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 126846-126849. By order of December 28, 2005, the application for leave to appeal the July 7, 2004, and August 2, 2004, orders of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the applications are again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the orders of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision on remand in *46th Circuit Trial Court v Crawford Co* (Court of Appeals Docket Nos. 246823, 248593, and 251390). After *46th Circuit Trial Court v Crawford Co* is decided on remand, the Court of Appeals shall reconsider this case.

The stay of the circuit court's awards of attorney fees entered by this Court on October 1, 2004, and continued by order of December 28, 2005, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

The motions for immediate consideration and for peremptory reversal are denied. A public question being involved, and in light of the

relationships between the parties, no costs are awarded. Court of Appeals Nos. 246823, 248593, 251390, 252335.

KELLY, J. I would deny leave to appeal.

CRAWFORD COUNTY v OTSEGO COUNTY, No. 128880. By order of December 28, 2005, the application for leave to appeal the May 3, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision on remand in *46th Circuit Trial Court v Crawford Co* (Court of Appeals Docket Nos. 246823, 248593, and 251390). After *46th Circuit Trial Court v Crawford Co* is decided on remand, the Court of Appeals shall reconsider whether Otsego County is entitled to reimbursement for any attorney fees paid on behalf of the 46th Circuit Trial Court. 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.

The motions for immediate consideration and for peremptory reversal are denied. The remaining motions for miscellaneous relief are granted. A public question being involved, and in light of the relationships between the parties, no costs are awarded. Reported below: 266 Mich App 150.

KELLY, J. I would deny leave to appeal.

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, No. 128882. By order of December 28, 2005, the application for leave to appeal the May 3, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision on remand in *46th Circuit Trial Court v Crawford Co* (Court of Appeals Docket Nos. 246823, 248593, and 251390). If, after *46th Circuit Trial Court v Crawford County* is decided on remand, the Court of Appeals determines that Kalkaska and Crawford counties are responsible for the 46th Circuit Trial Court's attorney fees, the Court of Appeals shall reconsider whether Kalkaska and Crawford counties should be liable for sanctions when they will be responsible for the fees of the attorneys that responded to the sanctionable pleadings. 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.

The motions for immediate consideration and for peremptory reversal are denied. The remaining motion for miscellaneous relief is granted. A public question being involved, and in light of the relationships between the parties, no costs are awarded. Reported below: 266 Mich App 150.

KELLY, J. I would deny leave to appeal.

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 128886, 128887. By order of December 28, 2005, the application for leave to appeal the May 3, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (DOCKET NO. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the applications are again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision on remand in *46th Circuit Trial Court v Crawford Co* (COURT OF APPEALS DOCKET NOS. 246823, 248593, AND 251390). After *46th Circuit Trial Court v Crawford Co* is decided on remand, the Court of Appeals shall reconsider this case.

The motions for immediate consideration and for peremptory reversal are denied. The remaining motion for miscellaneous relief is granted. A public question being involved, and in light of the relationships between the parties, no costs are awarded. Reported below: 266 Mich App 150.

KELLY, J. I would deny leave to appeal.

STARKS v MICHIGAN WELDING SPECIALISTS, INC, No. 130283. On October 11, 2006, the Court heard oral argument on the application for leave to appeal the November 29, 2005, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals. Where, as here, a successor corporation acquires the assets of a predecessor corporation and does not explicitly assume the liabilities of the predecessor, the traditional rule of corporate successor non-liability applies. See *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702 (1999). Because an exception designed to protect injured victims of defective products rests upon policy reasons not applicable to a judgment creditor, the Court declines to expand the exception to the traditional rule set forth in *Turner v Bituminous Casualty Co*, 397 Mich 406 (1976), to cases in which the plaintiff is a judgment creditor. Court of Appeals No. 257127.

KELLY, J. (*dissenting*). I would grant leave to appeal. The issue of whether the continuity of the enterprise doctrine recognized in *Turner v Bituminous Casualty Co*, 397 Mich 406 (1976), extends beyond products liability actions warrants further discussion and closer attention from this Court.

AUSLANDER v CHERNICK, No. 131073. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to Court of Appeals for consideration as on leave granted. Court of Appeals No. 267705.

BRACKETT v FOCUS HOPE, No. 131370. 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, in light of *Daniel v Dep't of Corrections*, 468 Mich 34 (2003). We do not retain jurisdiction. Court of Appeals No. 266018.

PEOPLE v WATTS, No. 131406. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment that remands the case to the district court with directions to reconsider its bindover decision. Here, the Kalamazoo Circuit Court failed in its duty to determine whether the 8th District Court abused its discretion in ordering the case to be bound over. The circuit court erred in determining that a ground existed to dismiss or remand to the district court under MCR 6.110(H). The district court was not prohibited by MCR 6.110(D) from considering properly admitted other-acts evidence under MRE 404(b). Further, MCR 6.110(C) was not violated because the proceedings held in district court were conducted in accordance with the rules of evidence. Thus, we remand this case to the Kalamazoo Circuit Court for further proceedings as otherwise directed by the Court of Appeals. We do not retain jurisdiction. Court of Appeals No. 266959.

Leave to Appeal Denied Novemer 1, 2006:

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 125790-125792. By order of December 28, 2005, the application for leave to appeal the March 12, 2004, order of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (DOCKET NO. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. The motion to consolidate is denied. Court of Appeals Nos. 246823, 248593, 251390.

CRAWFORD COUNTY v OTSEGO COUNTY, No. 128884. By order of December 28, 2005, the application for leave to appeal the May 3, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford Co* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (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 miscellaneous motion is granted. A public question being involved, and in light of the relationships between the parties, no costs are awarded. Reported below: 266 Mich App 150.

HOWARD v ZAMORANO, No. 127507. By order of July 19, 2005, the application for leave to appeal the October 14, 2004, judgment of the Court of Appeals was held in abeyance pending the decision in *Woodard v Custer* (Docket Nos. 124994, 124995). On order of the Court, the case having been decided on July 31, 2006, 476 Mich 545 (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. Court of Appeals No. 244610.

HOLLINS v SINAI-GRACE HOSPITAL, No. 130983; Court of Appeals No. 257682.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

SKOWRONSKI v MUNSON MEDICAL CENTER, No. 130984; Court of Appeals No. 257538.

KELLY, J. I would grant leave to appeal.

BRASSELL v LABAN, No. 131136; Court of Appeals No. 252749.

CORRIGAN, J. I would reverse for the reasons stated in the Court of Appeals partially dissenting opinion.

PARKS v QUALEX, INC, No. 131155; Court of Appeals No. 265568.

ACKERMAN v MIOTKE, No. 131178; Court of Appeals No. 265004.

PEOPLE v LOFTIS, No. 131376; Court of Appeals No. 258817.

HICKEY v LOPATIN, MILLER, FREEDMAN, BLUESTONE, HERSKOVIC AND DOMOL, PC, No. 131402; Court of Appeals No. 257093.

KELLY, J. I would grant leave to appeal.

PEOPLE v DERRICK ROBERSON, No. 131424; Court of Appeals No. 269207.

PEOPLE v WATTS, No. 131478; Court of Appeals No. 266959.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 3, 2006:

GLENN v MARTENS, No. 131257. 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 may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 258233.

Leave to Appeal Granted November 3, 2006:

ROHDE v ANN ARBOR PUBLIC SCHOOLS, No. 128768. The parties shall include among the issues to be briefed: (1) whether plaintiffs satisfied the demand requirement of MCL 129.61; (2) whether that statute purports to provide standing to individual taxpayers; and (3) whether standing in this case is controlled by *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), or whether this case is distinguishable from the principles announced in *Nat'l Wildlife*. See, e.g., *Vermont Agency of Nat'l Resources v United States*, 529 US 765 (2000). Appellants' brief and appendix must be filed no later than December 6, 2006. Appellees' brief and appendix, if appellees choose to file an appendix, must be filed no later than January 3, 2007. Briefs and appendixes are to be served on opposing counsel by hand delivery or by such other means as assures delivery not later than one day after the filing date. We direct the clerk of the Court to place this case on the January 2007 session calendar for argument and submission. Persons or groups interested in the determination of the issues set forth above may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 253565.

WEAVER, J. The grant order raises questions regarding *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608 (2004). Therefore, I would ask the parties to address whether *Nat'l Wildlife* was correctly decided, as I have similarly asked the parties in *Michigan Citizens for Water Conservation v Nestlé*, 477 Mich ___ (2006) (Docket Nos. 130802-130803), to do in my October 20, 2006, statement in that case.

KELLY, J. I join the statement of Justice WEAVER.

Summary Dispositions November 3, 2006:

PALARCHIO v AUTOMOBILE CLUB INSURANCE ASSOCIATION, No. 128620. By order of September 21, 2005, the application for leave to appeal the March 24, 2005, order of the Court of Appeals was held in abeyance pending the decision in *Cameron v Auto Club Ins Ass'n* (Docket No. 127018). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 55 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for reconsideration of its order of October 13, 2004, granting plaintiff's motion for summary disposition concerning room and board expenses, in light of this Court's decision in *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005). We do not retain jurisdiction. Court of Appeals No. 258847.

WEAVER, J. (*dissenting*). I would grant leave to appeal in this case to reconsider *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005).

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

PALARCHIO v AUTOMOBILE CLUB INSURANCE ASSOCIATION, No. 128622. By order of September 21, 2005, the application for leave to appeal the March 24, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Cameron v Auto Club Ins Ass'n* (Docket No. 127018). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 55 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and the Wayne Circuit Court's order granting the plaintiff's motion for partial summary disposition, and remand this case to the Wayne Circuit Court for further proceedings consistent with this Court's decisions in *Cameron, supra*, and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005). Court of Appeals No. 258992.

WEAVER, J. (*dissenting*). I would grant leave to appeal in this case to reconsider *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005).

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

GRAND TRUNK WESTERN RAILROAD INCORPORATED v 37TH CIRCUIT COURT JUDGE, No. 132217. By order of October 9, 2006, the Court granted motions for immediate consideration, to waive the filing of the transcript, and for stay of trial court proceedings in *Kemperman v Canadian National RR* (Docket No. 04-4370-NO) and *O'Connell v Canadian National RR* (Docket No. 04-4372-NO). On order of the Court, the application for leave to appeal the October 4, 2006, 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 reinstatement and consideration of the complaint for superintending control. The trial court had not issued any order on plaintiff's motion contending that the underlying asbestos cases should not be bundled, or on its motion for reconsideration. Accordingly, there was no order from which plaintiff could file an emergency appeal. The Court of Appeals is directed to decide plaintiff's claim that the trial court has violated this Court's Administrative Order No. 2006—6 concerning the "bundling" of asbestos-related cases for trial. This Court's order staying the underlying proceedings remains in effect 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. The motion for pro hac vice admission is granted. We do not retain jurisdiction. Court of Appeals No. 273411.

WEAVER, J. (*dissenting*). I would deny leave for an interlocutory appeal in this case. It is unnecessary to further delay the trials in these cases. Accordingly, I dissent from the order remanding these cases to the Court of Appeals.

KELLY, J. (*dissenting*). I would not remand the case to the Court of Appeals but would deny leave for an interlocutory appeal.

CAVANAGH, J. I join the statement of Justice KELLY.

Appeal Dismissed with Prejudice November 3, 2006:

PEOPLE v JOHN STEVENS, No. 131635; Court of Appeals No. 269892.

Leave to Appeal Denied November 3, 2006:

In re JACKSON (DEPARTMENT OF HUMAN SERVICES v JACKSON), No. 132273; Court of Appeals No. 267963.

Summary Disposition November 8, 2006:

LACROSS v ZANG, No. 130701. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Washtenaw Circuit Court for reconsideration of defendants' motion for summary disposition pursuant to *Zsigo v Hurley Med Ctr*, 475 Mich 215 (2006). Court of Appeals No. 267132.

KELLY, J. I would deny leave to appeal for the reasons stated in my dissent in *Zsigo v Hurley Med Ctr*, 475 Mich 215, 232-244 (2006).

Leave to Appeal Denied November 8, 2006:

PEOPLE v GODSEY, No. 129970. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261628.

KELLY, J. I would grant leave to appeal.

HOLLEY v PAROLE BOARD, No. 130571; Court of Appeals No. 266983.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v WHITMAN, No. 130812; Court of Appeals No. 256223.

KELLY, J. I would remand this case to the trial court for a determination whether sentencing proceedings took place on an earlier date than appears on the docket entry and, if so, for the trial court to order the preparation of a transcript. If not, defendant should be resentenced.

GOODLANDER v NAIMI, No. 130824; Court of Appeals No. 265714.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

GLOWICKI v SWANSON, No. 130993; Court of Appeals No. 256574.

KELLY, J. I would grant leave to appeal.

WOODS v TAUBMAN COMPANY, LLC, No. 131287; Court of Appeals No. 265790.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Granted November 13, 2006:

DETROIT FIREFIGHTERS ASSOCIATION, IAFF LOCAL 344 v CITY OF DETROIT, No. 131463. The parties shall include among the issues to be briefed whether the defendant may implement the restructuring plan, or lay off firefighters, before coming to an agreement with the plaintiff about the impact of those actions. The Michigan Municipal League, the Michigan Association of Counties, Michigan AFSCME Council 25, and the Michigan State AFL-CIO 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: 271 Mich App 457.

Summary Disposition November 13, 2006:

MOORE v PRESTIGE PAINTING AND CONSTRUCTION ASSOCIATION OF MICHIGAN, No. 131638. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the question whether the Workers' Compensation Appellate Commission erred in holding that the decedent had "deserted" the plaintiff's daughter, so as to make the daughter a conclusive dependent under the second sentence of MCL 418.331(b). We do not retain jurisdiction. Court of Appeals No. 267751.

CORRIGAN, J. *(concurring)*. I concur with the Court's decision to remand this case to the Court of Appeals for consideration as on leave granted. I write separately to highlight my concerns about the Workers' Compensation Appellate Commission's (WCAC's) analysis.

I. FACTS

Plaintiff Jessica Douglas gave birth to a daughter whom she named Jamie. Plaintiff now contends that she was in an exclusive sexual relationship with Scott Moore at the time of Jamie's conception. After Jamie was born, plaintiff and her daughter moved in with Moore. But about two months later, plaintiff and Moore quarreled, so plaintiff and her daughter moved back to plaintiff's parents' home. From that point forward, Moore provided no financial support to plaintiff or her daughter. Moore did, however, sue to determine Jamie's paternity. Five days before the paternity hearing, Moore died in a workplace accident. He was employed by defendant at the time. Plaintiff Jessica Douglas sought workers' compensation death benefits on behalf of Jamie. Defendant and its insurer objected, challenging whether Jamie was Moore's daughter, and, if so, whether Jamie was Moore's dependent. The WCAC ultimately found that plaintiff had met her burden of proving that Moore was Jamie's father, and that Jamie was a conclusive dependent of Moore because he had "deserted" her under MCL 418.331(b). The Court of Appeals denied leave to appeal.

II. DISCUSSION

I have three concerns regarding the WCAC's analysis in affirming the magistrate's award of death benefits to plaintiff on behalf of her daughter.

First, the WCAC relied on a "court document" that was apparently not in the record. In affirming the magistrate's determination of paternity, the WCAC relied on Moore's "admission in the paternity petition" and "[p]laintiff's exhibit #1, a court document, [that] evidences that it was Mr. Moore who was the plaintiff in a paternity suit, trying to establish his rights." (WCAC opinion, p 5.) As Commissioner Przybylo pointed out in his dissent, the WCAC could not properly consider the paternity complaint as an admission because the records from the paternity action were never introduced as evidence in the workers' compensation action. I question how the WCAC arrived at any conclusion regarding matters not in evidence.

Second, I question the WCAC holding that Jamie Douglas is a conclusive dependent of Moore because Moore "deserted" her within the meaning of MCL 418.331(b). MCL 418.331(b) provides, in pertinent part:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
>
> * * *
>
> (b) A child under the age of 16 years . . . . In the event of the death of an employee who has at the time of death a living child by a former spouse or a child who has been deserted by such deceased

> employee under the age of 16 years, . . . such child shall be conclusively presumed to be wholly dependent for support upon the deceased employee, even though not living with the deceased employee at the time of death and in all cases the death benefit shall be divided between or among the surviving spouse and all the children of the deceased employee, and all other persons, if any, who are wholly dependent upon the deceased employee, in equal shares the surviving spouse taking the same share as a child.

In determining that Moore "deserted" Jamie, the WCAC stated, "When a parent is attempting to establish paternity in court and at the same time fails to support the involved child, he is as much a deserter of his child as the father who leaves town and disguises his identity to avoid supporting his child born out of wedlock." (WCAC opinion, p 8.) At the time of Moore's death, Moore and plaintiff were not married. It had not been established that Jamie was Moore's child. In fact, it appears that plaintiff did not concede that Moore was Jamie's father, because, if she had, a paternity suit would not have been necessary. Because there was a question regarding paternity, Moore had no established legal obligation to support Jamie. Further, it was understandable that Moore would not provide support to a woman who had left him and taken with her a child he was not sure was his own. How could Moore desert Jamie when there had been no determination before Moore died that he had a legal obligation to support Jamie or that Jamie was Moore's "child" under MCL 418.331(b)?

Third, the WCAC decision appears to be rooted in the WCAC's own views of "socially remedial legislation" (WCAC opinion, p 8) and based on inapplicable caselaw purportedly supporting these views, rather than on the language of the statute. In determining that Moore "deserted" Jamie, the WCAC focused on the need to treat legitimate and illegitimate children equally, citing *Bettelon v Metalock Repair Service*, 137 Mich App 448 (1984). The issue in *Bettelon* was whether a decedent's illegitimate child could be considered a dependent who is entitled to benefits. The *Bettelon* panel held that "[w]here paternity is found, we hold that an illegitimate child must be treated no differently from a legitimate child in determining dependency." *Id.* at 453. But this discussion of legitimacy in *Bettelon* does not address the situation in the instant case, where Moore's paternity was not established before he died. There is no dispute that legitimate and illegitimate children are equally entitled to benefits under the statute. If Jamie is not a conclusive dependent, it is not because she was born out of wedlock, but because Moore did not "desert" her under the meaning of the statute. In fact, even if plaintiff and Moore were married when Jamie was born and remained married until Moore died, Jamie would not be a conclusive dependent under MCL 418.331(b) unless Moore "deserted" her.

Leave to Appeal Denied November 13, 2006:

MARKHAM GENERAL INSURANCE COMPANY v EVANS, No. 131101; Court of Appeals No. 257284.

CAVANAGH and KELLY, JJ. We concur in the denial of leave to appeal except that we would vacate that portion of the Court of Appeals judgment that erroneously equates the plaintiff's voluntary waiver of its policy's property damage coverage deductible with an acknowledgement that the deductible loss paid was "covered by insurance" within the meaning of MCL 500.3135(3)(e).

ALTON v ALTON, No. 131663; Court of Appeals No. 263743.

WEAVER, J. *(dissenting).* I dissent from the order denying the application for leave to appeal. I would reverse that part of the judgment of the Court of Appeals that affirmed the circuit court's grant of summary disposition on the basis of res judicata, for the reasons stated in the Court of Appeals dissenting opinion, and I would remand for the circuit court to consider what determinations of the circuit court in the parties' divorce proceeding are to be accorded collateral estoppel effect.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

PEOPLE v GEOFFREY BROWN, No. 132210; Court of Appeals No. 264247.

KELLY, J. *(dissenting).* MCR 7.211(C)(1)(b) states that a motion to remand must be granted if accompanied by a certificate from the trial court indicating that the judge will grant a motion for a new trial. In this case, the Court of Appeals did not grant petitioner's motion to remand for a new trial. Instead, it took different action, remanding for an evidentiary hearing at which defendant could then move for a new trial. I would grant leave to appeal so that the Court can clarify MCR 7.211(C)(1)(b). The only motion referred to in subsection b appears to be a motion to remand for a new trial. I question whether the court rule allows the Court of Appeals to remand for any purpose other than the purpose sought by the petitioner here, a new trial.

In re NISWONGER (DEPARTMENT OF HUMAN SERVICES v NISWONGER), No. 132302; Court of Appeals No. 266343.

Summary Dispositions November 15, 2006:

PEOPLE v SKINNER, No. 131608. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for a determination of whether the defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan,* 545 US 605 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the Saginaw Circuit Court's order appointing counsel, in accord with the deadlines in effect at the time the defendant was denied counsel. See 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 the 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 remaining questions presented should be reviewed by this Court. Court of Appeals No. 266690.

HELFER v CENTER LINE PUBLIC SCHOOLS, No. 131765. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Macomb Circuit Court for entry of an order granting summary disposition in favor of the defendants. Court of Appeals No. 265757.

PEOPLE v HASSELBRING, No. 131779. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for plenary consideration of (1) whether the trial court correctly determined that the defense expert's testimony would have been admissible without the hearsay and opinion evidence cited in the trial court opinion; and (2) whether trial counsel's failure to object to testimony he believed necessary for the admission of the defense expert's opinion deprived the defendant of effective assistance of counsel. On remand, if the Court of Appeals determines that the trial court erred in finding ineffective assistance of counsel, the Court of Appeals shall consider the unaddressed issues raised in the defendant's appeal of right. We do not retain jurisdiction. Court of Appeals No. 257846.

YOUNG v DELCOR ASSOCIATES, INC, No. 131786. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the premises liability holding of the Court of Appeals and reinstate the Washtenaw Circuit Court's summary disposition ruling in favor of the premises owner. The defendant premises owner did not have a duty to protect the plaintiff, an employee of an independent contractor hired to perform construction work on the owner's premises, from the construction site hazardous condition that contributed to the plaintiff's injury. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd,* 466 Mich 11, 18-20 (2002). Moreover, the temporary hazardous condition was created by the independent contractor, the defendant premises owner had no notice of the condition, and the condition was not unreasonably dangerous in the context of a residential construction project. *Id.* Court of Appeals No. 266491.

Leave to Appeal Denied November 15, 2006:

PEOPLE v CONLEY, No. 131160; reported below: 270 Mich App 301.

PEOPLE v GILLIS, No. 131830; Court of Appeals No. 245012 (on remand).

SHERMAN TOWNSHIP v LEEMREIS, No. 131844; Court of Appeals No. 269020.

KELLY, J. I would grant leave to appeal.

PEOPLE v POSTLEY, No. 132301. We further order that the stay entered by this Court on January 9, 2006, in *People v Postley*, Docket No. 130272, is dissolved. Court of Appeals No. 267761.

KELLY, J. I would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal November 17, 2006:

RAAB v JOYCE, Nos. 129247, 129248. 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 submit supplemental briefs within 35 days of the date of this order addressing: (1) whether Dr. Marc Cooperman, a board-certified general surgeon, is qualified under MCL 600.2169 and MRE 702 to testify that the standard of care for a general surgeon required the defendant to refer plaintiff Ranee Lee Raab to, or at least consult with, a gynecologist and a urologist for the diagnosis and treatment of the plaintiff's gynecological and urological problems; (2) if so, (a) whether Dr. Cooperman is qualified under MCL 600.2169 and MRE 702 to testify regarding the response that a gynecologist or urologist would have made to such a referral or consultation, (b) whether Dr. Cooperman is qualified under MCL 600.2169 and MRE 702 to testify regarding whether the defendant's failure to involve a gynecologist or a urologist was the proximate cause of the plaintiff's allegedly unnecessary hysterectomy or negligently performed Marshall-Marchetti-Krantz procedure, and (c) if Dr. Cooperman is not qualified to offer the testimony described in 2(a) and (b), whether plaintiffs can present a prima facie case of medical malpractice. The parties should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals Nos. 254222, 256269.

GRACE v LEITMAN, No. 131035. 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 the proffered affidavit from plaintiff's expert witness was sufficient to create a genuine issue of material fact, in light of the principles discussed in *Simko v Blake*, 448 Mich 648 (1995), and other applicable law. The parties may file supplemental briefs within 35 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. 257896.

AUTO CLUB GROUP INSURANCE COMPANY v BUERKEL and SMITH v BUERKEL, Nos. 131439, 131440. 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 submit supplemental briefs within 35 days of the date of this order addressing whether the Court of Appeals analysis of MCL 257.401(1) paid adequate attention to the statute's provision that "[t]he owner is not liable unless the motor vehicle is being driven with his or her express or implied consent *or knowledge*" (emphasis added), and whether the motor vehicle at issue in this case was being driven with the owner's "express or implied consent or knowledge." The parties should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals Nos. 258240, 260775.

Leave to Appeal Granted November 17, 2006:

PEOPLE v BERNARD HARPER, No. 130988. The parties shall include among the issues to be briefed: (1) whether the intermediate sanction described in MCL 769.31(b) and MCL 769.34(4), which require the trial court to impose a sentence that does not include prison, constitutes a statutory maximum sentence under *Blakely v Washington*, 542 US 296 (2004), for which the departure reasons must be decided by a jury or admitted by the defendant; (2) whether, in general, a defendant's failure to challenge the accuracy of facts contained in a presentence investigation report constitutes an admission of those facts for purposes of an analysis under *Blakely*, *supra* at 303, 310; (3) whether in this case an admission occurred where the sentencing judge informed the defendant that it is important that any mistake in such a report be caught and specifically asked the defendant if he saw any such mistake, and where both the defendant and his counsel stated that they were not contesting anything in the report; and (4) whether, by affirmatively stating that he did not contest the facts in the presentence investigation report, the defendant waived his right to argue that the facts were not admitted for purposes of sentencing. *People v Carter*, 462 Mich 206, 215 (2000). 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. 268031.

PEOPLE v JESSE BURNS, No. 131898. The parties shall include among the issues to be briefed whether the intermediate sanction described in MCL 769.31(b) and MCL 769.34(4), which require the trial court to impose a sentence that does not include prison, constitutes a statutory maximum sentence under *Blakely v Washington*, 542 US 296 (2004), for which the departure reasons must be decided by a jury or admitted by the defendant, where the defendant is being sentenced for a violation of probation. 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. 270886.

Leave to Appeal Denied November 17, 2006:

In re BULLOCK (DEPARTMENT OF HUMAN SERVICES v BULLOCK), No. 132364; Court of Appeals No. 267910.

Leave to Appeal Clarified November 22, 2006:

ROHDE v ANN ARBOR PUBLIC SCHOOLS, No. 128768. The motion for clarification of order granting leave to appeal is granted. The Court is not granting leave to appeal on Issue II in the application for leave to appeal. Court of Appeals No. 253565.

Summary Dispositions November 29, 2006:

KUSMIERZ v SCHMITT, Nos. 130187, 130574. On November 14, 2006, the Court heard oral argument on the application for leave to appeal the November 15, 2005, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment assessing case evaluation sanctions, and remand this case to the Bay Circuit Court for further proceedings not inconsistent with this order. Because the parties stipulated a lump sum case evaluation award, there was no "amount of the evaluation . . . as to . . . particular pair[s] of parties" for purposes of MCR 2.403(O)(4)(a). Without such an amount, the court cannot compare the verdict to the case evaluation award for each pair of parties as required by the court rules, and the court cannot determine whether either party received a more favorable verdict. Therefore, neither party is entitled to case evaluation sanctions. Plaintiffs are directed to reimburse defendants for the case evaluation sanctions that have already been paid. We do not retain jurisdiction. Reported below: 268 Mich App 731.

REEVES v CARSON CITY HOSPITAL, No. 131462. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Woodard v Custer*, 476 Mich 545 (2006). Court of Appeals No. 266469.

PEOPLE v LIKENS, No. 131886. 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. 270589.

PEOPLE v PENA, No. 131948. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the defendant's safe breaking sentence, and we remand this case to the Kent Circuit Court for resentencing on that conviction. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range for the safe breaking conviction, 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. Court of Appeals No. 270554.

BUSH v HEISER, No. 132046. 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. 270437.

BUSH v SHABAHANG, Nos. 132073, 132074, 132075. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals Nos. 270433, 270437, 270897.

BUSH v SPECTRUM HEALTH BUTTERWORTH CAMPUS, No. 132077. 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. 270897.

PEOPLE v KARES, No. 132094. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee 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 605 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the circuit court's order appointing counsel, in accord with the deadlines in effect at the time defendant was denied counsel. See MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. Counsel may, but is not required to, include those issues defendant raised in his application for leave to appeal to this Court. Court of Appeals No. 266250.

Leave to Appeal Denied November 29, 2006:

NATIONAL WINE & SPIRITS, INC v STATE OF MICHIGAN, No. 126121. On order of the Court, leave to appeal having been granted and the case having been briefed and argued by counsel, the order of January 20, 2006, which granted leave to appeal, is vacated and leave to appeal is denied because we are no longer persuaded the questions presented should be reviewed by this Court. Court of Appeals No. 243524.

CAVANAGH, J. *(dissenting).* I respectfully disagree with the majority's determination that leave to appeal was improvidently granted in this case. The issues are jurisprudentially significant and far-reaching. I further note that this Court heard oral argument on the application and then chose to issue an order granting leave to appeal and requiring full briefing and oral argument. After considering arguments on the issues *twice*, I believe that this Court should issue an opinion on the merits of the issues presented.

KELLY, J. I join the statement of Justice CAVANAGH.

WEAVER, J. *(dissenting).* I dissent from the majority's decision that leave to appeal was improvidently granted. I would remand this case to the Court of Appeals for reconsideration in light of *Granholm v Heald*, 544 US 460 (2005).

The statute at issue, MCL 436.1205(3),[1] while perhaps not unconstitutional on its face, as applied, forever prohibits an out-of-state business

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[1] Section 205(3), in pertinent part, is set forth below:

> After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler

from operating as both an authorized distribution agent of spirits and as a distributor of wine. Michigan distributors of wine in operation before September 24, 1996, on the other hand, were permitted to also become authorized distribution agents of spirits (ADAs). As a result, § 205(3) precludes out-of-state distributors from achieving the benefits of a combined cost economy.[2]

In addition, § 205(3) prohibits any distributors established after September 24, 1996, from selling or distributing a brand of wine in an area where an established distributor has already been assigned or authorized to sell that particular brand of wine.[3] Thus, those Michigan distributors established before 1996 enjoy the competitive advantage of being able to sell certain brands exclusively, and to also act as authorized distribution agents of both spirits and wine.

It is undisputed that before September 24, 1996, only Michigan businesses were licensed as wine wholesalers in the state of Michigan. Consequently, when § 205(3) was enacted, only existing Michigan wine distributors retained the benefit of distributing all the wine brands they sold as before September 24, 1996. Conversely, no out-of-state wine distributor could achieve the same benefit, nor could any out-of-state distributor ever enjoy the cost savings of becoming a distributor of both wine and spirits.

The United States Supreme Court's decision in *Granholm* had not been released at the time the Court of Appeals decided this case. Had the Court of Appeals had the benefit of the United States Supreme Court's

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> who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

[2] For example, when a Michigan distributor operating as both an ADA of spirits and as a wine distributor delivers spirits and wine to retailers on the same truck, it can lower its delivery costs. However, under § 205(3), out-of-state distributors cannot conserve costs by loading wine and spirits on the same truck.

[3] Before September 24, 1996, Michigan wine distributors were not prohibited from "dualing," a concept whereby a wine distributor could compete with other distributors in a particular area and sell the same competing brands of wine. After September 24, 1996, only those wine distributors established in Michigan before that date could continue "dualing."

ruling in *Granholm*, it may very well have concluded that the burden on interstate commerce imposed by § 205(3) outweighs the state's objective in preserving the existing three-tier alcohol distribution system.[4] As the United States Supreme Court noted in *Granholm*, protectionist state legislation that provides a competitive advantage to intrastate commerce is subject to attack under the Commerce Clause:

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). See also *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. *H. P. Hood & Sons, Inc. v. Du*

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[4] The traditional Commerce Clause test was discussed by the United States Supreme Court in *Brown-Forman Distillers Corp v New York State Liquor Auth,* 476 US 573, 578-579 (1986):

> This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. See, *e. g., Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978); Shafer v. Farmers Grain Co.*, 268 U.S. 189, 45 S. Ct. 481, 69 L.Ed. 909 (1925); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-643, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates even-handedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. See *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 440-441, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978).

> *Mond*, 336 U.S. 525, 539, 69 S. Ct. 657, 93 L. Ed. 865 (1949). States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). [*Granholm* at 472.]

Given the constitutional implications posed by the application of § 205(3), and given the United States Supreme Court's mandate against differential treatment of out-of-state economic interests, a remand to the Court of Appeals for reconsideration in light of *Granholm* would be the most judicious resolution of this case.

PAWLAK v HENRY FORD HEALTH SYSTEM, No. 129468. The motion for miscellaneous relief is denied. Court of Appeals No. 262904.

COLE v VAN WERT, No. 129789; Court of Appeals No. 255208.

CLAYTON v DEPARTMENT OF CORRECTIONS, No. 130562; Court of Appeals No. 267124.

PEOPLE v ARDITO, No. 130659; Court of Appeals No. 257459.

LAURENCE G WOLF CAPITAL MANAGEMENT TRUST v CITY OF FERNDALE, No. 130748; reported below: 269 Mich App 265.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v GAFFNEY, No. 130867. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264489.

PEOPLE v HASTIE, No. 130881. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264217.

PEOPLE v GRAVES, No. 130893. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264816.

GONCALVES v COMMUNITY SUPPORT AND TREATMENT SERVICES, No. 130898; Court of Appeals No. 264450.

PEOPLE v VILLANUEVA, No. 130952; Court of Appeals No. 267938.

STATE TREASURER v KRUEGER, No. 130956; Court of Appeals No. 266951.

MARKMAN, J. *(concurring).* I concur in the order denying leave to appeal. The dissent argues that we should grant leave to appeal to revisit

our decision in *State Treasurer v Abbott,* 468 Mich 143 (2003). The question in *Abbott* was whether a court order directing payment of a prisoner's pension benefits constituted an "assignment" barred by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*. I joined the dissent of Justice KELLY in that case, which concluded that a disbursement ordered by the trial court represented an indirect assignment of pension benefits that is barred by ERISA. While I continue to believe that such dissent was correct, the instant case is readily distinguishable from *Abbott*. First, unlike in *Abbott*, the warden was not made a receiver over defendant's pension benefits. Second, the order does not require the pension holder to send the benefits to defendant's prison address in the event that he does not ask the holder to do so. Third, the order does not authorize the warden to make disbursements of funds from that pension check; rather, it states that the warden is only authorized to make disbursements from defendant's prison account.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. *(dissenting).* Despite Justice MARKMAN's attempts to distinguish the facts of this case from those of *State Treasurer v Abbott*, 468 Mich 143 (2003), I continue to believe that a grant of leave to appeal would necessitate a revisiting of *Abbott*. Although the trial court did not technically label the warden a "receiver," the warden managed and controlled defendant's property. See *Abbott, supra* at 165-166 n 6 (KELLY, J., dissenting). Additionally, just as in *Abbott*, the trial court ordered defendant to deposit his pension check into his prisoner account, enabling the warden to distribute to the state a specific percentage of defendant's pension benefits.

Moreover, the United States Court of Appeals for the Sixth Circuit has thrown the validity of *Abbott* into question. See *DaimlerChrysler Corp v Cox*, 447 F3d 967, 976 (CA 6, 2006) ("We find the *Abbott* opinion unpersuasive. Contrary to the reasoning of the Michigan Supreme Court, the fact that the prisoners have received their benefit payments at their 'own' addresses is irrelevant to the question of alienation . . . ."). Therefore, I would grant leave to appeal for the purpose of revisiting our decision in *Abbott*.

PEOPLE v GRIM, No. 130962; Court of Appeals No. 258201.

PEOPLE v BETTS, No. 131004; Court of Appeals No. 257257.

PEOPLE v CALVIN WRIGHT, No. 131112. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263746.

PEOPLE v HIRSCH, No. 131116. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264334.

PEOPLE v ANTHONY JACKSON, No. 131120. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268122.

PEOPLE v WADE, No. 131122. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264064.

PEOPLE v PRESTON WILLIAMS, No. 131127. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264458.

PEOPLE v LANGFORD, No. 131130. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263967.

PEOPLE v GENO, No. 131137. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265493.

HENRY v DEPARTMENT OF CORRECTIONS, No. 131165; Court of Appeals No. 265747.

ZEMAITIS v SPECTRUM HEALTH, No. 131189; Court of Appeals No. 265698.

DEMARSE v CITY OF LANSING, Nos. 131237, 131238; Court of Appeals Nos. 258729, 259685.

PEOPLE v ENGLISH, No. 131286. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265026.

PEOPLE v CHARLES, No. 131292; Court of Appeals No. 246034.

KELLY, J. *(dissenting)*. I believe, for the reasons stated in my dissent in *People v Houston*, 473 Mich 399 (2005), that the trial court erroneously scored 25 points for offense variable 3.

PEOPLE v LESSARD, No. 131305. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265945.

PEOPLE v ELAM, No. 131485; Court of Appeals No. 259866.

PEOPLE v MOLDEN, No. 131499. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266110.

BARBER v KALAMAZOO COUNTY, No. 131525; Court of Appeals No. 266320.

CITY OF SOUTH HAVEN v VAN BUREN COUNTY ROAD COMMISSION, No. 131532; Court of Appeals No. 266724.

COPELAND v MANUFACTURES & TRADERS TRUST, No. 131539; Court of Appeals No. 266252.

PEOPLE v KREGEAR, No. 131557; Court of Appeals No. 259833.

PEOPLE v COONROD, No. 131572; Court of Appeals No. 258726.

PEOPLE v RAY, No. 131574; Court of Appeals No. 260161.

KILBY v CHUBB GROUP OF INSURANCE COMPANIES, No. 131579. We are not persuaded that the questions presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. Reported below: 270 Mich App 465.

PEOPLE v PERKINS, No. 131586; Court of Appeals No. 259865.

LAFFIN v LAFFIN, No. 131593; Court of Appeals No. 266299.

WEAVER, J. I would grant leave to appeal.

KELLY, J. *(dissenting).* In this case, the parties bargained away their children's right to child support. The "deal" that the parents agreed on is unusual in the annals of divorce law in this state. It provides that if the father is ordered to pay any child support in the future, the obligation must be satisfied entirely from the mother's alimony.

Now, the trial court has enforced that agreement and defendant has appealed to us. The trial judge, in denying the mother's motion for child support, advised her that, pursuant to the parties' agreement, any further motions attacking the judgment of divorce "may result in sanctions being assessed against her."

This Court should examine the matter carefully rather than deny leave to appeal. As it pertains to child support, the parties' agreement may well be in violation of public policy. The Court will not enforce an agreement if it violates public policy. *Rory v Continental Ins Co*, 473 Mich 457, 469 (2005), quoting *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52 (2003). The agreement in this case would be contrary to public policy if it left the parties' three children without support and rendered them public charges.

Existing relevant Michigan law on this issue is found in *Macomb Co Dep't of Social Services v Westerman*, 250 Mich App 372, 377 (2002). It provides:

> Biological parents have an inherent obligation to support their children. *Evink v Evink*, 214 Mich App 172, 175-176; 542 NW2d 328 (1995). A biological parent must support a minor child unless a court of competent jurisdiction modifies or terminates the obligation or the child is emancipated. MCL 722.3. The purpose of child support is to provide for the needs of a child. *Evink*, *supra* at 176. The parents of a child are not permitted to bargain away a child's right to receive adequate support. *Id*. This Court has stated that it has "a dim view of agreements purporting to sign away the rights of a child, particularly when the result of such an agreement may be that the child becomes a public charge . . . ." *Van Laar v Rozema*, 94 Mich App 619, 624; 288 NW2d 667 (1980).

I strongly believe that the Court should grant leave to appeal in this case to explore the important issue raised.

PEOPLE v JEREMY RUSSELL, No. 131595; Court of Appeals No. 259073.

PEOPLE v LARRY LEWIS, No. 131597; Court of Appeals No. 269149.

PEOPLE v HAILES, No. 131609. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267059.

PEOPLE v HORTON, No. 131619. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266544.

PEOPLE v LAMB, No. 131625. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266812.

LINDAHL v RUBRIGHT, No. 131644; Court of Appeals No. 265931.

PEOPLE v RAINES, No. 131647. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269436.

PEOPLE v GREGORY, No. 131651; Court of Appeals No. 256194.

GEARY v C & K MUFFLERS, INC, No. 131653; Court of Appeals No. 267105.

PEOPLE v SAENZ, No. 131658. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266799.

PEOPLE v ARNDT, No. 131673; Court of Appeals No. 269497.

PEOPLE v DEBRUYN, No. 131678; Court of Appeals No. 269524.

PEOPLE v WILLIAM HALL, No. 131699; Court of Appeals No. 268270.

PEOPLE v TIMOTHY WILLIAMS, No. 131700; Court of Appeals No. 269695.

PEOPLE v CHRISTOPHER SMITH, No. 131703. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 268294.

PEOPLE v BUSTILLO-LARA, No. 131705; Court of Appeals No. 267350.

PEOPLE v TRIPPLETT, No. 131706; Court of Appeals No. 269580.

PEOPLE v JOSEPH JOHNSON, No. 131707; Court of Appeals No. 258492.

PEOPLE v RAPHAEL, No. 131708; Court of Appeals No. 269746.

PEOPLE v JOSEPH DAVENPORT, No. 131717; Court of Appeals No. 259297.

PEOPLE v HEADY, No. 131719; Court of Appeals No. 269854.

PEOPLE v ERVIN JOHNSON, No. 131720; Court of Appeals No. 259582.

PEOPLE v GAREL, No. 131722; Court of Appeals No. 258962.

PEOPLE v RICHARD GRAY, No. 131729. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 270843.

PEOPLE v PENDYGRAFT, No. 131731. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266128.

PEOPLE v BRANDEN MURDOCK, No. 131747; Court of Appeals No. 259722.

PEOPLE v WYNN, No. 131749; Court of Appeals No. 261039.

BUCK v THOMAS M COOLEY LAW SCHOOL, No. 131757; Court of Appeals No. 259347.

CAVANAGH, J., did not participate.

PEOPLE v DEBRA CARR, No. 131759; Court of Appeals No. 260958.

RYCKMAN v BARROWS, No. 131766; Court of Appeals No. 259620.

PEOPLE v KOWALAK, No. 131775. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267158.

PEOPLE v CHRISTOPHER JOHNSON, No. 131776. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266461.

PEOPLE v EARL GRAY, No. 131783; Court of Appeals No. 260811.

PEOPLE v DEBRA KING, No. 131789. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267056.

PEOPLE v TERRELL, No. 131790; Court of Appeals No. 269643.

PEOPLE v BOLDISZAR, No. 131792; Court of Appeals No. 259193.

PEOPLE v ESTES, No. 131793; Court of Appeals No. 270390.

PEOPLE v LADON MOORE, No. 131795; Court of Appeals No. 269357.

SCHIED v LINCOLN CONSOLIDATED SCHOOLS, No. 131803; Court of Appeals No. 267023.

In re LANGLAND ESTATE (BROWN v MARTIN), (MORRIS v COHEN), and (MORRIS v BROWN), Nos. 131808-131810; Court of Appeals Nos. 255287, 256134, 258476.

PEOPLE v WILLIE HUNTER, No. 131812; Court of Appeals No. 260307.

PEOPLE v MAHONE, No. 131813; Court of Appeals No. 269967.

PEOPLE v PRINCE MONTGOMERY, No. 131814; Court of Appeals No. 259896.

PEOPLE v MAYBERRY, No. 131816. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266995.

PEOPLE v RICE, No. 131819. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267313.

PEOPLE v CORDELL, No. 131826; Court of Appeals No. 260398.

PEOPLE v MALAGA, No. 131827. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267058.

HOLLOWAY v DEPARTMENT OF CORRECTIONS, No. 131831; Court of Appeals No. 270025.

PEOPLE v DONALD STEWART, JR, No. 131832; Court of Appeals No. 260317.

RUSSELL v PBG MICHIGAN, LLC, No. 131833; Court of Appeals No. 263903.

KELLY, J. I would grant leave to appeal.

GEER v NIKOLIC INDUSTRIES, INC, No. 131834; Court of Appeals No. 256572.

PEOPLE v ALBERT MITCHELL, No. 131835; Court of Appeals No. 259823.

PEOPLE v LOREN GREENE, No. 131836. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267740.

PEOPLE v WESTON, No. 131837. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266543.

COFFEE BEANERY, LTD v ALBERT, No. 131845; Court of Appeals No. 259022.

PEOPLE v TERANCE ANDERSON, No. 131847; Court of Appeals No. 259712.

PEOPLE v JOSHUA JONES, No. 131848; Court of Appeals No. 259826.

PEOPLE v RAYMOND, No. 131849. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267814.

KAMISAR v PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC, No. 131851; Court of Appeals No. 268100.

PEOPLE v COTA, No. 131852. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266920.

PEOPLE v LARHON JONES, No. 131853; Court of Appeals No. 261159.

PEOPLE v BARRETT, No. 131856. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267159.

HEMPSTEAD v DETROIT LIONS, INC, No. 131858; Court of Appeals No. 268534.

V & J FOODS OF MICHIGAN, INC v DEPARTMENT OF TREASURY, No. 131859; Court of Appeals No. 259460.

PEOPLE v CONKLIN, No. 131862; Court of Appeals No. 270243.

PEOPLE v BECKHAM, No. 131863. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267387.

PEOPLE v DOUGLAS ROGERS, No. 131864. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271136.

PEOPLE v SLOUGH, No. 131865; Court of Appeals No. 270586.

PEOPLE v ROBERT KING, No. 131866; Court of Appeals No. 260157.

PEOPLE v STRICKLAND, No. 131867; Court of Appeals No. 260480.

KELLY, J. I would grant leave to appeal.

PEOPLE v JETER, No. 131869; Court of Appeals No. 260487.

PEOPLE v TYLER, No. 131871; Court of Appeals No. 260304.

PEOPLE v PALING, No. 131873. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267173.

PEOPLE v JEROME KELLY, No. 131875. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269882.

PEOPLE v DORIE, No. 131878; Court of Appeals No. 270247.

SPROUL v JENKINS, No. 131881; Court of Appeals No. 267490.

TC SPANN BIBLE INSTITUTE v STATE OF MICHIGAN, No. 131885; Court of Appeals No. 268312.

PEOPLE v MERRIWEATHER, No. 131890; Court of Appeals No. 269679.

ABN AMRO MORTGAGE GROUP, INC v CHARTER ONE BANK, NA, No. 131892; Court of Appeals No. 258865.

PEOPLE v LOSEE, No. 131894; Court of Appeals No. 270665.

PEOPLE v PARTAKA, No. 131910. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271183.

PEOPLE v JESSEELEE HOLLAND, No. 131913. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267931.

PEOPLE v MORROW, No. 131917; Court of Appeals No. 256195.

PEOPLE v TIGGS, No. 131919; Court of Appeals No. 260552.

PEOPLE v STEPHEN DAVIS, No. 131922; Court of Appeals No. 270216.

PEOPLE v GOLBECK, No. 131925; Court of Appeals No. 261607.

PEOPLE v COATES, No. 131927; Court of Appeals No. 270035.

PEOPLE v DENNIS LEONARD, JR, No. 131928. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267968.

PEOPLE v ALLRED, No. 131929; Court of Appeals No. 270518.

PEOPLE v LAUDERDALE, No. 131930; Court of Appeals No. 270492.

PEOPLE v ROGER WASHINGTON, No. 131931. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266137.

PEOPLE v HOUGH, No. 131933; Court of Appeals No. 271427.

PEOPLE v CECIL DUNN, JR, No. 131934. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268033.

PEOPLE v ORANGE, No. 131935; Court of Appeals No. 269657.

FALCONER v MARSHALL FIELD'S/TARGET CORPORATION, No. 131936; Court of Appeals No. 268543.

PEOPLE v LOPEZ, No. 131941; Court of Appeals No. 261969.

PEOPLE v BETTIS, No. 131946; Court of Appeals No. 271262.

PEOPLE v SAMUEL TILL, No. 131950. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267782.

FRILL v DEPARTMENT OF CORRECTIONS, No. 131952; Court of Appeals No. 265090.

PEOPLE v GALE, No. 131954. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267319.

PEOPLE v WILLIAM SIMPSON, No. 131957; Court of Appeals No. 270555.

PEOPLE v MOSES WILLIAMS, No. 131961; Court of Appeals No. 260502.

PEOPLE v HOPEANN PATTON, No. 131964; Court of Appeals No. 270625.

PEOPLE v VIDEAU, No. 131967. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267631.

PEOPLE v NOBLE, No. 131968. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267630.

SCOTT v SECURA INSURANCE, No. 131972. We are not persuaded that the questions presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. Court of Appeals No. 266944.

PEOPLE v GREGORY COLEMAN, No. 131974; Court of Appeals No. 270998.

PEOPLE v TOTH, No. 131980; Court of Appeals No. 269405.

GAWRYCH v RUBIN, No. 131981; Court of Appeals No. 267447.

PALM BEACH POLO HOLDINGS, INC v RYDER, No. 131982; Court of Appeals No. 259730.

EVANS v FENTON, No. 131983; Court of Appeals No. 265688.

PEOPLE v PERIN, Nos. 131986, 131988; Court of Appeals Nos. 260305, 260306.

NOSAL v CITY OF POTTERVILLE, No. 131989; Court of Appeals No. 268647.

ALDER v DEPARTMENT OF CORRECTIONS, No. 131990; Court of Appeals No. 268123.

PEOPLE v LOUCKS, No. 131991; Court of Appeals No. 270907.

PEOPLE v VANZANDT, No. 131993; Court of Appeals No. 269863.

PEOPLE v LATHAM, No. 131998. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267303.

PEOPLE v CALVIN SMITH, No. 131999. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267774.

PEOPLE v TURK, No. 132003; Court of Appeals No. 270669.

PEOPLE v BOERMAN, No. 132005. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267422.

PEOPLE v TORIANO JOHNSON, No. 132006. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267343.

SAAD v DART PROPERTIES, INC, No. 132009; Court of Appeals No. 268638.

PEOPLE v PRESTON PORTIS, No. 132010; Court of Appeals No. 271133.

PEOPLE v MONTES, No. 132021; Court of Appeals No. 270867.

PEOPLE v DALRON HARRIS, No. 132023. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272291.

CELLEY v D'ORIO, No. 132028; Court of Appeals No. 269117.

PEOPLE v LIPSEY, No. 132031; Court of Appeals No. 271138.

PEOPLE v TYRER, No. 132032; Court of Appeals No. 271481.

PEOPLE v NEAL, No. 132035. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268245.

PEOPLE v RYAN HALL, No. 132036; Court of Appeals No. 260303.

PEOPLE v RICKY SIMPSON, No. 132038; Court of Appeals No. 270515.

PEOPLE v CLAY, No. 132041; Court of Appeals No. 270814.

PEOPLE v CHARLES BENSON, No. 132050. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267816.

PEOPLE v KLINGER, No. 132056; Court of Appeals No. 267930.

PEOPLE v LANSKI, No. 132057; Court of Appeals No. 259863.

PEOPLE v RUSHTON, No. 132058; Court of Appeals No. 271639.

PEOPLE v STAFFORD, No. 132059; Court of Appeals No. 270073.

PEOPLE v MELTON, No. 132061. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267744.

GAWLOWSKI v BOYER, No. 132062; Court of Appeals No. 270011.

PEOPLE v KEVIN DIXON, No. 132063. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268591.

PEOPLE v BRIGGINS, No. 132068. We are not persuaded that the question presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. Court of Appeals No. 268226.

PEOPLE v WAYMAN PATTERSON, JR, No. 132069. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268153.

PEOPLE v FREDERICK SMITH, No. 132072; Court of Appeals No. 267825.

STANTON v CITY OF COLDWATER, Nos. 132078, 132079; Court of Appeals Nos. 269221, 269222.

PEOPLE v MCCURDY, No. 132080. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267673.

PEOPLE v IRISH, No. 132081; Court of Appeals No. 270976.

PEOPLE v BRYCE BELL, No. 132084. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267513.

PEOPLE OF THE CITY OF GRAND RAPIDS v VAN FAROWE, No. 132086; Court of Appeals No. 270007.

PEOPLE v HAMMOND, No. 132095. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271710.

PEOPLE v WALTER MCGHEE, No. 132096. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268160.

AUTOWHIRL AUTO WASHERS, LLC v TAZMANIA GROUP, LLC, No. 132098; Court of Appeals No. 267359.

YPSILANTI CHARTER TOWNSHIP v KIRCHER, No. 132099; Court of Appeals No. 269879.

FERGUSON v HAMBURG TOWNSHIP, No. 132101; Court of Appeals No. 267597.

PEOPLE v VANHOOSEAR, No. 132107; Court of Appeals No. 270675.

PEOPLE v THEODORA MOSS, JR, No. 132112. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267559.

PEOPLE v RAYMOND GRAVES, No. 132113. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267778.

SCHILS v WASHTENAW COUNTY, No. 132114; Court of Appeals No. 270462.

PEOPLE v BUCCILLI, No. 132116; Court of Appeals No. 261514.

PEOPLE v MURRELL, No. 132117. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267464.

HALLMAN v HOLY CROSS HOSPITAL OF DETROIT, No. 132120; Court of Appeals No. 262527.

PEOPLE v THIMMES, No. 132121; Court of Appeals No. 270788.

COLE v AUTO OWNERS INSURANCE COMPANY, No. 132122. Reported below: 272 Mich App 50.

PEOPLE v FARR, No. 132123; Court of Appeals No. 260481.

PEOPLE v STREETY, No. 132124. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268127.

PEOPLE v NOBLE, No. 132125. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271090.

PEOPLE v MARCUS JACKSON, No. 132126. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267915.

PEOPLE v PEACOCK, No. 132127; Court of Appeals No. 270706.

KINCAID v DEPARTMENT OF CORRECTIONS, No. 132129; Court of Appeals No. 269360.

PEOPLE v TRAVIS JONES, No. 132130; Court of Appeals No. 266949.

PEOPLE v LAVERDURE, No. 132131; Court of Appeals No. 271352.

PEOPLE v COOKE, No. 132132; Court of Appeals No. 271343.

PEOPLE v SHORT, Nos. 132133, 132134; Court of Appeals Nos. 271449, 271450.

PEOPLE v ROLAK, No. 132135; Court of Appeals No. 269632.

PEOPLE v DONALD JONES, JR, No. 132136; Court of Appeals No. 270248.

PEOPLE v KIRKSEY, No. 132137. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268197.

PEOPLE v SAIN, No. 132142. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268032.

PEOPLE v WATSON, No. 132143; Court of Appeals No. 271269.

PEOPLE v DOMINICA SIMS, No. 132144; Court of Appeals No. 271092.

PEOPLE v ROUFA, No. 132146; Court of Appeals No. 270963.

PEOPLE v TACKEBURY, No. 132147. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 270858.

PEOPLE v HITE, No. 132148. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267824.

PEOPLE v CULLER, No. 132150; Court of Appeals No. 271573.

RECKER v MALSON, No. 132152; Court of Appeals No. 268230.

PEOPLE v PAQUETTE, No. 132155; Court of Appeals No. 270965.

PEOPLE v EPSTEIN, No. 132161; Court of Appeals No. 271745.

SOMMER v MAYER, No. 132166; Court of Appeals No. 266390.

PEOPLE v HAYMER, No. 132175. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271268.

HAAER v VREBA-HOFF DAIRY DEVELOPMENT, LLC, No. 132180; Court of Appeals No. 260001.

PEOPLE v GUMP, No. 132182. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268672.

PEOPLE v KEVIN BROWN, No. 132185; Court of Appeals No. 261893.

PEOPLE v FIKE, No. 132186; Court of Appeals No. 260535.

PEOPLE v PATRICK ALEXANDER, No. 132188. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271816.

PEOPLE v BRANDON MOORE, No. 132189; Court of Appeals No. 271380.

PEOPLE v INGRAM, No. 132190; Court of Appeals No. 257335.

PEOPLE v ANTHONY FIELDS, No. 132199; Court of Appeals No. 262081.

PEOPLE v KELLEY, No. 132201; Court of Appeals No. 271347.

PEOPLE v DOUGLAS, No. 132208; Court of Appeals No. 272189.

PEOPLE v ERIC DAVIS, No. 132209; Court of Appeals No. 260597.

PEOPLE v SZAFRANSKI, No. 132212; Court of Appeals No. 271574.

PEOPLE v BLUMENTHAL, No. 132213; Court of Appeals No. 271744.

PEOPLE v APPENZELLER, No. 132214; Court of Appeals No. 269857.

PEOPLE v DAVID MOSS, No. 132215; Court of Appeals No. 260726.

PEOPLE v SMITHEL, No. 132219; Court of Appeals No. 271863.

PEOPLE v HARRISON, No. 132222; Court of Appeals No. 271391.

PEOPLE v LOUIE AUSTIN, No. 132227; Court of Appeals No. 260772.

MARSHALL v CITY OF DETROIT, No. 132239; Court of Appeals No. 267486.

PEOPLE v HOFFMAN, No. 132249; Court of Appeals No. 271611.

PEOPLE v LUNA, No. 132254; Court of Appeals No. 260153.

PEOPLE v DULEY, No. 132255; Court of Appeals No. 261560.

PEOPLE v MINDA, No. 132259; Court of Appeals No. 271419.

PEOPLE v HUNTLEY, No. 132263; Court of Appeals No. 271452.

PEOPLE v CRAIG HILL, No. 132282; Court of Appeals No. 271872.

RICHARD v NORTHVILLE PSYCHIATRIC HOSPITAL, No. 132297; Court of Appeals No. 270265.

In re COX (FAMILY INDEPENDENCE AGENCY v COX), No. 132438; Court of Appeals No. 269455.

Interlocutory Appeal

Leave to Appeal Denied November 29, 2006:

SINGER v FREEDLAND, No. 132422; Court of Appeals No. 273011.

Summary Disposition November 30, 2006:

PEOPLE v STANFILL, No. 131701. 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. 266127.

Leave to Appeal Denied November 30, 2006:

PEOPLE v PEARSON, No. 130517; Court of Appeals No. 262310.

PEOPLE v SMIT, No. 131186; Court of Appeals No. 268225.

LAIR v ORTHO BIOTECH, No. 131188; Court of Appeals No. 263405.

PEOPLE v CUMBUS, No. 131239; Court of Appeals No. 268385.

MADKINS v LYNEM, No. 131246; Court of Appeals No. 258533.
KELLY, J. I would grant leave to appeal.

PEOPLE v WANG, No. 131410; Court of Appeals No. 268895.

VERVERIS v HARTFIELD LANES, No. 131430; reported below: 271 Mich App 61 (on remand).
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DONALD SWANIGAN, No. 131449; Court of Appeals No. 269270.
CAVANAGH and KELLY, JJ. We would remand this case to the trial court for a hearing.

LULGJURAJ v BASIC, No. 131474; Court of Appeals No. 267040.
KELLY, J. I would grant leave to appeal.

PEOPLE v MCLEMORE, No. 131490. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265881.
KELLY, J. I would grant leave to appeal.

PEOPLE v HENSHAW, No. 131508; Court of Appeals No. 258359.

PEOPLE v GREENFIELD, No. 131518. We are not persuaded that the question presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. Reported below: 271 Mich App 442 (on reconsideration).

TRAVELERS INDEMNITY COMPANY v KUHLMAN CORPORATION, No. 131527; Court of Appeals No. 265786.

PEOPLE v STEVENSON, No. 131548; Court of Appeals No. 269169.

PEOPLE v RUSSELL, No. 131558; Court of Appeals No. 269393.

COOPER v WASHTENAW COUNTY, Nos. 131562, 131563; reported below: 270 Mich App 506.

CAVANAGH and KELLY, JJ. We would affirm the denial of summary disposition with respect to the individual city defendants, reverse the grant of summary disposition with respect to the individual county defendants, and remand the case for trial to allow a trier of fact to resolve the unresolved questions of causation, for the reasons stated in the Court of Appeals dissenting opinion.

RAYES v CELADON TRUCKING SERVICES, INC, No. 131564; Court of Appeals No. 257735.

CORRIGAN, J. I would grant leave to appeal to consider the Court of Appeals dissenting opinion.

RAYES v ALLMERICA FINANCIAL, No. 131578; Court of Appeals No. 257683.

CORRIGAN, J. I would grant leave to appeal to consider the Court of Appeals dissenting opinion.

PEOPLE v CHAPMAN, No. 131584; Court of Appeals No. 268155.

PEOPLE v MEMMINGER, No. 131587; Court of Appeals No. 269577.

PEOPLE v OBLETON, No. 131630. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266580.

SPOOR v CHUHRAN, No. 131668; Court of Appeals No. 258497.

KELLY, J. I would grant leave to appeal.

HOME-OWNERS INSURANCE COMPANY v BONNVILLE, No. 131677. We are not persuaded that the questions presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. Court of Appeals No. 266794.

ORZEL v POLLAS FAMILY MARKET, No. 131740; Court of Appeals No. 269636.

PEOPLE v HOUSTON ROBERTS, III, No. 131753; Court of Appeals No. 258439.

KELLY, J. I would grant leave to appeal.

RED RUN GOLF CLUB CORPORATION v NORTON, No. 131760; Court of Appeals No. 260008.

BRENNAN v CBP FABRICATION, INC, No. 131770; Court of Appeals No. 267094.

KELLY, J. I would grant leave to appeal.

KENDRICKS v REHFIELD, No. 131771; reported below: 270 Mich App 679.

PEOPLE v ARMSTRONG, No. 131772; Court of Appeals No. 270291.

PEOPLE v LEVITSKY, No. 131774; Court of Appeals No. 268970.

KELLY, J. I would grant leave to appeal.

PEOPLE v LARRY JOHNSON, No. 131796; Court of Appeals No. 270356.

Summary Disposition December 1, 2006:

NICKE v MILLER, No. 130666. On November 15, 2006, the Court heard oral argument on the application for leave to appeal the January 26, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the Court of Appeals judgment and reinstate the May 4, 2005, order of the Wayne Circuit Court granting defendants' motion for summary disposition. Defendants are entitled to summary disposition for the reasons stated by the circuit court. The Court of Appeals concluded that "[p]laintiff's life before the accident is not substantially different from her life after the accident," and that plaintiff "failed to present evidence to establish that her general ability to lead her normal life has been affected . . . ." Based upon these conclusions, plaintiff has failed to demonstrate the existence of a serious impairment of bodily function as the term is defined in *Kreiner v Fischer*, 471 Mich 109, 114 (2004). Although an impairment that satisfies the *Kreiner* standard need not be permanent or of any particular duration, both "temporary" and "permanent" impairments must satisfy this same standard.

The motion by the Insurance Institute of Michigan for leave to file an amicus curiae brief is granted.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would deny leave to appeal for the reasons expressed in Justice CAVANAGH's dissent in *Kreiner v Fischer*, 471 Mich 109, 147-148 (2004).

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied December 1, 2006:

CARRIER CREEK DRAINAGE DISTRICT v LAND ONE, LLC, Nos. 130125-130127. On November 13, 2006, the Court heard oral argument on the application for leave to appeal the November 3, 2005, judgment of the Court of Appeals. On order of the Court, the application is again

considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 269 Mich App 324.

YOUNG, J. (*concurring*). I concur in the Court's decision to deny leave to appeal in this case. I believe the Court of Appeals interpretation of MCL 213.55(3) may be erroneous, but the Legislature recently amended the statute to cure any error that arose from the Court of Appeals opinion, 2006 PA 439, limiting the jurisprudential significance of this case. Moreover, defendant's offer of proof regarding the possibility of rezoning appears to have been insufficient to merit relief. Because of the limited jurisprudential significance and arguable deficiency in the proofs, there is no longer a need for this Court to intervene.

MARKMAN, J. I join the statement of Justice YOUNG.

CAVANAGH, J. (*dissenting*). I disagree with this Court's decision to deny leave to appeal. While I agree with Justice YOUNG that the jurisprudential significance of this case has indeed been limited because of the Legislature's recent amendment of the statute, I believe that the Court of Appeals improperly interpreted MCL 213.55(3) and that defendant was not required to file a written claim that the agency did not include the possibility of rezoning in the offer made for the property at issue. Thus, in light of the fact that this Court has already reviewed briefs and heard oral arguments on this matter, I believe that defendant should be afforded relief.

KELLY, J. I join the statement of Justice CAVANAGH.

DORMAN v CLINTON TOWNSHIP, No. 130721; reported below: 269 Mich App 638.

YOUNG, J. (*concurring*). I concur in the order denying leave to appeal. Plaintiff is a real estate developer who purchased the property in question in 2001 with intent to continue using the property as it was zoned at the time of purchase. During the planning stage, defendant rezoned the property from light industrial to residential. The zoning ordinance in effect when plaintiff purchased the property authorized use of the property as light industrial. However, the township's master plan, which had not been updated to reflect the zoning ordinance, authorized residential use for the property. Thus, in changing the zoning to residential, the township conformed its ordinance to its master plan.

Plaintiff claims, as a result of the anticipated diminished economic return, that the rezoning constitutes a regulatory taking. However, plaintiff has no vested interest in the rezoning of the property upon which to claim a regulatory taking. In Michigan, in order to have a vested interest in the rezoning of the property, plaintiff would need to have secured a building permit for the construction necessary to take advantage of the existing zoning classification *and* expended a substantial investment in performing that construction. See, e.g., *Bevan v Brandon Twp,* 438 Mich 385, 402 (1991); *Gackler Land Co, Inc v Yankee Springs Twp,* 427 Mich 562 (1986); *City of Lansing v Dawley*, 247 Mich 394, 396 (1929). Because plaintiff has met neither requirement, he does not have a vested interest in the rezoning of the property and may not claim a regulatory taking.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal. Plaintiff bought property that was zoned as light industrial, and planned to adapt the building on the property for light industrial use as a storage facility. He submitted a site plan to the township planning department and removed most of the building's interior fixtures. However, before plaintiff received a building permit or began construction, the township board voted to rezone the property for residential use only.

In order for this Court to evaluate a claim that a zoning ordinance constitutes a taking of property, a plaintiff must satisfy the rule of finality. This rule requires a showing that " 'the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' " *Paragon Properties Co v City of Novi*, 452 Mich 568, 579 (1996), quoting *Williamson Co Regional Planning Comm v Hamilton Bank*, 473 US 172, 191 (1985). Because plaintiff here has not affirmatively demonstrated that he sought a special land use permit, rezoning, or a land use variance, *Paragon Properties, supra* at 574, plaintiff has failed to satisfy the rule of finality. For this reason, I concur in the order denying leave to appeal.

However, I write separately to observe that this Court, in my judgment, should revisit the current rule that vests a property owner's right in existing zoning only after a building permit has been issued and "substantial investment" has been made with regard to the property. *City of Lansing v Dawley*, 247 Mich 394 (1929). Although this is fairly described as the "majority rule" among the states, it has increasingly been replaced. Under one alternative rule, a property owner's right in existing zoning vests when the local authority grants final approval, without the additional requirement that an owner undertake a "substantial investment" on the property. See, e.g., 53 Pa Stat Ann, § 10508(4)(ii) (2006); Ariz Rev Stat Ann 9-1202(G) (2006). Under another alternative rule, a property owner's right in existing zoning is vested as of the time that a project application is made. *Erickson & Assoc, Inc v McLerran*, 123 Wash 2d 864, 867-868 (1994). In rejecting the majority rule, the Washington Supreme Court has stated:

> We prefer not to adopt a rule which forces the court to search through . . . "the moves and countermoves of . . . parties . . . by way of passing ordinances and bringing actions for injunctions"—to which may be added the stalling or acceleration of administrative action in the issuance of permits—to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. [*Hull v Hunt*, 53 Wash 2d 125, 130 (1958), quoting *State ex rel Ogden v City of Bellevue*, 45 Wash 2d 492, 496 (1954).]

See also Cal Gov't Code § 66498.1(b) (2006); Tex Local Gov't Code § 245.002 (2006).

What is particularly pertinent is that the majority rule evolved at a time three-quarters of a century ago during which a single building permit may have been all that was required for even a major building project. Since then, however, the process of securing such permits has changed drastically in most jurisdictions, including in Michigan. Major building projects will often require multiple permits from multiple federal, state, and local agencies. Yet, the building permit on which the current rule hinges is only the final permit issued in this process. See, e.g., *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 62 (1989); see also Overstreet & Kirchheim, *The quest for the best test to vest: Washington's vested rights doctrine beats the rest*, 23 Seattle Univ L R 1043, 1053-1054 (2000). One commentator, for example, has related a project that required 65 separate permits from 12 separate agencies. Hagman, *The vesting issue: the rights of fetal development vis a vis the abortions of public whimsy*, 7 Envtl Law 519, 538 (1977). Under the present rule, property owners must expend considerable time, money, and effort to secure multiple permits before any right to existing zoning vests, placing these expenditures potentially at risk of adverse political and administrative decisions during the entire process.

Michigan's current rule implicates both due process guarantees and the stability and predictability of property rights. A rule that leaves a property owner's ability to build uncertain or tentative until late in an extended building process may act as a deterrent to the exercise of property rights, because an owner could be forced to expend considerable sums of money absent any assurance that the local zoning authority will not alter existing zoning at the last minute. Moreover, such a rule raises questions concerning at what point a change in zoning can fairly be construed as being effectively retroactive in character.

The building permit process has changed dramatically since the majority rule on vesting was originally adopted in Michigan. As a result, the current rule raises both practical and due process concerns. Balanced with this are considerations that pertain to the ability of local jurisdictions to exercise their zoning authority in a flexible and plenary manner. In an appropriate case, I believe that this Court should more fully consider the merits of alternative rules of vesting and determine whether our current rule should be maintained.

PEOPLE v MCGEE, No. 132280; Court of Appeals No. 271964.

Interlocutory Appeal

Leave to Appeal Denied December 1, 2006:

PEOPLE v DETRICK WILLIAMS, No. 132537; Court of Appeals No. 272888.

KELLY, J. I would grant leave for an interlocutory appeal to consider the constitutionality of requiring a filing fee from indigent defendants in criminal cases.

Leave to Appeal Granted December 6, 2006:

VEGA v LAKELAND HOSPITALS AT NILES AND ST JOSEPH, INC, No. 129436. The motion for reconsideration of this Court's May 12, 2006, is granted.

We vacate our order dated May 12, 2006. On reconsideration, the application for leave to appeal the July 28, 2005, judgment of the Court of Appeals is considered, and it is granted. The parties shall include among the issues to be briefed whether MCL 600.5851(1) applies to medical malpractice claims. 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: 267 Mich App 565.

BLOOMFIELD ESTATES IMPROVEMENT ASSOCIATION, INC v CITY OF BIRMINGHAM, No. 130990. The parties shall include among the issues to be briefed whether the use of Bloomfield Estates Subdivision lots in Springdale Park violates the deed restrictions, whether plaintiff is estopped from seeking enforcement of the deed restrictions, and what remedies may be available if there are violations of the deed restriction. Court of Appeals No. 255340.

CITY OF SOUTH HAVEN v VAN BUREN COUNTY BOARD OF COUNTY COMMISSIONERS, No. 131011. The application for leave to appeal the March 14, 2006, judgment of the Court of Appeals is granted, limited to Issue II in the application and the following issues: (1) If the city of South Haven did not agree to an allocation of the revenues derived from the tax levy different from that prescribed by MCL 224.20b(2)(a) and (b), was the tax levy submitted to the voters for approval in violation of MCL 224.20b(4), and, if so, what are the consequences of and remedy for such a violation? (2) Given that the city of South Haven did not contest the allocation of the proceeds of the revenues derived from the tax levy for a period of 28 years, during which it was continuously renewed and allocated solely to the Van Buren County Board of Road Commissioners, in accordance with the ballot proposal so providing, from 1976 through the city of South Haven's first challenge of the allocation in 2004, was the conduct of the parties sufficient to evidence that they "otherwise agreed" upon a different allocation of the revenues derived from the tax levy than that prescribed by the statute within the meaning of MCL 224.20b(2)? The State Bar of Michigan Taxation Section, the Michigan Municipal League, the Michigan Association of Counties, and the Michigan Townships Association 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: 270 Mich App 233.

RENNY v DEPARTMENT OF TRANSPORTATION, No. 131086. The parties shall include among the issues to be addressed: (1) whether the Court of Appeals correctly characterized the alleged dangerous or defective condition in this case as a design defect; (2) whether the public building exception, which obligates a governmental agency "to repair and maintain public buildings," permits a party to bring a design defect claim; and (3) whether the Court of Appeals conclusion that the icy sidewalk was not a transitory condition is contrary to this Court's decision in *Wade v Dep't of Corrections*, 439 Mich 158 (1992). The Michigan Municipal League, the Michigan Townships Association, the Michigan Trial Lawyers Associa-

tion, 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. Reported below: 270 Mich App 318.

Leave to Appeal Denied December 6, 2006:

ROEBUCK-WAGNER v GREEN, No. 130488; Court of Appeals No. 262754.

PEOPLE v YANNA, No. 131202; Court of Appeals No. 258633.

SHR LIMITED PARTNERSHIP v MERCURY EXPLORATION COMPANY, No. 131244. The application for leave to appeal the April 11, 2006, judgment of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Because we conclude that plaintiff's position on appeal is frivolous, we remand this case to the Otsego Circuit Court for an assessment against plaintiff of the costs and attorney fees incurred by defendants on appeal, along with an evidentiary hearing concerning the same, if requested by either party. We do not retain jurisdiction. Court of Appeals No. 258058.

FRANKENMUTH MUTUAL INSURANCE COMPANY v DORE, No. 131254; Court of Appeals No. 265176.

KELLY, J. I would grant leave to appeal.

WILLIAMS v VR THOMAS CONSTRUCTION COMPANY, No. 131269. The application for leave to appeal the March 2, 2006, 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. 263309.

JONES v WHEELOCK, No. 131363; Court of Appeals No. 258974.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

HUFF v ABOU-JOUDEH, No. 131636; Court of Appeals No. 266120.

CAVANAGH, WEAVER, and KELLY, JJ. We would remand this case to the Court of Appeals for consideration, as on reconsideration granted, of the issue whether personal jurisdiction may be exercised over the defendant as to the plaintiff's underinsured motorist coverage claim in light of the defendant's admission that it filed a certificate of compliance with the no-fault act pursuant to MCL 500.3163, and the policy provision that the "in court" alternative for "settling a claim" "may be decided in a lawsuit brought against us by you . . . in an Ontario court."

RENDER v CITY OF PONTIAC, No. 131694; Court of Appeals No. 258136.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BRANCH, No. 132065; Court of Appeals No. 260024.

KELLY, J. I would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 8, 2006:

BUKOWSKI v CITY OF DETROIT, No. 129409. 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 the Court of Appeals erred in instructing the Wayne Circuit Court, on remand, that the Freedom of Information Act "frank communications" exemption, MCL 15.243(1)(m), does not apply to communications that are no longer preliminary to an agency determination of policy or action, even if the communications were preliminary at the time that they were made. 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. 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. 256893.

ROSS v AUTO CLUB GROUP, No. 130917. The motion for reconsideration of this Court's August 29, 2006, order is granted. We vacate our order dated August 29, 2006. On reconsideration, the application for leave to appeal the January 3, 2006, 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 submit supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals correctly affirmed the trial court's award of attorney fees to plaintiff pursuant to MCL 500.3148(1). The parties should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 269 Mich App 356.

CAVANAGH and KELLY, JJ. We would deny reconsideration.

BAKER v COUCHMAN, No. 131607. 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 may file supplemental briefs within 35 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 271 Mich App 174.

ROSS v BLUE CARE NETWORK OF MICHIGAN, No. 131711. 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: (1) whether the Court of Appeals conclusion pays sufficient attention to MCL 550.1911(6), (8), (13), (14), (15), and (16), which provide that an independent review organization is to provide a "recommendation" to the Office of Financial and Insurance Services commissioner; (2) whether the Court of Appeals was correct in characterizing as dicta the statement in *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 464 (2004), that the independent review organization's "recommendation is not binding on the commissioner. In fact, on receipt of the recommendation, the commissioner must independently review the recommendation to confirm that it does not contradict

the terms of the health plan. MCL 550.1911(15)."; and (3) if the IRO's recommendation were deemed binding on the OFIS commissioner, would the legislation constitute an unlawful delegation of authority to a private party. 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: 271 Mich App 358.

OMDAHL v WEST IRON COUNTY BOARD OF EDUCATION, No. 131926. 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 the plaintiff attorney, proceeding *in propria persona*, is entitled to attorney fees under § 11(4) of the Open Meetings Act, MCL 15.271(4). The parties may file supplemental briefs within 56 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The Department of Attorney General, the Public Corporation Law Section of the State Bar of Michigan, the Michigan Municipal League, and the Michigan Association of School Boards are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 271 Mich App 552.

Summary Disposition December 8, 2006:

PEOPLE v ALTHOFF, No. 131012. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the following four issues: (1) whether MCL 28.722(e)(xi) requires registration of an offender based solely on the legal elements of the offense for which he stands convicted, or whether the facts of the particular offense are to be considered in determining if the offense "by its nature constitutes a sexual offense against an individual who is less than 18 years of age," cf. *People v Meyers*, 250 Mich App 637 (2002) (dictum); (2) whether the possession of pornographic photographs constitutes an offense "against" an individual who is less than 18 years of age; (3) if possession is an offense "against" an individual, what evidentiary standards apply to a hearing held to determine if a defendant must register under the Sex Offenders Registration Act; and (4) whether the evidence in this case was sufficient to satisfy the statutory requirement that the individual be "less than 18 years of age." Court of Appeals No. 264980.

WEAVER, J. I concur and would add that I do not object to the Court of Appeals considering any other issues it may deem appropriate.

CORRIGAN, J. (*dissenting*). I dissent from the majority's order remanding this case because I believe that the Court of Appeals has already determined in *People v Meyers*, 250 Mich App 637 (2002), that the "catch-all provision" of the Sex Offenders Registration Act (SORA), MCL 28.722(e)(xi), requires consideration of the facts of the particular offense. Although the Court of Appeals in *Meyers* also reviewed under an

"attempt" analysis the trial court's decision to require the defendant to register under the SORA, the Court's holding with regard to the catch-all provision was an equal and alternate theory supporting the defendant's sentence and, therefore, not dictum.

The SORA requires individuals who commit a "listed offense" to be registered under the act. MCL 28.723. The catch-all provision defines "[l]isted offense" as "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age." MCL 28.722(e)(xi). Defendant's grammatical argument in the instant case is without merit. This catch-all language does not require the offense to be sexual in nature. It requires the violation to be of a sexual character. The relevant antecedent noun preceding the phrase "by its nature" is "violation"; the phrase "of a law of this state or a local ordinance of a municipality" is a prepositional phrase that also modifies "violation." Thus, the Court of Appeals in *Meyers* correctly concluded that courts must examine the nature of the violation to determine whether registration is required under the catch-all provision. The trial court's conclusion that the conduct in this case was by its nature a sexual offense against an individual under 18 was not clearly erroneous, and I would, therefore, affirm.

Leave to Appeal Denied December 8, 2006:

DAIMLERCHRYSLER CORPORATION v DEPARTMENT OF TREASURY, No. 130106. Reported below: 268 Mich App 528.

MARKMAN, J. (*concurring*). Petitioner conceded at oral argument that nothing in the record demonstrates that it has used motor fuel to test its vehicles. Moreover, the record does not indicate that petitioner incorporated motor fuel into its vehicles before they became a part of its "finished goods inventory storage" under MCL 205.54t(7)(a). In light of these facts, petitioner has failed, in my judgment, to show that it qualifies as either a "bulk end user" under MCL 207.1002(f) or an "industrial end user" under now-repealed MCL 207.1003(o), and therefore has failed to show that it qualifies as an "end user" under MCL 207.1033 and MCL 207.1039. As a consequence, I agree with the Court of Appeals that under the instant circumstances petitioner is not entitled to a refund of the motor fuel tax under MCL 207.1032.

CAVANAGH, J. (*dissenting*). I dissent from the majority's decision to deny leave to appeal because this case concerns a matter of first impression that is jurisprudentially significant to the taxpayers of this state. I would reverse the judgment of the Court of Appeals and hold that, in accordance with the clear intent of the Legislature, petitioner is entitled to a refund because the fuel it purchased was not used for vehicles destined to be driven on Michigan roads, and nothing in the act requires a different conclusion.

KELLY, J. I would grant leave to appeal.

BENNETT v OFFICEMAX, INC, NO 1, No. 131150. The motion to file a reply brief is granted. The application for leave to appeal the February 28,

2006, order of the Court of Appeals is denied, because we are not persuaded that the question presented should be reviewed by this Court. The motion for leave to file an appeal bond and the motions to strike are denied. Costs of $250 are assessed against the plaintiff in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiff is barred from submitting additional filings in this Court until he offers proof that he has paid all his outstanding court-imposed sanctions. Court of Appeals No. 265653.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would issue the order without the last sentence.

KELLY, J. I would deny leave to appeal.

PORTER v CITY OF HIGHLAND PARK, No. 131538; Court of Appeals No. 263470.

MARKMAN, J. (*concurring*). I would affirm the decision of the Court of Appeals, albeit for a different reason. I find it unnecessary to address whether § 21(1)(q) of the Local Government Fiscal Responsibility Act, MCL 141.1221(1)(q), has retroactive effect because I believe that the then-applicable provisions of § 21 of the act, in conjunction with § 5c(b) of the Home Rule City Act, MCL 117.5c(b), afforded the emergency financial manager the authority to undertake the action that is in dispute in this case.

PEOPLE v CHARLES BELL, No. 131634; Court of Appeals No. 270285.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

MARKMAN, J. (*dissenting*). The dominant purpose of the legislative sentencing guidelines is to promote uniformity of criminal sentencing and to lessen the effect of the predispositions and preferences of individual sentencing judges. The guidelines establish relatively narrow ranges of sentences, based upon a variety of offense and offender characteristics, and require that judges sentence within those ranges. Only if a judge articulates "substantial and compelling" factors for departing above or below the guidelines range may he or she do so.

However, the articulation of "substantial and compelling" factors does not afford the sentencing judge carte blanche to depart above or below the guidelines at his or her discretion, for this would be to ignore the "sentencing uniformity" purpose of the guidelines with regard to extra-guidelines sentences. As this Court has stated:

> [W]e do not believe that the Legislature [in MCL 769.34(3)] intended, in every case in which a minimal upward or downward departure is justified by "substantial and compelling" circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the "substantial and compelling" circumstances articulated by the court must justify the *particular* departure in a case, i.e., "that departure." [*People v Hegwood*, 465 Mich 432, 437 n 10 (2001) (emphasis in original).]

That is, what may constitute "substantial and compelling" circumstances in support of a five-month departure from the guidelines range may not constitute "substantial and compelling" circumstances in support of a 30-month departure. From the requirement that a sentencing departure must be assessed by reference to the *particular* departure in a case, i.e., "that departure," I believe it follows that there is an obligation upon the sentencing judge as he or she departs increasingly far from the guidelines range to be more increasingly specific in his or her articulation of "substantial and compelling" circumstances and to explain increasingly clearly why a lesser departure would be inadequate.

In the instant case, defendant's guidelines range was 2 to 34 months and he was sentenced to a term of 90 to 180 months. Thus, he was sentenced to a minimum term of imprisonment that was 265 percent of the minimum guidelines range. Although this departure may well be justified in light of defendant's criminal history and probation violations, I believe that a fuller articulation than was given here is required by the sentencing court in support of a departure of this magnitude, and I would remand for such a rearticulation.

Merely reciting a list of allegedly "substantial and compelling" factors, as the sentencing court did here, is not sufficient, in my judgment, to support a departure of this magnitude absent some explanation regarding why such factors—some of which have already been taken into consideration by the guidelines—require a nearly five-year increase in imprisonment beyond what the Legislature has established. That is, there must be at least some rudimentary effort by the sentencing court to show a connection between the "substantial and compelling" factors and the actual sentence imposed.

The legislative sentencing guidelines, in my judgment, represent an important step toward sentencing fairness. They are designed to ensure that equally situated criminals receive reasonably equivalent sentences. The guidelines have considerably strengthened the rule of law in the criminal sentencing process in the place of the rule of individual judges. The serendipity of whether a perpetrator draws a relatively severe or a relatively lenient sentencing judge is now of considerably less consequence. However, the guidelines can only succeed if the trial and appellate courts of this state take seriously their obligation to ensure that departures from the guidelines range are not viewed as departures from the "sentencing uniformity" objective of the guidelines, and that departure sentences serve to promote, rather than to detract from, this objective.

PURDY v BERNAICHE, No. 131685; Court of Appeals No. 256730.

MARKMAN, J. (*concurring*). Christopher Bernaiche, a patron at defendant bar, verbally confronted another patron at the bar, and the bar's employees forcefully evicted him. Some witnesses testified that Bernaiche threatened to return and kill one or more of the other persons at the bar, while others testified that they did not hear these threats. As Bernaiche was ejected, the manager of the bar called the police and requested that they respond. Several moments later, the manager called the police again. The parties dispute what the manager told the police during the second call. According to the police dispatch log, the manager stated that the police did

not need to respond. However, the manager contends that he continued to request a police response. In the end, the police did not respond to the calls, and Bernaiche returned to the bar approximately 45 minutes after being ejected and shot five people, including plaintiff. Plaintiff filed suit against Bernaiche and defendant bar. The trial court denied summary disposition to defendant bar, and the Court of Appeals affirmed.

This Court has established the parameters of a merchant's duty to respond to criminal activity. In *MacDonald v PKT, Inc,* 464 Mich 322 (2001), this Court stated that "a merchant has no obligation to anticipate the criminal acts of third parties." *Id*. at 339.

> A merchant can assume that patrons will obey the criminal law. . . . This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond. [*Id*. at 335.]

Once a duty arises, "fulfilling the duty to respond requires only that a merchant make reasonable efforts to contact the police." *Id*. at 336. *MacDonald* did not impose a higher duty on merchants because to do so "would essentially result in the duty to provide police protection . . . ." *Id*. at 337. Nor are merchants "effectively vicariously liable for the criminal acts of third parties." *Id.* at 335. To impose such obligations not only lacks any basis in the law, it would also have a destructive effect on small businesses in high-crime areas of the state. *Id*. at 341, 344-345.

The witnesses provided varying testimony regarding whether Bernaiche threatened to return to the bar and kill patrons. Because of this differing testimony, it is uncertain whether a "present situation on the premises" can fairly be said to have existed, and consequently whether defendant bar had a duty to respond and what precisely that duty entailed. If the bar, in fact, had such a duty, the parties dispute whether the bar's manager satisfied that duty by his subsequent actions. Resolving what the manager told the police, and why he told them what he did, will assist in determining whether defendant bar made "reasonable efforts to contact the police," in a context in which the manager was "situated in roughly the same position [as his patrons] in terms of- . . . vulnerability to the violent criminal predator." *Id.* at 337 n 12 (emphasis omitted). Because potentially dispositive facts are in dispute, summary disposition for defendant bar under MCR 2.116(C)(10) is inappropriate at this time. On remand, the trial court should bear in mind that, under the law of our state, defendant bar has a duty to respond to criminal activity only if a "present situation on the premises" can be said to exist, and that any duty to respond is limited to making "reasonable efforts to contact the police." Imposing a higher duty upon merchants would be a step toward requiring them to provide police protection for patrons, a duty that this Court squarely rejected in *MacDonald*.

BENNETT v OFFICEMAX, INC, NO 2, No. 131900. The motion for miscellaneous relief is granted. Costs of $250 are assessed against the plaintiff in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiff is barred from submitting additional filings in this Court until he offers proof that he has paid all his outstanding court-imposed sanctions. Court of Appeals No. 265653.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would issue the order without the last sentence.

KELLY, J. I would deny leave to appeal.

Summary Dispositions December 13, 2006:

HUGHES v JACKSON COUNTY ROAD COMMISSION, No. 130764. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Wilson v Alpena Co Rd Comm*, 474 Mich 161 (2006). Court of Appeals No. 256652.

KELLY, J. I would deny leave to appeal.

BROWN v HAYES, No. 131184. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portion of the Court of Appeals judgment affirming the trial court's decision to strike defendants' affidavit of meritorious defense. The plain language of MCL 600.2912e(1) only requires that an attorney reasonably believe that the expert meets the requirements of MCL 600.2169; it does not require that the expert *actually* meet those requirements. *Grossman v Brown*, 470 Mich 593, 599 (2004) (addressing identical language in MCL 600.2912d). Since the Court of Appeals concluded in this case that defense counsel reasonably believed that his expert was qualified under MCL 600.2169 because of that statute's reference to a "*licensed* . . . health professional," it should have also found that the affidavit was sufficient under MCL 600.2912e and reversed the order striking the affidavit. 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. Reported below: 270 Mich App 491.

HARDY v MGM GRAND DETROIT, LLC, No. 131656. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and we reinstate the order of the Workers' Compensation Appellate Commission (WCAC). MCL 418.861a(5) requires that a party seeking review file a transcript of the hearing with the commission within 60 days, but permits an extension of time for "sufficient cause shown." The WCAC unanimously concluded that defendant failed to establish sufficient cause for the failure to timely file the transcript. The Court of Appeals erred in setting aside the WCAC's factual determination, which is conclusive in the absence of fraud. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000). See also *Marshall v D J Jacobetti Veterans Facility (After Remand),* 447 Mich 544 (1994). Court of Appeals No. 267550.

KELLY, J. I would grant leave to appeal.

MORANT v G & S TRANSPORTATION, INC, No. 132115. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of the limitations contained in MCR 2.603(D)(1) – (3), 2.612(C)(1) and (2), and 2.119(D)(3). Court of Appeals No. 268503.

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied December 13, 2006:

DETROIT FREE PRESS, INC, v STATE OF MICHIGAN, No. 131513; Court of Appeals No. 264273.

WEAVER and KELLY, JJ. We would grant leave to appeal.

SQUIER v CITY OF BIG RAPIDS, No. 131692; Court of Appeals No. 259387.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v JON MORRIS, No. 131698; Court of Appeals No. 260810.

KELLY, J. I would grant leave to appeal.

REDMOND v CITY OF DETROIT, No. 131732; Court of Appeals No. 265760.

KELLY, J. I would grant leave to appeal.

PEOPLE v MYLES, Nos. 131888, 131889; Court of Appeals Nos. 260806, 260809.

CAVANAGH, J. I would remand for performance of testing as originally ordered by the trial court.

PEOPLE v BERRY, No. 131923; Court of Appeals No. 270093.

MCDOWELL v MOORE INSURANCE SERVICES, INC, No. 131955; Court of Appeals No. 267853.

WEAVER and KELLY, JJ. We would grant leave to appeal.

PEOPLE v KILBOURNE, No. 131992; Court of Appeals No. 270667.

HOME OWNERS INSURANCE COMPANY v BROWN, No. 132007; Court of Appeals No. 259233.

KELLY, J. I would grant leave to appeal.

PEOPLE v CROMPTON, No. 132054; Court of Appeals No. 260727.

MACDONALD v REED, No. 132071. The motion for immediate consideration is granted. The motion to strike is denied. The application for leave to appeal the March 30, 2006, order of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Costs of $250 are assessed against plaintiff MacDonald in favor of defendants under MCR 7.316(D)(1) for filing a vexatious appeal. Court of Appeals No. 264940.

PEOPLE v CHATMAN, No. 132076. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267783.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v EDGETTE, No. 132083; Court of Appeals No. 271264.

CLANTON v ST LAWRENCE HOSPITAL and CLANTON v INGHAM CIRCUIT JUDGE, Nos. 132091, 132092. Costs of $250 are assessed against the plaintiff in favor of the defendants under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiff is barred from submitting additional filings in this Court until he offers proof that he has paid all his outstanding court-imposed sanctions. Court of Appeals Nos. 271432, 271935.

PEOPLE v MURAD WILLIAMS, No. 132093. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268119.

KELLY, J. I would remand this case for resentencing.

PEOPLE v WEAVER, No. 132220; Court of Appeals No. 271734.

PEOPLE v MUSU, No. 132225; Court of Appeals No. 271377.

PEOPLE v TIRAN, No. 132264; Court of Appeals No. 271226.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 15, 2006:

PEOPLE v DAVID KELLER and PEOPLE v MELINDA KELLER, Nos. 131223, 131224. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). We order the Genesee Circuit Court, in accordance with Administrative Order No. 2003-03, to promptly determine whether the defendants are indigent and, if so, to immediately appoint James Zimmer to represent the defendants in this Court. The parties shall submit supplemental briefs within 56 days of the determination of indigency, and they should address: (1) whether the presence in the defendants' trash of a small amount of marijuana constituted probable cause justifying the search; (2) assuming there was a Fourth Amendment violation, whether the police acted in objectively reasonable good-faith reliance on the warrant; (3) whether the search violated MCL 780.653; and (4) assuming that the search violated MCL 780.653, but not the Fourth Amendment, whether the trial court elected a proper remedy by permitting the defense to argue to the jury that the police misled the magistrate and violated Michigan law in their efforts to obtain a search warrant. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 270 Mich App 446.

PEOPLE v EARLS, No. 132284. The motion for immediate consideration is granted. 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 the defendant has standing to challenge evidence seized in violation of MCL 767A.1 *et seq*. and, if so, whether the violation of that statutory provision authorizes exclusion of the evidence, in light of *People v Hawkins*, 468 Mich 488, 507 (2003), and *People v Anstey*, 476 Mich 436, 448 (2006). 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 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. 267976.

Leave to Appeal Granted December 15, 2006:

PEOPLE v GILLAM, No. 131276. The parties are directed to include among the issues to be briefed whether the police conduct in this case constituted a constructive entry into a citizen's home for purposes of a Fourth Amendment search and seizure analysis. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 259122.

Summary Disposition December 15, 2006:

PEOPLE v MATHIS, No. 131686. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of its order. We note that the defendant filed timely postconviction motions and did not purport to file a motion for relief from judgment, and that the trial court did not address the defendant's motions under MCR 6.501 *et seq*. On remand, the Court of Appeals shall reconsider whether its order properly denied the defendant's delayed application for leave to appeal "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." Within 28 days of the date of this order, the Court of Appeals shall either reconsider the defendant's delayed application for leave to appeal under the standard applicable to direct appeals and decide whether it shall be granted, or submit to the clerk of this Court, in writing, an explanation of why its order denied leave to appeal under MCR 6.508(D). We retain jurisdiction. Court of Appeals No. 266593.

Leave to Appeal Denied December 15, 2006:

In re VANCONETT (RAU v LEIDLEIN), No. 126758. Leave to appeal having been granted and the case having been briefed and argued by counsel, the order of January 13, 2006, which granted leave to appeal, is vacated and

leave to appeal is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 247516.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal. At issue is whether the decedent, Herbert VanConnett, entered into a contract with his wife to make a mutual will and, if he did, whether that contract is specifically enforceable.

The Court of Appeals correctly concluded, in my judgment, that each of these wills shows an intention to enter into a contract for a mutual will and that each contains the material provisions of that contract. Such a contract becomes irrevocable by the survivor and can be specifically enforced by the beneficiaries. *Schondelmayer v Schondelmayer*, 320 Mich 565, 570 (1948). Having determined that a contract existed, the Court of Appeals should then have held that the contract was specifically enforceable and remanded to the probate court for enforcement. Instead, the Court of Appeals held that the will was revocable and remanded to the probate court for further factual development and consideration of whether revocation breached the contract.

Notwithstanding, the evidence indicates that the assets at issue are no longer part of the decedent's estate and, therefore, there is nothing to distribute to the intended beneficiaries. Because the remand ordered by the Court of Appeals will not detrimentally affect the rights of the intended beneficiaries, I would deny leave to appeal.

NAUMANN V FOREWAY TRANSPORTATION, INC, No. 131693; Court of Appeals No. 269712.

MARKMAN, J. (*dissenting*). I respectfully dissent and would remand to the magistrate to determine whether the medical procedure proposed for plaintiff is unreasonably dangerous and whether it affords a reasonable chance for enabling plaintiff to resume work. Plaintiff, a truck driver, suffered a work-related neck injury that has disabled her from performing her job. Her doctor recommended that she undergo surgery in order to alleviate her pain. However, as a precondition to performing the surgery, the doctor ordered plaintiff to cease smoking for six months. After three months, she resumed smoking and the doctor canceled her surgery. The magistrate subsequently granted defendant's motion to suspend workers' compensation benefits, holding that plaintiff's failure to cease smoking in preparation for surgery constituted an unreasonable refusal of medical treatment. The Workers' Compensation Appellate Commission (WCAC) reversed.

In order to justify the suspension of benefits, defendant must demonstrate that plaintiff unreasonably refused medical treatment. Contrary to the WCAC, I fail to see an obvious distinction between an explicit rejection of medical treatment and an affirmative decision to engage in behavior that renders such treatment impossible. Accordingly, I believe that plaintiff's failure to cease smoking for the required six months effectively constituted a refusal of medical treatment.

The question remains whether that refusal was unreasonable. " 'If the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion,

the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him.' " *Kricinovich v American Car & Foundry Co,* 192 Mich 687, 690 (1916) (citation omitted); see also *Couch v Saginaw Malleable Iron Plant*, 42 Mich App 223, 226 (1972). Here, the magistrate determined that plaintiff's refusal was unreasonable based solely on "her lack of control to prepare herself for surgery . . . ." However, the magistrate did not undertake any further determinations concerning whether the operation could be undertaken without danger to life or health or whether it offered plaintiff a reasonable prospect of relieving her pain. While the WCAC referenced testimony by plaintiff's physician that she "may not be any better or may be worse after the surgical procedures," this could be said of any surgery. By itself, this testimony does not demonstrate that there was a reasonable basis for plaintiff's refusal to undergo the surgery. I would have the magistrate assess the relevant circumstances and render such a determination.

Leave to Appeal Denied December 28, 2006:

PEOPLE v ALFONZO BROWN, No. 129719. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261524.

PEOPLE v CHARLES KELLY, No. 130664. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264488.

PEOPLE v DAVID GONZALES, JR, No. 130839; Court of Appeals No. 267316.

PEOPLE v CARNELL BATES, No. 130865. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263527.

PEOPLE v OTEAGO WILLIAMS, No. 130923; Court of Appeals No. 257334.

PONTI v EVEANN PROPERTIES, INC AND PONTI v PINNEGAR, Nos. 131007, 131008; Court of Appeals Nos. 253890, 253891.

PAPP v AMERITECH CORPORATION, INC, No. 131204; Court of Appeals No. 259115.

PEOPLE v GLENN, No. 131208. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264794.

PEOPLE v ANDRE WILLIAMS, No. 131264. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265091.

PEOPLE v SOLIS, No. 131321. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265352.

PEOPLE v BETHUNE, No. 131494; Court of Appeals No. 258068.

PEOPLE v KENNETH JOHNSON, No. 131577; Court of Appeals No. 259434.

VAN POPERIN v DILORENZO, No. 131591; Court of Appeals No. 265168.

PEOPLE v MARVIN COTTON, No. 131599. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266453.

PEOPLE v DORNBUSCH, No. 131600. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266353.

BATES-RUTLEDGE v RUTLEDGE, No. 131605; Court of Appeals No. 265263.

PEOPLE v ENGDAHL, No. 131611; Court of Appeals No. 269771.

PEOPLE v MATTHEW MITCHELL, No. 131628; Court of Appeals No. 260489.

PRESSEY ENTERPRISES, INC v BARNETT-FRANCE INSURANCE AGENCY, No. 131669; Court of Appeals No. 258646.

PEOPLE v DWAYNE JOHNSON, No. 131680. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267223.

PEOPLE v DARIUS GREEN, No. 131681; Court of Appeals No. 261041.

PEOPLE v HOLMES, No. 131734. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265819.

PEOPLE v GREENAWALT, No. 131735. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267177.

PEOPLE v DEVIN ROGERS, No. 131736. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266540.

PEOPLE v TOTTEN, No. 131739. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265735.

PEOPLE v BARDEN, Nos. 131748, 131750. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 268667, 266950.

PEOPLE v TURNPAUGH, No. 131758. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269652.

DEAN v JACKSON COUNTY ROAD COMMISSION, Nos. 131761, 131762; Court of Appeals Nos. 264063, 266355.

METROPOLITAN GROUP PROPERTY & CASUALTY INSURANCE v PRATT, No. 131763; Court of Appeals No. 267444.

PEOPLE v HEIBEL, No. 131777. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 269398.

PEOPLE v JACOB MARTIN, No. 131782. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267062.

PEOPLE v WILLIAM MOORE, No. 131794. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267250.

PEOPLE v WOODS, No. 131804; Court of Appeals No. 261418.

PEOPLE v CRAIG BRYANT, No. 131815; Court of Appeals No. 261153.

PEOPLE v GREGORY WASHINGTON, No. 131820; Court of Appeals No. 260155.

PEOPLE v LINDSAY, No. 131821; Court of Appeals No. 259462.

PEOPLE v HOGUE, No. 131897; Court of Appeals No. 269403.

PEOPLE v DONALD SMITH, No. 131914. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 270623.

PEOPLE v FLIE, No. 131920. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267672.

PEOPLE v EMERICK, No. 131921; Court of Appeals No. 268307.

COLUMBUS v MOORE, No. 131938; Court of Appeals No. 267957.

PEOPLE v DERRICK SMITH, No. 131939; Court of Appeals No. 260160.

PEOPLE v LESLIE EDWARDS, No. 131944; Court of Appeals No. 261406.

PEOPLE v TRACI JACKSON, No. 131947; Court of Appeals No. 260313.

EASTERN MICHIGAN UNIVERSITY v AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-EASTERN MICHIGAN UNIVERSITY CHAPTER, No. 131953; Court of Appeals No. 257668.

PEOPLE v LAQUAN JOHNSON, No. 132000. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267435.

PEOPLE v BINGHAM, No. 132001; Court of Appeals No. 269607.

PEOPLE v MCCARVER, No. 132012; Court of Appeals No. 270801.

PEOPLE v REDWOOD, No. 132022. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267414.

MEIER v DETROIT DIESEL CORPORATION, No. 132024; Court of Appeals No. 268009.

PEOPLE v MIDDLEBROOK, No. 132027; Court of Appeals No. 260589.

PEOPLE v POOLE, No. 132037; Court of Appeals No. 269092.

HALEY v NAHIKIAN, No. 132040; Court of Appeals No. 265794.

HARDGE v WAYNE COUNTY, Nos. 132052, 132053; Court of Appeals Nos. 266780, 266808.

PEOPLE v ANTHONY BROOKS, No. 132067; Court of Appeals No. 260151.

LANSING PAVILLION, LLC v EASTWOOD, LLC, No. 132103; Court of Appeals No. 265970.

PEOPLE v GUERRERO, No. 132108. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266590.

PEOPLE v MARLIN HOLLAND, No. 132110. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267736.

PEOPLE v KENYA ROGERS, No. 132111. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267562.

PEOPLE v FREEMAN, No. 132138. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267845.

STOMPS v MICHIGAN BELL TELEPHONE COMPANY, No. 132140; Court of Appeals No. 268420.

KREBS v NYGREN, No. 132151; Court of Appeals No. 258813.

PEOPLE v SEDURICK HUNTER, No. 132157; Court of Appeals No. 271254.

PEOPLE v ELLIOT, No. 132159. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268293.

PEOPLE v SHERMAN BELL, No. 132160. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272062.

PEOPLE v LASHUAY, No. 132162. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267846.

PEOPLE v MORITZ, No. 132172; Court of Appeals No. 251265.

JUDGE v JUDGE, No. 132178; Court of Appeals No. 270447.

PEOPLE v WHITTEN, No. 132181; Court of Appeals No. 270373.

ERDMAN v WAYNE CIRCUIT JUDGE, No. 132194; Court of Appeals No. 271418.

PEOPLE v COUNSEL, No. 132197; Court of Appeals No. 270355.

PEOPLE v JAMIL THOMAS, No. 132202. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268241.

PEOPLE v ANTOINE JACKSON, No. 132205; Court of Appeals No. 260820.

PEOPLE v WILLIAM WASHINGTON, No. 132207. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268676.

PEOPLE v URBAN, No. 132221; Court of Appeals No. 257728.

PEOPLE v MCCAIN, No. 132223; Court of Appeals No. 271687.

PEOPLE v PATRICIA PLUMMER, No. 132224. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268473.

SEYFRIED v SEYFRIED, Nos. 132226, 132275; Court of Appeals No. 270171.

PEOPLE v GLEASON, No. 132228. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268439.

PEOPLE v MCQUEEN, No. 132230. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268598.

PHILLIPS v INGHAM CIRCUIT JUDGE, No. 132232; Court of Appeals No. 272398.

PEOPLE v WEABER, No. 132233. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268206.

PEOPLE v SHILTS, No. 132237. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268476.

PEOPLE v VINSON, Nos. 132241, 132242; Court of Appeals Nos. 259079, 259204.

PEOPLE v OSWALD, No. 132246. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272481.

Interlocutory Appeal

Leave to Appeal Denied December 28, 2006:

HAMEL v RAO, No. 132200; Court of Appeals No. 270603.

Leave to Appeal Granted December 29, 2006:

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC v MARION TOWNSHIP, No. 130698. On November 15, 2006, the Court heard oral argument on the application for leave to appeal the January 31, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is granted. The parties shall include among the issues to be briefed: (1) what was the specific benefit conferred on petitioner's property by the special assessment confirmed in 1996, see *Kadzban v Grandville*, 442 Mich 495 (1993); (2) whether that benefit was reduced by the informal change in the improvement plan or respondent's May 13, 2004, resolution; (3) whether respondent's informal change or respondent's May 13, 2004, resolution is reviewable by the Michigan Tax Tribunal under MCL 205.731(a); and (4) what remedy, if any, petitioner would have if the change in the improvement plan after confirmation of the special assessment roll reduced the value that accrued to petitioner's property such that the benefit became unreasonably disproportionate to the amount assessed. Court of Appeals No. 262437.

Summary Dispositions December 29, 2006:

BOWMAN v R L COOLSAET CONSTRUCTION COMPANY, Nos. 132019, 132104. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Court of Appeals to address the intervening plaintiff's remaining arguments. The Court of Appeals erred by adopting the "traveling employee" doctrine under the circumstances of this case. Here, the employee was traveling from his worksite to his home for the time being at the time of his injury. The general rule, that injuries sustained by an employee while going to or coming from work are not compensable, is applicable even when an employee's residence is temporary because of a particular job assignment. *Graham v Somerville Construction Co,* 336 Mich 359 (1953). Reported below: 272 Mich App 27.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

SHAFFER v ST JOSEPH'S MERCY HOSPITALS OF MACOMB, No. 132317. The motion for immediate consideration is granted. The application for leave to appeal the October 12, 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 for stay is granted. Trial court proceedings 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. 270884.

KELLY, J. (*dissenting*). I dissent from the majority's decision to remand this case to the Court of Appeals. Because the trial court correctly denied defendants' motion for summary disposition, there is no need for the Court of Appeals to review the matter on remand.

Plaintiff brought a medical malpractice claim under the theory that a delay in antibiotic treatment for bacterial endocarditis caused her condition to deteriorate so that she needed a mitral valve replacement. This case centers on the application of MCL 600.2912a(2), which, in pertinent part, provides: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."

Defendants brought a motion for summary disposition in the trial court. In reviewing such motions, the Court must consider the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Coblentz v City of Novi*, 475 Mich 558, 567-568 (2006). When the standard is applied here, it becomes apparent that defendants were not entitled to summary disposition.

Plaintiff's expert opined that, had there been no malpractice, plaintiff's chance of avoiding the heart valve replacement operation would have been greater than 50 percent. Following the alleged malpractice, plaintiff was obliged to undergo the surgery. A reasonable juror could infer from this evidence that the chance of avoiding the replacement surgery after the malpractice was zero percent. This inference is appropriate, because defendants presented no evidence to contradict it. Hence, viewed in the light most favorable to plaintiff, the evidence shows that plaintiff's opportunity to achieve a better result (i.e., to avoid the surgery) went from over 50 percent to zero percent after the alleged malpractice. Accordingly, plaintiff met her burden under MCL 600.2912a(2).

Summary disposition was correctly denied. I would deny leave to appeal.

Leave to Appeal Denied December 29, 2006:

LAWSON v KREATIVE CHILD CARE CENTER, INC, No. 130872; Court of Appeals No. 256388.

HOSEY v BERRY, No. 131213. We are not persuaded that the question presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. Court of Appeals No. 257709.

PEOPLE v CALDWELL, No. 131709; Court of Appeals No. 260957.

PEOPLE v MCGUIRE, No. 131877; Court of Appeals No. 260421.

KELLY, J. (*dissenting*). I would grant defendant's application for leave to appeal to consider whether defendant was denied a fair trial because of prearrest delay.

In 1981, defendant's brother was acquitted of felony murder charges that arose out of a shooting death that occurred in 1980. No charges were filed against defendant until 2004. Defendant contends that the prearrest delay denied him a fair trial.

Michigan applies a balancing test to determine if such a delay requires reversing a defendant's conviction. *People v Cain*, 238 Mich App 95 (1999). "A defendant has the burden of coming forward with evidence of prejudice resulting from the delay while the prosecutor has the burden of persuading the reviewing court that the delay was not deliberate and did not prejudice the defendant." *Id.* at 108.

In this case, 24 years elapsed between the shooting death and defendant's arrest. During that time, defendant's brother and defendant's brother's wife died. Both had provided alibi testimony at defendant's brother's trial, but they could not testify at defendant's trial. It is also unclear whether transcripts of the brother's trial exist and, if they do, whether they would be helpful to defendant in his defense. This is especially true because the focus of defendant's brother's trial was on defendant's brother's innocence, and not defendant's innocence. Accordingly, I would grant defendant's application for leave to appeal to further explore these questions in order to determine whether the prearrest delay prejudiced defendant.

PEOPLE v STEVEN SANDERS, No. 131915; Court of Appeals No. 260163.

PEOPLE v GATES, No. 131924; Court of Appeals No. 258266.

PEOPLE v CHRISTOPHER CLARK, JR, No. 131937; Court of Appeals No. 270293.

PEOPLE v SWINT, No. 131963; Court of Appeals No. 270964.

KELLY, J. I would grant leave to appeal.

PEOPLE v ROY WHITE, No. 131966; Court of Appeals No. 264594.

WEAVER and KELLY, JJ. We would direct the Court of Appeals to accept the defendant's Standard 4 brief.

PEOPLE v GARY SMITH, No. 132030; Court of Appeals No. 271025.

PEOPLE v ZIMMERMAN, No. 132251. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268409.

PEOPLE v VAN AUKER, No. 132253. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268922.

SPRINGING ACRES, INC v MICHIGANA HOLSTEINS, INC, No. 132258; Court of Appeals No. 259779.

PEOPLE v LEONARD LEWIS, JR, No. 132261. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269025.

PEOPLE v SIRBAUGH, No. 132262. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268969.

PEOPLE v JARRETT SWANIGAN, No. 132266; Court of Appeals No. 257144.

PEOPLE v CUTTS, No. 132267; Court of Appeals Nos. 260356, 243126.

PEOPLE v WELLON, No. 132271; Court of Appeals No. 259086.

OPTION ONE MORTGAGE CORPORATION v SUTTON, No. 132272; Court of Appeals No. 269401.

PEOPLE v AARON LLOYD, No. 132276; Court of Appeals No. 271516.

PEOPLE v BUENROSTRO, No. 132278; Court of Appeals No. 270219.

CIPRIANO v CIPRIANO, No. 132279; Court of Appeals No. 259818.

PEOPLE v ROY, No. 132283. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268588.

BOARD OF TRUSTEES OF THE DETROIT GENERAL RETIREMENT SYSTEM v CITY OF DETROIT, No. 132287; Court of Appeals No. 259592.

PEOPLE v WILKENS, No. 132289; Court of Appeals No. 260031.

PEOPLE v COHN, No. 132290; Court of Appeals No. 261567.

PEOPLE v ROUNDTREE, No. 132291; Court of Appeals No. 262328.

SAWUKAYTIS v DEPARTMENT OF TREASURY, No. 132298; Court of Appeals No. 258318.

PEOPLE v ROBERT GONZALEZ, No. 132299; Court of Appeals No. 271545.

PEOPLE v DUANE MONTGOMERY, No. 132300; Court of Appeals No. 272100.

PEOPLE v MICHAEL TAYLOR, No. 132304. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268731.

PEOPLE v SEALS, No. 132305; Court of Appeals No. 271093.

PEOPLE v BOONE, No. 132306. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268998.

PEOPLE v CLINTON WALKER, No. 132307. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272272.

PEOPLE v NICHOLAS ALLEN, No. 132308; Court of Appeals No. 270709.

PEOPLE v JAMES CARTER, JR, Nos. 132309, 132310; Court of Appeals Nos. 261412, 261413.

PEOPLE v GARRISON, No. 132312. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268735.

PEOPLE v MARION, No. 132313. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266069.

PEOPLE v WOLFE, No. 132314; Court of Appeals No. 273088.

Interlocutory Appeal

Leave to Appeal Denied December 29, 2006:

PEOPLE v LAWTON, No. 132260; Court of Appeals No. 266674.

Summary Dispositions January 4, 2007:

PEOPLE v GURDA, No. 132369. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Gogebic Circuit Court for a determination of whether the defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan,* 545 US 605 (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 Gogebic Circuit Court's order appointing counsel, in accord with the deadlines in effect at the time the defendant was denied counsel. See 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 the 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 remaining questions presented should be reviewed by this Court. Court of Appeals No. 271001.

PEOPLE v TESEN, No. 132713. 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 expedited consideration as on leave granted. The motion for stay is granted. The trial court proceedings are stayed pending the completion of this appeal. On motion of a party or 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. 273484.

Leave to Appeal Denied January 4, 2007:

NEELEY v PITTS, No. 132316; Court of Appeals No. 272169.

PEOPLE v HANSON, No. 132319; Court of Appeals No. 270022.

PEOPLE v LANE, No. 132320. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272849.

PEOPLE v SELLORS, No. 132321. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269396.

PEOPLE v EARLAND COLLINS, No. 132322; Court of Appeals No. 261217.

PEOPLE v CARLTON RIDER, No. 132323; Court of Appeals No. 272137.

PEOPLE v LOVEJOY, No. 132324; Court of Appeals No. 271997.

PEOPLE v SMALL, No. 132326, Court of Appeals No. 270385.

10 & SCOTIA PLAZA, LLC v ALL OCCUPANTS, No. 132331; Court of Appeals No. 269184.

PEOPLE v CHRISTIAN, No. 132335. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269359.

PEOPLE v MOLIK, No. 132336; Court of Appeals No. 270820.

PEOPLE v REINGARDT, No. 132337; Court of Appeals No. 271761.

PEOPLE v HUMPHREY, No. 132353. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268884.

PEOPLE v CARATTONI, No. 132356; Court of Appeals No. 271688.

PEOPLE v MALDONADO-ZAPON, No. 132358; Court of Appeals No. 272313.

PEOPLE v JIMMIE WILLIAMS, No. 132372. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272831.

PEOPLE v LONGGREAR, No. 132373. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268674.

PEOPLE v HINCKLEY, No. 132375; Court of Appeals No. 272025.

PEOPLE v SIERADZKI, No. 132377. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269236.

PEOPLE v WERTH, No. 132381; Court of Appeals No. 272075.

PEOPLE v CORDELL PRICE, No. 132386. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269233.

PEOPLE v BURKE, No. 132387; Court of Appeals No. 271607.

PEOPLE v O'QUINN, No. 132389. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269701.

PEOPLE v BENNER, No. 132391. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268677.

PEOPLE v WELCH, No. 132394. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268987.

KELLY, J. I would hold this case in abeyance for *Whorton v Bockting*, cert gtd 126 S Ct 2017; 164 L Ed 2d 778 (2006).

PEOPLE v BLADE, Nos. 132396, 132559; Court of Appeals Nos. 273032, 273033.

PEOPLE v ALLEN HUDSON, No. 132397. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269079.

RANDAZZO MECHANICAL HEATING & COOLING, INC v DILORENZO, No. 132405; Court of Appeals No. 269438.

GORMAN v COLOSKY, No. 132407; Court of Appeals No. 268650.

PEOPLE v WILL JACKSON, No. 132424. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269625.

PEOPLE v MICHAEL BATES, No. 132426. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269782.

PEOPLE v TODD, No. 132428. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268220.

MILLER v HEAD, No. 132449; Court of Appeals No. 269349.

PEOPLE v BURROW, No. 132451. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269028.

PEOPLE v ADAMS, No. 132452. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271897.

PEOPLE v COLLIER, No. 132456. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269087.

RANDOLPH v REISIG, No. 132464. The motion for immediate consideration is granted. The application for leave to appeal the October 3, 2006, judgment of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court prior to

the completion of the proceedings ordered by the Court of Appeals. Reported Below: 272 Mich App 331.

Summary Dispositions January 5, 2007:

INTERNATIONAL HOME FOODS, INC v DEPARTMENT OF TREASURY and LENOX, INC v DEPARTMENT OF TREASURY, Nos. 130542, 130543. Leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we hereby reverse the judgment of the Court of Appeals and reinstate the judgment of the Ingham Circuit Court for the reasons stated in the Court of Appeals dissent. Reported below: 268 Mich App 356.

CAVANAGH, J. (*dissenting*). I would affirm the Court of Appeals decision in this matter.

LANZO CONSTRUCTION COMPANY v WAYNE STEEL ERECTORS, No. 130992. On December 14, 2006, the Court heard oral argument on the application for leave to appeal the January 26, 2006, judgment of the Court of Appeals. The application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment that affirmed the circuit court's grant of summary disposition to the defendant. Fernando Agueros, the plaintiff in the underlying injury action on which the plaintiff sought indemnity, had a duty to proceed with reasonable caution for his own safety, *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 522 (2001). Agueros admitted at his deposition that he misjudged the distance to the column when he swung the rebar around that he was carrying and the leading ends of the rebar struck the column, causing his fall. Therefore, Agueros's negligence was at least partially responsible for his accident, so the plaintiff could not have been solely responsible for Agueros's accident, and MCL 691.991 is inapplicable. We remand this case to the Wayne Circuit Court for entry of an order granting the plaintiff's motion for summary disposition against the defendant. Court of Appeals No. 264165.

KELLY, J. I would deny leave to appeal.

BANKS v EXXON MOBIL CORPORATION, No. 131036. On December 14, 2006, the Court heard oral argument on the application for leave to appeal the March 16, 2006, judgment of the Court of Appeals. The application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals holding that the defendants were entitled to summary disposition on the issue of constructive notice of the dangerous condition of the gasoline pump that allegedly injured the plaintiff. A defendant has a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 328 (2004). This duty arises when the defendant has actual or constructive notice of the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995). Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements. *Kroll v*

Katz, 374 Mich 364, 372 (1965). Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law. *Id.* at 371 (citing *Cruz v City of Saginaw*, 370 Mich 476, 481 [1963]). Because a reasonable jury could conclude based on the facts presented to the trial court that the defendants should have discovered the defect, summary disposition was improperly granted. We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. Court of Appeals No. 257902.

KELLY, J. (*concurring*). I join the order reversing and remanding on the issue of notice. I write separately to discuss an issue not essential to the order, but nonetheless interesting: whether an adverse-inference jury instruction should be taken into consideration when ruling on a motion for summary disposition.

Plaintiff was injured at a gas station when the pump he was using to put gasoline in his automobile burst and sprayed gasoline in his face. Plaintiff sued the owner and the manager of the gas station, asserting premises liability. One of the station's cameras videotaped the pumps. Defendants could not produce a videotape that allegedly may have shown that defendants had notice that the pump in question was damaged before it injured plaintiff. As a result, the judge ruled that she would give the jury an instruction that allowed it to infer that the contents of the videotape would have been adverse to defendants. But the case did not go to trial because, soon after making the ruling, the judge granted summary disposition to defendants.

An issue not addressed in our order is whether the judge should have taken the adverse inference into consideration when ruling on the motion for summary disposition. It is an issue of first impression. This Court has stated that whether a summary disposition motion should be granted depends on whether there is evidence "sufficient to permit a reasonable jury to find"[1] for the nonmoving party. We have decided that a jury is able to take an adverse inference into account. I believe that it logically follows that the judge must draw the adverse inference when ruling on a motion for summary disposition.[2] Just as the jury should consider all the evidence before it, so too should the judge when ruling on a motion for summary disposition.

This determination is not only logical, it accords with courts outside our jurisdiction that have allowed an adverse inference to be considered when ruling on a summary disposition motion. See *Byrnie v Town of Cromwell Bd of Ed*, 243 F3d 93, 107 (CA 2, 2001), quoting *Kronisch v*

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[1] *Quinto v Cross & Peters Co*, 451 Mich 358, 367 (1996).

[2] The adverse inference is permissive in that a jury would be free to accept or reject it. However, in ruling on a motion for summary disposition, the judge should be required to draw the adverse inference when it favors the nonmoving party. Otherwise, the judge would not be viewing the evidence, as required, in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561 (2003).

United States, 150 F3d 112, 128 (CA 2, 1998) ("an inference of spoliation, in combination with 'some (not insubstantial) evidence' for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment"); *Larsen v Romeo*, 254 Md 220, 228 (1969) (considering an adverse inference when reviewing a ruling on a motion for a directed verdict).

Because the adverse inference here was relevant to the issue of notice, the trial judge erred in failing to take it into consideration when ruling on defendants' motion for summary disposition.

CORRIGAN, J. I would grant leave to appeal.

WEAVER, J. I would not peremptorily reverse, as I would grant leave to appeal.

Leave to Appeal Denied January 5, 2007:

TRI-COUNTY INTERNATIONAL TRUCKS v HILLS' PET NUTRITION, INC, No. 130671; Court of Appeals No. 255695.

CORRIGAN, J. (*concurring in part and dissenting in part*). I dissent from the order to the extent that it denies leave to appeal on the issue whether defendant has a contractual duty to indemnify plaintiff Tri-County International Trucks, Inc. I would reverse in part the judgment of the Court of Appeals for the reasons stated in Judge ZAHRA's partial dissent. I concur with the order to the extent that it denies leave to appeal on the remaining issues.

MARKMAN, J. I join the statement of Justice CORRIGAN.

In re MCCULLUM (DEPARTMENT OF HUMAN SERVICES v MCCULLUM), Nos. 132654, 132683; Court of Appeals Nos. 269326, 269327.

In re HAGGERTY (DEPARTMENT OF HUMAN SERVICES v HAGGERTY), No. 132684; Court of Appeals No. 269826.

In re PARKER (DEPARTMENT OF HUMAN SERVICES v PARKER), No. 132694; Court of Appeals No. 270109.

In re WEBER (DEPARTMENT OF HUMAN SERVICES v WEBER), No. 132709; Court of Appeals No. 269146.

In re WILLIAMS (DEPARTMENT OF HUMAN SERVICES v HUDSON), No. 132714; Court of Appeals No. 270397.

Leave to Appeal Denied January 10, 2007:

HIGHLAND PARK POLICEMEN & FIREMEN RETIREMENT SYSTEM v CITY OF HIGHLAND PARK, No. 131778; Court of Appeals No. 252424.

KELLY, J. I would grant leave to appeal.

PEOPLE v TERANGELUS JAMES, No. 131918; Court of Appeals No. 261723.

SOBIESKI v TAKATA SEAT BELTS, INC, No. 132088; Court of Appeals No. 268366.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 12, 2007:

In re MOUKALLED ESTATE (BAKIAN v NATIONAL CITY BANK), No. 130810. The application for leave to appeal the February 16, 2006, 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)(l). At oral argument, the parties shall address the following questions: (1) Under the facts of this case where the petitioner is seeking priority over other creditors with respect to the Heather Hills real estate, did the Court of Appeals appropriately invoke the doctrine of equitable lien to grant the petitioner a security interest in that real property, and, if not, by what method should the petitioner have secured an interest in the real property? (2) Was the "Security Agreement" subject to the recording requirements found for example in MCL 565.201, and, if so, did it meet those requirements? (3) Does the fact that the register of deeds accepted the "Security Agreement" for filing definitively prove compliance with a recording statute? 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: 269 Mich App 708.

PEREZ v FORD MOTOR COMPANY, No. 131655. The Michigan Manufacturers Association's motion for leave to file a brief amicus curiae is granted. The application for leave to appeal the June 6, 2006, 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). At oral argument, the parties shall address whether the record submitted to the trial court creates a genuine issue of material fact as to whether defendant Ford was on notice that Daniel Bennett was allegedly sexually harassing the plaintiff. 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. 249737.

WEAVER, J. (*concurring*). I concur in the order granting oral argument on whether to grant the application for leave to appeal but would *not* limit what issues should be briefed or argued.

Leave to Appeal Granted January 12, 2007:

MATTHEWS v REPUBLIC WESTERN INSURANCE COMPANY, No. 130912. The parties are directed to include the following among the issues to be briefed:

(1) This state's "wrongful conduct" rule prohibits a plaintiff from maintaining an action "if, in order to establish his action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." *Orzel v Scott Drug Co*, 449 Mich 550, 558 (1995).

(A) Did the Court of Appeals err when it determined that the causal connection between the plaintiff's injuries and his illegal conduct of driving on a suspended license was too attenuated for

application of the "wrongful conduct" rule, or should it be presumed foreseeable that an individual, whose license has been suspended for the reasons here, is not only more likely to become involved in an accident injuring another, but is also himself more likely to become involved in an accident and sustain injury?

(B) To what extent, in the context of this claim for personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*., does a statutory exception exist to the "wrongful conduct" rule? Compare *Orzel*, 449 Mich at 570-572, with *Garwols v Baker's Trust Co*, 251 Mich 420 (1930).

(C) If a statutory exception exists, is it properly assessed by the standards of the Restatement, Torts, 2d or by the traditional standards of statutory interpretation?

(D) If a statutory exception exists, is it relevant in the context of this case, in which the plaintiffs' claims are based on plaintiff Lewis Matthews III having sustained "accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle," MCL 500.3105(1), as the term "accidental" is defined in MCL 500.3105(4)? and

(E) Does a "safety statute" exception to the "wrongful conduct" rule exist, and, if so, how is such an exception to be defined?

(2) MCL 500.3102(1) provides that "[a] nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter."

(A) When the nonresident owner or registrant of a motor vehicle not registered in this state is a motor vehicle rental company, does the prohibition of MCL 500.3102(1) against operating or permitting a motor vehicle to be operated in this state "for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter" apply?

(B) If so, does the "calendar year" refer to the 12 months preceding the accidental bodily injury on which a claim for personal protection benefits is based, the calendar year in which the claim arises, the calendar year preceding the year in which the claim arises, to all of the foregoing, or to some other period equal to a calendar year?

The State Bar Negligence Law Section, Michigan Defense Trial Counsel, Inc., Michigan Trial Lawyers Association, and the Automotive

Fleet and Leasing Association 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. 251333.

Summary Disposition January 12, 2007:

KROON-HARRIS V STATE OF MICHIGAN, No. 129689. On November 1, 2006, the Court heard oral argument on the application for leave to appeal the July 14, 2005, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Court of Claims that dismissed plaintiff's complaint with prejudice. The long-term disability policy was provided by a group insurance plan approved by the Civil Service Commission. Pursuant to the terms of Civil Service Regulation 5.18, if the plaintiff felt aggrieved by a decision of an administrator of a group insurance plan, she was required to complain under the exclusive procedure set forth in that regulation. Her failure to exhaust administrative remedies precludes the possibility of relief outside the promulgated procedure. Further, any appeal from the Civil Service Commission lies in the appropriate circuit court, not the Court of Claims. Const 1963, art 6, § 28; *Viculin v Dep't of Civil Service*, 386 Mich 375, 385 (1971). Reported below: 267 Mich App 353.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent and would not peremptorily reverse because I would grant leave to appeal.

KELLY, J. (*dissenting*). I dissent from the decision to reverse the judgment of the Court of Appeals by order. In so deciding, the majority relies on an issue that was not raised or addressed by the parties in any court. Moreover, the majority's conclusory statements regarding jurisdiction do not answer the central question of why this case does not involve a matter of contract. Rather than act peremptorily, I would grant leave to appeal.

Plaintiff worked as a secretary for the Department of Natural Resources. She was enrolled in a long-term disability and income protection plan (LTD plan). She received LTD-plan benefits from 2001 to May 2003, when the defendant discontinued her benefits. Defendant contended that plaintiff had failed to demonstrate that she could no longer perform any reasonable occupation for which she could become qualified. Plaintiff filed suit in the Court of Claims, arguing that she had a contractual right to the benefits. Defendant contended that this case did not involve a contractual right, and, as such, the Court of Claims did not have jurisdiction. The Court of Appeals ruled in favor of plaintiff. And it was this issue that the parties brought to the Supreme Court.

But it is not this issue that the majority has addressed. Instead, it has decided the case on the basis of plaintiff's alleged failure to exhaust her administrative remedies. This issue was not raised by defendant in this Court. In fact, it was not raised in or addressed by any court. It is unfair to plaintiff for the majority to sua sponte decide that this issue is

controlling. At the very least, plaintiff should get a chance to respond. Also, the Court needs to decide why the issue was not waived, or at least forfeited, by defendant's failure to raise it below. Instead of going off on this tangent, we should grant leave to appeal to allow the parties to address this issue.

In its final sentence, the majority's order alludes to the issue actually discussed by the parties. Without any real connection to the rest of the order, the final sentence concludes that the circuit court was the appropriate venue for this case, rather than the Court of Claims. Absent from the order is any mention of the question whether plaintiff's LTD benefits are contractual. If this case is a contractual dispute, it is now undisputed that the Court of Claims would have jurisdiction. This question remains open and needs to be answered.

Because the majority's order leaves fundamental questions unanswered, it is inadequate. I would grant leave to appeal and order the parties to address whether the dispute is contractual, whether plaintiff exhausted her administrative remedies, and, if not, whether defendant waived the issue.

Leave to Appeal Denied January 12, 2007:

SPITZLEY v SPITZLEY, No. 130585; Court of Appeals No. 255345.

YOUNG, J. (*concurring*). I concur in the Court's decision to deny leave to appeal in this case. This case arises from the sale of a home and land from the estate of plaintiff's father. Plaintiff, in his capacity as personal representative of his father's estate, sold the home and land to his relatives by personal representative deed. In this action, plaintiff claims that the personal representative deed mistakenly included 40 acres of plaintiff's own property along with the estate's property. Thus, the primary issue was whether the 40-acre parcel was included in the deed mistakenly or intentionally. The trial court found that "[d]efendants have not presented an offer to purchase or any documentary evidence that supports their position. Overwhelming evidence persuades the Court that the personal representative's deed included the farmland legal description by mistake. *Defendants simply tried to take advantage of the mistake after it occurred*." (Emphasis added.) Justice MARKMAN cites the deed as factual support for defendants' claim that the 40 acres were intentionally included in the deed and asserts that "it was hardly frivolous for defendants to rely upon [the deed] to identify the extent of the property that had been purchased." However, the deed itself does not refute plaintiff's claim that the deed contained a mistake, and defendants have simply not provided any evidence to show that the description was anything other than a mistake. Justice MARKMAN also cites a July 2001 letter from the estate's attorney indicating that those 40 acres were estate property to be given to plaintiff after the mortgage was satisfied. However, the parties did not enter a purchase agreement until September 2002. In the interim, the quitclaim deed from the father to plaintiff was

recorded on December 26, 2001. After the deed was recorded, it was wholly unreasonable for defendants to rely on the clearly erroneous letter.[1]

Therefore, the trial court correctly found that there was *overwhelming evidence* that the deed contained a mistake and that defendants simply tried to take advantage of that mistake. This point is made emphatic by the fact that plaintiff had received his property from his father by *inter vivos* gift and did not take under his father's will. Defendants, relatives of plaintiff, fully knew this fact, and the only argument justifying enforcing the deed is that plaintiff intended to donate his land as a gift to the estate in which he had no interest. The trial court was thus fully justified in finding defendants' claim frivolous because they "had no reasonable basis to believe that the *facts* underlying [their] legal position were in fact true." MCL 600.2591(3)(a)(ii) (emphasis added).

Because there has been no showing that the trial court clearly erred in finding that the defendants had no evidence to support their position that the description in the deed was not a mistake, sanctions are appropriate.

MARKMAN, J. (*dissenting*). I respectfully dissent. Plaintiff, as a representative of an estate, sold a house and 40 acres to defendants. Plaintiff later filed suit to reform the deed because the 40 acres had been owned personally by plaintiff, not the estate. After granting summary disposition to plaintiff, the trial court imposed sanctions on defendants for filing frivolous counterclaims, and the Court of Appeals affirmed.

A party's claim is "frivolous" if that party "had no reasonable basis to believe that the facts underlying that party's legal position were in fact true" or "[t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(ii) and (iii). Defendants' claims, in my judgment, were not "devoid of arguable legal merit." Indeed no Michigan case expressly controls the precise issue presented: whether a representative of an estate is estopped from asserting a personal interest in real property which that representative has conveyed in his or her capacity as representative. In the absence of dispositive authority, defendants cited 23 Am Jur 2d, Deeds, § 289, p 264, as well as foreign cases, see, e.g., *Bliss v Tidrick*, 25 SD 533 (1910), in support of their contention that plaintiff should be precluded from reasserting an interest in the property in this case.

Moreover, defendants arguably possessed a "reasonable basis to believe that the facts underlying [their] legal position were in fact true." The deed itself explicitly included the 40 acres within its language. Although the deed may have granted the 40 acres by mistake, it was hardly frivolous for defendants to rely upon it to identify the extent of the property that had been purchased.

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[1] I am uncertain how the sibling's (Mark Spitzley) "understanding" of the transaction is relevant because he is not a party to the transaction and his affidavit does not show that he was privy to any relevant negotiations.

Defendants also presented evidence that all of the parties initially assumed that the land did not automatically pass to plaintiff upon his father's death. A July 18, 2001, letter from the first probate attorney, Gary Kasenow, stated:

> The 40 acres of farmland and farm buildings . . . shall be given to Michael Spitzley but he must pay off 1/2 of the mortgage balance owed,[1] the other 1/2 would be paid off by the other beneficiaries.

Some time later, a second attorney, William Jackson, was retained by personal representatives plaintiff and Lisa Klein. In a letter dated November 12, 2002, Jackson stated:

> Apparently, the entire real estate holdings of the decedent were included in the inventory of the estate. Unfortunately, this was incorrect, as the farm land has been previously deeded by the decedent to himself and to Michael Spitzley as joint tenants with full rights of survivorship . . . . This means that upon the death of the decedent, the title to this property passed to the survivor, Michael Spitzley, by operation of law, without the need of further probate. Therefore, it was error to include this land in the inventory of the estate.

Although plaintiff asserts in his brief that this letter is dated two days prior to the execution of the personal representative's deed, and therefore that the parties were aware of any mistake, defendants claimed they were not informed of the error until after the closing. The letter provides a reasonable basis for defendants' claim, since it was *dated* November 12, 2002, but there is no evidence that defendants *received* it before the closing. Other defense evidence, in addition to defendants' own testimony, included the affidavit of another sibling, Mark Spitzley, stating that "[his] understanding was that Tom and Kimberly Spitzley were purchasing the disputed 40 acres," and that plaintiff told him "that [plaintiff] was unhappy about the debt [plaintiff] had inherited by way of the mortgage." The two letters and the affidavit of Mark Spitzley are relevant because they suggest that the parties to the estate, including defendants, understood the estate to possess the 40 acres. In accordance with this understanding, the defendants could have reasonably believed that the plaintiff, as personal representative, intended to convey the 40 acres. Therefore, in my judgment the trial court clearly erred when it found that "[d]efendants have not presented . . . *any documentary evidence that supports their position*." (Emphasis added.)

While defendants' argument may not have deserved to prevail, defendants nonetheless presented a good-faith argument in support of

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[1] Defendants specifically argued that plaintiff, acting as the estate's personal representative, eventually agreed to transfer the 40 acres, in part, because he did not wish to pay off his portion of the mortgage.

their legal position and they possessed a deed that explicitly purported to grant them the property at issue. Because I do not believe that defendants' defenses and counterclaims were frivolous under MCL 600.2591, I would reverse the judgment of the Court of Appeals and strike the sanctions.

KELLY and CORRIGAN, JJ. We join the statement of Justice MARKMAN.

BATKO v BATKO, No. 131742; Court of Appeals No. 266766.

MARKMAN, J. (*dissenting*). I respectfully dissent and would remand to the trial court for it to interpret and apply the term "cohabitation" in the parties' consent judgment of divorce in accordance with traditional rules of interpretation. The term "cohabitation" is not made ambiguous simply because its meaning is in dispute, or because the term is susceptible to multiple definitions. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 317 (2002). Rather, an ambiguity exists in a contract "if two provisions of the same contract irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 467 (2003), or "when [a term] is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166 (2004) (emphasis in original). Only after a contract is found to be ambiguous may a trial court consider extrinsic evidence. *Klapp*, *supra* at 470-471. "[C]onsidering extrinsic evidence in the absence of ambiguous language is 'clearly inconsistent with the well-established principles of legal interpretation . . . .' " *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 49 (2005), quoting *Little v Kin*, 468 Mich 699, 700 n 2 (2003). Rather, absent ambiguous language, it is the obligation of the trial court to define contract terms in accordance with their "plain or common meanings," *People v Yamat*, 475 Mich 49, 55 (2006), and to "give effect to every word, phrase, and clause in a contract . . . ." *Klapp*, *supra* at 468.

On remand, I would counsel the trial court to bear in mind the following statement of this Court: "In lieu of the traditional approach to discerning 'ambiguity'—one in which only a few provisions are truly ambiguous and in which a diligent application of the rules of interpretation will normally yield a 'better,' albeit perhaps imperfect, interpretation of the law—the dissent would create a judicial regime in which courts would be quick to declare ambiguity and quick therefore to resolve cases and controversies on the basis of something other than the words of the law." *Lansing Mayor*, *supra* at 166. "A provision of law that is unambiguous may well be one that merely has a better meaning, as opposed to a clear meaning." *Id.* at 166 n 7.

PEOPLE v SANDY GORDON, No. 131909; Court of Appeals No. 261838.

MARKMAN, J. (*dissenting*). I would direct that oral argument be heard on the application for leave to appeal to determine whether attempted carrying a concealed weapon constitutes a "specified felony" under MCL 750.224f(6)(iii).

KELLY, J. I join the statement of Justice MARKMAN.

BENNETT v COOK CHEVROLET-PONTIAC-OLDSMOBILE-BUICK, INC, No. 132153. Costs of $250 are assessed against the plaintiff-appellant in favor

of the defendant-appellee under MCR 7.316(D)(1) for filing a vexatious appeal. Court of Appeals No. 268980.

KELLY, J. I would not assess costs because insufficient evidence exists that the appeal was vexatious.

ALLGAIER v CITY OF WARREN, No. 132195; Court of Appeals No. 268102.

KELLY, J. (*dissenting*). Plaintiff is a 50-year-old blind man. He resides in the city of Warren and routinely goes for walks by himself. He uses a cane to avoid tripping or running into things. On two separate occasions, plaintiff fell in front of 32849 Grinsell Drive. The cause of the falls was a $1\frac{1}{2}$-inch discrepancy in height between adjoining sidewalk slabs.

Plaintiff brought suit alleging that defendant city had failed to maintain the sidewalk in reasonable repair, in violation of its statutory duty. Defendant moved for summary disposition. The trial court granted the motion. The court found that an issue of fact existed about whether the sidewalk was in reasonable repair. However, it also concluded that plaintiff had failed to show that defendant had notice of the defect. The Court of Appeals affirmed in a split decision. The majority disagreed with the trial court on the notice issue, but found that plaintiff had not rebutted the inference of reasonable repair. Judge DAVIS dissented. He agreed with the majority's notice analysis, but would have found that a genuine issue of fact existed with regard to the issue of reasonable repair.

The Governmental Tort Liability Act (GTLA) provides that "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The term "highway" expressly includes sidewalks. MCL 691.1401(e). MCL 691.1402a(2) provides that defects of less than two inches create a rebuttable inference that the municipal corporation maintained the sidewalk in reasonable repair.[1]

The issue in this case is whether plaintiff has presented sufficient evidence to rebut the inference that the particular area of sidewalk where plaintiff fell was in reasonable repair.[2] By providing for a rebuttable inference, not an irrebuttable presumption, the Legislature intended a case-by-case determination about whether a height differential under two inches gives rise to liability.

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[1] MCL 691.1402a(2) provides:

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

[2] Since the height differential causing plaintiff's falls was less than two inches, the rebuttable inference of MCL 691.1402a(2) applies, and it was plaintiff's duty to rebut this inference.

The plaintiff presented evidence that the sidewalk slab he tripped on was weathered and in poor condition. There was also testimony from the city engineer that the city had adopted a policy of replacing sidewalk slabs if the height differential was three-quarters of an inch or more. The engineer surmised that the city adopted this policy because it had decided that a height differential of three-quarters of an inch or more represented a safety hazard.

I think that the evidence plaintiff presented is sufficient to rebut the inference created by MCL 691.1402(a)(2). Defendant city, which is more familiar with the condition of its roadways than anyone, has decided that any differential more than three-quarters of an inch is unsafe and needs remedying. This decision is entitled to weight. Since (1) the height differential causing plaintiff's fall violated the city's own policy, and (2) there was also evidence that the slab in question was weathered and in poor condition, the inference that the sidewalk was in reasonable repair at this particular location has been rebutted. I would reverse and remand for further proceedings.

CAVANAGH, J. I join the statement of Justice KELLY.

In re DUBOSE/WARREN (DEPARTMENT OF HUMAN SERVICES V DUBOSE), No. 132749; Court of Appeals No. 268652.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 19, 2007:

REAUME V JEFFERSON MIDDLE SCHOOL, No. 132154. 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 (1) whether the plaintiff's injury, which occurred during the course of wrestling activity with the defendant coach, was proximately caused by the defendant's alleged failure to give adequate notice of the initial takedown to the wrestling mat, and (2) if so, whether defendant's conduct "was so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). 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. 268071.

WEBBER V HILBORN, No. 132174. 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 the Court of Appeals erred in holding that plaintiff adequately stated a prima facie case of legal malpractice, in light of the observation in *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586 (1994), that "a plaintiff 'must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit' "; and, if so, whether it is necessary to remand this case to the trial court for a determination of whether further amendment of the complaint to allege proximate cause would be futile. 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. 267582.

FARMERS INSURANCE EXCHANGE v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 132179. 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 an injured motorcyclist may recover personal protection insurance benefits from the no-fault insurer of an owner of the vehicle involved in the accident but not listed in the owner's policy, pursuant to MCL 500.3114(5)(a), and whether such a recovery is proper when the owner's no-fault policy does not in terms afford such coverage or purports to exclude it. The parties may file supplemental briefs within 49 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., the Insurance Institute of Michigan, and the Michigan Assigned Claims Facility (organized pursuant to MCL 500.3171 *et seq*.) 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: 272 Mich App 106.

Leave to Appeal Denied January 19, 2007:

AZZAR v CITY OF GRAND RAPIDS, No. 130310. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 4, 2006. The application for leave to appeal the September 22, 2005, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 260438.

DYNA GRIND SERVICES, LLC v CITY OF RIVERVIEW, No. 131860; Court of Appeals No. 255825.

MARKMAN, J. (*dissenting*). I dissent and would remand to the trial court for it to determine whether, under the actual language of the contract, defendant or plaintiff was in breach. A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467 (2003), or "when [a term] is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166 (2004) (emphasis in the original). Only after a contract has been found to be ambiguous may a trial court consider extrinsic evidence. *Klapp, supra* at 470-471. "[C]onsidering extrinsic evidence in the absence of ambiguous language is 'clearly inconsistent with well-established principles of legal interpretation . . . .' " *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 49 (2005), quoting *Little v Kin*, 468 Mich 699, 700 n 2 (2003). Where there is an ambiguity, ascertainment of the meaning of contract language presents a question of fact that must be decided by a jury. *Klapp, supra* at 469. Absent ambiguity, it is the obligation of the court to interpret the contract as written. *Id*.

After reviewing the language of the contract, I believe that the instant contract is not ambiguous, and that the trial court therefore erred in admitting extrinsic evidence and in submitting the question of interpretation to the jury. Under the contract, Dyna Grind Services (DGS) has

"exclusive rights to grind *acceptable waste at the Land Preserve*" landfill. (Emphasis added.) "Acceptable grindable material" is limited to construction and demolition debris, and "nonfriable" asbestos type of roofing, delivered by Cans Unlimited and by "such other of City's customers as the City directs to the grinding area." Thus, the definition of "acceptable grindable material" indicates that the city has the *discretion* to direct this waste to the Land Preserve landfill. The city has no obligation to direct *all* of the waste collected by the city's customers to Land Preserve, and DGS has exclusive rights to grind only "acceptable grindable material" directed to the Land Preserve landfill. Paragraph 8 sets forth the minimum grinding capacity required of DGS and indicates that all the deliveries of "acceptable grindable material" made at the Land Preserve landfill must be processed in accordance with Land Preserve policy before they are transported to DGS's grinding area; paragraph 6 sets forth the payment to which DGS is entitled for grinding the acceptable waste. There is neither a conflict among these provisions nor any other basis for finding the contract to be ambiguous

In re LHUILLIER (DEPARTMENT OF HUMAN SERVICES V LHUILLIER), No. 132804; Court of Appeals No. 268112.

HORTON V ARNESON, No. 132833; Court of Appeals No. 274053.

Leave to Appeal Granted January 24, 2007:

MCDONALD V FARM BUREAU INSURANCE COMPANY, No. 132218. The parties shall include among the issues to be briefed: (1) whether a contractual limitations period may be avoided on the basis of the doctrine of waiver or the doctrine of estoppel, and (2) whether the one-year limitations period contained in the insurance policy is tolled from the time a claim is made until the insurance company denies the claim. The motion to consolidate is denied. Court of Appeals No. 259168.

Summary Dispositions January 24, 2007:

PEOPLE V LEVIE WILLIAMS, No. 132420. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of whether *Crawford v Washington*, 541 US 36 (2004), precludes admission of the deceased victim's prior testimony on retrial. We do not retain jurisdiction. Court of Appeals No. 265851.

PEOPLE V JABOW, No. 132509. 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. 269954.

PEOPLE V DEJESUS, No. 132511. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the sentence of the Wayne Circuit Court that ordered defendant to pay attorney fees, and we

remand this case to the trial court for a decision on attorney fees that considers defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240 (2004). At the trial court's discretion, the decision may be made based on the record without the need for a formal evidentiary hearing. If the court decides to order defendant to pay attorney fees, it shall do so in a separate order. *Id*. On remand, defendant may file a motion in the trial court to modify the judgment of sentence as to the amount of credit for time served. In all other respects, the application for 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. 272762.

Leave to Appeal Denied January 24, 2007:

BURKE v DETROIT PUBLIC SCHOOLS, No. 131422; Court of Appeals No. 262983.

KELLY, J. I would grant leave to appeal.

DEPARTMENT OF TRANSPORTATION v WEAVER, Nos. 131824, 131825; Court of Appeals Nos. 257798, 257799.

PEOPLE v LEGRONE, No. 132244. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 268937.

PEOPLE v TERRENCE WILLIAMS, No. 132256. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268261.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v XAVIER SMITH, No. 132265; Court of Appeals No. 266652.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal January 26, 2007:

BETTEN AUTO CENTER, INC v DEPARTMENT OF TREASURY, BETTEN MOTOR SALES, INC v DEPARTMENT OF TREASURY, and BETTEN-FRIENDLY MOTORS COMPANY v DEPARTMENT OF TREASURY, Nos. 132343-132345, 132347-132349. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address: (1) how the use tax exemption in MCL 205.94(1)(c) for property purchased for resale may best be reconciled with the statutory language of MCL 205.93(2), and (2) how MCL 205.94(2) affects this analysis. The parties may file supplemental briefs within 49 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The Taxation Section of the State Bar of Michigan and both the Detroit Automobile Dealers Association and the Michigan Automobile Dealers Association 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: 272 Mich App 14.

Summary Disposition January 26, 2007:

PEOPLE v YAHNE, No. 131326. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence for the second count charging the defendant with second-degree criminal sexual conduct. The prosecution dismissed one count of second-degree criminal sexual conduct at the preliminary examination, and the defendant entered a plea of *nolo contendere* to a single count of second-degree criminal sexual conduct as a third-felony offender. The trial court therefore erred in imposing a sentence for the second count of second-degree criminal sexual conduct. We remand this case to the Kent Circuit Court, which may, in its discretion, decide whether resentencing is necessary. In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 267933.

Leave to Appeal Denied January 26, 2007:

PEOPLE v WILLIAM CARTER, No. 129614; Court of Appeals No. 260369.

KELLY, J. (*dissenting*). I dissent from the decision to deny the application for leave to appeal from the trial court's denial of defendant's motion for relief from judgment. Defendant demonstrated the good cause and actual prejudice required by MCR 6.508(D). Therefore, the case should be remanded for resentencing.

Defendant brought his motion pursuant to MCR 6.508(D), contending, among other things, that offense variable 3 (OV 3), which addresses "physical injury to a victim,"[1] was improperly scored. In denying the motion, the trial judge found that defendant had failed to show why he had not raised this issue on direct appeal. In addition, he observed that, even if good cause had been established, "on resentencing [he] would impose the identical sentence [originally imposed]." The Court of Appeals also denied relief to defendant.

In order to succeed on a motion for relief from judgment in this Court, a defendant must demonstrate (1) good cause for failure to raise during the prior appeal the grounds raised now, and (2) actual prejudice to the defendant arising from the irregularities alleged. MCR 6.508(D)(3). In a case like this one, which challenges the sentence, "actual prejudice" exists where the sentence is invalid. MCR 6.508(D)(3)(b)(iv).[2]

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[1] MCL 777.33.

[2] The question arises whether MCR 6.508(D)(2) is applicable here. It states: "The court may not grant relief to the defendant if the motion alleges grounds for relief which were decided against the defendant in a

GOOD CAUSE

Defendant contends that "good cause" exists for his failure to previously assert that OV 3 was improperly scored. He argues that his trial counsel omitted to raise and preserve this issue and was ineffective because of it. I agree. This Court has previously noted that " '[g]ood cause' can be established by proving ineffective assistance of counsel." *People v Kimble*, 470 Mich 305, 314 (2004). "To demonstrate ineffective assistance, it must be shown that defendant's attorney's performance fell below an objective standard of reasonableness and this performance prejudiced him." *Id.*

It is undisputed that 100 points were attributed to OV 3 when defendant was sentenced. It is also undisputed that MCL 777.33(2)(b), as it existed at the time, stated that OV 3 should not be scored at 100 points if the sentencing offense was homicide, as it was here. It appears that trial counsel ignored the language of the statute and failed to object when the court scored OV 3. The erroneous score given to OV 3 increased defendant's total OV score from 26 points to 126 points and heightened the sentencing guidelines range. See MCL 777.61. Counsel's failure to object cannot be viewed as trial strategy or any other rational, deliberate action. Accordingly, defendant has satisfied the "good cause" element of MCR 6.508(D)(3)(a).

ACTUAL PREJUDICE

Next, defendant must demonstrate "actual prejudice." MCR 6.508(D)(3)(b). As a result of the erroneous OV 3 score, the sentencing

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prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision[.]" Defense counsel never raised the sentencing issue on direct appeal before the Court of Appeals or this Court. In fact, the Court of Appeals stated in its opinion that defendant "does not currently argue that the guidelines were wrongly scored or that the sentence was based on inaccurate information; thus, we will not consider any challenge to the sentence." *People v Carter*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2002 (Docket No. 225049), p 4. Similarly, defendant did not raise the issue in his motion pro se for reconsideration or supporting brief before this Court. Defendant did raise the issue, however, in his supplemental brief pro se in support of his motion for reconsideration before this Court. However, defendant filed his supplemental brief pro se on December 23, 2002. This Court issued its order on December 30, 2002. Therefore, it appears that this Court did not review defendant's supplemental brief pro se and consider his challenge to the scoring of OV 3. Accordingly, this issue was never considered, much less "decided against the defendant in a prior appeal or proceeding," and MCR 6.508(D)(2) is not applicable here.

guidelines range was 270 to 450 months or life. MCL 777.61. Defendant was sentenced to a minimum of 288 months' imprisonment. If, as the parties agree, the proper score of 25 points for OV 3 had been ascribed, the sentencing guidelines range would have been lowered to 225 to 375 months or life. MCL 777.61.

This Court previously recognized that a defendant is entitled to be scored on the basis of accurate information, which includes accurately scored guidelines. *People v Francisco*, 474 Mich 82, 88, 89 (2006). "[W]hen a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information." *Id.* at 89 n 7. As this Court noted in *Francisco*, the resulting sentence is invalid. *Id.* at 89, quoting *People v Miles*, 454 Mich 90, 96 (1997).

As noted above, "actual prejudice" exists when the sentence is invalid. MCR 6.508(D)(3)(b)(iv). The prejudice that resulted here is apparent when one considers where defendant's sentence fell within the initial guidelines range compared to where it falls within the corrected range. The bottom of the erroneous guidelines range was 270 months,[3] and, in reliance on that range, defendant was sentenced to a minimum of 288 months. Once the 100 points are removed and the 25 points are added, the corrected guidelines range becomes 225 to 375 months or life. MCL 777.61. Therefore, defendant's minimum sentence of 288 months is now closer to the middle of the guidelines range. Although the initial sentencing judge intended that defendant be sentenced at the lower end of the range, defendant is now being sentenced in the middle. As this Court noted in *Francisco,* "requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends." *Francisco, supra* at 92.

THE NEED FOR RESENTENCING

The final issue in this case concerns whether resentencing was warranted because the second trial judge indicated that he would have imposed the same sentence regardless of the sentencing error.[4] In *Francisco*, this Court stated that "[r]esentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *Id.* at 89 n 8, citing *People v Mutchie*, 468 Mich 50, 51 (2003). In *Francisco*, the trial court had not indicated that it would have imposed the same sentence regardless of the scoring error. Therefore, the above-quoted language from *Francisco* is dictum, a statement not necessary for the holding of the case.

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[3] MCL 777.61.

[4] Specifically, in the order denying the motion for relief from judgment, Judge James Redford stated that "even if the defendant were to be given the relief requested as relates to OV 3 . . . this Court on resentencing would impose the identical sentence [originally imposed.]"

However, this Court did make a similar statement in *Mutchie.* In *Mutchie*, the sentencing court departed from the sentencing guidelines range. After an OV scoring error was discovered, the trial court, at a hearing on the defendant's motion for resentencing, indicated that it would have given the same sentence regardless of the error. This Court approved the Court of Appeals statement that the scoring issue was moot. Even had there been error, resentencing was not warranted given the trial court's remarks that it would have imposed the same sentence. *Mutchie*, *supra* at 51.

There is one important factual distinction between this case and *Mutchie*. In *Mutchie*, the *same* sentencing judge imposed the initial sentence and refused to alter it after having been shown the guidelines error. In this case, Judge H. David Soet sentenced defendant. Nearly 4½ years later, Judge James Redford, who had replaced Judge Soet, denied defendant's motion for relief from judgment, indicating that he would impose the same sentence. Therefore, the initial sentencing judge did not indicate that he would have imposed the same sentence. Presumably, had he been given the correct guidelines range, he would have sentenced defendant near the bottom of the range. Also, Judge Redford did not consider Judge Soet's considered view about where on the range defendant should be sentenced.

Accordingly, because both good cause and actual prejudice exist and the case is distinguishable from *Mutchie*, I believe this Court should remand it to the circuit court for resentencing.

CAVANAGH, J. I join the statement of Justice KELLY.

MARKMAN, J. (*dissenting*). I would remand to the circuit court for resentencing. Where the original sentencing judge sentenced defendant to a term of imprisonment less than 7 percent above the bottom of the guideline range and where, because of an error in scoring, such sentence would now be 28 percent above the bottom of the correct guideline range, I believe that defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82 (2006). The need for resentencing is not mitigated, in my judgment, by the fact that a *substitute* sentencing judge has indicated in an order denying relief from judgment that, even if the guidelines were correctly scored, "this Court on resentencing would have imposed the identical sentence." Before it can be concluded that the *original* sentencing judge was genuinely determined to sentence defendant to a term of precisely 288 months—notwithstanding what the correct high and low ends of the guideline range are—defendant is entitled to a new sentencing hearing. If, after such hearing, the new sentencing judge is persuaded that the original sentencing judge would have sentenced defendant to a term of 288 months—regardless of the high and low ends of the guideline range—or otherwise decides that 288 months is the proper sentence, then so be it.

GLENN v MARTENS, No. 131257; Court of Appeals No. 258233.

In re RAHE (DEPARTMENT OF HUMAN SERVICES v RAHE), No. 132877; Court of Appeals No. 270232.

Summary Dispositions January 29, 2007:

PALARCHIO v AUTOMOBILE CLUB INSURANCE ASSOCIATION, No. 128620. The motion for reconsideration of this Court's November 3, 2006, order is considered. In lieu of granting the motion, we clarify that this case is remanded to the Wayne Circuit Court only for reconsideration of its decision regarding room and board expenses. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 258847.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the trial court only for reconsideration of its decision regarding room and board expenses.

I would grant reconsideration and would grant leave to appeal in this case to reconsider *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005).

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal to reconsider *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005).

PEOPLE v WITHERSPOON, No. 132433. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, with direction that it order preparation of the transcripts of the defendant's December 6, 2004, probation violation and sentencing hearings and of any other hearings the court deems necessary to its consideration of the defendant's appeal. The defendant's brief shall be filed 42 days after the transcripts are forwarded to the defendant. The prosecutor's responsive brief, if any, shall be filed 21 days after service of the defendant's brief. The Court of Appeals shall then reconsider the defendant's application for leave to appeal. Court of Appeals No. 269579.

Leave to Appeal Denied January 29, 2007:

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, No. 128882. The motion for reconsideration of this Court's November 1, 2006, order is considered, and it is granted. In light of the fact that the circuit court did not impose sanctions on Kalkaska County or Crawford County in this case, but only imposed sanctions on Cohl, Stoker, Toskey & McGlinchey, P.C., and the parties concede that if sanctions are paid by Cohl, Stoker, Toskey & McGlinchey, P.C., the 46th Circuit Trial Court will not receive a double recovery of its attorney fees, we vacate that part of our November 1, 2006, order that vacated the Court of Appeals opinion in part and remanded this case to the Court of Appeals. On reconsideration, the application for leave to appeal the May 3, 2005, judgment of the Court of Appeals is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 266 Mich App 150.

PEOPLE v HADDEN, No. 128995; Court of Appeals No. 253084.

KELLY, J. I would vacate the decision of the Court of Appeals and remand this case for a new trial.

PEOPLE v LUTZE, No. 130513. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263579.

L LOYER CONSTRUCTION COMPANY v CITY OF ANN ARBOR and L LOYER CONSTRUCTION COMPANY v DEPARTMENT OF TRANSPORTATION, Nos. 130669, 130670; Court of Appeals Nos. 263030, 263031.

HEIDELBERG BUILDING, LLC v DEPARTMENT OF TREASURY, No. 130835. Reported below: 270 Mich App 12.

O'FLYNN v DEPARTMENT OF COMMUNITY HEALTH, No. 130997; Court of Appeals No. 265826.

NOWAK v GANTZ, No. 131293; Court of Appeals No. 258688.

CLULEY v LANSING BOARD OF WATER AND LIGHT, No. 131316; Court of Appeals No. 264208.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v AUTO-OWNERS INSURANCE COMPANY, No. 131401; Court of Appeals No. 266677.

TWIN CITY FIRE INSURANCE COMPANY v SECOND CHANCE BODY ARMOR, INC, No. 131554; Court of Appeals No. 265697.

PEOPLE v CLINTON TAYLOR, No. 131567; Court of Appeals No. 258848.

COLUMBIA CASUALTY COMPANY v LADI, No. 131576; Court of Appeals No. 266102.

PEOPLE v DYER, No. 131594; Court of Appeals No. 258565.

KASBEN v HOFFMAN, Nos. 131601-131603; Court of Appeals Nos. 247297, 253201, 254295.

PEOPLE v SIGGERS, No. 131604. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266307.

PEOPLE v LAPINE, No. 131621. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266825.

PEOPLE v STONE, No. 131702; Court of Appeals No. 269392.

PEOPLE v HALSTEAD, No. 131784; Court of Appeals No. 260065.

PEOPLE v DARNELL MITCHELL, No. 131817; Court of Appeals No. 261372.

PEOPLE v SCOTT ANDERSON, No. 131857; Court of Appeals No. 260593.

MARIA v JUDSON CENTER, INC, No. 131907; Court of Appeals No. 266394.

PEOPLE v MAYES, No. 131951; Court of Appeals No. 259184.

PEOPLE v DUENAZ, No. 131973; Court of Appeals No. 270702.

HAMILTON'S HENRY THE VIII LOUNGE v DEPARTMENT OF TREASURY, HAMILTON'S BOGART'S, INC v DEPARTMENT OF TREASURY, JO-BET v DEPARTMENT OF TREASURY, GARTER BELT, INC v DEPARTMENT OF TREASURY, Nos. 131976-131979; Court of Appeals Nos. 267537-267540.

PEOPLE v NEVINS, No. 132011; Court of Appeals No. 260758.

BIORESOURCE, INC v CITY OF DETROIT, Nos. 132163, 132177; Court of Appeals No. 266668.

PEOPLE v JORDAN, No. 132173; Court of Appeals No. 259436.

JACKSON v OSGOOD, No. 132183; Court of Appeals No. 265510.

NAVARRO v ISTERABADI, No. 132184; Court of Appeals No. 256654.

LAZARIDIS v LAZARIDIS, Nos. 132236, 132362; Court of Appeals Nos. 272285, 272239.

PERAZZA v EMMET COUNTY ROAD COMMISSION, No. 132248; Court of Appeals No. 269722.

MOORE v DEPARTMENT OF CORRECTIONS, No. 132257; Court of Appeals No. 269883.

PEOPLE v TIMOTHY JENKINS, Nos. 132269, 132270; Court of Appeals Nos. 258581, 263154.

PEOPLE v LITTLE, No. 132274; Court of Appeals No. 260100.

PEOPLE v SALOME GONZALES, JR, No. 132277; Court of Appeals No. 260596.

PEOPLE v HENRY HOWARD, No. 132296. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268947.

PEOPLE v AL-DILAIMI, No. 132325. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268781.

PEOPLE v MANES, No. 132330. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269178.

PEOPLE v MATTHEW BRYANT, No. 132332; Court of Appeals No. 260768.

PEOPLE v VAUGHN, No. 132333; Court of Appeals No. 260488.

BAJA v BILL, No. 132338; Court of Appeals No. 269686.

GLIEBERMAN AVIATION, LLC v DEPARTMENT OF TREASURY, No. 132340; Court of Appeals No. 261599.

PEOPLE v CIARAMITARO, No. 132346; Court of Appeals No. 272827.

CORNELL v ERP OPERATING LIMITED PARTERSHIP, No. 132350; Court of Appeals No. 269331.

PEOPLE v MASON, No. 132357; Court of Appeals No. 271731.

PEOPLE v TIMOTHY WILLIAMS, No. 132359; Court of Appeals No. 260904.

PEOPLE v RONALD WRIGHT, No. 132360; Court of Appeals No. 260813.

PEOPLE v BURLEIGH, No. 132361; Court of Appeals No. 260636.

PEOPLE v MISHALL, No. 132367; Court of Appeals No. 261511.

BUSH v DETROIT SCHOOL DISTRICT, No. 132370; Court of Appeals No. 268362.

PEOPLE v GARCIA-DORANTES, No. 132376. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269176.

PEOPLE v FOSTER, No. 132378; Court of Appeals No. 263091.

PEOPLE v BOMER, No. 132379; Court of Appeals No. 271447.

PEOPLE v DOGGENDORF, No. 132380; Court of Appeals No. 271959.

LAFOUNTAIN v DEPARTMENT OF CORRECTIONS, No. 132382; Court of Appeals No. 270072.

OPHOFF v HOME DEPOT, No. 132383; Court of Appeals No. 267921.

WILLIAMS v TVT RECORDS, INC, No. 132388; Court of Appeals No. 259210.

PEOPLE v EAMES, No. 132392; Court of Appeals No. 269927.

PEOPLE v ODOMS, No. 132393; Court of Appeals No. 272136.

PEOPLE v POTTS, No. 132395. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269309.

EUG, LLC v RPL OF MICHIGAN, INC, No. 132398; Court of Appeals No. 268337.

DIETRICH R BERGMANN LIVING TRUST v PILOT CORPORATION, No. 132408; Court of Appeals No. 260665.

PEOPLE v EPPS, No. 132415; Court of Appeals No. 262287.

PEOPLE v PAMELA BOOKER, No. 132416; Court of Appeals No. 262286.

PEOPLE v MICHAEL BROWN, No. 132418; Court of Appeals No. 261321.

PEOPLE v MITROVICH, No. 132419; Court of Appeals No. 271923.

PEOPLE v DUENAZ, No. 132423; Court of Appeals No. 271981.

PEOPLE v HOOPER, No. 132425; Court of Appeals No. 261569.

PEOPLE v WILLIE SIMS, JR, No. 132427; Court of Appeals No. 260757.

COHEN v REDCOAT TAVERN, INC, No. 132430; Court of Appeals No. 269044.

PEOPLE v DARYLE STEWART, No. 132435; Court of Appeals No. 259358.

GARCIA v TITAN INSURANCE COMPANY, No. 132440; Court of Appeals No. 272613.

PEOPLE v SHERWOOD, No. 132444. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268715.

PEOPLE v COOPSHAW, No. 132453; Court of Appeals No. 272289.

PEOPLE v CURTO, No. 132454; Court of Appeals No. 272798.

PEOPLE v VARNER, No. 132455; Court of Appeals No. 261379.

PEOPLE v KEITH PERRY, No. 132458; Court of Appeals No. 261095.

PEOPLE v MARSILI, No. 132460; Court of Appeals No. 261419.

HARAJLI v HARAJLI, No. 132465; Court of Appeals No. 262651.

PEOPLE v NICKSON, No. 132467; Court of Appeals No. 262288.

PEOPLE v TROBY BENSON, No. 132468; Court of Appeals No. 261094.

PEOPLE v MATHEWS, No. 132470; Court of Appeals No. 261346.

PEOPLE v HARRELL, No. 132472. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 270870.

BERGESEN & CLARK, PLC v BUEGELEISEN, No. 132475; Court of Appeals No. 271662.

PEOPLE v MELVIN ANDERSON, No. 132477; Court of Appeals No. 260698.

PEOPLE v OFFICER, Nos. 132479-132481; Court of Appeals Nos. 270973-270975.

PEOPLE v DARRYL PORTER, No. 132482; Court of Appeals No. 271707.

PEOPLE v MUNIZ, No. 132485; Court of Appeals No. 259291.

PEOPLE v AUBREY COTTON, No. 132489. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273035.

PEOPLE v AGUILAR, No. 132494; Court of Appeals No. 261725.

PEOPLE v NORTH, No. 132496; Court of Appeals No. 260549.

PEOPLE v BRANTLEY, No. 132503. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268965.

PEOPLE v PAILLE, No. 132505; Court of Appeals No. 272705.

PEOPLE v STARKS, No. 132508; Court of Appeals No. 272149.

PEOPLE v MICHAEL ANDREWS, No. 132510. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 267278.

PEOPLE v CORY ROBERTS, No. 132512; Court of Appeals No. 272606.

STARDEVANT v DEPARTMENT OF CORRECTIONS, No. 132593; Court of Appeals No. 272735.

Reconsiderations Denied January 29, 2007:

CRAWFORD COUNTY v OTESEGO COUNTY, No. 128880. Summary disposition entered at 477 Mich 921. Reported below: 266 Mich App 150.

KELLY, J. I would grant reconsideration.

CRAWFORD COUNTY v OTESEGO COUNTY, No. 128884. Leave to appeal denied at 477 Mich 923. Reported below: 266 Mich App 150.

SAMOSIUK v SAMOSIUK, No. 129424. Leave to appeal denied at 476 Mich 854. Court of Appeals No. 260612.

PEOPLE v EDGAR, No. 129777. Leave to appeal denied at 477 Mich 865. Court of Appeals No. 263780.

ROBERTSON v BLUE WATER OIL COMPANY, No. 130100. Leave to appeal denied at 477 Mich 897. Reported below: 268 Mich App 588.

WEAVER, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal and ask the parties to brief the issue whether *Mann v Shusteric Enterprises Inc,* 470 Mich 320 (2004), was correctly decided.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would grant defendant's application for leave to appeal for the reasons set forth in *Robertson v Blue Water Oil Co,* 477 Mich 897 (2006).

LIGGETT RESTAURANT GROUP, INC v CITY OF PONTIAC, No. 130287. Leave to appeal denied at 477 Mich 858. Court of Appeals No. 256571.

CAVANAGH, J. I would grant reconsideration.

WEAVER, J. I would grant reconsideration and, on reconsideration, would reverse this Court's September 15, 2006, order denying leave, and grant leave to appeal.

KELLY, J. I would grant reconsideration.

MARKMAN, J., did not participate.

PEOPLE v WALTER MILLER, No. 130358. Leave to appeal denied at 477 Mich 905. Court of Appeals No. 261528.

PEOPLE v QUADA, No. 130425. Summary disposition entered at 477 Mich 891. Court of Appeals No. 256068.

KELLY, J. I would grant reconsideration.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v LATTING, No. 130463. Summary disposition entered at 477 Mich 852. Court of Appeals No. 255964.

ROWE v CHILDREN'S HOSPITAL OF MICHIGAN, No. 130534. Leave to appeal denied at 477 Mich 905. Court of Appeals No. 264379.

PEOPLE v JENNINGS, No. 130650. Leave to appeal denied at 477 Mich 905. Court of Appeals No. 267563.

PEOPLE v TIMOTHY RODRIGUEZ, No. 130719. Leave to appeal denied at 476 Mich 856. Court of Appeals No. 262838.

PEOPLE v BRADDOCK, Nos. 130892, 130989. Leave to appeal denied at 477 Mich 880, 906. Court of Appeals Nos. 256619, 265030.

ALLAN v ALLAN, No. 130902. Leave to appeal denied at 476 Mich 859. Court of Appeals No. 259126.

PEOPLE v JAMES SANDERS, No. 130911. Leave to appeal denied at 477 Mich 873. Court of Appeals No. 261993.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the circuit court for a determination of indigency and appointment of appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005).

LEZELL v HILLER, INC, Nos. 130943, 130944. Leave to appeal denied at 477 Mich 859. Court of Appeals Nos. 256415, 257384.

ALLEN v DAIMLERCHRYSLER CORPORATION, No. 130969. Leave to appeal denied at 476 Mich 859. Court of Appeals No. 265427.

FATA v ROSCOMMOM COUNTY ROAD COMMISSION, No. 130996. Leave to appeal denied at 476 Mich 859. Court of Appeals No. 257936.

STREETS v CWC TEXTRON, INC, No. 131062. Leave to appeal denied at 476 Mich 860. Court of Appeals No. 266741.

PEOPLE v BAUBLITZ, No. 131066. Leave to appeal denied at 477 Mich 867. Court of Appeals No. 263118.

PEOPLE v SEYMORE, No. 131069. Leave to appeal denied at 477 Mich 906. Court of Appeals No. 263724.

PEOPLE v ESPIE, No. 131083. Leave to appeal denied at 477 Mich 907. Court of Appeals No. 263620.

CASSISE v WALLED LAKE CONSOLIDATED SCHOOLS, No. 131100. Leave to appeal denied at 476 Mich 866. Court of Appeals No. 257299.

PEOPLE v WILLIAM WILLIS, No. 131111. Summary disposition entered at 477 Mich 877. Court of Appeals No. 243439.

WEAVER, J. I would grant reconsideration and, on reconsideration, would reverse this Court's September 29, 2006, order reversing the Court

of Appeals and trial court decisions and remanding to the trial court for a new trial, and would affirm defendant's jury convictions of second-degree murder and felony-firearm.

PEOPLE v ROE, No. 131118. Leave to appeal denied at 476 Mich 867. Court of Appeals No. 255635.

LEAPHART v BOTSFORD COLLISION AND SERVICE, INC, No. 131258. Leave to appeal denied at 476 Mich 868. Court of Appeals No. 258697.

LAFFIN v CAPLAN, No. 131394. Leave to appeal denied at 476 Mich 869. Court of Appeals No. 265125.

PEOPLE v SCHUH, No. 131416. Leave to appeal denied at 477 Mich 869. Court of Appeals No. 268913.

Leave to Appeal Denied January 31, 2007:

BUCHANAN v DEPARTMENT OF TRANSPORTATION, No. 131843; Court of Appeals No. 267856.

YOUNG v SPECTRUM HEALTH-REED CITY CAMPUS, No. 132014; Court of Appeals No. 259644.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v PIGEE, No, 132128; Court of Appeals No. 270511.

KELLY, J. I would grant leave to appeal.

PEOPLE v STRAWS, No. 132229; Court of Appeals No. 271026.

KELLY, J. I would grant leave to appeal.

PEOPLE v ORLANDO WILLIS, No. 132240. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268332.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v RONALD JONES, No. 132243; Court of Appeals No. 260499.

PEOPLE v GEYER, No. 132252; Court of Appeals No. 270662.

KELLY, J. (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted, and I believe that the defendant is entitled to a corrected presentence report.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal February 2, 2007:

MATHER INVESTORS, LLC v LARSON, No. 131654. 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 submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the circuit court properly dismissed this case under MCR 2.202(A) for plaintiff's failure to substitute in a timely manner the estate

of Alice Maddock, the deceased debtor, when Maddock was never a party to the action; (2) whether the presence of Maddock's estate is "essential to permit the court to render complete relief" under MCR 2.205(A), and, if so, whether the circuit court should have analyzed the effect of plaintiff's failure to join the estate under MCR 2.205(B); (3) whether, on the facts of this case, Maddock's estate is a necessary party, in light of the Uniform Fraudulent Transfer Act's definition of "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured," MCL 566.31(c); (4) whether the UFTA, MCL 566.31 *et seq.*, generally requires a debtor to be joined in an action, when the debtor no longer has an interest in the property at issue; and (5) whether the UFTA affects the significance of the *Paton v Langley*, 50 Mich 428 (1883), and *Bixler v Fry*, 157 Mich 314 (1909), cases discussed in the Court of Appeals opinion. The Probate & Estate Planning and Elder Law and Advocacy sections of the State Bar of Michigan and the Michigan Health and Hospital Association 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: 271 Mich App 254.

CORRIGAN, J. (*concurring*). I concur in the order to schedule oral argument on the application in this case. I write separately in an effort to clarify the questions posed. This case requires us to ask whether the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.,* requires joinder of a debtor who has not retained an interest in the transferred property, particularly when the debt has not been reduced to a judgment.

At common law,

> [i]n the greater number of jurisdictions it is held, apparently on the theory that having parted with all interest in the property the grantor can no longer be affected by any decree pertaining to the property, that the debtor is not a necessary party to the action, although the debtor may be a proper party. [37 Am Jur 2d, Fraudulent Conveyances and Transfers, § 189, p 666.]

In accord, courts nationwide have held that, under states' uniform fraudulent transfer acts and at common law, the debtor is not a necessary party. See, e.g., *Citizens Bank of Massachusetts v Grand Street Parkway, LLC*, 21 Mass L Rep 594 (Mass Super, 2006) (not reported in NE2d) ("The [Massachusetts Fraudulent Transfers Act] identifies an avenue of relief for a creditor aggrieved by a fraudulent transfer; there is no requirement of a suit against the original debtor."); *Springfield Gen Osteopathic Hosp v West*, 789 SW2d 197, 201 (Mo App, 1990) ("as the property has passed beyond the grantor's control, . . . he has no interest in the suit and is not a necessary party"); *Sheepscot Land Corp v Gregory*, 383 A2d 16, 24 (Me, 1978) (the fraudulent grantor is not an indispensable party to an action against his grantees, particularly when the conveyance is declared void and the grantor's original status quo is re-established);

Frell v Frell, 154 So 2d 706, 708 (Fla Dist Ct App, 1963) ("While there is a recognized conflict of authority as to whether the debtor-grantor is a necessary or indispensable party defendant in an action to set aside a fraudulent conveyance, our Supreme Court has held that he is not.").

In contrast, however, at least at common law, the debtor *may* be considered a necessary party if the claim has not been reduced to a judgment. See 37 Am Jur 2d, Fraudulent Conveyances and Transfers, § 189, p 666 ("Where the creditor has not reduced its claim to judgment, the debtor is an indispensable party since, in such circumstances, the debtor has the right to be heard in regard to the validity or amount of the claim."); *Emarine v Haley,* 892 P2d 343, 348 (Colo App, 1994) (grantor who parts with his entire interest in real property is not a necessary party to a *judgment creditor's* fraudulent conveyance suit against a grantee).

Authorities also diverge regarding how these questions apply when a debtor has died. E.g., 37 Am Jur 2d, Fraudulent Conveyances and Transfers, § 191, p 667 ("where it appears that during his lifetime the debtor has parted with all title and interest in the property, the debtor's administrator or executor is not a necessary party defendant in an action to set aside the fraudulent conveyance"); *Tsiatsios v Tsiatsios,* 144 NH 438, 445; 744 A2d 75 (1999) (the plain language of New Hampshire's Uniform Fraudulent Transfers Act did not require the estate to be named as a party in an action against the executrix-transferee to set aside a fraudulent transfer because the act does not require that a judgment be entered against the transferor before action may be taken against the transferee). But see *Tcherepnin v Franz*, 439 F Supp 1340, 1343 (ND Ill, 1977) ("the setting aside of the conveyance as fraudulent would restore the property to the Executor of the . . . [e]state as far as the . . . creditor of the . . . [e]state . . . is concerned. This restoration of property to the Executor . . . makes the Executor a necessary party, so that the court's decree, if any, will be binding upon it.").

The central question posed by this case is, of course, whether the language of Michigan's UFTA requires joinder of the debtor, particularly in light of the definition of "claim" as "a right to payment, *whether or not* the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." MCL 566.31(c) (emphasis added). The other authorities I have listed may shed light on this question, particularly if they address statutory language similar to our own. Overall, however, the lack of a clear answer to the question at common law simply reinforces the fact that the language of the UFTA, as the Legislature's codification of this area of law, must guide the inquiry.

BROWN V MAYOR OF DETROIT, Nos. 132016, 132017. 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 submit supplemental briefs within 42 days of the date of this order addressing whether an employee of a public body must report to an outside agency or higher authority to be protected by the Whistleblowers' Protection Act, MCL 15.361 *et seq*., and, if so, what statutory language supports that

conclusion. They should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 271 Mich App 692.

PEOPLE v DENDEL, No. 132042. 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 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. 247391.

Summary Dispositions February 2, 2007:

PEOPLE v DAVID SMITH, No. 132198. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. The Court of Appeals shall then remand the case to the Van Buren Circuit Court, which shall, in accordance with Administrative Order No. 2003-03, determine whether the defendant is indigent and, if so, appoint counsel to represent the defendant at an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the failure to timely seek appellate review was caused by the ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470 (2000). If the trial court rules that the defendant's appellate counsel was ineffective, the Court of Appeals shall treat the defendant's application as having been timely filed. It shall then grant or deny the application, or otherwise exercise its authority under MCR 7.216(A)(7). Court of Appeals No. 272188.

In re CHESTER (DEPARTMENT OF HUMAN SERVICES v CHESTER), No. 132448. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and direct that court to decide the case on an expedited basis. Court of Appeals No. 272775.

KELLY, J. (*concurring*). I agree with this Court's decision to remand this case to the Court of Appeals for consideration as on leave granted. I write separately to highlight the unusual facts of this case.

The Oakland Circuit Court, Family Division, entered an order terminating respondent's parental rights to her minor son. Respondent filed a request for the appointment of appellate counsel. Notwithstanding the fact that respondent filed her request more than 14 days after the court terminated her parental rights[1] the trial court granted her request and appointed appellate counsel. Appellate counsel filed a claim of appeal on respondent's behalf on September 5, 2006, which the Court of Appeals denied. Respondent filed a motion for reconsideration.

The Court of Appeals denied the motion, reasoning that it could not accept a delayed application for leave to appeal because more than 63 days had elapsed since the trial court terminated respondent's parental rights. See MCR 3.993(C)(2). It appears, on the basis of the Court of

[1] MCR 7.204(A)(1).

Appeals reference to MCR 3.993(C)(2)[2], that it would have treated the claim of appeal as an application for leave to appeal, had it been filed within 63 days. I believe that this would have been the proper course to take. On remand, it should be noted that the 63rd day following the entry of the order terminating respondent's parental rights was Labor Day. MCR 1.108(1) provides that, if the last day of the period is a holiday, the period runs until the end of the next day.

Therefore, respondent's September 5, 2006, claim of appeal, which the Court of Appeals properly treated as an application for leave to appeal, was filed within 63 days following the order terminating respondent's parental rights. Accordingly, because the appeal was timely filed, the case has been remanded for consideration as on leave granted.

CORRIGAN, 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. The Court of Appeals did not err in dismissing respondent's claim of appeal for lack of jurisdiction.

In this case, the trial court entered an order terminating respondent's parental rights to her son. In order to perfect an appeal of right, respondent was required to either file a claim of appeal or seek the appointment of appellate counsel within 14 days of the entry of the order terminating her parental rights. MCR 3.977(I)(1)(c), 7.204(A)(1)(c). Here, respondent waited until 48 days after entry of the order terminating parental rights to request the appointment of counsel. The trial court nonetheless appointed counsel, and a claim of appeal was filed on respondent's behalf 64 days after entry of the order terminating parental rights.

The Court of Appeals dismissed the claim of appeal for lack of jurisdiction because respondent "failed to request the appointment of appellate counsel within 14 days of the entry of the July 3, 2006 order terminating her parental rights. MCR 3.977(I)(2), 3.993(A)(2), 7.203(A)(2), and 7.204(A)(1)(c)." Unpublished order of the Court of Appeals, entered September 15, 2006 (Docket No. 272775). Respondent moved for reconsideration of the dismissal of the claim of appeal. The Court of Appeals denied reconsideration, and then stated: "Furthermore, this Court cannot accept a delayed application for leave to appeal as more than 63 days have elapsed since the Oakland Circuit Court, Family Division entered the July 3, 2006 order terminating appellant's parental rights. MCR 3.933(C)(2) [sic, 3.993(C)(2)] and 7.203(B)(4)." Unpublished order of the Court of Appeals, entered October 25, 2006 (Docket No. 272775).

The court rules cited by the Court of Appeals fully support its dismissal of the claim of appeal. The time limit for an appeal of right is jurisdictional. MCR 7.204(A). An appeal of right from an order terminating parental rights must be taken within 14 days after entry of the order. MCR 7.204(A)(1)(c). If a request for the appointment of appellate counsel is made within 14 days, the claim of appeal must be filed within 14 days

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[2] The Court of Appeals order transposed the numbers of the court rule and mistakenly referenced MCR 3.933(C)(2).

of the request for counsel. MCR 3.977(I)(1) and (2). In short, to perfect a claim of appeal, respondent was required to file either a claim of appeal or a request for the appointment of appellate counsel within 14 days after the entry of the order terminating her parental rights.

Here, it is *undisputed* that respondent failed to file either a claim of appeal or a request for counsel within the time required by the rules. Thus, the Court of Appeals correctly determined that it lacked jurisdiction and dismissed the claim of appeal.

This Court's order does not explain why it is upsetting the Court of Appeals application of the jurisdictional rules. In her concurring statement, Justice KELLY purports to divine an unstated intent by the Court of Appeals to treat "the claim of appeal as an application for leave to appeal, had it been filed within 63 days." *Ante* at 1013. She further opines "that this would have been the proper course to take." *Id.* She indicates that because of the Labor Day holiday, respondent's claim of appeal, *if treated as an application for leave to appeal*, would have been timely because the last day of the period was a holiday, and the period thus ran until the end of the next day under MCR 1.108(1).

I do not dispute Justice KELLY's calculation that, because of the Labor Day holiday, the 63 days for filing a delayed application for leave to appeal did not expire until the end of the day after the holiday. *But her calculation is entirely irrelevant to the issue before us.* That is because respondent did *not* file a delayed application for leave to appeal. Nor did the Court of Appeals treat the claim of appeal as a delayed application. On the contrary, the Court of Appeals dismissed the claim of appeal because respondent did not satisfy the jurisdictional requirements for filing a *claim of appeal*—the order explained that respondent did not request counsel within 14 days of the order terminating her parental rights.

Justice KELLY has misconstrued the Court of Appeals order denying reconsideration as reflecting some sort of hidden intent to treat the claim of appeal as a delayed application. But the order expresses no such intent. The Court of Appeals merely observed, *after* denying reconsideration, that, "*[f]urthermore*, this Court cannot accept a delayed application for leave to appeal as more than 63 days *have* elapsed since the" entry of the order terminating parental rights. (Emphasis added.) This language reflects that the Court of Appeals was simply observing, *after* denying reconsideration, that, *as of that date*, it was by then too late for respondent to file a delayed application. That is why the Court of Appeals stated that more than 63 days "*have*" elapsed. It did *not* remotely purport to say that the 63-day period *had* expired on the day after Labor Day, and that if the period had not expired on that day, it would have treated the claim of appeal as a delayed application. Thus, the record does not support Justice KELLY's view that the Court of Appeals harbored an unexpressed desire to treat the claim of appeal as a delayed application.

Accordingly, I would deny leave to appeal because the Court of Appeals did not err in its application of the jurisdictional court rule provisions.

YOUNG, J. I join the statement of Justice CORRIGAN.

Leave to Appeal Denied February 2, 2007:

CC MID WEST, INC v MCDOUGALL, No. 131829; Court of Appeals No. 265667.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal, but do so on the basis that plaintiff failed to state a valid claim of tortious interference with a contract or business expectancy. In particular, I believe that plaintiff failed to introduce sufficient evidence that defendants' communication about the potential effect of continued employment by plaintiff on the truckers' self-contribution rights amounted to a " 'per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship' " with plaintiff. *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131 (2002) (citation omitted). Rather, defendants demonstrated that they communicated the information as part of a legitimate plan-related activity, i.e., offering beneficiaries detailed plan information in order to help them decide whether to remain with the plan. *Varity Corp v Howe*, 516 US 489, 502-503 (1996). Therefore, plaintiffs failed to show that defendants committed tortious interference with a contract or business expectancy.

I disagree, however, with the analysis of the Court of Appeals that, because the manner in which the pension fund was administered was allegedly a factor in plaintiff's claims, the instant suit is subject to the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*., preemption. Although offering beneficiaries pension plan information in order to help them decide whether to remain with a plan constitutes "plan-related" activity, I do not believe that the application of Michigan tort law to the communication of allegedly fraudulent information is preempted. Rather, Michigan's tort law "affect[s] employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v Delta Air Lines*, 463 US 85, 100 n 21 (1983). The imposition of common-law tort liability is an area of the law historically left to the states, and there is no indication that Congress intended that such authority be preempted by ERISA. See *Firestone Tire & Rubber Co v Neusser*, 810 F2d 550, 555-556 (CA 6, 1987).

PEOPLE v VANGEISON, No. 132015. We are not persuaded that the questions presented should be reviewed by this Court. Defendant is entitled to early parole eligibility under MCL 791.234(13). See *People v Kelly*, 474 Mich 1026 (2006). Court of Appeals No. 254117.

PEOPLE v NORTON, No. 132196; Court of Appeals No. 270887.

KELLY, J. I would grant the application for leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

MARKMAN, J. I would grant the application for leave to appeal for the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006).

LASALLE BANK NA v ORR, Nos. 132689, 132690; Court of Appeals Nos. 274042, 274583.

In re HANSON (DEPARTMENT OF HUMAN SERVICES v HANSON), No. 132942; Court of Appeals No. 271110.

In re VALENTE (VALENTE v ROETMAN), No. 132943; Court of Appeals No. 272058.

In re CAMPBELL (DEPARTMENT OF HUMAN SERVICES v CAMPBELL), No. 132957; Court of Appeals No. 270610.

Reconsiderations Denied February 2, 2007:

PEOPLE v BRIAN HILL, No. 130546. Leave to appeal denied at 477 Mich 897. Reported below: 269 Mich App 505.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant the motion for reconsideration and grant defendant's application for leave to appeal for the reasons set forth in my dissent to the Court's order of October 27, 2006, denying leave to appeal in this case. 477 Mich 897 (2006). I continue to believe that there is a substantial question whether the Legislature intended in MCL 750.145c(2) to punish persons who download preexisting child pornographic images from the Internet and then burn them onto a CD for personal use as severely as persons who physically coerce children into engaging in sexual activities in order to create pornographic images for sale and profit. Moreover, as I have also set forth, I believe that there are significant legal implications arising from this question for other types of Internet downloading.

In re SCHILL and *In re* HARDING (DEPARTMENT OF HUMAN SERVICES v HARDING), Nos. 132048, 132049. Leave to appeal denied at 477 Mich 879. Court of Appeals Nos. 267501, 267526.

In re NISWONGER (DEPARTMENT OF HUMAN SERVICES v NISWONGER), No. 132302. Leave to appeal denied at 477 Mich ___. Court of Appeals No. 266343.

Summary Dispositions February 7, 2007:

PEOPLE v MAXON, No. 131854. By order of December 13, 2006, the prosecuting attorney was directed to answer the application for leave to appeal the July 26, 2006, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Lapeer Circuit Court for resentencing. The defendant was sentenced under the judicial sentencing guidelines even though all of the offenses he was convicted of

occurred after the effective date of the legislative sentencing guidelines, MCL 777.1 *et seq*. On remand, the Lapeer Circuit Court shall sentence the defendant within the appropriate legislative 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. Court of Appeals No. 267481.

HARVLIE v JACK POST CORPORATION, No. 132235. 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. 270678.

CORRIGAN, J. (*concurring*). I concur in the order of remand, but I continue to adhere to the views that I expressed in my concurring statement in *Donoho v Wal-Mart Stores, Inc*, 474 Mich 1057 (2006).

Leave to Appeal Denied February 7, 2007:

HUNTSMAN v GERRISH TOWNSHIP, No. 130068. On August 11, 2006, the Court directed the clerk to schedule oral argument on whether to grant the application for leave to appeal the October 6, 2005, order of the Court of Appeals or take other peremptory action. On September 21, 2006, and December 5, 2006, we received stipulations signed by counsel for certain parties agreeing to the dismissal of certain plaintiffs, to the vacation of the order disqualifying Roscommon Circuit Judge Michael Baumgartner, and to the dismissal of this application for leave to appeal if the disqualification order were vacated and Judge Baumgartner reassigned to the case. In light of the stipulations, the order directing the Clerk to schedule oral argument is vacated, and the application for leave to appeal is denied without prejudice to any future motions that the parties may wish to bring in the Roscommon Circuit Court regarding the vacation of the disqualification order and potential reassignment of this case to Judge Baumgartner. Court of Appeals No. 262216.

PEOPLE v CHANDLER, No. 131884; Court of Appeals No. 259430.
KELLY, J. I would grant leave to appeal.

PEOPLE v HORTON, No. 132206; Court of Appeals No. 259838.
KELLY, J. I would grant leave to appeal.

GARGES v TODD, No. 132281; Court of Appeals No. 260084.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BERNARD HILL, No. 132311; Court of Appeals No. 271351.
KELLY, J. I would remand this case to the trial court for resentencing.

PEOPLE v WITHERSPOON, No. 132368. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269172.

KELLY, J. I would request the prosecutor to provide proof of service of the amended information.

Interlocutory Appeal

Leave to Appeal Denied February 7, 2007:

MAY v TITAN INSURANCE COMPANY, No. 131903; Court of Appeals No. 266417.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal February 9, 2007:

DRAKE v CITIZENS INSURANCE COMPANY, No. 130855. 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 may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 270 Mich App 22.

LIBERTY HILL HOUSING CORPORATION v CITY OF LIVONIA, No. 131531. 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 *Pheasant Ring v Waterford Twp*, 272 Mich App 436 (2006), was correctly decided. They may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 258752.

LAKE FOREST PARTNER 2, INC v DEPARTMENT OF TREASURY, No. 132013. 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 may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 271 Mich App 244.

MARTIN v THE RAPID INTER-URBAN TRANSIT PARTNERSHIP, No. 132164. 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 may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 271 Mich App 492.

SHEPARD v M & B CONSTRUCTION, LLC, No. 132351. 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: (1) whether the proofs submitted at trial were sufficient to satisfy the standard for general contractor liability that is set forth in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54 (2004); and (2) whether

the trial court should have granted summary disposition or a directed verdict in defendant's favor based on this issue. 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. 261484.

CAVANAGH, J. I would deny leave to appeal.

Leave to Appeal Granted February 9, 2007:

PEOPLE v MURPHY, No. 132421. The parties shall include among the issues to be briefed: (1) whether trial counsel's failure to respond to the prosecutor's interlocutory application for leave to appeal, which resulted in the reversal of a pretrial motion to suppress evidence, should be viewed as structural error under *United States v Cronic*, 466 US 648 (1984), or whether it should be reviewed under the two-part standard for evaluating claims of ineffective assistance of counsel enunciated in *Strickland v Washington*, 466 US 668 (1984); and (2) whether, under either standard, the appropriate remedy is reversal of the defendant's conviction and remand for a new trial, or whether a second appellate review of the trial court's suppression ruling should be conducted with the defendant being afforded constitutionally adequate representation. The application for leave to appeal as cross-appellant remains pending. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Until further order from this Court, we direct the Court of Appeals, in all cases involving preconviction appeals by the prosecution, to inform defense counsel in writing that they must file a timely response to the application. Cf. MCR 6.005(H)(3). In the alternative, defense counsel may promptly communicate to the Court of Appeals in writing that the client has directed defense counsel not to respond to the prosecution's interlocutory appeal. Court of Appeals No. 258397.

Summary Disposition February 9, 2007:

PEOPLE v NICHOLAS JACKSON, No. 125250. By order of July 21, 2006, we remanded this case to the Oakland Circuit Court for an evidentiary hearing and directed the trial court to make additional findings regarding the defendant's request to present evidence regarding the defendant's stepbrother's alleged prior false accusation of sexual abuse. On order of the Court, the evidentiary hearing having been held and the Oakland Circuit Court's findings having been received, we reverse the October 21, 2003, judgment of the Court of Appeals, and we remand this case to the Oakland Circuit Court for a new trial. Upon retrial, the defendant must be afforded the opportunity to introduce testimony that the complainant has previously been induced by his father to make false allegations of sexual abuse against other persons disliked by the father. MRE 404(b). Such testimony concerning prior false allegations does not implicate the rape shield statute. MCL 750.520j. Further, the father's hearsay state-

ment made to the police about the event in controversy should not be admitted because it constituted error in light of *Crawford v Washington*, 541 US 36 (2004). Court of Appeals No. 242050.

WEAVER, J. (*dissenting*). I dissent and would deny leave to appeal because evidence of the nine-year-old victim's alleged prior false accusation of sexual abuse was inadmissible under MRE 608(b). The trial court did not err by excluding that evidence from the trial. Moreover, if there was any error, it was harmless beyond a reasonable doubt.

This Court knows everything it needs to know to resolve this case. Defendant, the victim's 19-year-old, 240-pound stepbrother, claims he woke up to find his penis in the mouth of his nine-year-old, 75-pound stepbrother. The victim, who is below the age of consent, claims that defendant was awake and made him do it. Defense counsel sought to introduce testimony from other witnesses that the victim had made a prior false allegation of sexual abuse.

Defendant's counsel made the following offer of proof at trial:

> We would be able to present evidence that [the victim] was removed from his mother when Anthony, Sr. and Cheryl Hines, Anthony Sr.'s mother, made, induced [the victim] to make allegations, false allegations of sexual molestation against Charlotte Hines' then fiancé. We would be able to offer testimony indicating that that case was investigated and it was found by the investigating authority that those statements were false.

Direct, in-court testimony about the victim's prior conduct provided by individuals other than the victim is inadmissible under MRE 608 as extrinsic evidence. MRE 608(b) provides:

> Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

On its face, MRE 608(b) bars the proposed direct testimony regarding the victim's alleged prior false allegation. Because the proposed testimony was not to be elicited during cross-examination, it is a waste of time and an insult to the victim and the trial court to remand this case on this issue.

Even assuming that a criminal defendant can be prejudiced by the exclusion of inadmissible evidence, any error in its exclusion in this case is harmless beyond a reasonable doubt.

YOUNG, J. (*dissenting*). I respectfully dissent from the order reversing the judgment of the Court of Appeals and remanding this case to the Oakland Circuit Court for a new trial. A jury convicted defendant of three counts of criminal sexual conduct. This case has been argued twice in this Court and been remanded to the trial court—all in aid of providing defense counsel with multiple opportunities satisfactorily to provide *some* evidence that there was error requiring reversal. Notwithstanding that this case has been sufficiently complex to warrant such an unusual expenditure of judicial resources, having become frustrated with the futility of this sustained effort, the Court now simply reverses the jury verdict by order, the better to avoid having specifically to articulate why the verdict must be reversed and identify the errors on which this decision is predicated. Given the fact that no one, not even *defendant*, contests the fact that defendant's penis was in his nine-year-old stepbrother's mouth on the night of November 16, 2000, I fail to see how the two evidentiary errors cited by the majority are anything but harmless. Therefore, this Court should simply affirm defendant's convictions.

The only material dispute at trial concerned *why* defendant's penis was in his stepbrother's mouth that night. Defendant argued that the nine-year-old complainant, AMH, was in fact the sexual aggressor, acting at the behest of Tony Hines, the complainant's father, as part of a conspiracy to have defendant removed from the family home. According to defendant, as he slept, AMH performed fellatio on him so that Mr. Hines could catch them in the act, accuse defendant of sexually abusing AMH, and have defendant permanently out of his house and his life. This theory of defense was fully presented at trial. The jury considered and roundly rejected this story, convicting defendant of three counts of criminal sexual conduct after two hours of deliberation.

As noted, this case has a long procedural history in this Court. We have heard oral argument on defendant's application for leave to appeal, full oral arguments after granting that application, and now we are considering the case after remanding for an evidentiary hearing in the Oakland Circuit Court. After all this, the majority, through an order, points to two evidentiary errors and reverses defendant's convictions. Neither withstands scrutiny.

According to the majority, the trial court erred by admitting Mr. Hines's statement to the police because under *Crawford v Washington*, 541 US 36 (2004), admitting the statement violated defendant's Sixth Amendment right to confront his accusers. Assuming a *Crawford* violation, the error is still subject to a harmless error review. See *Delaware v Van Arsdall*, 475 US 673, 681 (1986). Because defendant objected to the admission of the statement, the proper standard of review is for a preserved constitutional error, which holds that an error is harmless "if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Mass*, 464 Mich 615, 640 n 29 (2001) (quoting the standard announced in *Neder v United States*, 527 US 1, 18 [1999]) (quotation marks omitted).

In this case, Mr. Hines told the police that he witnessed the fellatio, separated the boys, and told AMH's mother about the fellatio. According to Mr. Hines's statement, he entered the room at the precise moment the

fellatio occurred, and he promptly reported that activity to the police. His version of the events bolsters defendant's theory that the fellatio was a trap. Furthermore, Mr. Hines's statement is largely cumulative of defendant's *own admission* that his penis was in his nine-year-old stepbrother's mouth. Because Mr. Hines's statement adds no additional incriminating evidence against defendant and supports defendant's theory of defense, its admission was harmless beyond a reasonable doubt.

The majority also concludes that the trial court erred by excluding evidence that AMH and Mr. Hines allegedly had previously colluded to falsely accuse another man of sexual abuse. The primary error with this conclusion is that there is absolutely *no evidence* that AMH and Mr. Hines previously colluded to falsely accuse anyone of sexual abuse. This point is made abundantly clear by the fact that defendant never made any actual offer of proof of evidence to this effect. See *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 242050), p 7 ("Jackson has not made the requisite offer of proof to justify introduction of the evidence."). In addition, defense counsel was questioned by this Court during both oral arguments held on this case regarding what his proofs entailed regarding the alleged prior false allegation of sexual abuse. On both occasions, defense counsel was unable to provide an answer. Finally, at the hearing on remand ordered by this Court concerning defendant's offer of proof, defense counsel was unable to state what each of the proffered witnesses might say regarding evidence of the prior alleged collusion and, as to most, *defense counsel admitted that he had never spoken to his witnesses and had no personal knowledge regarding what their testimony might be*. Thus, as late as the hearing on remand, defense counsel offered no specific line of testimony about which any single witness (or the collection of them) would testify, much less that he had actual proofs that the prior alleged false allegation of sexual contact with AMH was the product of collusion. Apparently the majority has determined that this finding of fact was erroneous despite the fact that defendant has not pointed to anything in the record contradicting the trial court's holding.

Even if defendant had made a proper offer of proof, there is no proper basis for admitting the evidence (whatever it may be). First, as Justice WEAVER correctly points out, MRE 608(b) bars the use of extrinsic evidence of specific instances of conduct to attack a witness's credibility. Nonetheless, the majority apparently believes that the evidence is substantively admissible under MRE 404(b) as proof of a plan, scheme, or system between Mr. Hines and AMH. The majority declares that defendant "must be afforded the opportunity to introduce" this testimony of a common scheme of collusion. This holding completely usurps the trial court's function as the gatekeeper of evidence without any testing of the evidence under the rules of evidence. The most egregious aspect of this holding is that the majority makes this demand of the trial court without knowing what defendant intends to introduce to support his theory of a common scheme.

Furthermore, a prior act of collusion to fabricate an allegation of sexual abuse does not meet the similarity requirement under MRE 404(b) to serve as a similar scheme with defendant's theory that AMH operated

as a sexual aggressor to "create" an act of sexual abuse. *People v Sabin (After Remand)*, 463 Mich 43, 63 (2000). Here, defendant does not claim that he, like the "witness," was *falsely accused* of sexual abuse. Rather, defendant claims that the victim was actually the *sexual aggressor* in this case. The dissimilarity between the two acts precludes the admission of the alleged prior false allegation.

Finally, even assuming that the evidence is properly admissible under MRE 404(b), the trial court's error is harmless. Because this error is a preserved non-constitutional error, defendant has the burden of establishing that the exclusion more probably than not resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484 (1999). Introduction of this evidence could not have affected the jury's verdict and, thus, defendant has not satisfied his burden of proof that its exclusion has more probably than not resulted in a miscarriage of justice. Had the evidence been admitted, the jury would have been left to choose between defendant's story and the victim's version of events—the latter now tempered by the suggestion that the victim had falsely accused someone of sexual abuse in the past. Thus, in order for this evidence to have affected the outcome, the jury would have had to conclude that a child who made a false allegation of sexual abuse in the past is more likely to act as a sexual aggressor against his older stepbrother. To put it mildly, that is an enormous inferential leap. I find it highly implausible that any rational juror would have reached such a conclusion, especially in light of the extent to which defendant's story was impeached by his own admissions and the testimony of his mother. This testimony, offered by defendant, corroborated the fact that defendant was awake while his nine-year-old stepbrother performed fellatio on him. If the jury believed only defendant's mother's testimony, this would be a sufficient basis for the guilty verdicts.

Defendant's trial may not have been perfect. The trial court may have erred by admitting testimonial statements from the victim's father and did err by applying MCL 750.520j to exclude evidence regarding the victim's past accusations of sexual abuse. But because admitting Tony Hines's statement was harmless beyond a reasonable doubt, and because defendant has not satisfied his burden of proving that exclusion of the "evidence" of collusion more probably than not resulted in a miscarriage of justice, I believe defendant received a *fair* trial. That, as the United States Supreme Court has held, is all that is required by the constitution. See *Van Arsdall*, *supra* at 681.

Accordingly, I vigorously dissent from the order granting defendant a new trial and would affirm the judgment of the Court of Appeals.

CORRIGAN, J. I join the statement of Justice YOUNG.

Leave to Appeal Denied February 9, 2007:

HAMILTON v WENDETROIT, LTD, No. 128877; Court of Appeals No. 251842.

MARKMAN, J. (*dissenting*). I would grant defendant's application for leave to appeal to address the issues of "avoidability" and "unavoidabil-

ity" for the reasons set forth in my statement in *Wiater v Great Lakes Recovery Centers, Inc*, 477 Mich 896 (2006).

BRAUN v SECURE PAK, No. 132119; Court of Appeals No. 260118.

MARKMAN, J. (*dissenting*). I respectfully dissent and would reverse the judgment of the Court of Appeals and reinstate the decision of the Workers' Compensation Appellate Commission (WCAC). The WCAC reviews the magistrate's decision under the "substantial evidence" standard, while this Court reviews the WCAC's determination under the "any evidence" standard. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701 (2000). " 'If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal . . . .' " *Id.* at 703 (citation omitted). Here, the WCAC rejected the magistrate's decision on the basis of its conclusion that the magistrate: (1) failed to consider testimony by plaintiff's coworker that after a driver clocks out at 6:00 p.m. he's "done"; and (2) misinterpreted testimony by defendant's dispatcher to mean that "rarely would an employee receive a delivery run after 6:00 p.m." when the dispatcher actually testified that "it was rare for a delivery run to come in just prior to 6 p.m." The WCAC, in my judgment, fairly reviewed the magistrate's sparse opinion and offered an " 'adequate reason grounded in the record for reversing the magistrate.' " *Id.* Further, the conclusion reached by the WCAC majority is supported by competent evidence in the record. Accordingly, under *Mudel*, the Court of Appeals should have denied leave to appeal in this case. Just as this Court in its decisions overwhelmingly defers to the WCAC, so must the Court of Appeals.

CORRIGAN, J. I join the statement of Justice MARKMAN.

TES FILER CITY STATION, LLP v FILER TOWNSHIP, No. 131419; Court of Appeals No. 258806.

CORRIGAN, J. (*concurring*). I concur in the order denying the application for leave but take this opportunity to express my reservations about petitioner's motion to file a brief that exceeds the page limits in this tax case involving a cogeneration plant. Petitioner's motion accompanied its application for leave to appeal. The application that exceeds the page limits reflected a scattershot appellate strategy in a 74-page submission. The statement of the issues confusingly did not conform to the argument section of the application. Petitioner's counsel raised 20 issues in this Court, after having raised 49 issues in the Court of Appeals. The Court of Appeals had helpfully condensed the issues into nine, but in this Court, petitioner again multiplied the issues. Further, petitioner's counsel raised four issues in this Court for the first time—issues that were never raised in the Court of Appeals or the Michigan Tax Tribunal. Moreover, petitioner's arguments pertaining to the issues in its application seem both redundant and poorly developed.

With some focus on editing, petitioner's counsel could have consolidated many of the issues for a more effective presentation. Why should a

respondent have to read, analyze, and respond to a 74-page application before this Court has granted a motion to file an excess-length brief? Why should this Court be required to scrutinize, decipher, and consolidate excessively long and unnecessarily complex briefs? It is petitioner, and not this Court, who must focus the issues to be presented. The strategy employed here has unnecessarily increased the expense of litigation, to the detriment of the pocketbooks of the ratepayers and the taxpayers.

Having considered this matter and too many like it, I concur only to provide fair notice to the litigants. I will very carefully scrutinize motions to file applications or briefs that exceed the page limits. Indeed, such motions are expressly disfavored by the court rules. Cf. MCR 7.212(B). Our current rule requires extraordinary and compelling reasons why an adequate argument cannot be made within the standard page limits. That case has not been made here.

Moreover, I would open an administrative file to consider amending the court rules to require that the Chief Justice decide motions to file applications that exceed the page limits. The Chief Justice could, as part of the Chief Justice's "housekeeping responsibilities," quickly rule on an appellant's motion before an appellee's response is due and before the case is assigned internally. Some of our sister states have adopted such a practice by rule,[1] while others have done so by internal operating procedures.[2] Other states allow a single justice to decide motions to file applications or briefs that exceed the page limits.[3] Such a rules amendment might provide a more expedient and efficient use of this Court's limited resources.

YOUNG, J. I join the statement of Justice CORRIGAN.

Reconsideration Denied February 9, 2007:

PEOPLE v AXLEY, No. 131108. Leave to appeal denied at 477 Mich 878. Court of Appeals No. 268866.

CAVANAGH, J. I would grant the motion for reconsideration.

KELLY, J. (*dissenting*). I dissent from the order denying reconsideration. Because defendant's sentence presents significant issues that need to be addressed, I would grant reconsideration and grant leave to appeal.

Defendant pleaded guilty of aiding a prisoner to escape detention. MCL 750.183. She does not challenge her conviction, but she does challenge her sentence. In sentencing defendant, the trial court departed from the recommended guidelines range of 0 to 14 months and sentenced defendant to 56 to 84 months, the highest possible minimum sentence. The Court of Appeals denied her application for leave to appeal, and this Court denied leave to appeal, with Justices CAVANAGH, MARKMAN, and myself dissenting. *People v Axley*, 477 Mich 878 (2006).

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[1] See, e.g., California, Cal Rules of Court, Rule 8.204(c)(5), and Connecticut, Conn Rules of Court, Connecticut Practice Book § 67-3.

[2] See, e.g., Wisconsin, Supreme Ct IOP II, 6.a.

[3] See, e.g., Tennessee, Tenn R App P, Rule 11(f), and Virginia, Va Sup Ct Rules, R 5:26(a).

Defendant raises several arguments regarding the appropriateness of her sentence that are worthy of this Court's review. First, she challenges the ten points scored for offense variable (OV) 10. This OV deals with exploitation of a vulnerable victim. Ten points are appropriate if

> [t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status. [MCL 777.40(1)(b).]

The trial court found that defendant abused her authority status as a guard for the Michigan Department of Corrections (MDOC) when she helped the prisoner escape. And it found that the MDOC was a vulnerable victim. Both findings appear to be incorrect.

It seems axiomatic that the institution charged with housing this state's criminal offenders is not a vulnerable victim. In fact, antonyms of "vulnerable" are "guarded, protected, safe, secure," the natural descriptors of the MDOC. (See Thesaurus.com, <http://thesaurus.reference.com/browse/vulnerable> [accessed January 22, 2007].) OV 10 offers an internal definition of the word. " 'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The trial court failed to address how the MDOC was vulnerable under this definition. And it is certainly a stretch of the imagination to find that it is particularly susceptible to injury. As such, the trial court's finding appears to be an abuse of discretion.

The same conclusion results when one considers the meaning of an "abuse of authority status." Again, OV 10 provides the definitive definition. " 'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d). In this case, defendant was the MDOC's employee. Under the trial court's reasoning, the employee was in a position of authority over the employer. There seems little justification for such a conclusion.

Given these apparent errors, defendant's request that we address the scoring of OV 10 is well founded. In addition to defendant's reasons, the question arises whether the Legislature intended this OV to apply to an institutional victim. Considering the language used in the statute to describe the victim, it appears that this was not the intent of the Legislature. I believe that we should grant leave to appeal on this issue.

Second, defendant challenges the ten points scored for OV 14. The trial court scored ten points because it found defendant to be a leader in a multiple offender situation. MCL 777.44(1)(a). It found that defendant was the leader in the escape because her participation as a guard was indispensable. There is no support for reading "leader" to mean indispensable participant. Moreover, all the evidence suggests that defendant's participation was passive and potentially coerced. As such, the scoring appears to be an abuse of discretion. I would grant leave to appeal on this issue as well.

Third, defendant argues that the trial court's upward departure from the sentencing guidelines was not supported, as it must be, by substantial

and compelling reasons. A factor that constitutes a substantial and compelling reason for departing from the guidelines must be objective and verifiable and must " 'keenly' or 'irresistibly' grab our attention." *People v Babcock*, 469 Mich 247, 257 (2003). Such reasons for departure exist only in exceptional cases. *Id*.

> [I]f the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions. That is, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. If the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, or determines that the trial court would not have departed to the same degree on the basis of the substantial and compelling reasons, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure. [*Id*. at 260-261.]

The trial court offered multiple reasons for departure: (1) because the escaping inmate was dangerous, defendant's breach of trust was "much more serious" than contemplated by the guidelines; (2) defendant would have faced life in prison under the originally charged offense of voluntarily suffering a prisoner to escape, MCL 750.188; and (3) defendant's conduct resulted in a "huge risk" to members of law enforcement and the public. There is a strong argument that none of these reasons for departure qualifies as substantial and compelling.

Regarding the first reason, whether someone is dangerous is a subjective determination. The trial court did not show objective verification of it. Regarding the second reason, a defendant should not be punished for accepting a plea bargain. There are many reasons beyond leniency why the prosecution may decide to agree to a plea. For instance, the prosecution may not believe it has sufficiently strong evidence to meet the requirements for the greater charge. Given the multiple reasons influencing a plea deal, the fact that defendant was not convicted of the original charges does not " 'keenly' or 'irresistibly' grab our attention." And it is not of considerable worth in deciding a sentence. *Babcock*, 469 Mich 257.

Regarding the third factor, the "hugeness" of the risk is a subjective determination. As such, there is an argument that the trial court did not give a sufficiently articulated reason for the departure. But, even if the trial court's subjective description of the risk were ignored and this factor were found to be substantial and compelling, resentencing still would be appropriate. The trial court did not make clear on the record that it would pronounce the same sentence even if the reviewing court found

only one factor to be appropriate. As such, *Babcock* seems to require resentencing. *Id*. at 260-261. I would grant leave to appeal to discuss this issue as well.

Fourth, defendant argues that her sentence was disproportionate. In a similar context, the Court of Appeals stated:

> By sentencing defendant to life imprisonment, the sentencing court "has left no room for the principle of proportionality to operate on an offender convicted of [criminal sexual conduct] who has a previous record for this kind of offense or whose criminal behavior is more aggravated than in [defendant's] case." [*People v Bennett*, 241 Mich App 511, 517 (2000), quoting *People v Milbourn*, 435 Mich 630, 668-669 (1990).]

Defendant's sentence in this case suffers from a similar problem. The trial court imposed the longest minimum sentence. This leaves no room for a more serious offense or offender. For instance, defendant arguably took a passive role in a nonviolent escape. But a felon with multiple convictions that led a violent escape of a dozen offenders would receive the same sentence as did defendant. This fact tends to indicate that the sentence was not properly fashioned for the individual defendant and is not proportionate to the individual offense. I would grant leave to appeal to allow the Court to discuss this issue.

Finally, defendant argues that her sentence violated *Blakely v Washington*, 542 US 296 (2004).[1] Specifically, after the trial court scored the OV factors, defendant's guidelines range was 0 to 14 months. Because the upper limit of this recommended range is less than 18 months, the recommended sentence falls in an intermediate sanction cell. MCL 769.34(4)(a). 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 a defendant to prison if the recommended sentence falls 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).

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[1] Defendant did not raise this issue in her initial application for leave to appeal in this Court. But Justice MARKMAN noted in his dissenting statement that this case presents an appropriate vehicle for determining an important question: If the guidelines recommend an intermediate sanction sentence, does *Blakely* preclude a prison sentence based on findings of fact made by the trial court at sentencing? *Axley*, 477 Mich 878-879 (MARKMAN, J., dissenting). Justice YOUNG based his concurrence to the order denying leave to appeal on defendant's failure to raise this issue. *Id.* at 878 (YOUNG, J., concurring).

But this ability to depart from a maximum sentence conflicts with the Sixth Amendment requirement that defendant receive only the maximum sentence that is supported by (1) the facts admitted by defendant or (2) the facts found by a jury. *Blakely*, 542 US 303-304. Because her sentence exceeds the maximum sentence set by an intermediate sanction cell, defendant raises a legitimate *Blakely* issue worthy of this Court's attention.

I have thoroughly addressed the *Blakely* issue in my dissent in *People v McCuller*, 475 Mich 176 (2006).[2] But the majority's analysis in that case left undecided the issue presented in this case. This Court has granted leave to appeal to address this issue in two cases, *People v Burns*, ___ Mich ___ (2006) (Docket No. 131898), and *People v Harper*, ___ Mich ___ (2006) (Docket No. 130988). Granting leave to appeal in this case would present the Court with yet another vehicle to fully discuss this important constitutional issue.

This case presents numerous sentencing issues. Because of many apparent mistakes in defendant's sentence, I would grant reconsideration. On reconsideration, I would grant leave to appeal on all the issues discussed above.

MARKMAN, J. I would grant the motion for reconsideration and would remand this case to the Court of Appeals for consideration as on leave granted for the reasons set forth in *People v Axley,* 477 Mich 878-879 (2006).

Summary Dispositions February 27, 2007:

BRINKLEY v BRINKLEY, No. 132328. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for plenary consideration of the grandparents' constitutional issue. Although the Court of Appeals did not err in concluding that the doctrine of res judicata was improperly applied by the Wayne Circuit Court to deny the motion for relief from judgment, a remand to the circuit court is not necessary in order to resolve the constitutional questions presented. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 269725.

PEOPLE v LAPLANTE, No. 132560. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Delta Circuit Court for a determination of whether the defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005). Appointed counsel may file an application for leave to appeal to 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 the 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),

[2] Given the limited nature of this statement, I will not go into an extensive *Blakely* analysis. But I encourage the reader to review my dissent in *McCuller* for a full understanding of the topic.

MCR 6.311, and MCR 6.429. Counsel may include among the issues raised, but is not required to include, those issues raised by the 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 remaining questions presented should now be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 270289.

PEOPLE v DUKE, No. 132641. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the November 1, 2006, order of the Court of Appeals and we remand this case to the Court of Appeals for consideration as on reconsideration granted of whether the Livingston Circuit Court erred in departing from the sentencing guidelines under MCL 769.34(3) in light of the Sentencing Information Report Departure Evaluation. We do not retain jurisdiction. Court of Appeals No. 262325.

Leave to Appeal Denied February 27, 2007:

WESCHE v MECOSTA COUNTY ROAD COMMISSION, No. 129295; reported below: 267 Mich App 274.

PEOPLE v BATTLE, No. 130909; Court of Appeals No. 267842.

KELLY, J. I would grant leave to appeal to review the process by which the Department of Corrections calculated jail credit.

PEOPLE v FOX, No. 130982; Court of Appeals No. 258260.

SUBURBAN MOBILITY AUTHORITY REGIONAL TRANSPORTATION v JOHNSON, No. 131039; Court of Appeals No. 258958.

PEOPLE v WILLIAM COATS, No. 131117; Court of Appeals No. 258983.

PEOPLE v HARRINGTON, No. 131336; Court of Appeals No. 258401.

GATCHBY PROPERTIES, LP v ANTRIM COUNTY ROAD COMMISSION, No. 131369; Court of Appeals No. 258909.

PEOPLE v DEWAR, No. 131405; Court of Appeals No. 268733.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

MARKMAN, J. I would remand this case to the Court of Appeals for consideration as on leave granted for the reasons set forth in my dissenting statement in People *v Wright*, 474 Mich 1138 (2006).

PEOPLE v ROOSEVELT WALKER, No. 131466; Court of Appeals No. 259072.

FRASER TOWNSHIP v LINWOOD-BAY SPORTSMAN'S CLUB, No. 131483; reported below: 270 Mich App 289.

HARRIS v TURNER CONSTRUCTION, No. 131526; Court of Appeals No. 263679.

CUTLER v CUTLER, No. 131543; Court of Appeals No. 265403.

PEOPLE v MATHIS, No. 131686. Court of Appeals No. 266593.

PEOPLE v LIPPERT, No. 131798. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266746.

POLICE OFFICERS ASSOCIATION OF MICHIGAN v CITY OF MT CLEMENS, No. 131800; Court of Appeals No. 267100.

JAIKINS v ROSE TOWNSHIP, No. 131802; Court of Appeals No. 264695.

PENZIEN v VILLAGE OF CAPAC, Nos. 131840, 131841; Court of Appeals Nos. 259536, 259540.

TURNER v RICHARDS, No. 131932; Court of Appeals No. 266610.

PEOPLE v POSEY, No. 131965; Court of Appeals No. 259820.

PEOPLE v BURGER, No. 132004; Court of Appeals No. 268986.

PEOPLE v NEWSON, No. 132043; Court of Appeals No. 259715.

PEOPLE v EDWARD WALTON, No. 132044; Court of Appeals No. 259584.

PEOPLE v LAFOREST, No. 132051; Court of Appeals No. 271341.

J D'S PUB & GRUB, INC v NORTH POINTE INSURANCE COMPANY, No. 132090; Court of Appeals No. 256634.

PEOPLE v WATTS, No. 132097; Court of Appeals No. 259903.

PEOPLE v GREGORY BERRY, No. 132118; Court of Appeals No. 259431.

PEOPLE v HAROLD VARNER, No. 132139; Court of Appeals No. 244024.

PEOPLE v RONNIE BOONE, No. 132158; Court of Appeals No. 271604.

PEOPLE v RICHARDS, No. 132167; Court of Appeals No. 272033.

PEOPLE v RANDY ROGERS, No. 132204. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270762.

GRANBERRY v HARPER HOSPITAL, No. 132238; Court of Appeals No. 266775.

WILKERSON v UNIVERSITY OF MICHIGAN, No. 132294; Court of Appeals No. 265220.

DETROIT SCHOOL DISTRICT v URS CORPORATION, No. 132303; Court of Appeals No. 267715.

METRO v AMWAY ASIA PACIFIC LTD, No. 132318; Court of Appeals No. 258902.

BARNES v KICHER, No. 132339; Court of Appeals No. 258127.

UNITED INDUSTRIAL ENGINEERING CORPORATION v FLUTY, Nos. 132341, 132342; Court of Appeals Nos. 260034, 260035.

WILCOXON v CONWAY, No. 132354; Court of Appeals No. 261135.

ZBRANCHIK v KUZNER, No. 132365; Court of Appeals No. 269159.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON v UNITED STATES STEEL CORPORATION, No. 132384; Court of Appeals No. 269441.

PEOPLE v ERVING, No. 132411; Court of Appeals No. 261899.

PEOPLE v PICKETT, No. 132414; Court of Appeals No. 262668.

PEOPLE v LEACH, No. 132429; Court of Appeals No. 260819.

SBC MICHIGAN v PUBLIC SERVICE COMMISSION, Nos. 132431, 132432; Court of Appeals No. 254980.

PEOPLE v AGEE, No. 132434. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268594.

MICHIGAN PAY TELEPHONE ASSOCIATION v PUBLIC SERVICE COMMISSION, Nos. 132436, 132437; Court of Appeals Nos. 254980, 261341.

PORTER v DEPARTMENT OF CORRECTIONS, No. 132457; Court of Appeals No. 271239.

PEOPLE v CHARLES LOTT, No. 132459. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269801.

HEDGLEN v KOKESH, No. 132463; Court of Appeals No. 270164.

PEOPLE v RICKO LOTT, No. 132469; Court of Appeals No. 272167.

PEOPLE v HAYTHAM, No. 132471; Court of Appeals No. 272151.

PEOPLE v SPENCER, No. 132476; Court of Appeals No. 260903.

AMERICAN FAMILY INSURANCE GROUP v CITY OF DETROIT, No. 132483; Court of Appeals No. 271153.

DEPARTMENT OF TRANSPORTATION v ROOKS FAMILY TRUST, No. 132484; Court of Appeals No. 264337.

EGELER v WYLIE, Nos. 132486, 132487; Court of Appeals Nos. 272740, 272742.

ABN AMRO MORTGAGE GROUP, INC v HOUSEHOLD BANK, FSB, No. 132488; Court of Appeals No. 265518.

PEOPLE v WARD, No. 132490; Court of Appeals No. 272540.

PEOPLE v WARE, No. 132493. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269770.

PEOPLE v ANTHONY ELLIS, No. 132495; Court of Appeals No. 271277.

PEOPLE v VICK, No. 132497. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269773.

PEOPLE v PAUL SIMS, No. 132504; Court of Appeals No. 262959.

PEOPLE v JAMES WASHINGTON, No. 132517; Court of Appeals No. 271934.

PEOPLE v BRIAN SANDERS, No. 132518; Court of Appeals No. 271954.

PEOPLE v KARPPINEN, No. 132520; Court of Appeals No. 271259.

PEOPLE v LOGAN, No. 132522; Court of Appeals No. 263948.

PEOPLE v ADRIAN KING, No. 132525; Court of Appeals No. 263046.

PEOPLE v MCINNIS, No. 132526; Court of Appeals No. 272757.

PEOPLE v KITTRELL, No. 132527; Court of Appeals No. 260248.

PEOPLE v RONALD JOHNSON, No. 132530; Court of Appeals No. 262415.

PEOPLE v GRIGGS, No. 132531; Court of Appeals No. 273069.

POWELL v NEWMAN, No. 132533; Court of Appeals No. 262621.

PEOPLE v WILCOX, No. 132535; Court of Appeals No. 269443.

PEOPLE v GODFREY, No. 132538; Court of Appeals No. 264602.

PEOPLE v ROBART, No. 132539; Court of Appeals No. 272879.

PEOPLE v BUNDRIDGE, No. 132542; Court of Appeals No. 262069.

PEOPLE v MARK RHODUS, No. 132543; Court of Appeals No. 262241.

PEOPLE v PATRICK, No. 132546; Court of Appeals No. 271933.

In re BERG ESTATE (SILVERSTEIN v THOMAS), No. 132551; Court of Appeals No. 268584.

EL PASO PRODUCTION OIL & GAS COMPANY v PRIVATE BUSINESS, INC, No. 132555; Court of Appeals No. 268141.

PEOPLE v DECAREO WILLIAMS, No. 132561; Court of Appeals No. 263800.

PEOPLE v BECK, No 132563; Court of Appeals No. 262682.

PEOPLE v NEFF, No. 132564; Court of Appeals No. 262521.

PEOPLE v HERBON, No. 132565; Court of Appeals No. 272856.

PEOPLE v MARLAND, No. 132566; Court of Appeals No. 262683.

PEOPLE v WILSKE, No. 132569; Court of Appeals No. 270354.

CUMMINGS v SIEMENS DEMATIC ELECTRONICS ASSEMBLY, No. 132573; Court of Appeals No. 272600.

PEOPLE v OHANA, No. 132577; Court of Appeals No. 272495.

PEOPLE v DONALD RHODUS, No. 132579; Court of Appeals No. 262242.

PEOPLE v YVONNE THOMPSON, No. 132584; Court of Appeals No. 272520.

PEOPLE v GIVAN, No. 132586; Court of Appeals No. 262019.

PEOPLE v BARRON, No. 132588; Court of Appeals No. 271758.

PEOPLE v HALBERT, No. 132590; Court of Appeals No. 244756.

PEOPLE v FRENCH, No. 132592; Court of Appeals No. 260543.

PEOPLE v CARUTHERS, No. 132594; Court of Appeals No. 273285.

PEOPLE v JOSEPH, No. 132596; Court of Appeals No. 272881.

MAY v GREINER, No. 132600; Court of Appeals No. 269516.

PEOPLE v PIERCE, No. 132611; reported below: 272 Mich App 394.

PEOPLE v GRANING, No. 132612; Court of Appeals No. 272243.

PEOPLE v THEREZ LEE, No. 132617; Court of Appeals No. 272525.

PEOPLE v DAVID JOHNSON, No. 132622; Court of Appeals No. 265801.

PEOPLE v GARY WILLIAMS, No. 132623; Court of Appeals No. 265109.

PEOPLE v PARKER, No. 132634; Court of Appeals No. 271689.

PEOPLE v LUTHER, No. 132635; Court of Appeals No. 271531.

PEOPLE v WILKERSON, No. 132645; Court of Appeals No. 272878.

PEOPLE v HAYDEN, No. 132651; Court of Appeals No. 272702.

GRUNBAUM v GRUNBAUM, No. 132652; Court of Appeals No. 272123.

PEOPLE v BENNY LITTLE, No. 132661; Court of Appeals No. 270123.

PEOPLE v GRANT, No. 132679. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270184.

Reconsiderations Denied February 27, 2007:

HALLMAN v DELA CRUZ, No. 129531. Leave to appeal denied at 477 Mich 904. Court of Appeals No. 253363.

LUTZ v MERCY MT CLEMENS CORPORATION, No. 130849. Leave to appeal denied at 477 Mich 859. Court of Appeals No. 261465.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v CALVIN WRIGHT, No. 131112. Leave to appeal denied at 477 Mich 939. Court of Appeals No. 263746.

PEOPLE v LANGFORD, No. 131130. Leave to appeal denied at 477 Mich 940. Court of Appeals No. 263967.

GROSSE ILE TOWNSHIP v GROSSE ILE BRIDGE COMPANY, No. 131185. Leave to appeal denied at 477 Mich 890. Court of Appeals No. 255759.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v BERNARD FIELDS, No. 131200. Leave to appeal denied at 477 Mich 908. Court of Appeals No. 267871.

PEOPLE v SHAMU MARTIN, No. 131227. Leave to appeal denied at 477 Mich 909. Court of Appeals No. 266403.

FRANKENMUTH MUTUAL INSURANCE COMPANY v DORE, No. 131254. Leave to appeal denied at 477 Mich 959. Court of Appeals No. 265176.

CAVANAGH and WEAVER, JJ. We would grant reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

CHURCH MUTUAL INSURANCE COMPANY v CONSUMERS ENERGY COMPANY, No. 131283. Leave to appeal denied at 477 Mich 868. Court of Appeals No. 267524.

PT TODAY, INC v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES, No. 131298. Leave to appeal denied at 477 Mich 868. Court of Appeals No. 259964.

PEOPLE v O'DELL JOHNSON, No. 131330. Leave to appeal denied at 477 Mich 868. Court of Appeals No. 260308.

PEOPLE v MADDOX-EL, No. 131379. Leave to appeal denied at 477 Mich 868. Court of Appeals No. 257981.

COLEMAN v OAKLAND CIRCUIT JUDGE, No. 131383. Leave to appeal denied at 477 Mich 911. Court of Appeals No. 268607.

PEOPLE v GEARY GILMORE, No. 131458. Leave to appeal denied at 477 Mich 912. Court of Appeals No. 265879.

LULGJURAJ v BASIC, No. 131474. Leave to appeal denied at 477 Mich 952 . Court of Appeals No. 267040.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

DHUE v KASLE STEEL CORPORATION, No. 131488. Leave to appeal denied at 477 Mich 869. Court of Appeals No. 266818.

BOMER v DEPARTMENT OF CORRECTIONS, No. 131507. Leave to appeal denied at 477 Mich 869. Court of Appeals No. 269026.

PEOPLE v KREGEAR, No. 131557. Leave to appeal denied at 477 Mich 940. Court of Appeals No. 259833.

CAMPBELL v SULLINS, No. 131592. Leave to appeal denied at 477 Mich 915. Court of Appeals No. 266305.

PEOPLE v LEMIEUX, No. 131596. Leave to appeal denied at 477 Mich 915. Court of Appeals No. 266318.

HEAPHY v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 131627. Leave to appeal denied at 477 Mich 915. Court of Appeals No. 257941.

GEARY v C & K MUFFLERS, INC, No. 131653. Leave to appeal denied at 477 Mich 942. Court of Appeals No. 267105.

ALTON v ALTON, No. 131663. Leave to appeal denied at 477 Mich 930. Court of Appeals No. 263743.

CAVANAGH and WEAVER, JJ. We would grant reconsideration.

PEOPLE v HEDEEN, No. 131712. Leave to appeal denied at 477 Mich 898. Court of Appeals No. 259798.

WEAVER, J. I would grant the prosecutor's motion for reconsideration.

CORRIGAN, J. I would grant the motion for reconsideration. I adhere to my view that the trial court did not abuse its discretion in sentencing defendant outside the guidelines for the reasons stated in Justice WEAVER's dissent to the order of October 27, 2006, denying leave to appeal in *People v Hedeen*, 477 Mich 898 (2006). The trial court stated substantial and compelling reasons for departing from the guidelines, and the sentence imposed fell within the range of reasonable and principled outcomes. I would, therefore, reinstate the sentence that the trial court originally imposed.

YOUNG, J. I would grant the motion for reconsideration and, upon granting reconsideration, would reverse the Court of Appeals.

PEOPLE v TERRELL, No. 131790. Leave to appeal denied at 477 Mich 943. Court of Appeals No. 269643.

SHERMAN TOWNSHIP v LEEMREIS, No. 131844. Leave to appeal denied at 477 Mich 931. Court of Appeals No. 269020.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

V & J FOODS OF MICHIGAN, INC v DEPARTMENT OF TREASURY, No. 131859. Leave to appeal denied at 477 Mich 945. Court of Appeals No. 259460.

PEOPLE v SHEPHERD, No. 131861. Leave to appeal denied at 477 Mich 917. Court of Appeals No. 270345.

PEOPLE v PARTAKA, No. 131910. Leave to appeal denied at 477 Mich 945. Court of Appeals No. 271183.

PEOPLE v HOUGH, No. 131933. Leave to appeal denied at 477 Mich 946. Court of Appeals No. 271427.

PEOPLE v ORANGE, No. 131935. Leave to appeal denied at 477 Mich 946. Court of Appeals No. 269657.

PEOPLE v ESPIE, No. 131945. Leave to appeal denied at 477 Mich 907. Court of Appeals No. 270710.

PEOPLE v SAMUEL TILL, No. 131950. Leave to appeal denied at 477 Mich 946. Court of Appeals No. 267782.

PEOPLE v LATHAM, No. 131998. Leave to appeal denied at 477 Mich 947. Court of Appeals No. 267303.

GAWLOWSKI v BOYER, No. 132062. Leave to appeal denied at 477 Mich 948. Court of Appeals No. 270011.

PEOPLE v WATSON, No. 132143. Leave to appeal denied at 477 Mich 950. Court of Appeals No. 271269.

PEOPLE v APPENZELLER, No. 132214. Leave to appeal denied at 477 Mich 951. Court of Appeals No. 269857.

OPTION ONE MORTGAGE CORPORATION v SUTTON, No. 132272. Leave to appeal denied at 477 Mich 979. Court of Appeals No. 269401.

PEOPLE v WILKENS, No. 132289. Leave to appeal denied at 477 Mich 979. Court of Appeals No. 260031.

RICHARD v NORTHVILLE PSYCHIATRIC HOSPITAL, No. 132297. Leave to appeal denied at 477 Mich 952. Court of Appeals No. 270265.

Leave to Appeal Denied March 7, 2007:

WHITE v HAHN, Nos. 132191, 132192; Court of Appeals Nos. 256178, 265087.

WEAVER, J. (*concurring*). I concur in the order of denial and note that Justice CAVANAGH has properly supplied to the justices and staff his reason for his decision not to participate in this case because his daughter, Megan Cavanagh, represents the defendant, Robert Hahn. However, in this case, he has not, as required by Const 1963, art 6, § 6, requested that the reason for his decision be included with the order. I further note that Justice CAVANAGH has informed me that in the future he will request that his reasons for not participating be included with his decisions on the orders.

CAVANAGH, J., did not participate.

Summary Disposition March 9, 2007:

KARCHON v LAND WORKS LANDSCAPES, INC, No. 131547. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment that reversed the trial court's award of treble damages for harm to the plaintiffs' trees. A trial court's factual findings are reviewed for clear error. MCR 2.613(C); *People v Cress*, 468 Mich 678, 691 (2003). The record in this case contains no evidence to support the Court of Appeals conclusion that the damage to the plaintiffs' trees occurred as a natural consequence of the defendants' use of the property or that any such damage would have been included in the rental price. Because the trial court's findings of fact were not clearly erroneous, the Court of Appeals erred in reversing that portion of the trial court's

judgment awarding the plaintiffs treble damages for harm to their trees occurring as a result of the defendants' trespass on plaintiffs' property. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 255513.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Denied March 9, 2007:

PEOPLE V REGAINS, No. 131583; Court of Appeals No. 269205.

CORRIGAN, J. (*concurring*). I concur with the order denying leave to appeal. I write separately to point out that by unconditionally pleading guilty to the charge of probation violation, defendant waived any claim that the police did not diligently arrest him for that violation.[1]

In *People v New*, 427 Mich 482, 491 (1986), this Court held that a defendant who pleads guilty waives all claims except those that implicate the very authority of the state to bring the defendant to trial. In *People v Hanson*, 178 Mich App 507, 509-510 (MAHER, J.), 511 (REILLY, J. [concurring in the result only]) (1989), a divided Court of Appeals panel, citing *New, supra*, held that a defendant does not waive the due diligence issue by pleading guilty. In so holding, the *Hanson* lead opinion analogized due diligence claims to speedy trial claims and held that such claims "implicate the very authority of the state to bring [a defendant] to trial."

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[1] In *People v Ortman*, 209 Mich App 251, 254 (1995), the Court of Appeals explained the origins of the "due diligence" rule:

> In *People v Diamond*, 59 Mich App 581, 587; 229 NW2d 857 (1975), this Court first announced the rule that once a warrant for probation violation has been issued, the probation authorities must exercise due diligence in executing it. If there is a determination that the probation authorities did not act with reasonable dispatch under all the circumstances, then there is a waiver of the probation violation. *Id.*, p 588. This rule has been consistently followed by this Court. *People v Gunner*, 61 Mich App 569, 570; 233 NW2d 87 (1975); *People v Henry*, 66 Mich App 394, 397; 239 NW2d 384 (1976); *People v Miller*, 77 Mich App 381, 384; 258 NW2d 235 (1977); *People v Hanson*, 178 Mich App 507, 510; 444 NW2d 175 (1989); *People v Ritter*, 186 Mich App 701, 709; 464 NW2d 919 (1991).

The issue in this case is not the validity of the "due diligence" rule, but whether defendant waived the due diligence argument by pleading guilty. I offer no opinion on the validity of the "due diligence" rule or the correctness of the Court of Appeals opinions adopting the rule, but will assume for purposes of this case that the rule is valid.

Hanson, supra at 509. But because *Hanson* was issued before November 1, 1990, it is not binding authority. MCR 7.215(J)(1). Subsequent binding Court of Appeals decisions imply that *Hanson* was incorrectly decided. In *People v Irwin*, 192 Mich App 216, 218 (1991), the Court of Appeals held that an unconditional guilty plea waives review of a claim that the 180-day rule was violated. Thus, under current law in the Court of Appeals, speedy trial issues no longer implicate the state's authority to bring a defendant to trial within the meaning of *New, supra*. As the *Hanson* panel stated, due diligence claims fall into this category of speedy trial claims. Therefore, by unconditionally pleading guilty of a probation violation, a defendant waives any issue that law enforcement did not exercise due diligence in executing the probation violation warrant.

KELLY, J. (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted. Defendant's position has support in the only published Court of Appeals decision to directly address the issue presented. *People v Hanson*, 178 Mich App 507 (1989). Also, we have not had the opportunity for a full briefing or oral argument. Under those circumstances, a definitive statement rejecting defendant's claim seems unwise.

In re AYERS (DEPARTMENT OF HUMAN SERVICES v FISCHER), No. 133169; Court of Appeals No. 269995.

HEALTHSOURCE v URBAN HOSPITAL CARE PLUS, No. 133199; Court of Appeals No. 270482.

Reconsiderations Denied March 9, 2007:

RANDAZZO MECHANICAL HEATING & COOLING, INC v DILORENZO, No. 132405. Leave to appeal denied at 477 Mich 982. Court of Appeals No. 269438.

In re VALENTE (VALENTE v ROETMAN), No. 132943. Leave to appeal denied at 477 Mich 1016. Court of Appeals No. 272058.

Leave to Appeal Denied March 16, 2007:

AUTO CLUB GROUP INS CO v BUERKEL AND SMITH v BUERKEL, Nos. 131439, 131440; Court of Appeals Nos. 258240, 260775.

In re CAMPBELL (DEPARTMENT OF HUMAN SERVICES v FALKIEWICZ), No. 133255; Court of Appeals No. 269585.

In re COOK-TEEPLES (DEPARTMENT OF HUMAN SERVICES v TEEPLES), No. 133289; Court of Appeals No. 272133.

Summary Disposition March 21, 2007:

PEOPLE v HERNANDEZ-GARCIA, No. 129038. The judgment of the Court of Appeals is affirmed in part and vacated in part. We affirm and adopt the

Court of Appeals holding that the trial court correctly instructed the jury that momentary innocent possession of a concealed weapon is not a defense to a charge of unlawfully carrying a concealed weapon (CCW).[1] 266 Mich App 416, 417-420 (2005). *People v Coffey*, 153 Mich App 311 (1986), is overruled.[2] We also affirm the Court of Appeals holding that "the trial court's response to the jury's questions regarding the definition of 'concealment' did not constitute a finding of fact or an order to the jury to find defendant guilty." 266 Mich App at 421.

We vacate the Court of Appeals holding that the trial court's contradictory preliminary and final instructions regarding the validity of the momentary innocent possession defense were harmless error because defendant requested the erroneous instruction, and jurors are presumed to follow the incorrect instruction. Nonetheless, we affirm the Court of Appeals result on different grounds. Even if the trial court had given consistent instructions regarding the validity of the momentary innocent possession defense, the outcome would more probably than not have been the same. *People v Lukity*, 460 Mich 484, 495-496 (1999).

First, even if the trial court had followed *Coffey* and adhered to its preliminary instruction that momentary innocent possession is a valid defense to CCW, the evidence does not show that defendant's possession of the gun was innocent. In *Coffey, supra* at 315, the Court of Appeals held that "momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon if the possessor had the intention of delivering the weapon to the police at the earliest possible time." Defendant admitted on the stand that he never indicated his intention to relinquish the gun to the police on the night in question because he "was drunk." Further, when an officer responding to a report of gunshots told defendant to stop walking, defendant turned around, looked at the uniformed officer, and walked away from the officer at a faster pace. The

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[1] Our decision in *People v Tombs*, 472 Mich 446 (2005), does not require recognition of a defense of momentary innocent possession. In *Tombs, supra* at 454-455, this Court held that there exists a presumption that a criminal intent or *mens rea* requirement applies to each element of a statutory crime. Applying *Tombs*, the CCW statute, MCL 750.227(2), requires only that a defendant knowingly possess a concealed weapon. The *mens rea* requirement does not extend to the defendant's purpose for carrying the concealed weapon.

[2] Justice KELLY incorrectly asserts that our decision to affirm the Court of Appeals decision disrupts established law. As the Court of Appeals explained, *Coffey* is no longer good law in light of *People v Pasha*, 466 Mich 378 (2002). Even defendant does not dispute this conclusion. *Coffey* must be interpreted in light of subsequent decisions by this Court. The Court of Appeals reasoning in *Coffey* is no longer legally sustainable in light of our decision in *Pasha*. While we did not explicitly overrule *Coffey* in *Pasha*, we do so today.

jury did not believe defendant's testimony that he did not conceal the gun, and there is no indication that the jury would have believed that defendant's possession of the gun was innocent. Defendant has not shown that the jury more probably than not would have found that he intended to deliver the gun to the police at the earliest possible time. Rather, defendant's own admission establishes that he was not entitled to an instruction on momentary innocent possession, because he concedes that he did not relinquish the weapon to the police at the earliest possible time.

Conversely, if the trial court had consistently instructed the jury that momentary innocent possession is *not* a valid defense to a CCW charge, and defendant had instead argued the defense of duress, the outcome of the trial still would not have changed. There is no evidence that defendant, in order to avoid death or serious bodily harm, was compelled to grab the unloaded gun from the sellers or to hold onto the gun and conceal it in his waistband after the sellers had run away. *People v Lemons*, 454 Mich 234, 247 (1997).[3] Reported below: 266 Mich App 416.

CAVANAGH, J. (*dissenting*). I disagree with the majority's decision to affirm the judgment of the Court of Appeals. I would grant defendant a new trial because the conflicting jury instructions prejudiced defendant. It is well established that a trial court must properly instruct the jury so that it may correctly and intelligently decide the case. *People v Clark*, 453 Mich 572, 583 (1996). Where the trial court errs in misleading or misinforming counsel regarding the ultimate instructions that will be given to the jury and prejudice results, a new trial is required. *Id*. at 587. In this case, defense counsel relied on the trial court's acceptance of the preliminary jury instructions, which included an instruction on momentary innocent possession. Defendant directed his case toward this defense, which was still valid law at the time of the trial. *People v Coffey*, 153 Mich App 311 (1986). In fact, when objecting to the trial court's final jury instructions, defense counsel told the trial court, "I prepared this case with this defense in mind." Had defense counsel known that the trial court would refuse to instruct on momentary innocent possession after

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[3] Justice CAVANAGH argues that the error was not harmless because defendant directed his case toward the defense of momentary innocent possession, and defense counsel relied on the trial court's acceptance of the preliminary jury instructions. But Justice CAVANAGH fails to consider that defendant also claimed that the weapon was not concealed. Defendant testified that he walked with the gun in front of him so that the "whole world could see" that he "didn't have it concealed." By its guilty verdict, the jury obviously rejected defendant's testimony. Justice CAVANAGH also fails to acknowledge defendant's admission that he did not act in a manner consistent with the intent to deliver the weapon to the police at the earliest possible time, a necessary element of the momentary innocent possession defense articulated in *Coffey*. Lastly, in light of the evidence adduced at trial, Justice CAVANAGH fails to articulate how the error changed the outcome of the trial.

closing arguments, he may well have taken a different approach at trial. For example, defendant could have requested an instruction regarding duress and conducted his defense accordingly. Or, as a practical matter, defendant might have pursued a plea bargain that would have resulted in a more favorable outcome.

Further, the jury's confusion about the contradictory instructions was apparent when it sought clarification regarding the relevance of intent or motive. Given the jury's confusion and defense counsel's extensive reliance on the validity of the defense, I cannot say that this error was harmless. Instructing the jury that a defense exists, allowing counsel to proceed in reliance on the preliminary ruling, and then issuing a final jury instruction that specifically repudiates the validity of the defense causes prejudice that can only be rectified by a new trial.

MARKMAN, J. I join the statement of Justice CAVANAGH.

KELLY, J. (*dissenting*). For the reasons articulated in Justice CAVANAGH's statement, I dissent from the order affirming the judgment of the Court of Appeals. I write separately to discuss the unnecessary overruling of *People v Coffey,* 153 Mich App 311 (1986).

On December 16, 2001, the Grand Rapids Police responded to a report of "shots fired." Officer Jeffrey Freres found defendant leaving the crime scene and told him to stop. Defendant, who does not speak English, continued to walk away until he was directed in Spanish to stop. When he turned to face the officer, the officer saw that defendant had a gun.

Defendant was arrested and charged with carrying a concealed weapon (CCW), MCL 750.227(2). At trial, he testified that two men had approached him and offered to sell him drugs. When defendant told them he was not interested, one of the men offered to sell him a gun. Defendant said he seized the gun and fled. When the men pursued him, defendant loaded the gun and fired two shots to frighten them. He said he intended to call the police and turn the gun over to them. He testified that he did not immediately stop when the officer called to him because he did not see the officer and feared that the two men were following him. He realized that it was the police only when he was ordered in Spanish to stop.

Defendant argued at trial that these factual allegations entitled him to have the jury instructed on the defense of momentary innocent possession. The trial court gave a preliminary instruction on the defense but refused to give a final instruction on it. The jury convicted defendant of CCW, and the Court of Appeals affirmed the conviction.

In 1986, the Court of Appeals recognized in *Coffey*, *supra*, that momentary innocent possession could be raised as a defense to the charge of carrying a concealed weapon. *People v Coffey*. In order to establish the defense, defendant in this case had to show that he took the weapon from a wrongful possessor. He also had to assert his intention to deliver the weapon to the police at the earliest possible time. *Coffey*, 153 Mich App at 315.

A majority of this Court concludes that the facts do not support an instruction on momentary innocent possession. Given that conclusion, the Court need not decide whether *Coffey* should be overruled. Yet, the majority has overruled *Coffey*. This case represents another in a long

series of needless disruptions of established law. I continue to object to this practice. Cf. *Joliet v Pitoniak*, 475 Mich 30, 46 (2006) (KELLY, J., dissenting); *People v Cornell*, 466 Mich 335, 371 (2002) (KELLY, J., dissenting); *People v Kazmierczak*, 461 Mich 411, 427 (2000) (KELLY, J., dissenting).

The majority claims that it has not disrupted established law because *Coffey* was no longer good law in light of *People v Pasha*, 466 Mich 378 (2002). This simply is not true. In *Pasha*, this Court held that lawful ownership of a pistol is not a prerequisite to establishing an exception to the CCW statute. *Id.* at 383. In so deciding, the Court stated that "our holding is confined to an interpretation of the dwelling house exception to the CCW statute." *Id.* at 383 n 8. Since this Court explicitly stated that its holding in *Pasha* was limited to an issue not presented in *Coffey*, it is preposterous to claim that, by implication, *Pasha* overruled *Coffey*. *Coffey* remained good law and should not have been overruled here.

Leave to Appeal Denied March 21, 2007:

PEOPLE v MELTON, Nos. 130682, 132064; reported below: 269 Mich App 542, 271 Mich App 590.

WEAVER, J. I would grant leave to appeal.

DAIMLERCHRYSLER SERVICES OF NORTH AMERICA, LLC v DEPARTMENT OF TREASURY, No. 131995; reported below: 271 Mich App 625.

TAYLOR, C.J., and WEAVER and CORRIGAN, JJ. We would grant leave to appeal.

GRANT v AAA MICHIGAN/WISCONSIN, INC, No. 132211; reported below: 272 Mich App 142 (on remand).

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HARBISON, No. 132756; Court of Appeals No. 261727.

WEAVER, J. I would grant leave to appeal.

Reconsiderations Denied March 21, 2007:

KROON-HARRIS v STATE OF MICHIGAN, No. 129689. Summary disposition entered at 477 Mich 988. Reported below: 267 Mich App 353.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

DAIMLERCHRYSLER CORPORATION v DEPARTMENT OF TREASURY, No. 130106. Leave to appeal denied at 477 Mich 962. Reported below: 268 Mich App 528.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

SPITZLEY v SPITZLEY, No. 130585. Leave to appeal denied at 477 Mich 989. Court of Appeals No. 255345.

MARKMAN, J. (*dissenting*). For the reasons set forth in my dissenting statement in *Spitzley v Spitzley*, 477 Mich 989, 990-992 (2007), I would

grant the motion for reconsideration, reverse the judgment of the Court of Appeals, and strike the sanctions against defendants.

KELLY and CORRIGAN, JJ. We join the statement of Justice MARKMAN.

LANZO CONSTRUCTION COMPANY v WAYNE STEEL ERECTORS, No. 130992. Summary disposition entered at 477 Mich 983. Court of Appeals No. 264165.

Summary Disposition March 23, 2007:

PEOPLE v LAVALLIS, No. 130942. 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. 267225.

WEAVER, J. I would grant leave to appeal.

CORRIGAN, J. I would direct that the prosecutor respond to the application for leave to appeal.

Leave to Appeal Denied March 23, 2007:

RUIZ v CLARA'S PARLOR, INC, No. 130847; Court of Appeals No. 264833.

WEAVER, J. (*concurring*). I concur in the order denying leave to appeal. I write separately to note that Justice MARKMAN has disqualified himself from this case and has supplied no reasons for his decision not to participate.

Although I specifically requested Justice MARKMAN's reasons for not participating in this case, he refused to provide them in writing or verbally—stating to me at conference that it was "none of your business"—for his not participating in this case.

My request that Justice MARKMAN give reasons on the record for his nonparticipation is not trivial. Nor is it motivated by resentment or personal ill will. A justice has a duty to supply the parties, the public, and thereby future litigants with his or her reasons for nonparticipation.

Where, as here, a justice decides on his own motion not to participate in a case, the justice should be accountable to the parties and the public for his decision. Although Justice MARKMAN has taken the time to personally attack me in this case, he still has not given his reasons for not participating. While his reasons likely support his decision to not participate, his decision needs to be in writing, on the record, and available to the parties, the public, and thereby future litigants.[1]

KELLY, J. I would grant leave to appeal.

MARKMAN, J., did not participate.

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[1] For a detailed discussion of why it is necessary for a justice recusing himself/herself from a case to provide written reasons for his/her decision, see my statement in *People v Parsons*, unpublished order of the Supreme Court, entered March 6, 2007 (Docket No. 132975), provided below:

WEAVER, J., concurs and states as follows:

I concur with the order to stay trial court proceedings in this case and write separately to state again that a justice has a duty to supply the public, and thereby future litigants, with his or her reasons for nonparticipation. As I wrote almost two (2) years ago (in 2005) in *Scalise v Boy Scouts of America*, 473 Mich 853, 854 (2005) (Weaver, J., dissenting):

"Const 1963, art 6, § 6, which states that 'Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . .' requires that justices give written reasons for each decision.[1] There is no more fundamental purpose for the requirement that the decisions of the Court be in writing than for the decisions to be accessible to the citizens of the state. Because a justice's decision to not participate in a case can, itself, change the outcome of a case, the decision is a matter of public significance and public access and understanding regarding a justice's participation or nonparticipation is vital to the public's ability to assess the performance of the Court and the performance of the Court's individual justices. Thus, the highest and best reading of art 6, § 6 requires that a justice's self-initiated decision not to participate, or a challenged justice's decision to participate or not participate, should be in writing and accessible to the public."

As I stated in my December 21, 2006, dissent to the order denying the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228 (2006), I first raised the issue of justice recusal almost four (4) years ago when, in *In re JK,* 468 Mich 202 (2003) (a termination of parental rights and reversal of adoption case, not involving attorney Geoffrey Fieger), I had reason to examine the rules governing my own participation in that case:

"During the consideration of *In re JK*, I was informed that unwritten 'traditions' governed the decision and that, MCR 2.003 the court rule concerning disqualification of all other Michigan judges, did not apply to justices of the Michigan Supreme Court. I was further informed that it was a 'tradition' of the Court that the decision whether a justice would disqualify himself or herself was left to the individual justice and that no reasons for the decision whether to participate or not participate in a case were to be given.

"I concluded that these unwritten traditions and the unfettered discretion violate Michigan's Constitution, which requires

justices to give written reasons for each decision, including a decision to participate in or be disqualified from a case.[2]

"Because the Court's traditions were clearly inadequate, in *In re JK, supra,* I followed the remittal of disqualification procedure provided by MCR 2.003(D). In light of my understanding of the requirements of Const 1963, art 6, § 6, I also provided an explanation in writing of my decision not to participate and asked that the Court open an administrative file to explore the rules that should govern justice disqualification decisions.[3] [*Fieger, supra* at 1240.]" Thus, any assertion that my position on justice recusals is new, or began with attorney Fieger's motion to disqualify "the majority of four" (then Chief Justice Corrigan and Justices Taylor, Young, and Markman) is incorrect.

It is important to note that attorney Fieger initially moved to disqualify me, as well as "the majority of four." Then, when I denied the motion with written reasons for my decision not to recuse myself, attorney Fieger made no further disqualification motions against me, although attorney Fieger has continued to make disqualification motions against "the majority of four." See *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003) (Weaver, J., participating in part and voting to grant reconsideration in part).

It is also untrue that my position on justice recusals has only been directed toward Chief Justice Taylor and Justices Corrigan, Young, and Markman. I have, in fact, raised the issue of the importance of providing the reasons for nonparticipation to Justice Cavanagh, most recently in *White v Hahn*, 477 Mich 1037 (2007), a case in which Justice Cavanagh's daughter represents one of the parties.[4]

In *Hahn, supra,* I noted that Justice Cavanagh had not included his reason for recusal, but had informed me he would do so in future cases. Further, Justice Kelly has also indicated to me that in the future, she will request that her reasons for not participating be included with her decisions on the orders. Thus, obviously, contrary to assertions of a concurring justice, I have taken up my position on justice recusals with Justices Cavanagh and Kelly. As noted above, I have publicly raised this issue since 2003 by my statement in *In re JK, supra.*

At present there is no sufficient system in place in this Court for providing to justices adequate notice of justice recusals. Given

the current "helter-skelter" approach to handling justice recusal decisions, it is unreasonable to expect that any justice would be able to identify all justice recusals. For instance, it is when a case appears on a conference agenda, or sometimes, but not always, on commissioner reports, that a justice has a reasonable opportunity to learn about a fellow justice's recusal from a case and to request that nonparticipating justice to provide written reasons for not participating.[5]

Further, other assertions by concurring justices are simply incorrect and untrue. For instance: my reliance on art 6, § 6 of the Michigan Constitution is not newfound or incorrect as evidenced by this very order, which is issued as a "decision of the Supreme Court," not just from one justice. Further, I have no proposal or "desire to abolish our elective system for justices and judges."[6]

A justice's decision to participate or not participate (recuse himself or herself) in a case implicates a bedrock principle of our judicial system—the impartiality of the judiciary. Without a record of a justice's reasons to not participate in a case, how can future litigants be guaranteed that the same reasons are not present in their cases? Moreover, how can the people of Michigan be sure that a justice is not simply refusing to work on a case to avoid some controversy that the case might involve—for example, a controversy that might call into question his or her impartiality on an issue or make reelection more difficult?

The impartiality of the judiciary preserves the ethics of judicial administration, protects decision-making, and ensures the public's, and thereby future litigants', trust and confidence in the judiciary. Thus, preserving the impartiality of the Court is "real work of the Court."

What are needed are clear, fair, enforceable, written, and published rules concerning the participation, nonparticipation, or disqualification of justices. Such rules would enhance the accountability of justices to the public. They would provide a way for the public to have some knowledge about how justices conduct the public's business so that the public could accurately assess the justices' performance of their duties.

Further while it appears to continue to be for some justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, it is a "tradition of

secrecy" that must for all justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[7]

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[1] Article 6, § 6 of the 1963 Michigan Constitution states, in full:

Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[2] Const 1963, art 6, § 6, *supra*, n 1.

[3] In my statement of nonparticipation in *In re JK, supra*, I also proposed for public comment amendments of MCR 2.003 that would require that a justice publish in the record of the case the reasons for the decision to participate or not participate in the case when the issue of disqualification was raised by a party, the justice himself or herself, or another justice. I further outlined the procedure for a justice to raise his or her potential disqualification with the parties and their attorneys. See *In re JK, supra,* 220-221 (Weaver, J., nonparticipation statement).

[4] See *Hahn*, *supra*:

"WEAVER, J., (*concurring*). I concur in the order of denial and note that Justice CAVANAGH has properly supplied to the justices and staff his reason for his decision not to participate in this case because his daughter, Megan Cavanagh, represents the defendant, Robert Hahn. However, in this case, he has not, as required by Michigan Const 1963, art 6, § 6, requested that the reason for his decision be included with the order. I further note that Justice CAVANAGH has informed me that in the future he will request that his reasons for not participating be included with his decisions on the orders. [*Hahn, supra,* 477 Mich ___ (2007).]"

[5] In addition, when justice "non-hold memos" associated with orders scheduled to enter are received monthly in large batches, with sometimes less than a week before the scheduled entry date, a justice does not have a reasonable opportunity to learn about a fellow justice's recusal from a case.

NEAL v DEPARTMENT OF CORRECTIONS AND ANDERSON v DEPARTMENT OF CORRECTIONS, Nos. 130862, 130863; Court of Appeals Nos. 253543, 256506 (on remand).

WEAVER, J. (*concurring*). I concur in the order denying leave to appeal. I write separately to note that Chief Justice TAYLOR has disqualified himself from this case but has supplied no reasons for his decision not to participate.

Although I specifically requested Chief Justice TAYLOR's reasons for not participating in this case at the October 25, 2006, conference, he refused to provide them in writing or verbally.

My request that Chief Justice TAYLOR give reasons on the record for his nonparticipation is not trivial. Nor is it motivated by resentment or personal ill will. A justice has a duty to supply the parties, the public, and thereby future litigants, with his or her reasons for nonparticipation.

Where, as here, a justice decides on his own motion not to participate in a case, the justice should be accountable to the parties and the public for his decision. Chief Justice TAYLOR still has not given his reason for not participating in this case. While his reasons likely support his decision to not participate, his decisions need to be in writing, on the record, and available to the parties, the public, and thereby future litigants.[1]

TAYLOR, C.J. did not participate.

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[6] My revised proposal for the 2007-2008 election cycle to reform and improve, not abolish, the present system of election and appointment of justices, along with reform of term limits for justices, will be published on my personally funded website, <www.justiceweaver-.com>, this year, 2007. My similar proposal to reform and improve, not abolish, the election and appointment of justices for the 2005-2006 election cycle was circulated in 2005-2006.

[7] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

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statement of the facts and reasons for each decision . . .' requires that justices give written reasons for each decision.[1] There is no more fundamental purpose for the requirement that the decisions of the Court be in writing than for the decisions to be accessible to the citizens of the state. Because a justice's decision to not participate in a case can, itself, change the outcome of a case, the decision is a matter of public significance and public access and understanding regarding a justice's participation or nonparticipation is vital to the public's ability to assess the performance of the Court and the performance of the Court's individual justices. Thus, the highest and best reading of art 6, § 6 requires that a justice's self-initiated decision not to participate, or a challenged justice's decision to participate or not participate, should be in writing and accessible to the public."

As I stated in my December 21, 2006, dissent to the order denying the motion for stay in *Grievance Administrator v Fieger*, 477 Mich 1228 (2006), I first raised the issue of justice recusal almost four (4) years ago when, in *In re JK*, 468 Mich 202 (2003) (a termination of parental rights and reversal of adoption case, not involving attorney Geoffrey Fieger), I had reason to examine the rules governing my own participation in that case:

"During the consideration of *In re JK*, I was informed that unwritten 'traditions' governed the decision and that, MCR 2.003 the court rule concerning disqualification of all other Michigan judges, did not apply to justices of the Michigan Supreme Court. I was further informed that it was a 'tradition' of the Court that the decision whether a justice would disqualify himself or herself was left to the individual justice and that no reasons for the decision whether to participate or not participate in a case were to be given.

"I concluded that these unwritten traditions and the unfettered discretion violate Michigan's Constitution, which requires justices to give written reasons for each decision, including a decision to participate in or be disqualified from a case.[2]

"Because the Court's traditions were clearly inadequate, in *In re JK, supra,* I followed the remittal of disqualification procedure provided by MCR 2.003(D). In light of my understanding of the requirements of Const 1963, art 6, § 6, I also provided an explanation in writing of my decision not to participate and asked that the Court open an administrative file to explore the rules that should govern justice disqualification decisions.[3] [*Fieger, supra* at 1240.]"

> Thus, any assertion that my position on justice recusals is new, or began with attorney Fieger's motion to disqualify "the majority of four" (then Chief Justice Corrigan and Justices Taylor, Young, and Markman) is incorrect.

It is important to note that attorney Fieger initially moved to disqualify me, as well as "the majority of four." Then, when I denied the motion with written reasons for my decision not to recuse myself, attorney Fieger made no further disqualification motions against me, although attorney Fieger has continued to make disqualification motions against "the majority of four." See *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003) (Weaver, J., participating in part and voting to grant reconsideration in part).

It is also untrue that my position on justice recusals has only been directed toward Chief Justice Taylor and Justices Corrigan, Young, and Markman. I have, in fact, raised the issue of the importance of providing the reasons for nonparticipation to Justice Cavanagh, most recently in *White v Hahn*, 477 Mich 1037 (2007), a case in which Justice Cavanagh's daughter represents one of the parties.[4]

In *Hahn, supra,* I noted that Justice Cavanagh had not included his reason for recusal, but had informed me he would do so in future cases. Further, Justice Kelly has also indicated to me that in the future, she will request that her reasons for not participating be included with her decisions on the orders. Thus, obviously, contrary to assertions of a concurring justice, I have taken up my position on justice recusals with Justices Cavanagh and Kelly. As noted above, I have publicly raised this issue since 2003 by my statement in *In re JK, supra.*

At present there is no sufficient system in place in this Court for providing to justices adequate notice of justice recusals. Given the current "helter-skelter" approach to handling justice recusal decisions, it is unreasonable to expect that any justice would be able to identify all justice recusals. For instance, it is when a case appears on a conference agenda, or sometimes, but not always, on commissioner reports, that a justice has a reasonable opportunity to learn about a fellow justice's recusal from a case and to request that nonparticipating justice to provide written reasons for not participating.[5]

Further, other assertions by concurring justices are simply incorrect and untrue. For instance: my reliance on art 6, § 6 of the Michigan Constitution is not newfound or incorrect as evidenced by this very order, which is issued as a "decision of the Supreme Court," not just from one justice. Further, I have no proposal or "desire to abolish our elective system for justices and judges."[6]

A justice's decision to participate or not participate (recuse himself or herself) in a case implicates a bedrock principle of our judicial system—the impartiality of the judiciary. Without a record of a justice's reasons to not participate in a case, how can future litigants be guaranteed that the same reasons are not present in their cases? Moreover, how can the people of Michigan be sure that a justice is not simply refusing to work on a case to avoid some controversy that the case might involve—for example, a controversy that might call into question his or her impartiality on an issue or make reelection more difficult?

The impartiality of the judiciary preserves the ethics of judicial administration, protects decision-making, and ensures the public's, and thereby future litigants', trust and confidence in the judiciary. Thus, preserving the impartiality of the Court is "real work of the Court."

What are needed are clear, fair, enforceable, written, and published rules concerning the participation, nonparticipation, or disqualification of justices. Such rules would enhance the accountability of justices to the public. They would provide a way for the public to have some knowledge about how justices conduct the public's business so that the public could accurately assess the justices' performance of their duties.

Further while it appears to continue to be for some justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, it is a "tradition of secrecy" that must for all justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[7]

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[1] Article 6, § 6 of the 1963 Michigan Constitution states, in full:

Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise

statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[2] Const 1963, art 6, § 6, *supra*, n 1.

[3] In my statement of nonparticipation in *In re JK, supra*, I also proposed for public comment amendments of MCR 2.003 that would require that a justice publish in the record of the case the reasons for the decision to participate or not participate in the case when the issue of disqualification was raised by a party, the justice himself or herself, or another justice. I further outlined the procedure for a justice to raise his or her potential disqualification with the parties and their attorneys. See *In re JK, supra,* 220-221 (Weaver, J., nonparticipation statement).

[4] See *Hahn*, *supra*:

"WEAVER, J., (*concurring*). I concur in the order of denial and note that Justice Cavanagh has properly supplied to the justices and staff his reason for his decision not to participate in this case because his daughter, Megan Cavanagh, represents the defendant, Robert Hahn. However, in this case, he has not, as required by Michigan Const 1963, art 6, § 6, requested that the reason for his decision be included with the order. I further note that Justice Cavanagh has informed me that in the future he will request that his reasons for not participating be included with his decisions on the orders. [*Hahn, supra,* 477 Mich ___ (2007).]"

[5] In addition, when justice "non-hold memos" associated with orders scheduled to enter are received monthly in large batches, with sometimes less than a week before the scheduled entry date, a justice does not have a reasonable opportunity to learn about a fellow justice's recusal from a case.

[6] My revised proposal for the 2007-2008 election cycle to reform and improve, not abolish, the present system of election and appointment of justices, along with reform of term limits for justices, will be published on my personally funded website, <www.justiceweaver.com>, this year, 2007. My similar proposal to reform and improve, not abolish, the election and appointment of justices for the 2005-2006 election cycle was circulated in 2005-2006.

[7] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

COBLE v GREEN, No. 132082; reported below: 271 Mich App 382.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

In re HARTSOE (DEPARTMENT OF HUMAN SERVICES v PATTON), No. 133357; Court of Appeals No. 272232.

SHERMAN TOWNSHIP v LEEMREIS, No. 133413; Court of Appeals No. 276585.

Appeals Dismissed March 23, 2007:

RAAB v JOYCE, Nos. 129247, 129248. A stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals Nos. 254222, 256269.

MARKMAN, J. (*concurring*). The application for leave to appeal in this case was filed more than 18 months ago and oral argument on whether to grant the application was scheduled more than three months ago. This Court now dismisses the appeal on the basis of a stipulation between the parties. I join in this dismissal because parties should be encouraged to resolve their disputes. Nonetheless, it must be noted that this Court has committed substantial public resources in preparing for oral argument. The offices of the seven justices, the clerk, the commissioners, and the reporter have all been actively engaged in this preparation. Moreover, to the extent that we have committed resources to this case, our ability to commit resources to other cases has obviously been diminished. For these reasons, I would modify our court rules to clarify that the Court may impose costs equally upon the parties in cases in which last-minute settlements are proposed. Both a sufficient regard for the interests of the taxpayers and for the limited resources of the Court commend such a rule.

GLOVER v SOUTHGATE COMMUNITY SCHOOL DISTRICT, No. 132827. A stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 270198.

Summary Dispositions March 26, 2007:

PEOPLE v BRIAN WHITE, No. 132665. 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. 272042.

PEOPLE v SHOFFNER, No. 132673. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Montcalm 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 605 (2005). Appointed counsel may file an application for leave to

appeal to 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. We do not retain jurisdiction. Court of Appeals No. 272475.

PEOPLE v MONCIVAIS, No. 132807. 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. 273508.

Leave to Appeal Denied March 26, 2007:

KLOSS v CZAJKOWSKI, No. 130481; Court of Appeals No. 257737.

SHORT v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 131020; Court of Appeals No. 258451.

SUMMERS v DEPARTMENT OF CORRECTIONS, No. 131285; Court of Appeals No. 266994.

E R ZEILER EXCAVATING, INC v VALENTI TROBEC CHANDLER, INC, No. 131297; reported below: 270 Mich App 639.

PEOPLE v DAMON HUDSON, No. 131473. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266745.

ZARAZUA v LEITELT IRON WORKS, INC, No. 131528; Court of Appeals No. 266022.

HAMILTON'S HENRY THE VIII LOUNGE, INC v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, No. 131887; Court of Appeals No. 255983.

PEOPLE v BURGESS, No. 132187. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268233.

RADULOVICH v CITY OF GROSSE POINTE WOODS, Nos. 132441, 132442, 132443; Court of Appeals Nos. 256594, 258683, 260275.

PEOPLE v GARY WILLIAMS, No. 132450; Court of Appeals No. 261896.

PEOPLE v MAGEE, No. 132515; Court of Appeals No. 261158.

PEOPLE v TWILLEY, No. 132521; Court of Appeals No. 261570.

ONTONAGON RURAL COUNTY ELECTRICAL ASSOCIATION v ALLOUEZ TOWNSHIP AND ONTONAGON RURAL COUNTY ELECTRICAL ASSOCIATION v SHERMAN TOWNSHIP, Nos. 132547, 132548; Court of Appeals Nos. 265605, 265606.

MORREALE v DEPARTMENT OF COMMUNITY HEALTH, No. 132557; reported below: 272 Mich App 402.

PEOPLE v TYE, No. 132567; Court of Appeals No. 272226.

PEOPLE v BURTON, No. 132601; Court of Appeals No. 272703.

PEOPLE v MCINTYRE, No. 132605; Court of Appeals No. 261900.

PEOPLE v WILLHITE, No. 132606; Court of Appeals No. 261509.

PEOPLE v NEUFER, No. 132613; Court of Appeals No. 271356.

PEOPLE v ERIC SMITH, No. 132615; Court of Appeals No. 262379.

PEOPLE v CANTLEY, No. 132620; Court of Appeals No. 260761.

PEOPLE v HAWKINS, No. 132624; Court of Appeals No. 262677.

PEOPLE v MICHAEL JERELL KING, No. 132626; Court of Appeals No. 260637.

GENERAL CASUALTY OF WISCONSIN v SECURA INSURANCE, No. 132628; Court of Appeals No. 270457.

LIPTOW v DEPARTMENT OF COMMUNITY HEALTH, No. 132631; reported below: 272 Mich App 544.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v RICKY FRANKLIN, No. 132633; Court of Appeals No. 260959.

PEOPLE v TIMMERS, No. 132636; Court of Appeals No. 261604.

PEOPLE v JIMMIE GORDON, No. 132640; Court of Appeals No. 261834.

PEOPLE v POOLE, No. 132642; Court of Appeals No. 262107.

PEOPLE v CAMERON, No. 132646; Court of Appeals No. 261847.

PEOPLE v CHAD WHITE, No. 132650; Court of Appeals No. 262084.

PEOPLE v NOLEN, No. 132656; Court of Appeals No. 266300.

PEOPLE v HOMER TAYLOR, No. 132657; Court of Appeals No. 272799.

PEOPLE v SHAWN RENAUD, No. 132662; Court of Appeals No. 263593.

PEOPLE v MCCULLOUGH, No. 132664; Court of Appeals No. 273030.

PEOPLE v HUGHES, No. 132666; Court of Appeals No. 261895.

PEOPLE v CRAIG SMITH, No. 132669; Court of Appeals No. 264196.

PEOPLE v LITTERAL, No. 132670; Court of Appeals No. 261330.

PEOPLE v GUTZMAN, No. 132672; Court of Appeals No. 273623.

PEOPLE v MARSHALL, No. 132675; Court of Appeals No. 262996.

PEOPLE v JASON DAVIS, No. 132678; Court of Appeals No. 269627.

PEOPLE v OTHA CLARK, No. 132680; Court of Appeals No. 273276.

PEOPLE v GRETA HALL, No. 132681; Court of Appeals No. 264830.

PEOPLE v BUSH, No. 132685; Court of Appeals No. 260635.

COLLIER v PRUZINSKY, No. 132687; Court of Appeals No. 268827.

CITY OF DETROIT v MOORE, No. 132691; Court of Appeals No. 270520.

PEOPLE v ANTOINE HOWELL, No. 132695; Court of Appeals No. 264583.

PEOPLE v RANDY MORRIS, No. 132696; Court of Appeals No. 262697.

HAYDEN v GENERAL MOTORS CORPORATION, No. 132697; Court of Appeals No. 264060.

PEOPLE v MATTHEW WILLIS, No. 132700; Court of Appeals No. 272001.

PEOPLE v KASOFF, No. 132702; Court of Appeals No. 271991.

PEOPLE v DONTEZ ANDERSON, No. 132704; Court of Appeals No. 263268.

PEOPLE v BALDWIN, No. 132705; Court of Appeals No. 271256.

PEOPLE v ENGELBERG, No. 132708; Court of Appeals No. 272893.

TKACHIK v MANDEVILLE, No. 132710; Court of Appeals No. 270253.

PEOPLE v AARON JACKSON, No. 132712. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270700.

HUFFMAN v CITY OF MARLETTE, No. 132715; Court of Appeals No. 260283.

SCHAEFER v BORMANS, INC, No. 132716; Court of Appeals No. 270935.

PEOPLE v WILLIAM BOOKER, JR, No. 132718; Court of Appeals No. 272528.

PEOPLE v PRATT, No. 132720; Court of Appeals No. 261045.

PEOPLE v KOLAJ, No. 132722; Court of Appeals No. 262205.

PEOPLE v FLOURNOY, No. 132723; Court of Appeals No. 273622.

PEOPLE v DIAZ, No. 132724; Court of Appeals No. 263444.

PEOPLE v PLOTNICK, No. 132726; Court of Appeals No. 262207.

PEOPLE v MARK STEWART, No. 132727; Court of Appeals No. 263274.

PEOPLE v CHRIS GREEN, No. 132728; Court of Appeals No. 261732.

PEOPLE v SINGH, No. 132729; Court of Appeals No. 272040.

PEOPLE v ERIC DAVENPORT, No. 132731; Court of Appeals No. 263437.

PEOPLE v DORLAND, No. 132732; Court of Appeals No. 273127.

PEOPLE v SALINAS, No. 132733; Court of Appeals No. 264006.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v CALKINS, No. 132738; Court of Appeals No. 273376.

PEOPLE v TOLBERT, No. 132739; Court of Appeals No. 262792.

PEOPLE v BRANNON SMITH, No. 132741; Court of Appeals No. 272422.

PEOPLE v GRANT, No. 132742; Court of Appeals No. 273201.

PEOPLE v REESE, No. 132752; Court of Appeals No. 261410.

PEOPLE v BALINDA DAVIS, No. 132757; Court of Appeals No. 273564.

PEOPLE v CRAMBLIT, No. 132764; Court of Appeals No. 272894.

PEOPLE v JARED MONTGOMERY, No. 132765; Court of Appeals No. 273479.

PEOPLE v NSEIR, No. 132770; Court of Appeals No. 264211.

PEOPLE v ARTHUR MOORE, No. 132772; Court of Appeals No. 272954.

PEOPLE v HEARD, No. 132777; Court of Appeals No. 262687.

PEOPLE v JOHN RIGGINS, No. 132782; Court of Appeals No. 273772.

PEOPLE v SHAWN MOORE, No. 132784; Court of Appeals No. 273651.

PEOPLE v ROBERT MORGAN, No. 132785; Court of Appeals No. 273277.

PEOPLE v JERRY SMITH, No. 132787; Court of Appeals No. 262993.

PEOPLE v WEIL, No. 132788; Court of Appeals No. 273415.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006).

SLOVINSKI v POWELL MOVING & STORAGE, INC, No. 132791; Court of Appeals No. 271939.

PEOPLE v JUAN HOWARD, No. 132799; Court of Appeals No. 263563.

In re WARREN ESTATE (WARREN v WARREN), No. 132801; Court of Appeals No. 262937.

PEOPLE v SHOATS, No. 132808; Court of Appeals No. 273878.

PEOPLE v KASSUBA, No. 132809; Court of Appeals No. 273282.

PEOPLE v JONATHON MITCHELL, No. 132817; Court of Appeals No. 265141.

ARMOCK v PETOSKEY MOVING COMPANY, No. 132821; Court of Appeals No. 272662.

PEOPLE v BRULEZ, No. 132826; Court of Appeals No. 270707.

LOVELACE v GARLAND GOLF COURSE, No. 132830; Court of Appeals No. 269776.

ANDERSON v MCCONVILLE, No. 132834; Court of Appeals No. 265965.

PEOPLE v HERRANDO, No. 132835; Court of Appeals No. 266424.

PEOPLE v ADOLPHUS, No. 132838; Court of Appeals No. 265198.

MARTINI v HENRY FORD HEALTH SYSTEM, No. 132854; Court of Appeals No. 270818.

PEOPLE v BRISCOE, No. 132857; Court of Appeals No. 265107.

PEOPLE v DARRYL MORGAN, No. 132860; Court of Appeals No. 265199.

CHILDERS v LEAR AUTOMOTIVE SYSTEMS, No. 132883; Court of Appeals No. 272806.

PEOPLE v JEFFERY WHITE, No. 132899; Court of Appeals No. 271097.

RUPERSBURG v ETKIN SKANSKA CONSTRUCTION COMPANY OF MICHIGAN, Nos. 132900, 132901, 132913, 132914, 132921; Court of Appeals Nos. 262560, 262561, 262388, 262406, 262470.

PEOPLE v SHEILA LIVELY AND PEOPLE v ERIC LIVELY, Nos. 132904, 132905; Court of Appeals Nos. 264222, 264223.

BEACOM v LAMB TECHNICON; No. 132963; Court of Appeals No. 271139.

MARTIN v DEPARTMENT OF CORRECTIONS, No. 132980; Court of Appeals No. 272384.

PEOPLE v SHAIEB, No. 133016. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273273.

KELLY, J. I would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied March 26, 2007:

ALPHA CAPITAL MANAGEMENT, INC v RENTENBACH, No. 132658; Court of Appeals No. 272819.

Reconsiderations Denied March 26, 2007:

PEOPLE v DENISE POWELL, No. 131385. Summary disposition entered at 477 Mich 860. Court of Appeals No. 256878.

CAVANAGH, J. I would grant the motion for reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons stated in my dissenting statement in *People v Powell*, 477 Mich 860 (2006).

VERVERIS v HARTFIELD LANES, No. 131430. Leave to appeal denied at 477 Mich 952. Reported below: 271 Mich App 61.

CAVANAGH, J. I would grant the motion for reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

HUFF v ABOU-JOUDEH, No. 131636. Leave to appeal denied at 477 Mich 959. Court of Appeals No. 266120.

WEAVER, J. I would grant reconsideration.

PEOPLE v TURNPAUGH, No. 131758. Leave to appeal denied at 477 Mich 973. Court of Appeals No. 269652.

DEAN v JACKSON COUNTY ROAD COMMISSION, Nos. 131761, 131762. Leave to appeal denied at 477 Mich 973. Court of Appeals Nos. 264063, 266355.

PEOPLE v HALSTEAD, No. 131784. Leave to appeal denied at 477 Mich 1003. Court of Appeals No. 260065.

DYNA GRIND SERVICES, LLC v CITY OF RIVERVIEW, No. 131860. Leave to appeal denied at 477 Mich 995. Court of Appeals No. 255825.

MARKMAN, J. I would grant the motion for reconsideration, and would remand this case to the trial court for the reasons set forth in my earlier dissent in this case.

PEOPLE v TRACI JACKSON, No. 131947. Leave to appeal denied at 477 Mich 973. Court of Appeals No. 260313.

PEOPLE v WHITTEN, No. 132181. Leave to appeal denied at 477 Mich 975. Court of Appeals No. 270373.

ERDMAN v WAYNE CIRCUIT JUDGE, No. 132194. Leave to appeal denied at 477 Mich 975. Court of Appeals No. 271418.

PEOPLE v GEYER, No. 132252. Leave to appeal denied at 477 Mich 1009. Court of Appeals No. 270662.

SPRINGING ACRES, INC v MICHIGANA HOLSTEINS, INC, No. 132258. Leave to appeal denied at 477 Mich 978. Court of Appeals No. 259779.

CIPRIANO v CIPRIANO, No. 132279. Leave to appeal denied at 477 Mich 979. Court of Appeals No. 259818.

PEOPLE v LANE, No. 132320. Leave to appeal denied at 477 Mich 981. Court of Appeals No. 272849.

10 & SCOTIA PLAZA, LLC v ALL OCCUPANTS, No. 132331. Leave to appeal denied at 477 Mich 981. Court of Appeals No. 269184.

Summary Dispositions March 28, 2007:

MITCHELL v PREMIUM PROPERTIES INVESTMENTS LIMITED PARTNERSHIP, No. 130273. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated

in the Court of Appeals dissenting opinion, and we reinstate the summary disposition order of the Roscommon Circuit Court. Court of Appeals No. 253847.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

SOUTHFIELD JEEP, INC v PREFERRED AUTO SALES, INC, No. 131822. 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. The Court of Appeals erred in finding that the defendant's failure to appeal the district court's denial of its motion to transfer the case to the circuit court leads to the conclusion that defendant either acquiesced in the district court's decision that the damages did not exceed the jurisdictional limit, or chose to forfeit any amount in excess of the jurisdictional limit of the district court. Slip op, p 7. Because the district court's denial of the defendant's motion was interlocutory, the defendant may appeal that decision as of right, on entry of a final order by the district court disposing of the case. See *People v Torres*, 452 Mich 43, 59 (1996) ("[A] party in a civil action may raise previous interlocutory decisions when it brings an appeal of right from a final order."); subchapter 7.100 of the Michigan Court Rules. In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should now be reviewed by this Court. Court of Appeals No. 256014.

PEOPLE v HATCHETT, No. 131949. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing. The court plainly erred in considering the defendant's continuing claim of actual innocence. A court cannot base its sentence even in part on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892 (1977). 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. 261132.

PEOPLE v SCHENK, No. 131985. 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, holding that defense counsel was ineffective for failing to request a limiting instruction regarding the consideration of the defendant's actions in resisting arrest as evidence of obstructing a police officer, and reinstate defendant's conviction for obstructing a police officer, MCL 750.81d. The record does not support the Court of Appeals conclusion that jurors were confused about whether the defendant's postarrest behavior could be considered in their deliberations on the charge of obstructing a police officer. As recognized by both the Court of Appeals majority and dissent, "the prosecutor consistently presented that his theory of the case was that the offense occurred when defendant attempted to get around Officer Porta before defendant was arrested." While evidence of the defendant's postarrest behavior was presented, it was used by the parties only to address the question of whether the defendant was the victim of police abuse. Therefore, there was no substantial likelihood of juror confusion justifying a reversal of the defendant's conviction pursuant to *People v Kelley,* 78 Mich App 769

(1977). Furthermore, as trial counsel clearly used the defendant's post-arrest acts to support the defense theory of police misconduct, the Court of Appeals clearly erred by concluding that there was no sound trial strategy that would include forgoing a limiting instruction pursuant to *People v Kelley, supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 259087.

MILLER V ALLSTATE INSURANCE COMPANY, No. 132352. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals to determine whether PT Works may properly be incorporated solely under the Business Corporations Act and not the Professional Services Corporations Act, and, once that determination is made, to reconsider (if necessary) whether physical therapy provided by PT Works was "lawfully rendered" under MCL 500.3157. We do not retain jurisdiction. Reported below: 272 Mich App 284.

PEOPLE V HORAN, No. 132582. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Muskegon Circuit Court and we remand this case to the trial court for resentencing. It is undisputed that offense variable 13 (continuing pattern of criminal behavior) was incorrectly scored, and that correcting the score reduces the applicable guidelines range. The trial court departed upward from the guidelines, but did not declare that it would impose the same sentence regardless of the offense variable scoring. Rather, the court based the extent of the departure on the guidelines range. It is unclear that the trial court would have departed to the same extent under the correctly scored guidelines. Therefore, *People v Mutchie*, 468 Mich 50, 51 (2003), does not apply. On remand, the court may again depart from the appropriate sentencing guidelines range by articulating a substantial and compelling reason for the departure in accordance with *People v Babcock*, 469 Mich 247, 268 (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. 272373.

PEOPLE V RIDEOUT, No. 132751. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse, in part, the decision of the Court of Appeals. We do not disturb the Court of Appeals ruling that a new trial is warranted because the jury was not adequately instructed on the issues of proximate and intervening cause. But the Court of Appeals erred when it concluded that the defendant's wrongful conduct could not be the proximate cause of the decedent's death. A reasonable jury could find that the actions of the decedent were foreseeable based on an objective standard of reasonableness. *People v Schaefer*, 473 Mich 418, 437-438 (2005), overruled in part by, explained by, *People v Derror*, 475 Mich 316 (2006). Accordingly, the prosecutor may retry the defendant on the charge of operating while intoxicated or operating while visibly impaired causing death. We remand this case to the Court of Appeals to address the defendant's remaining issue concerning the admissibility of expert testi-

mony, which may arise again if defendant is retried on the same charge. We do not retain jurisdiction. Reported below: 272 Mich App 602.

PEOPLE v ROUSE, No. 132820. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the defendant's convictions. Reported below: 272 Mich App 665.

KELLY, J., I would deny leave to appeal.

Leave to Appeal Denied March 28, 2007:

PEOPLE v SPENCER JOHNSON, No. 131896; Court of Appeals No. 259862.

PEOPLE v RHODEN, No. 132089; Court of Appeals No. 262102.

NEW PROPERTIES, INC v GEORGE D NEWPOWER, JR, INC, No. 132327; Court of Appeals No. 259932.

BEUS v BROAD, VOGT & CONANT, INC, No. 132413; Court of Appeals No. 258995.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SHELDON, No. 132498; Court of Appeals No. 272756.

KELLY, J. I would direct the appointment of an expert.

Reconsideration Denied March 28, 2007:

AZZAR v CITY OF GRAND RAPIDS, No. 130310. Leave to appeal denied at 477 Mich 995. Court of Appeals No. 260438.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal March 30, 2007:

KIRKALDY v RIM, No. 129128. We direct the clerk to schedule oral argument on May 10, 2007, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address (1) whether filing a medical malpractice complaint with a defective affidavit of merit can toll the statute of limitations; (2) whether a defect in an affidavit of merit filed with a medical malpractice complaint can be cured without refiling the complaint; and (3) whether *Geralds v Munson Healthcare,* 259 Mich App 225 (2003), was correctly decided. The parties shall submit supplemental briefs no later than April 27, 2007, addressing the issues mentioned above. They should avoid submitting mere restatements of the arguments made in their application papers. The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., Michigan Health and Hospital Association, and Michigan State Medical Society are invited to file briefs amicus curiae no later than April 27, 2007. 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: 266 Mich App 626.

KOULTA v CITY OF CENTERLINE, No. 131891. 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 include but not be limited to addressing: (1) whether the "public duty" doctrine, as set forth in *White v Beasley*, 453 Mich 308 (1996), bars plaintiff's claims; (2) whether defendants' conduct amounted to "gross negligence," as defined by MCL 691.1407(7)(a); and (3) whether defendants' conduct constituted the proximate cause of the accident, as defined in *Robinson v Detroit*, 462 Mich 439 (2000). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. The Michigan Fraternal Order of Police, Police Officers Association of Michigan, Michigan Municipal League, Michigan Association of Counties, and Mothers Against Drunk Driving 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. 266886.

Leave to Appeal Granted March 30, 2007:

GRACE v LEITMAN, No. 131035. The parties shall include among the issues to be briefed: (1) whether *Simko v Blake*, 448 Mich 648 (1995), recognized a "judgment" exception to legal malpractice liability that operates independently of the standard of care, unlike the malpractice standards for other professions; (2) if not, whether this Court should recognize such an exception; (3) how would such an "attorney judgment rule" operate in practice; and (4) under what circumstances could a claimed exercise of "judgment" be successfully challenged. The State Bar of Michigan, the Criminal Defense Attorneys of Michigan, the Insurance Institute of Michigan, and the Michigan Insurance Federation 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 to file briefs amicus curiae. Court of Appeals No. 257896.

CITY OF DETROIT v AMBASSADOR BRIDGE COMPANY, No. 132329. The parties shall include among the issues to be briefed whether defendant Ambassador Bridge Company is a federal instrumentality and whether federal law preempts application of the city of Detroit's zoning ordinances to construction projects within the "sterile zone" enclosure of the bridge plaza. The International Law Section of the State Bar of Michigan and the United States Departments of Justice and Homeland Security 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. 257415.

Summary Dispositions March 30, 2007:

INTERNATIONAL HOME FOODS, INC v DEPARTMENT OF TREASURY AND LENOX, INC v DEPARTMENT OF TREASURY, Nos. 130542, 130543. In lieu of granting reconsideration, the January 5, 2007, order is amended to read as follows:

We remand this case to the Court of Appeals for a determination of whether there is a genuine issue of material fact as to the amount of plaintiff's tax liability. If so, the Court of Appeals may remand this case to the trial court for whatever additional proceedings it deems appropriate, including a determination of the actual amount owed. We do not retain jurisdiction. Court of Appeals Nos. 253748, 253760.

CAVANAGH, J. I would grant reconsideration.

HARRY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 132355. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals decision that concluded that plaintiff had abandoned her non-foot injury claims. In her brief on appeal to the Court of Appeals, plaintiff discussed the non-foot injuries and their continuing effect on her life. As a result, plaintiff did not abandon these claims. We remand this case to the Wayne Circuit Court for a bifurcated retrial with respect to plaintiff's uninsured motorist and personal protection insurance benefit claims, the relief defendant requested in its appeal to the Court of Appeals. The testimony of Dr. Richard Pike will not be considered on retrial of either claim. Court of Appeals No. 257539.

Leave to Appeal Denied March 30, 2007:

MOTLEY v GENESYS REGIONAL MEDICAL CENTER, No. 132552. This denial is without prejudice to the defendants moving, at trial, for dismissal on the basis of the statute of limitations. Court of Appeals No. 261928.

PEOPLE v PARSONS, No. 132975. The application for leave to appeal the October 24, 2006, order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals. On remand, the district court shall determine whether there is a potential conflict of interest sufficient to outweigh the defendant's right to the counsel of his choice. See *Wheat v United States*, 486 US 153 (1988); *United States v Gonzalez-Lopez*, __ US __; 126 S Ct 2557; 165 L Ed 2d 409 (2006). The party seeking disqualification bears the burden of proving how prejudice will result. *Kubiak v Hurr*, 143 Mich App 465 (1985). The stay of district and circuit court proceedings, ordered on March 6, 2007, is dissolved. Court of Appeals No. 273560.

WEAVER, J. (*concurring*). I concur only in the result of the order to deny leave to appeal and dissolve the stay in the district court and circuit court proceedings, ordered on March 6, 2007, as I am not persuaded that the question presented should be reviewed before the completion of the proceedings ordered by the Court of Appeals. Further, I note the reasons for Justice CORRIGAN's nonparticipation in the case were stated by her in her concurrence in a previous order in this case. *People v Parsons,* unpublished order of the Supreme Court, entered March 6, 2007 (Docket No. 132975).

CORRIGAN, J., did not participate.

Leave to Appeal Granted April 4, 2007:

MULLINS v ST JOSEPH MERCY HOSPITAL, No. 131879. The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., Michigan Health and Hospital Association, and Michigan State Medical Society are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 271 Mich App 503.

Summary Dispositions April 4, 2007:

LAFFIN v LAFFIN, No. 131593. The motion for reconsideration of this Court's November 29, 2006, order is granted. We vacate our order dated November 26, 2006. On reconsideration, the application for leave to appeal the May 26, 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. Leave to appeal denied at 477 Mich 941. Court of Appeals No. 266299.

PEOPLE v MORTE SCOTT, No. 132020. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal and in light of the concession by the prosecutor, we remand this case to the Wayne Circuit Court. On remand, the trial court shall sentence the 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. 271724.

PEOPLE v TATE, No. 132231. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Wayne Circuit Court denying defendant's motion for a new trial. The appeals court improperly substituted its judgment for that of the trier of fact, in this case the trial court, in regard to the assessment of witness credibility. *People v Lemmon*, 456 Mich 625, 646-647 (1998). Court of Appeals No. 254868.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v BLACKMON, No. 132250. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall include among the issues to be considered: (1) whether the Court of Appeals, on direct appeal, erred in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved federal constitutional error, *Chapman v California*, 386 US 18 (1967); (2) if so, whether the errors committed at trial were harmless beyond a reasonable doubt; and (3) whether the defendant is entitled to postappeal relief under MCR 6.508(D)(3). We do not retain jurisdiction. Court of Appeals No. 268628.

PEOPLE v JEFFREY HAYNES, No. 132587. 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. 272609.

GEORGE v GEORGE, No. 132609. 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. 269313.

HILEMAN v TRAILER EQUIPMENT, INC, No. 132850. 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 decision of the magistrate. The Court of Appeals erred in affirming the decision of the Workers' Compensation Appellate Commission (WCAC) by equating the plaintiff's testimony about his continuing symptoms with evidence of an ongoing work-related disability. The magistrate found, and the WCAC agreed, that the plaintiff's January 9, 2002, surgery was solely occasioned by a nonoccupational condition. The magistrate also found, and the WCAC agreed, that the plaintiff's disabling symptoms, although worsened by work activity, were the result of that nonoccupational condition. The magistrate therefore correctly held that relationship to work was not proven by the plaintiff after the date of the surgery, and the WCAC erred as a matter of law in holding otherwise. *Rakestraw v Gen Dynamics Land Systems, Inc,* 469 Mich 220, 231 (2003). Court of Appeals No. 265641.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied April 4, 2007:

MANUEL v GILL, No. 131103; reported below: 270 Mich App 355.

PEOPLE v DEMPS, No. 132478; Court of Appeals No. 271605.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v JAMES WILSON, No. 132491. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268967.

PEOPLE v PHILLIP MITCHELL, No. 132523; Court of Appeals No. 265290.

CAVANAGH and KELLY, JJ. We would remand for resentencing.

Summary Dispositions April 6, 2007:

CLERC v CHIPPEWA COUNTY WAR MEMORIAL HOSPITAL, Nos. 129438, 129482. Pursuant to MCL 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Chippewa Circuit Court, although on a basis different from that articulated by the Court of Appeals.

The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169. The court's gatekeeper role under MRE 702

> mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of [an] expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782 (2004).]

Consistent with this role, the court "shall" consider all of the factors listed in MCL 600.2955(1). If applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved general scientific acceptance among impartial and disinterested experts in the field.

Here, the trial court did not consider the range of indices of reliability listed in MCL 600.2955. Rather, it focused on its concern that plaintiff could not present specific studies on the growth rate of untreated cancer. Therefore, the court did not fulfill its gatekeeping role because it failed to consider other factors such as, for example, whether the methodology used by plaintiff's experts is "generally accepted within the relevant expert community," is relied upon as a "basis to reach the type of opinion being proffered" by experts in the field, or is "relied upon by experts outside of the context of litigation." MCL 600.2955(1)(e)-(g).

Accordingly, we remand to the Chippewa Circuit Court to complete the proper inquiry. Leave to appeal the August 4, 2005, judgment of the Court of Appeals is, in all other respects, denied. Reported below: 267 Mich App 597.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v FIEGER, No. 130456. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the November 8, 2005, order of the Court of Appeals and affirm the Wayne Circuit Court order dismissing plaintiff's case for different reasons.

State Automobile Mutual Insurance Company (State Auto) provided uninsured motorist benefits to John Rogers, who was killed in an automobile accident. State Auto had a judgment lien securing the $450,000 it paid to Rogers. Geoffrey Fieger represented Rogers's estate in a wrongful death action against the city of Detroit and obtained a jury verdict in favor of Rogers. After the appeals process was exhausted, the Wayne Circuit Court issued an order disbursing the jury verdict. Pursuant to the January 9, 1999, order of the Wayne Circuit Court, Fieger was paid his costs of litigating the case for Rogers's estate and his attorney fee. The order then allocated the remainder of the total award among Rogers's estate, State Auto, and a third lien holder, which is not a party to this appeal. Instead of awarding State Auto the full amount of its lien, the court discounted the amount State Auto was entitled to by one-third. Rogers's estate received the remainder of the verdict. Thereafter, State Auto brought an action in Oakland Circuit Court against Fieger, alleging

conversion and breach of fiduciary duty. The circuit court held that summary disposition was inappropriate, but the Court of Appeals reversed, holding that summary disposition in favor of Fieger was proper because "the Oakland Circuit Court could not grant [State Auto] relief without effectively reversing or vacating part of Wayne Circuit Court Judge Callahan's January 6, 1999 order." *State Auto Mut Ins Co v Fieger*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2003 (Docket No. 231590). The Court of Appeals then ordered State Auto to "commence an action for relief from judgment pursuant to MCR 2.612(C)(1)(f) in Wayne Circuit Court." *Id*.

State Auto did not appeal that decision to this Court. Instead, it brought the present action for relief from judgment. The Wayne Circuit Court dismissed State Auto's action. State Auto appealed, and the Court of Appeals issued a four-part order remanding the case to the Wayne Circuit Court for further fact-finding and more specific rulings. State Auto appealed to this Court, which, while retaining jurisdiction, remanded to the Wayne Circuit Court for further fact-finding. The Wayne Circuit Court has complied with that order, and this Court now vacates the order of the Court of Appeals and remands for summary disposition in favor of Fieger for the following reasons.

After this Court affirmed the verdict in favor of Rogers's estate in the original action, Fieger received a proper attorney fee based on the total recovery less costs. The remainder of the verdict was then divided between Rogers's estate and the lien holders. Fieger did not receive *any more* money from the verdict. Thus, the unrecovered portion of State Auto's lien inured to the benefit of Rogers's estate, not to Fieger. Therefore, the source of State Auto's loss is Rogers's estate, which is not a party to these proceedings. Therefore, albeit for different reasons, the Wayne Circuit Court properly dismissed this case.

In this case, defendant seeks a stay of proceedings until final disposition of pending federal litigation, wherein defendant initiated a lawsuit challenging the constitutionality of the Michigan Supreme Court recusal rule. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006).

In the recent past, defendant has filed numerous motions for the recusal of one or more Michigan Supreme Court justices, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions for recusal has involved various allegations of claimed bias, principally stemming from Michigan Supreme Court judicial campaigns. All of the previous motions for recusal have been denied. *Graves v Warner Bros*, 469 Mich 853 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Grievance Administrator v Fieger*, 472 Mich 1244 (2005); *McDowell v Detroit*, 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); and *Lewis v St John Hosp*, 474 Mich 1089 (2006).

The pending motion to stay this case asserts no new basis for recusal. Rather, the motion is predicated entirely on allegations made in the previous eight motions that have been considered and denied.

As we have each done in connection with these past motions, and as justices must do in connection with every motion for disqualification, we

have each looked into our consciences in this case and concluded that we are able to accord fair, impartial, and equal treatment to plaintiff's counsel and his clients.

Further, the motion is predicated on the erroneous notion that disqualification of a justice of the Michigan Supreme Court is governed by the disqualification procedure set forth in MCR 2.003. On the contrary, this procedure has never been held applicable to disqualification of justices. See, e.g., *Adair v Michigan*, 474 Mich 1027, 1043 (2006) (statement of CAVANAGH, J.), 1029 n 2 (statement of TAYLOR, C.J., and MARKMAN, J.); *In re JK,* 468 Mich 202, 220 (2003) (statement of WEAVER, J.). Throughout its history, the disqualification procedure followed in the Michigan Supreme Court is similar to the one followed in the United States Supreme Court. See Statement of Recusal Policy, United States Supreme Court, November 1, 1993; *Laird v Tatum*, 409 US 824, 833, 837 (1972); *Jewell Ridge Coal Corp v Local 6167*, 325 US 897 (1945) (Jackson, J., *concurring*).

There being no new asserted basis that would warrant a stay of proceedings, the motion is denied. Court of Appeals No. 254461.

CAVANAGH and KELLY, JJ. We would grant the motion for stay.

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the result only of the order vacating the November 8, 2005, order of the Court of Appeals and affirming the Wayne Circuit order dismissing plaintiff's case as the circuit court correctly decided this case on February 25, 2005, over two years ago.

I dissent from the participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case, where Mr. Geoffrey N. Fieger is a party. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting), and my dissent to the denial of the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

I also dissent from the order denying defendant's motion for stay of proceedings pending Mr. Fieger's lawsuit in the United States District Court for the Eastern District of Michigan concerning Michigan's disqualification rules governing Supreme Court justices. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006). I would grant the motion to stay.

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged,[1] without success for almost four

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[1] Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., statements of WEAVER, J., in *In re JK,* 468 Mich 202 (2003); *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit,* 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc,* 474 Mich 1080 (2006); *Lewis*

years, this Court to undertake action and achieve, the disqualification of justices is governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not.

For example, in *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN stated that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." Justice YOUNG concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to parties' counsel and clients without any independent check on justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further, while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for *all* justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[2]

YOUNG, J. (*concurring*). I concur with the order vacating the Court of Appeals order and affirming the Wayne Circuit Court's dismissal of this case. I write separately to address Justice MARKMAN's discussion of the implications of the collateral source rule on this case. Because the direct beneficiary of the collateral source rule, the city of Detroit, has not been a part of this case for some time, and because applying the collateral

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v St John Hosp, 474 Mich 1089 (2006); *Adair v Michigan,* 474 Mich 1027 (2006); *Grievance Administrator v Fieger,* 476 Mich 231 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228 (2006); *People v Parsons*, (Docket No. 132975, unpublished order issued March 6, 2007); *Ruiz v Clara's Parlor*, 477 Mich 1044 (2007); and *Neal v Dep't of Corrections*, 477 Mich 1049 (2007).

[2] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

source rule does not remedy the trial court's decision to reduce plaintiff State Automobile Mutual Insurance Company's (State Auto) lien, the collateral source rule is wholly irrelevant to the final disposition of this case.

The collateral source rule is designed to prevent double recovery by plaintiffs. After a trier of fact reaches a verdict for a plaintiff, the court must enter an order of judgment. MCL 600.6306(1). The judgment must contain a number of elements of damages, including "[a]ll past economic damages, less collateral source payments as provided for in section 6303." MCL 600.6306(1)(a). Section 6303 allows for "evidence to establish that [an] expense or loss was paid or is payable, in whole or in part, by a collateral source . . . ." MCL 600.6303(1). If the court determines that a portion of the past economic damages was paid by a collateral source, then the court must reduce the judgment by that amount. *Id*. However, payments subject to a statutory or contractual lien are not eligible for deduction as "collateral sources" under the statute. MCL 600.6303(4). This is because the amount due to the lien holder must still be paid.

After calculating the proper amount of the judgment, the court finds whether the attorney's contingent fee is "appropriate" by determining if the fee is one-third or less of "the *net sum recovered* after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action." MCR 8.121(C)(1) (emphasis added). After subtracting the appropriate costs and attorney fee, the remainder of the judgment belongs to the plaintiff, subject to any liens. Therefore, any reduction in the liens inures to the benefit of the plaintiff, not his or her attorney.

In this case, defendant Geoffrey N. Fieger successfully represented the estate of John Rogers in a lawsuit against the city of Detroit for Rogers's wrongful death. Plaintiff State Auto was Rogers's insurer and had paid $450,000 in benefits. Pursuant to the insurance contract, State Auto had a right of reimbursement for any damages recovered by Rogers, up to the amount of the benefits paid. After the verdict in favor of Rogers, the city of Detroit sought to reduce the judgment by State Auto's payment. This Court held that even though Fieger did not provide the proper statutory notice of the verdict to the lien holders, the trial court did not abuse its discretion by extending the period for lien holders to assert their rights. *Rogers v Detroit*, 457 Mich 125, 156-157 (1998). Therefore, on remand, the Wayne Circuit Court refused to allow the city a setoff for State Auto's insurance payments in the judgment. After the city paid the judgment, the court allowed Fieger to deduct his costs and attorney fee pursuant to the contingency fee contract between Rogers and Fieger. See MCR 8.121(C)(1). The remaining amount was Rogers's, subject to the liens. Instead of allowing the lien holders to recover the full amount of their liens, the court reduced them by one-third, increasing *Rogers's recovery*. Fieger could not benefit from the reduction in State Auto's recovery because he already received his attorney fee.

Justice MARKMAN apparently disagrees with this Court's decision in *Rogers* regarding the collateral source rule, arguing that State Auto's payment was in fact a collateral source. I fail to see how overruling that holding would affect the disposition of *this case* in any way. If State Auto's

payment was a collateral source, then the court would have reduced the judgment against the city of Detroit by $450,000. The court would have then allowed Fieger to deduct his costs and attorney fees. The remaining amount would have been distributed among the lien holders and Rogers (assuming that State Auto would not lose its right to recovery under MCL 600.6303[3]). If the court again reduced the liens by one-third, State Auto would still only recover $300,000.[1] Justice MARKMAN is correct that Fieger's attorney fee would be reduced by $150,000 under this scenario; however, the beneficiary of that reduction would have been the city of Detroit, not State Auto.[2]

The collateral source rule does not advance State Auto's theory that Fieger was the beneficiary of the $150,000 reduction of its lien. The only party that benefited from that reduction was Rogers.

MARKMAN, J. (*concurring*). Although I concur with the dismissal of this complex dispute, I respectfully disagree with the Court's order, which states that defendant received a "proper attorney fee based on the total recovery less costs."

The collateral source rule, MCL 600.6303(1), requires a court to determine whether any damages have been paid by a collateral source, such as an insurance company, and, if so, to reduce a judgment by the amount that has been paid by the collateral source. This rule operates to reduce the amount of money an attorney representing a plaintiff on a contingent fee basis will recover. This is because an attorney working for a contingent fee is entitled to a percentage of the judgment; however, if the "judgment" is reduced as it is under the collateral source rule, the contingent fee will necessarily be reduced as well.

The instant dispute presents a significant issue under MCL 600.6303(1)—where there has been a payment from a collateral source, should a contingent attorney fee be calculated on the basis of the judgment or on the basis of the judgment less the collateral source payment? On the one hand, plaintiff's attorney can fairly be said to be

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[1] Justice MARKMAN questions why a court applying the collateral source rule would reduce the liens by one-third. The majority's order holds that the source of State Auto's loss is the *Rogers, supra,* trial court's decision to reduce State Auto's lien to the benefit of Rogers. Justice MARKMAN believes that the source of State Auto's loss was the trial court's decision not to apply the collateral source rule, even though this Court explicitly held that the trial court "properly ruled concerning the collateral source rule." *Rogers, supra* at 157. Justice MARKMAN fails to acknowledge that, regardless of the proper application of the collateral source rule, the trial court's decision to reduce the lien by one-third caused State Auto's loss. The collateral source rule does not affect that decision.

[2] Fieger did "benefit" from the larger recovery, but he did not benefit at State Auto's expense. The larger recovery caused a loss to the city of Detroit. As noted in the previous footnote, the only way to make State Auto whole is to reduce the final disbursement to Rogers by the total amount of State Auto's lien.

responsible for the recovery of the entire judgment and entitled to his contractual share; on the other hand, that portion of the judgment embodying the collateral source payment presumably has already been made available to the plaintiff and thus plaintiff cannot be said to have been enriched to that extent by his attorney's efforts. To allow an attorney to recover a contingent fee based on the judgment, rather than the judgment less the collateral source payment, would effectively require plaintiff to pay more than the contingency percentage of the amount by which he has benefited from the judgment.

In MCL 600.6303(1), the Legislature seems to have determined that a contingent fee should not be calculated on the portion of a judgment already paid from a collateral source. Therefore, the trial court in the instant case erred by not reducing plaintiff's judgment by the amount received from a collateral source. Because plaintiff's attorney in the underlying action (the defendant in the instant action) received an attorney fee based on the total judgment, rather than the judgment less the amount received from a collateral source, he did not receive a "proper attorney fee," as the majority asserts.

Plaintiff here sues defendant to recover $150,000 that plaintiff alleges defendant improperly received as an attorney fee in an earlier case. In that case, plaintiff held a $450,000 lien on a judgment because of uninsured motorist benefits that it had paid to the original plaintiff. After the Wayne Circuit Court distributed approximately $300,000 to plaintiff from the judgment, plaintiff filed a complaint against defendant in the Oakland Circuit Court, alleging that defendant improperly received the missing $150,000 as an attorney fee. The Oakland Circuit Court held that the complaint could proceed in that forum. However, on appeal from that holding, the Court of Appeals ruled that plaintiff had improperly filed the complaint in Oakland County and that it must instead commence an action for relief from judgment in Wayne County, where the original case had been tried. Plaintiff then filed suit against defendant in Wayne County. The Wayne Circuit Court dismissed the action, but the Court of Appeals ordered a remand to that court, and directed the trial court to rule on several issues. Plaintiff appealed to this Court, arguing that two of the issues raised had been decided previously in its favor, and hence constituted law of the case. This Court ordered a remand to the trial court to rule on two issues and retained jurisdiction. After the trial court held a hearing, the case returned to this Court.

MCL 600.6303(1) applies when: (1) the original plaintiff commenced a personal injury action to recover for economic loss and (2) a portion of that loss was paid by a collateral source. The original plaintiff here sought recovery for economic loss arising from the decedent's wrongful death in a car accident involving employees of the city of Detroit, and plaintiff paid $450,000 in uninsured motorist benefits to the original plaintiff. Therefore, § 6303(1) applies.[1]

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[1] MCL 600.6303(4) provides, " 'collateral source' means benefits received or receivable from an insurance policy . . . ." It also provides, "Collateral source does not include benefits paid by a person . . . or other

Because MCL § 6303(1) applies in the instant case, the trial court should have reduced the judgment by the amount paid by the collateral source, i.e., plaintiff. In this case, however, the Wayne Circuit Court did not reduce the judgment by the amount paid by plaintiff. Consequently, defendant received an attorney fee based on the total judgment, rather than the judgment less the collateral source payment.

In his concurrence, Justice YOUNG claims that "the collateral source rule is wholly irrelevant to the final disposition of this case," *ante* at 1072, because Rogers, the plaintiff in the underlying case, not defendant, benefited from the failure to apply the collateral source rule. *Ante* at 1073. I respectfully disagree. Because defendant received one-third of the total judgment, rather than one-third of the redefined judgment under MCL 600.6303(1), it is clear that he benefited from the court's failure to apply the collateral source rule.[2]

Although defendant was improperly awarded an attorney fee, dismissal nonetheless seems warranted. The Court of Appeals decision expressly ordered plaintiff "to commence an action for relief from judgment pursuant to MCR 2.612(C)(1)(f)" in the Wayne Circuit Court. Because the Court of Appeals directed plaintiff to commence an action pursuant to this provision, plaintiff was obligated to comply with its procedures. MCR 2.612(C)(1) states that "[o]n motion and on just terms," a court "may relieve a party . . . from a final judgment, order, or proceeding." MCR 2.612(C)(1) requires plaintiff to file a "motion" in the underlying case. Yet, instead of filing a proper motion, plaintiff commenced an independent action against defendant. Plaintiff thus appears to have failed to comply with the order of the Court of Appeals. For this reason only, I concur with the result reached by this Court.

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legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)." MCL 600.6303(3) provides, "Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery." Because the benefits were received from an insurance policy and the contractual lien was not exercised pursuant to subsection 3, i.e., notice was not sent within ten days, plaintiff seems to be a "collateral source."

[2] Justice YOUNG contends that "the source of State Auto's loss is the *Rogers* . . . trial court's decision to reduce State Auto's lien to the benefit of Rogers." *Ante* at 1073 n 1. I believe that the source of State Auto's loss is the trial court's decision to reduce State Auto's lien *and* the trial court's decision not to apply the collateral source rule. Had the trial court not made these two errors, State Auto would have received the $450,000 that it was owed and both Rogers and defendant would have received something less. Because the trial court's errors benefited both Rogers and defendant, State Auto did not err in seeking to recover from defendant.

SICKLES v HOMETOWN AMERICA, LLC, No. 131984. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals that found the defendants immune from suit under MCL 600.2918(3) because "plaintiffs' allegations unquestionably directly arose as a result of the eviction performed by Hometown America and its agent." Slip op, p 5. The plain language of MCL 600.2918(3) provides immunity only for actions undertaken pursuant to an order of eviction. Accepting the plaintiffs' well-pleaded factual allegations as true, and construing them in a light most favorable to the plaintiffs, certain of the defendants' actions, including the conversion and destruction of plaintiffs' property in a manner that was neither necessary to effect the eviction nor incidental to the process of eviction, cannot be said as a matter of law to be within the scope of the July 7, 2004, order of eviction, and hence, may not have been undertaken pursuant to that order. Thus, the circuit court erred in granting summary disposition to the defendants under MCR 2.116(C)(7). We remand this case to the St. Clair Circuit Court for further proceedings not inconsistent with this order. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 266722.

PEOPLE v PAIGE, No. 132553. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and we reinstate the July 26, 2006, order of the Genesee Circuit Court, remanding the case to the 68th District Court for a second preliminary examination. Under the unique circumstances of this case, the circuit court did not abuse its discretion when it ordered the remand. Court of Appeals No. 272645.

PEOPLE v ROSENBERG, No. 132676. 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. The Court of Appeals erred in ruling that the defendant waived his objection to the imposition of a $25,000 fine. Once the Court of Appeals vacated the defendant's original sentence and remanded for resentencing, the case was before the trial court in a presentence posture, allowing for objection to any part of the new sentence. *People v Ezell*, 446 Mich 869 (1994). We remand this case to the Court of Appeals for consideration of the defendant's fine in light of *People v Antolovich*, 207 Mich App 714 (1994). In addition, we direct the Court of Appeals to address the propriety of the sentencing court's remarks regarding the defendant's prior acquittals. If the Court of Appeals determines such remarks to have been inappropriate, it should determine whether resentencing is required. *People v Babcock*, 469 Mich 247 (2003). We do not retain jurisdiction. Court of Appeals No. 262673.

Leave to Appeal Denied April 6, 2007:

ANSARI v GOLD, No. 131161. On order of the Court, the application for leave to appeal the February 14, 2006, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

In this case, plaintiff seeks a stay of proceedings until final disposition of pending federal litigation, wherein plaintiff's counsel initiated a lawsuit challenging the constitutionality of the Michigan Supreme Court recusal rule. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006).

In the recent past, plaintiff's counsel has filed numerous motions for the recusal of one or more Michigan Supreme Court justices, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions for recusal has involved various allegations of claimed bias, principally stemming from Michigan Supreme Court judicial campaigns. All of the previous motions for recusal have been denied. *Graves v Warner Bros*, 469 Mich 853 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Grievance Administrator v Fieger*, 472 Mich 1244 (2005); *McDowell v Detroit*, 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking*, Inc, 474 Mich 1080 (2006); and *Lewis v St John Hosp*, 474 Mich 1089 (2006).

The pending motion to stay this case asserts no new basis for recusal. Rather, the motion is predicated entirely on allegations made in the previous eight motions that have been considered and denied.

As we have each done in connection with these past motions, and as justices must do in connection with every motion for disqualification, we have each looked into our consciences in this case and concluded that we are able to accord fair, impartial, and equal treatment to plaintiff's counsel and his clients.

Further, the motion is predicated on the erroneous notion that disqualification of a justice of the Michigan Supreme Court is governed by the disqualification procedure set forth in MCR 2.003. On the contrary, this procedure has never been held applicable to disqualification of justices. See, e.g., *Adair v Michigan*, 474 Mich 1027, 1043 (2006) (statement of CAVANAGH, J.), 1029 n 2 (statement of TAYLOR, C.J., and MARKMAN, J.); *In re JK,* 468 Mich 202, 220 (2003) (statement of WEAVER, J.). Throughout its history, the disqualification procedure followed in the Michigan Supreme Court is similar to the one followed in the United States Supreme Court. See Statement of Recusal Policy, United States Supreme Court, November 1, 1993; *Laird v Tatum*, 409 US 824, 833, 837 (1972); *Jewell Ridge Coal Corp v Local 6167*, 325 US 897 (1945) (Jackson, J., *concurring*).

There being no new asserted basis that would warrant a stay of proceedings, the motion is denied. Court of Appeals No. 263920

CAVANAGH, J. I would grant the motion for stay.

KELLY, J. I would grant the application for leave to appeal and grant the motion for stay.

WEAVER, J. (*dissenting*). I dissent from the participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case, where Mr. Geoffrey N. Fieger's law firm represents the plaintiff. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting), and my dissent to the denial of the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

I also dissent from the order denying plaintiff's motion for stay of proceedings pending Mr. Fieger's lawsuit in the United States District Court for the Eastern District of Michigan concerning Michigan's disqualification rules governing Supreme Court justices. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006). I would grant the motion to stay.

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged,[1] without success for almost 4 years, this Court to undertake action and achieve, the disqualification of justices is governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not.

For example, in *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN stated that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." Justice YOUNG concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

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[1] Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., statements of WEAVER, J., in *In re JK,* 468 Mich 202 (2003); *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit,* 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc,* 474 Mich 1080 (2006); *Lewis v St John Hosp,* 474 Mich 1089 (2006); *Adair v Michigan,* 474 Mich 1027 (2006); *Grievance Administrator v Fieger,* 476 Mich 231 (2006*); Grievance Administrator v Fieger*, 477 Mich 1228 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor*, 477 Mich 1044 (2007); and *Neal v Dep't of Corrections*, 477 Mich 1049 (2007).

Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to parties' counsel and clients without any independent check on justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further, while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for *all* justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[2]

PEOPLE v WAGONER, No. 132390; Court of Appeals No. 261837.

KELLY, J. (*dissenting*). Defendant was convicted of being a felon in possession of a firearm, MCL 750.224f, and of possession of a firearm during the commission of a felony, MCL 750.227b, as a result of a single act of possessing a firearm. Because I believe that the social norms underlying these statutes are similar, an inference may be drawn that the Legislature intended not to provide multiple punishments for a single act that violated both statutes. See *People v Calloway*, 469 Mich 448, 455 (2003) (KELLY, J., concurring in result only). Accordingly, I would grant leave to appeal to reconsider *Calloway*.

Appeal Dismissed April 6, 2007:

MILI v TENDERCARE MICHIGAN, INC, No. 132410. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 265824.

Summary Dispositions April 11, 2007:

MCDOWELL v CITY OF DETROIT, No. 127660. We hereby reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of a judgment in favor of defendants. "Except as otherwise provided in [the governmental immunity] 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). The interpretation of the governmental tort liability act set forth in *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139 (1988), applies to all cases brought on or before April 2, 2002, which includes the instant case. *Pohutski v City of Allen Park,* 465 Mich 675, 699 (2002). As plaintiff concedes, the Court of Appeals erred in holding that negligent nuisance is an exception to governmental immunity under *Hadfield*. The Court of Appeals also erred in holding that plaintiff presented sufficient evidence to create a genuine issue of material fact allowing plaintiff to proceed with the cause of action for trespass nuisance. Because the fire

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[2] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

started within the walls of the leased apartment and a lease of an apartment includes the walls of that apartment, *Forbes v Gorman,* 159 Mich 291, 294 (1909), there was no trespass or any other physical intrusion into the apartment on the part of the defendant.[1] The provision of the lease that prohibited the lessee from making any "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management" did not exclude from the lease the space within the walls; it merely regulated the lessee's activities with respect to this space. If plaintiff's argument to the contrary was to prevail, this would mean that the lessee had no right of possession over *any* of the apartment because the lessee could not make any alterations or repairs anywhere within the apartment without the lessor's consent.[2] Reported below: 264 Mich App 337.

CAVANAGH, J. (*dissenting*). I dissent from the order reversing the judgment of the Court of Appeals in this case. As a preliminary matter, I

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[1] The dissent criticizes the majority for focusing on the fact that the fire started within the walls and ignoring the fact that the fire started because of faulty electrical wiring, and that defendant had a contractual and statutory duty to maintain the electrical wiring. First, we want to make perfectly clear that the fact that the fire started within the walls is completely uncontested. Plaintiff's brief states, "Fire broke out from inside the north wall," and plaintiff's experts "confirmed that the fire originated in the interstitial space of the north wall." Plaintiff's brief at 4, 5. Second, contrary to the dissent's contention, we do not contend that "the walls were the source or cause of the fire." *Post* at 1082 n 1. Instead, we simply state the uncontested fact that the fire started within the walls. Third, the issue here is *not* whether faulty electrical wiring caused the fire or whether defendant violated a contractual or statutory duty to maintain the electrical wiring. Rather, the issue is whether the governmental immunity act of this state immunizes defendant from liability, or, more precisely, whether the fire allegedly caused by defendant's negligence "trespassed" onto plaintiff's apartment. Because the fire started within the walls of plaintiff's own apartment, the fire cannot be said to have "trespassed" onto her apartment.

[2] Contrary to the dissent's contention, it is the dissent's position that "defies logic"; under its rationale, *no* lessee would *ever* have the right to possess the leased premises if the lease contained *any* restriction on the lessee's use of the premises. Further, we do not hold, as the dissent suggests, that "a tenant's permission to live in a space negates the landlord's ownership and control over the premises and exonerates the landlord from liability for unsafe conditions." *Post* at 1083 n 2. Rather, we simply hold that a fire that starts within the walls of an apartment does not "trespass" onto the apartment when it spreads throughout the apartment within the meaning of the trespass nuisance exception to governmental immunity. That is, we are not holding that *no* landlord

would grant plaintiff's motion for a stay of proceedings in this case. Litigation regarding the constitutionality of this Court's recusal procedures is currently pending in the federal court system. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006) (reversing the United States District Court for the Eastern District of Michigan and remanding the case to that court for further proceedings). Because plaintiff has asked several justices to recuse themselves from participating in this case, and those justices have declined to do so, the most prudent course of action would be to await the final disposition of the federal suit.

Regarding the substance of the majority's order, the majority is simply wrong to base its conclusion that there was no trespass on its observation that "the fire started within the walls of the leased apartment . . . ." *Ante* at 1079-1080. By failing to examine more precisely where the fire began and the source of that fire, the majority erroneously denies any possibility of recovery for the tragic and preventable deaths of six children.

Indisputably, the fire began in an electrical outlet because of faulty wiring in that outlet.[1] While the wiring to the outlet was "within the walls," the walls of plaintiff's apartment did not spontaneously combust. Rather, the faulty electrical wiring, which the tenant had pleaded with defendants many times to fix, ignited, causing the walls to burn. And not only did the tenant not have control of the electrical wiring, the tenant's contract also *specifically placed the duty of maintaining the electrical systems on defendants*. Critically, section VII(A)(1) of the lease imposed the following contractual obligations on defendants:

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would ever be liable under these circumstances, but only that the governmental immunity act immunizes *this* defendant from liability under these circumstances.

[1] The majority proclaims that because plaintiff's brief states that the " '[f]ire broke out from inside the north wall' " and that an expert testified that " 'the fire originated in the interstitial space of the north wall,' " *ante* at 1080 n 1, the analysis must center on the walls of the tenant's apartment. Neither plaintiff's nor the expert's statement denies or conflicts with the expert's testimony that the *source* of the fire was the electrical wiring. (Nor do the statements the majority points to conflict with common sense or logic.) The electrical wiring was inside the wall; thus, the expert naturally stated that the fire originated inside the walls. Then, as fires do, the fire spread throughout the interstitial wall space and "broke out" into the apartment "from inside" the wall. Neither plaintiff nor either of her experts ever contended that the walls were the source or cause of the fire. That is the majority's fiction alone. Further, while I agree with the majority that the question is whether the government is immune from liability for this horrendous event, I simply conclude that it was not immune under the correct analysis.

> a. Repair and maintain the dwelling unit, equipment and appliances, and the common areas and facilities which are needed to keep the housing in decent, safe and sanitary condition.
>
> b. Comply with all requirements of applicable state and local building and housing codes and HUD regulations concerning matters materially affecting the health or safety of the occupants.
>
> c. Keep development buildings, facilities, and common areas, not otherwise assigned to Residents for maintenance and upkeep, in a clean and safe condition.
>
> d. Maintain electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances, supplied or required to be supplied by Management in good and safe working order and condition.
>
> * * *
>
> k. Respond to and satisfy Resident's damage claims, unless Management determines that Resident's damage(s) or loss was not caused by Management but by theft or casualty, among other things, in which case Management shall not be liable.

Obviously, the tenant neither installed nor maintained the electrical wiring within her apartment, which wiring, it is worth noting, was part of an electrical system serving an entire building. And it is self-evident that the tenant did not have the right to alter or otherwise interfere with the apartment building's electrical system. Clearly, defendants, not the tenant, had control and dominion over the electrical wiring. Of course, the majority does not opine, nor did defendants argue, that the tenant controlled the wiring, for such a conclusion would be difficult to sustain indeed. Rather, the majority turns a blind eye and proclaims instead that the fire began "within the walls." *Ante* at 1080 n 1. That red herring of a conclusion blatantly ignores the true origin of the fire as shown by expert testimony, through which it was established that the fire originated *inside the electrical outlet* as the result of electrical "arcing," which, in turn, "ignite[ed] fuels in the wall space including, but not limited to, any insulating materials that were in there that may have had a combustible component . . . ." Thus, the majority's dismissal of this case based on its interpretation of law regarding control over walls is truly egregious.

But the majority errs again in stating that "a lease of an apartment includes the walls of that apartment" because it cannot be said that the tenant had a right of control that in any way negated defendants' duties, despite the majority's citation of *Forbes v Gorman*, 159 Mich 291 (1909). In *Forbes*, this Court stated, "Such lessee obtains the right, *in the absence of restrictions, to use such premises*, including the walls, for all purposes not inconsistent with the lease. He acquires the right to the use of the outer walls, and can put any sign or signs thereon which work no injury to the freehold. . . ." *Id.* at 294 (emphasis added). Because the area of

inquiry in *Forbes* was the roof of the subject building, this Court's comment with respect to the walls might be considered obiter dictum. But even were the principle announced in *Forbes* given full force, the lease in the present case contained restrictions regarding the walls, as noted by the majority, and *Forbes* explicitly excepted such restrictions from its analysis. The majority defies logic by asserting that the lease contemplated restricting only the tenant's use of the outer surface of the wall, while leaving intact her right to control and alter the *inner space between* the walls.[2]

In *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139 (1988), this Court set forth the elements of trespass-nuisance as "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Id.* at 169. It is well established that a fire hazard that the government allows to remain is a nuisance, *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 643 (1970), and that fire is a physical intrusion, *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 164 (1996). In *Continental Paper* this Court stated:

> Control may be found where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, or employs another to do work that he knows is likely to create a nuisance. It may also be found where the governmental defendant is under a statutory duty to abate the nuisance. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995) (citation omitted). [*Id.* at 165 n 7.]

As the Court of Appeals properly recognized, but the majority neglects to acknowledge, MCL 554.139 mandates landlords to keep premises "fit for the use intended by the parties" and "in reasonable repair . . . and . . . comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located . . . ." MCL 554.139(1)(a), (b). Likewise, MCL 125.471 requires that "[e]very dwelling and all the parts thereof including plumbing, heating, ventilating *and electrical wiring* shall be kept in good repair *by the owner*." (Emphasis added.) Defendants were on actual notice of the problems with the electrical outlet that eventually caught fire and other electrical components of the home as evidenced by nearly two years' worth of complaints made by the tenant to defendants. For instance, the tenant

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[2] The majority's statement that under my rationale, no lessee could ever "possess" his premises, *ante* at 1080 n 2, obfuscates the real issue. "Possession," in this context, has a meaning entirely different than "ownership" or "control." See, e.g., *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 165 n 7 (1996). It is the majority's failure to recognize this difference that leads to its erroneous conclusion that a tenant's permission to live in a space negates the landlord's ownership and control over the premises and exonerates the landlord from liability for unsafe conditions.

informed defendants that sparks would fly from lights in the basement and kitchen, the thermostat shot flames and made popping noises, and the subject outlet sparked, fumed, and smelled like burning paper when the tenant would plug in appliances.

The wisdom of *Continental Paper* is well-suited to this case. Defendants unquestionably owned the premises from which this nuisance arose and retained the right of complete control over the electrical system, which malfunctioned. Further, defendants knew of the dangerous condition, and failed to fix it, despite their contractual and statutory obligations to do so. The fact that a landlord may "regulate" uses of its leased premises is, in my view, irrelevant to the question of trespass-nuisance as that question pertains to ownership and control.

Further, I find that the reasoning used throughout cases addressing nuisance applies with full force to the case at hand. Namely, this Court has soundly reasoned that to allow the government to escape liability for harm resulting from a nuisance it controls "would allow the state an absolute right to use its property in any manner it may choose without regard for the public at large or private persons." *Hadfield*, *supra* at 208 (opinion of BOYLE, J.), citing *Gerzeski v State Highway Dep't*, 403 Mich 149, 169 (1978) (RYAN, J., dissenting). The carte blanche to the government of which *Hadfield* warned is, unfortunately, established by the majority in this case.

The focus of the majority on who owned or controlled the walls or the space between the walls is gravely misplaced. The majority should acknowledge that the correct analysis asks who owned, controlled, and had a duty to maintain *the electrical wiring*. Here, the duty to maintain the wiring, as well as ownership and control over it, was unequivocally defendants'. Defendants failed abysmally in their obligations, and six children died. Accordingly, I would affirm the judgment of the Court of Appeals and let the victims of defendants' neglect have their day in court.

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). I join Justice CAVANAGH's dissenting statement in this case. I write further to state that I dissent from the participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case, where Mr. Geoffrey N. Fieger's law firm represents the plaintiff. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger*, 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting), and my dissent to the denial of the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

I also dissent from the order denying plaintiff's motion for a stay of proceedings pending Mr. Fieger's lawsuit in the United States District Court for the Eastern District of Michigan concerning Michigan's disqualification rules for Supreme Court justices. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006). I would grant the motion to stay.

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged,[1] without success for almost 4 years, this Court to undertake action and achieve, the disqualification of justices is governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not.

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Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to parties' counsel and clients without any independent check on justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further while it appears to continue to be for *some* justices a "tradition" of this Court for

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a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for *all* justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[2]

HUGHES v TIMKO, No. 130896. The motion for leave to file a brief amicus curiae is granted. The application for leave to appeal the February 28, 2006, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the February 28, 2006, judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Garcetti v Ceballos*, 547 US ___; 126 S Ct 1951; 164 L Ed 2d 689 (2006). We do not retain jurisdiction. Court of Appeals No. 255229.

PEOPLE v SPENCER, No. 131618. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court, and we remand this case to the trial court for resentencing. Because the defendant's second-degree criminal sexual conduct convictions did not involve sexual penetration, the defendant was improperly assessed 50 points for offense variable 13. The correct score for offense variable 13 was 25 points. On remand, the trial court shall correct the score on offense variable 13 and resentence the defendant within the appropriate statutory sentencing guidelines range, pursuant to the evaluation under *People v Cobbs,* 443 Mich 276 (1993), or permit the defendant to withdraw his plea. 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. The motion for stay and motion for miscellaneous relief are denied as moot. We do not retain jurisdiction. Court of Appeals No. 266840.

PEOPLE v GROSS, No. 131689. 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. 266975.

SZKRYBALO v SZKRYBALO, No. 132759. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment holding that the only evidence of a "badge of fraud" in this case under MCL 566.34(2) was that the defendant James Szkrybalo transferred assets to Andrea Szkrybalo, an "insider" under MCL 566.31(g)(i)(A), which assets Andrea subsequently utilized to make mortgage payments on a home titled in her name. The plaintiff presented evidence of other "badges of fraud" including: James was sued before he made the transfers, MCL 566.34(2)(d); the transfers occurred shortly after James incurred a substantial debt, MCL 566.34(2)(j); James did not receive a reasonably equivalent value for the transfers, MCL 566.34(2)(h); *McCaslin v Schouten*, 294 Mich 180 (1940); and James allegedly attempted to conceal the transfers, MCL 566.34(2)(c) and (g). See *Regan v Carrigan*, 194 Mich App 35, 39 (1992) ("[C]ourts will closely

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[2] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

scrutinize transactions between a husband and wife when creditors are involved."). We remand this case to the Court of Appeals for consideration of whether, in light of this evidence, the plaintiffs established the existence of a genuine issue of material fact regarding whether the defendants actually intended to hinder, delay, or defraud the plaintiffs under MCL 566.34. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 269125.

MIERZEJEWSKI v TORRE & BRUGLIO, INC, No. 132903. The motion for miscellaneous relief is granted. The application for leave to appeal the September 26, 2006, 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 we remand this case to the Oakland Circuit Court for entry of an order of summary disposition in favor of the defendant. The Court of Appeals erred in reinstating the plaintiffs' claim on the basis of a duty owed by the defendant to the plaintiffs. The defendant did not owe any duty to the plaintiffs separate and distinct from the contractual promise made under its snow removal contract with the premises owner. *Fultz v Union-Commerce Assoc,* 470 Mich 460 (2004). Court of Appeals No. 269599.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

O'NEAL v ST JOHN HOSPITAL & MEDICAL CENTER, Nos. 133232, 132276. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on March 7, 2007, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals Nos. 274573, 274570.

WEAVER, J. I would deny leave to appeal as I am not persuaded of the need for immediate appellate review.

Leave to Appeal Denied April 11, 2007:

BROWN v AMERITECH CORPORATION, INC, Nos. 132574, 132575; Court of Appeals Nos. 262420, 263469.

CORRIGAN, J. I would reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissent.

PEOPLE v THEODORE LEE, No. 132677; Court of Appeals No. 273288.

PEOPLE v MARK SCOTT, No. 132707; Court of Appeals No. 273879.

KELLY, J. I would grant leave to appeal.

PEOPLE v ALVIN WALKER, No. 132747; reported below: 273 Mich App 56 (on remand).

KELLY, J. I would grant leave to appeal.

RIZZUTO v RIZZUTO, No. 132769. The application for leave to appeal the November 8, 2006, order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. This order is without prejudice to the plaintiff raising the issue of whether MCL 552.28 precludes courts from prohibiting a party from seeking a modification of spousal support prior to the expiration of a stated period of years, should the plaintiff seek to modify his support obligation prior to the expiration of the five-year period imposed by the Wayne Circuit Court's March 7, 2006, order. Court of Appeals No. 269993.

Reconsideration Denied April 11, 2007:

NATIONAL WINE & SPIRITS, INC v STATE OF MICHIGAN, No. 126121. Leave to appeal denied at 477 Mich 935. Court of Appeals No. 243524.

MARKMAN, J. (*concurring*). I concur in the order denying plaintiffs' motion for reconsideration for essentially the reasons set forth by the Court of Appeals. I therefore agree with the majority that an opinion of this Court is unnecessary. However, given that we held plaintiffs' application in abeyance pending the United States Supreme Court's decision in *Granholm v Heald,* 544 US 460 (2005), and then twice heard oral arguments on the issues presented, I wish to add something more to this Court's order of denial.

The statute at issue here, MCL 436.1205(3), prohibits an authorized distribution agent (ADA) that is licensed as a wine wholesaler from "dualing," i.e., selling a brand of wine in an area in which another wine wholesaler has already been licensed to sell that brand, unless the wine wholesaler was dualing on or before September 24, 1996.[1] Plaintiffs

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[1] MCL 436.1205(3) provides:

An authorized distribution agent shall not have a direct or indirect interest in a supplier of spirits or in a retailer. A supplier of spirits or a retailer shall not have a direct or indirect interest in an authorized distribution agent. An authorized distribution agent shall not hold title to spirits. After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing

contend that § 205(3) violates the Commerce Clause and the Equal Protection Clause of the United States Constitution.

The Commerce Clause, US Const, art I, § 8, provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States . . . ." Derived from this is the so-called "dormant" Commerce Clause that prohibits state laws that discriminate against or unduly burden interstate commerce. *Gen Motors Corp v Tracy*, 519 US 278, 287 (1997).

The restriction in § 205(3) applies to all ADA wine wholesalers that were not already dualing on or before September 24, 1996. It does not distinguish between in-state and out-of-state ADA wine wholesalers. Because the restriction in § 205(3) on dualing does not so distinguish, it regulates ADA wine wholesalers evenhandedly. Therefore, § 205(3) does not discriminate against or unduly burden interstate commerce in violation of the Commerce Clause.

In order to obtain a wine wholesale license in Michigan, one must have resided in Michigan for at least one year. MCL 436.1601(1).[2] Plaintiffs argue that because of this residency requirement, as of September 24, 1996, only Michigan residents were dualing wine wholesalers, and § 205(3) effectively prohibits companies that did not dual in Michigan on or before September 24, 1996, from ever dualing in Michigan. Thus, say plaintiffs, the Legislature has "permanently barred" any out-of-state ADA/wine wholesalers from ever dualing.

First, out-of-state ADA/wine wholesalers are not "permanently barred" from dualing because § 205(3) allows them to dual if they acquire, purchase, or merge with a company that dualed in Michigan on or before September 24, 1996.

Second, plaintiffs have not properly challenged the one-year residency requirement of MCL 436.1601(1). At oral arguments, plaintiffs' counsel stated, "We have not challenged [§ 601(1)] nor do we think it is critical to our case." Further, whether plaintiffs would have standing to challenge the residency requirement of § 601 is questionable given that National Wine & Spirits, L.L.C., is a Michigan resident and a licensed wine wholesaler in Michigan. As plaintiffs' counsel acknowledged at oral argument, when asked why they had not challenged the residency requirement of § 601, "[B]ecause we are operating now. We have met the residency requirement . . . ."

The Fourteenth Amendment of the United States Constitution provides, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV. The rational basis test is used to review equal protection challenges to social or economic

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wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

[2] MCL 436.1601(1) provides: "A wholesale licensee or an applicant for a wholesale license, if an individual, shall be licensed only if that individual has resided in this state for not less than 1 year immediately prior to the date of issuance of the license."

legislation. *Phillips v Mirac, Inc,* 470 Mich 415, 434 (2004). The parties agree that the rational basis test is the appropriate test in this case. "Under this test, 'courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose.' " *Id.* at 433 (citation omitted). "This highly deferential standard of review requires a challenger to show that the legislation is ' "arbitrary and wholly unrelated in a rational way to the objective of the statute." ' " *Id.* (citation omitted).

> The rational basis test considers whether the " 'classification itself is rationally related to a legitimate governmental interest.' " But the rational basis test does not test "the wisdom, need, or appropriateness of the legislation . . . ." We examine the purpose with which the legislation was enacted, not its effects: "That the accommodation struck may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." In discerning the purpose, we look to "any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." [*Id.* at 434-435 (citations omitted).]

Regardless of whether MCL 436.1205(3) constitutes wise or prudent legislation, it is rationally related to an apparent governmental interest, namely, that of preventing ADAs from dominating the wholesale wine market, while protecting the business interests of wine wholesalers who were dualing on or before September 24, 1996. As the Court of Appeals explained:

> We conclude that the classification based on date is rationally related to defendant's purpose. Before 1996, there were no ADAs because the distribution of alcohol was handled solely by Michigan's Liquor Control Commission. After defendant allowed ADAs to distribute alcohol, it realized that ADAs receiving state subsidies that were also wine wholesalers had an unfair economic advantage over wine wholesalers that were not ADAs. In order to prevent this specific unfair advantage, it decided to preclude ADA/wholesalers from dualing. But because some ADA/wholesalers already had dualing agreements, defendant did not take away their pre-existing right to dual. It was necessary for the Legislature to insert a date prior to the date the statute was effective because if it had not ADAs and wholesalers would have had a window of time in which to obtain licenses and/or dualing agreements. In other words, it would have allowed circumstances to be altered beyond the status quo. . . . Rather than penalizing a wine wholesaler that already had a dualing agreement when/if it became an ADA, the Legislature allowed the wine wholesaler to continue to operate under their preexisting agreement.

Because § 205(3) is rationally related to a legitimate government purpose, it does not violate the Equal Protection Clause.

Plaintiffs' application for leave to appeal was held in abeyance pending the decision in *Heald*. In *Heald*, the United States Supreme Court held that allowing in-state wineries to sell wine directly to consumers, but prohibiting out-of-state wineries from doing so, discriminated against interstate commerce in violation of the Commerce Clause and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment.[3] Because I agree with the Court of Appeals that the statute at issue in the instant case does not discriminate against interstate commerce in violation of the Commerce Clause, there is no need to address whether the Twenty-first Amendment would authorize or permit any discrimination against interstate commerce.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

CAVANAGH and WEAVER, JJ. We would grant reconsideration.

KELLY, J. (*dissenting*). Plaintiffs brought an action challenging the constitutionality of MCL 436.1205(3). The statute prevents an authorized distribution agent (ADA) from acting as a wine wholesaler and distributor in an area where a wholesale agreement existed before September 24, 1996. An exception exists for an ADA with respect to the brands of wine it sold in the area before that date.

Both the trial court and the Court of Appeals found the statute constitutional. This Court heard oral argument on the application for leave to appeal and granted full briefing and argument on the merits of the case. However, the Court then inexplicably decided that leave to appeal had been improvidently granted. I joined Justice CAVANAGH's statement dissenting from that decision. Now plaintiffs have filed a motion for reconsideration. I would grant that motion, reverse the judgment of the Court of Appeals, and hold that MCL 435.1205(3) is unconstitutional as applied.

FACTS OF THE CASE

Following the adoption of the Twenty-first Amendment,[1] Michigan enacted the Michigan Liquor Control Act of 1933.[2] Under the act, there were no private distributors of spirits. Rather, the state itself purchased spirits and distributed them to licensed outlets using a three-tiered system. This model was intended to keep manufacturers, wholesalers, and retailers separate and distinct. In contrast to the distribution of spirits, the distribution of wine is and always has been done by private parties.

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[3] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[1] US Const, Am XXI.

[2] MCL 436.1 *et seq.*, repealed by 1998 PA 58, effective April 14, 1998.

In 1996, the State of Michigan ended its role in warehousing and distributing spirits and adopted a system whereby authorized distribution agents handled these functions. The state paid the ADAs for their services. In the course of privatizing warehousing and delivery, the state also imposed eligibility and operational restrictions on the ADAs. Certain of those restrictions are at issue in the case and are contained in MCL 436.1205(3).[3] They prohibit ADAs who wish to sell given brands of wine wholesale from doing so in areas where a wholesaler has already been assigned to sell those brands. An exception exists for ADAs that were selling those brands in those areas before September 24, 1996.

Since the end of Prohibition, Michigan law has required every wine wholesaler to be a Michigan resident for one year before obtaining a wholesaler's license. See MCL 436.1601. The effect of MCL 436.1205(3) is that only in-state companies can take advantage of the exception, because only they were licensed wine wholesalers on September 24, 1996.

Plaintiffs National Wine & Spirits, Inc.; NWS Michigan, Inc.; and National Wine & Spirits, L.L.C., brought suit challenging MCL 436.1205(3).[4] Plaintiffs argue that the statute violates the Commerce

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[3] MCL 436.1205(3) provides:

> An authorized distribution agent shall not have a direct or indirect interest in a supplier of spirits or in a retailer. A supplier of spirits or a retailer shall not have a direct or indirect interest in an authorized distribution agent. An authorized distribution agent shall not hold title to spirits. After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

[4] Defendants are the state of Michigan and the Michigan Beer & Wine Wholesalers Association of Michigan. Michigan Beer & Wine Wholesalers represents 75 percent of the licensed wholesalers in Michigan. It intervened in the action on April 17, 2002.

Clause[5] and the Equal Protection Clause[6] of the United States Constitution. The trial court determined that the statute violated neither and granted summary disposition to defendants. The Court of Appeals affirmed.

ANALYSIS OF THE LAW

THE COMMERCE CLAUSE

Article 1, § 8 of the United States Constitution gives Congress the power to regulate commerce among the states. The United States Supreme Court has inferred, as a necessary corollary to this power, that state and local laws placing an undue burden on interstate commerce cannot be upheld. This principle has generally become known as the "Dormant Commerce Clause." The United States Supreme Court has adopted a two-tiered approach to determining whether a state regulation violates the Dormant Commerce Clause.

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [it is] generally struck down . . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [it must be] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. . . . In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. [*Brown-Forman Distillers Corp v New York State Liquor Authority*, 476 US 573, 579 (1986).]

Recently, in explaining its Dormant Commerce Clause jurisprudence, the United States Supreme Court said that states may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. *Granholm v Heald*, 544 US 460, 472 (2005). Laws that establish a competitive advantage deprive citizens of the right to access the markets of other states on equal terms. *Id.* at 473. A state law will violate the Commerce Clause if it forces differential treatment of in-state and out-of-state economic interests that benefits the former while burdening the latter. *Id.* at 472.

After the Twenty-first Amendment was adopted, the United States Supreme Court appeared to support the view that, when alcohol was involved, the amendment gave states the authority to discriminate against out-of-state goods. *Id*. at 484-485. However, this view has been abandoned, and it is now clear that the Twenty-first Amendment does

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[5] US Const, art I, § 8, cl 3.

[6] US Const, Am XIV, § 1.

not give states the right to pass discriminatory laws in the area. The state regulation of alcohol, like other articles in interstate commerce, is limited by the Commerce Clause. *Id.* at 487.

MCL 436.1205(3) IS SUBJECT TO STRICT SCRUTINY

The Commerce Clause problem with MCL 436.1205(3) is not straightforward. To appreciate the magnitude of the constitutional issue, it is necessary to understand the law's effects.

MCL 436.1205(3) creates two categories of ADAs: (1) ADAs that were wholesaling wine before September 24, 1996 (the favored class) and (2) ADAs that were not (the disfavored class). The two classes are treated differently but, within each class, every ADA is treated the same. At first blush, treating ADAs differently depending on whether they were in the wholesaling business on a certain date would seem not to create a Commerce Clause issue. It is only when one considers that solely Michigan companies were able to wholesale wine before September 24, 1996,[7] that the constitutional problem comes into focus.

Because only Michigan companies could sell wine wholesale in Michigan before September 24, 1996, the favored class contains only Michigan companies. The members of this class are given a distinct advantage over all other ADAs. The reason is that only they can act as wine wholesalers and distributors in areas where a preexisting wholesale agreement exists.[8] By giving a class of Michigan companies this advantage, the law creates a system where out-of-state ADAs can never compete on the same terms as the favored class of Michigan ADAs. When a state statute discriminates against interstate commerce by favoring in-state economic

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[7] See MCL 436.1601. The constitutionality of the residency requirement is not at issue. Justice MARKMAN finds this to be a determinative factor. It is not. MCL 436.1205(3) locks in place a system that discriminates in favor of local commerce. Plaintiffs can challenge the effects of MCL 436.1205(3) without challenging the residency requirement.

[8] An ADA that was selling alcohol wholesale in Michigan before September 24, 1996, can continue to sell all the brands of wine in the state that it was selling on that date. One that was not can sell brands of wine wholesale only in areas where there is not a preexisting wholesale agreement for those brands. By September 24, 1996, every brand of wine sold in Michigan had been assigned to a wholesaler. Ninety-seven percent of the brands sold today in Michigan were being sold then. Thus, there are very few brands sold today for which there was not a preexisting wholesale agreement on September 24, 1996. Consequently, it is almost impossible for ADAs that were not selling here before that date to compete effectively in the market. Also, ADAs that can participate in this market are able to develop cost savings that they can pass on to suppliers. Obviously, ADAs that cannot develop these cost savings have a much harder time competing with ADAs that can.

interests over out-of-state interests, it is subject to strict scrutiny. *Brown-Forman Distillers Corp*, 476 US at 578. Because this law favors in-state entities over out-of-state entities, it can survive only if it can withstand strict scrutiny.[9]

To survive strict scrutiny, the state must demonstrate that the law in question actually furthers the purported legitimate state interest, and no less discriminatory means exist to accomplish this interest. *New Energy Co of Indiana v Limbach,* 486 US 269, 278 (1988). Intervening defendant Michigan Beer & Wine Wholesalers Association claims that the purpose of this statute is to protect existing wine wholesalers from ADAs that might desire to become wine wholesalers. It argues that this protection is needed because, without it, ADA wholesalers would have a built-in advantage over non-ADA wholesalers and could gobble up the market.

Assuming this is a legitimate purpose, there is a less discriminatory way to accomplish it. The Legislature could ban all ADAs, not just those that began wholesaling after September 24, 1996, from wholesaling brands of wine in areas where there is a preexisting wholesale agreement covering them.[10] Because this law is not narrowly tailored to achieve the government's interest, it is invalid and must be struck down.[11]

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[9] When more than one wholesaler sells the same brand of wine in the same area it is known as "dualing." In finding MCL 436.1205(3) constitutional, Justice MARKMAN relies on the fact that an out-of-state company could "dual" if it acquired, purchased, or merged with a company that "dualed" before September 24, 1996. *Ante* at 1088. The fact that a hypothetical situation can be envisioned where the statute could be constitutionally applied does not save the statute from a constitutional challenge. See *Brown-Forman Distillers Corp*, 476 US at 579. ("When a state statute directly regulates or discriminates against interstate commerce, or when its *effect* is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.") (Emphasis added).

Justice MARKMAN also refers to the possibility that the Twenty-first Amendment may authorize the discrimination at issue. *Ante* at 1091. The state regulation of alcohol is limited by the Commerce Clause the same as state regulation of any other article in interstate commerce. *Heald*, 544 US at 487.

[10] At least two Michigan companies that were wholesalers as of September 24, 1996 have become ADAs. They handle approximately 70 percent of the wholesale business in the state. If the Legislature was concerned about unfair competition from ADAs, this question arises: Why did it include a loophole that allows two companies representing 70 percent of the market to become ADAs and continue to wholesale every brand of wine they sold before September 24, 1996?

[11] The defendants have argued that there can be no Commerce Clause violation because the disfavored class created by this law also contains

CONCLUSION

MCL 436.1205(3) locks in place a system that provides an advantage to a class of Michigan companies that no out-of-state company will ever be able to match. For this reason, it violates the Commerce Clause of the United States Constitution and should be struck down. I dissent from the order denying plaintiffs' motion for reconsideration. I would grant the motion and reverse the judgment of the Court of Appeals.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 13, 2007:

H A SMITH LUMBER & HARDWARE COMPANY v DECINA, No. 128560. By order of March 8, 2006, the Court remanded this case to the Oakland Circuit Court and directed it to provide a written explanation of the legal basis for its attorney fee awards. On order of the Court, the Oakland Circuit Court having entered its order clarifying judgment regarding the bases for its attorney fee awards, the application is again 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 submit supplemental briefs within 42 days of the date of this order addressing whether the lien claimants, plaintiff H.A. Smith Lumber & Hardware Company and defendant William Gardella, doing business as Williams Glass Company, were entitled to attorney fees as prevailing parties under MCL 570.1118(2). Reported below: 265 Mich App 380.

PEOPLE v GARDNER, No. 131942. By order of December 13, 2006, the prosecuting attorney was directed to answer the application for leave to appeal the July 10, 2006, order of the Court of Appeals. On order of the Court, the answer having been received, the application is again 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). We further order the Wayne Circuit Court, in accordance with Administrative Order No. 2003—3, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court. The parties shall submit supplemental briefs within 56 days of the date of the order appointing counsel, addressing whether *People v Preuss*, 436 Mich 714 (1990), and *People v Stoudemire*, 429 Mich 262 (1987), mod *Preuss, supra*, correctly held that multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes and, if so, whether the defendant is entitled to be resentenced. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs

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Michigan companies. This is irrelevant and does not erase the discriminatory effect. The fact that a statute favors one class of in-state entities over another does not mitigate its burden on interstate commerce. *Fort Gratiot Sanitary Landfill v Michigan Dep't of Natural Resources*, 504 US 353, 357-358 (1992).

amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 267317.

STOKES v DAIMLERCHRYSLER CORPORATION, No. 132648. The motions for leave to file a brief amicus curiae are granted. The application for leave to appeal the October 26, 2006, 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). At oral argument, the parties shall address whether the burden-shifting analysis described in the Court of Appeals opinion in this case relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich 144 (2002). The parties shall file supplemental briefs addressing this issue within 56 days of the date of this order, but they should not submit mere restatements of the arguments made in their application papers. Reported below: 272 Mich App 571.

Leave to Appeal Granted April 13, 2007:

KUZNAR v RAKSHA CORPORATION, No. 132203. The parties shall include among the issues to be briefed whether a pharmacy is a "licensed health facility" under MCL 600.5838a, and whether, in light of MCL 333.17741, the pharmacist is a necessary party to a claim against a pharmacy for dispensing the wrong drug. 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: 272 Mich App 130.

KAISER v ALLEN, No. 133031. The parties shall include among the issues to be briefed: (1) the interrelationship between MCL 600.2957(1), which allocates liability "in direct proportion to the person's percentage of fault," and MCL 257.401(1), which imposes vicarious liability on a motor vehicle owner that is not based on the owner's fault; and (2) the effect, if any, of the jury's damage award against the defendant driver of $100,000, which, according to the jury verdict form, was "the total amount of damages suffered by the estate of Marion Rose Kaiser as a result of her death in this accident," in assessing the trial court's conclusion that the plaintiff would take nothing against the defendant driver in light of the $300,000 paid in settlement of the claim against the defendant vehicle owner arising from the subject accident.

The Michigan Trial Lawyers Association and Michigan Defense Trial Counsel are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 264600.

Summary Disposition April 13, 2007:

BAKER v COUCHMAN, No. 131607. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in Court of Appeals Judge O'CONNELL's partial dissent, and we remand this

case to the Livingston Circuit Court for entry of summary disposition in favor of the defendant superintendent pursuant to MCR 2.116(C)(7). Reported below: 271 Mich App 174.

TAYLOR, C.J. (*concurring*). I agree with reversal of the Court of Appeals judgment because the defendant superintendent is entitled to absolute governmental immunity from suit under MCL 691.1407(5) ("A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.").

KELLY and YOUNG, JJ. We join the statement of Chief Justice TAYLOR.

MARKMAN, J. (*concurring*). I fully concur in the decision to reverse the judgment of the Court of Appeals and to remand the case for entry of an order dismissing plaintiff's claim. I would do so on the ground that plaintiff has failed to state a claim. To state a claim for tortious interference with a business relationship, a plaintiff must allege tortious interference by a third party. See *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13 (1993); *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287-288 (1986). Here, defendant is not a third party to the business relationship at issue—plaintiff's employment as the school resource officer for Pinckney Community Schools. See *Baker v Couchman*, 271 Mich App 174, 193 n 3, 199-200 (2006) (O'CONNELL, J., concurring in part and dissenting in part). Accordingly, plaintiff has failed to state a claim upon which relief can be granted and dismissal is appropriate.

YOUNG, J. I join the statement of Justice MARKMAN.

Leave to Appeal Denied April 13, 2007:

JOHNSON V HENRY FORD HOSPITAL, Nos. 128568, 128569. On order of the Court, the application for leave to appeal the March 22, 2005, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to stay is denied.

In this case, plaintiff seeks a stay of proceedings until final disposition of pending federal litigation, wherein plaintiff's counsel initiated a lawsuit challenging the constitutionality of the Michigan Supreme Court recusal rule. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006).

In the recent past, plaintiff's counsel has filed numerous motions for the recusal of one or more Michigan Supreme Court justices, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions for recusal has involved various allegations of claimed bias, principally stemming from Michigan Supreme Court judicial campaigns. All of the previous motions for recusal have been denied. *Graves v Warner Bros*, 469 Mich 853 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Grievance Administrator v Fieger*, 472 Mich 1244 (2005); *McDowell v Detroit*, 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking*, Inc, 474 Mich 1080 (2006); and *Lewis v St John Hosp*, 474 Mich 1089 (2006).

The pending motion to stay this case asserts no new basis for recusal. Rather, the motion is predicated entirely on allegations made in the previous eight motions that have been considered and denied.

As we have each done in connection with these past motions, and as justices must do in connection with every motion for disqualification, we have each looked into our consciences in this case and concluded that we are able to accord fair, impartial, and equal treatment to plaintiff's counsel and his clients.

Further, the motion is predicated on the erroneous notion that disqualification of a justice of the Michigan Supreme Court is governed by the disqualification procedure set forth in MCR 2.003. On the contrary, this procedure has never been held applicable to disqualification of justices. See, e.g., *Adair v Michigan*, 474 Mich 1027, 1043 (2006) (statement of CAVANAGH, J.), 1029 n 2 (statement of TAYLOR, C.J., and MARKMAN, J.); *In re JK,* 468 Mich 202, 220 (2003) (statement of WEAVER, J.). Throughout its history, the disqualification procedure followed in the Michigan Supreme Court is similar to the one followed in the United States Supreme Court. See Statement of Recusal Policy, United States Supreme Court, November 1, 1993; *Laird v Tatum*, 409 US 824, 833, 837 (1972); *Jewell Ridge Coal Corp v Local 6167*, 325 US 897 (1945) (Jackson, J., *concurring*).

There being no new asserted basis that would warrant a stay of proceedings, the motion is denied.

The motion for recusal and for evidentiary hearing is denied. Court of Appeals Nos. 250874, 251542.

CAVANAGH, J. I would grant the motion for stay, and I do not participate in the decision regarding the motion for recusal.

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the Court's order denying leave to appeal. I write further to state that I dissent from the participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, in this case, where Mr. Geoffrey N. Fieger's law firm represents the plaintiff. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting), and my dissent to the denial of the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

I also dissent from the order denying plaintiff's motion for stay of proceedings pending Mr. Fieger's lawsuit in the United States District Court for the Eastern District of Michigan concerning Michigan's disqualification rules governing Supreme Court justices. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006). I would grant the motion to stay.

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged,[1] without success for almost four

[1] Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., statements of WEAVER, J., in *In re JK,* 468 Mich 202 (2003); *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003); *Advocacy Org for Patients &*

years, this Court to undertake action and achieve, the disqualification of justices is governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not.

For example, in *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN stated that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." Justice YOUNG concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to parties' counsel and clients without any independent check on justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further, while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for *all* justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[2]

KELLY, J. (*dissenting*). I would grant the motion for stay. I do not participate in the decision regarding the motion for recusal. The Court's established procedure is to leave the decision to the discretion of the

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Providers v Auto Club Ins Ass'n, 472 Mich 91 (2005); *McDowell v Detroit,* 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc,* 474 Mich 1080 (2006); *Lewis v St John Hosp,* 474 Mich 1089 (2006); *Adair v Michigan,* 474 Mich 1027 (2006); *Grievance Administrator v Fieger,* 476 Mich 231 (2006)*; Grievance Administrator v Fieger*, 477 Mich 1228 (2006); *People v Parsons*, Docket No. 132975 (unpublished order issued March 6, 2007); *Ruiz v Clara's Parlor*, 477 Mich ___ (2007); and *Neal v Dep't of Corrections*, 477 Mich 1049 (2007).

[2] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

challenged justice. However, I continue to urge the Court to establish and put in writing a better procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

TATE v CITY OF DEARBORN, No. 129241. On order of the Court, leave to appeal having been granted and the case having been briefed and argued by counsel, the order of January 13, 2006, which granted leave to appeal is vacated and leave to appeal is denied because we are no longer persuaded the question presented should be reviewed by this Court.

In this case, plaintiff seeks a stay of proceedings until final disposition of pending federal litigation, wherein plaintiff's counsel initiated a lawsuit challenging the constitutionality of the Michigan Supreme Court recusal rule. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006).

In the recent past, plaintiff's counsel has filed numerous motions for the recusal of one or more Michigan Supreme Court justices, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions for recusal has involved various allegations of claimed bias, principally stemming from Michigan Supreme Court judicial campaigns. All of the previous motions for recusal have been denied. *Graves v Warner Bros*, 469 Mich 853 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Grievance Administrator v Fieger*, 472 Mich 1244 (2005); *McDowell v Detroit*, 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking*, Inc, 474 Mich 1080 (2006); and *Lewis v St John Hosp*, 474 Mich 1089 (2006).

The pending motion to stay this case asserts no new basis for recusal. Rather, the motion is predicated entirely on allegations made in the previous eight motions that have been considered and denied.

As we have each done in connection with these past motions, and as justices must do in connection with every motion for disqualification, we have each looked into our consciences in this case and concluded that we are able to accord fair, impartial, and equal treatment to plaintiff's counsel and his clients.

Further, the motion is predicated on the erroneous notion that disqualification of a justice of the Michigan Supreme Court is governed by the disqualification procedure set forth in MCR 2.003. On the contrary, this procedure has never been held applicable to disqualification of justices. See, e.g., *Adair v Michigan*, 474 Mich 1027, 1043 (2006) (statement of CAVANAGH, J.), 1029 n 2 (statement of TAYLOR, C.J., and MARKMAN, J.); *In re JK,* 468 Mich 202, 220 (2003) (statement of WEAVER, J.). Throughout its history, the disqualification procedure followed in the Michigan Supreme Court is similar to the one followed in the United States Supreme Court. See Statement of Recusal Policy, United States Supreme Court, November 1, 1993; *Laird v Tatum*, 409 US 824, 833, 837 (1972); *Jewell Ridge Coal Corp v Local 6167*, 325 US 897 (1945) (Jackson, J., *concurring*).

There being no new asserted basis that would warrant a stay of proceedings, the motion is denied.

The motion for recusal and for evidentiary hearing is denied. Court of Appeals No. 261950.

CAVANAGH, J. (*concurring*). I concur with this Court's order denying leave to appeal. However, I cannot participate in the decision regarding the motion for recusal and for an evidentiary hearing because current Court practices—with which I disagree—only allow the individual justice who is the subject of the motion to decide the motion. Thus, I can offer no opinion about the validity of the motion for recusal and for an evidentiary hearing that was filed.

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the Court's order denying leave to appeal. I write further to state that I dissent from the participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, in this case, where Mr. Geoffrey N. Fieger's law firm represents the plaintiff. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting), and my dissent to the denial of the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

I also dissent from the order denying plaintiff's motion for stay of proceedings pending Mr. Fieger's lawsuit in the United States District Court for the Eastern District of Michigan concerning Michigan's disqualification rules for Supreme Court justices. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006). I would grant the motion to stay.

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged,[1] without success for almost four years, this Court to undertake action and achieve, the disqualification of justices is governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not.

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[1] Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., statements of WEAVER, J., in *In re JK,* 468 Mich 202 (2003); *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit,* 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc,* 474 Mich 1080 (2006); *Lewis v St John Hosp,* 474 Mich 1089 (2006); *Adair v Michigan,* 474 Mich 1027 (2006); *Grievance Administrator v Fieger,* 476 Mich 231 (2006)*; Grievance Administrator v Fieger*, 477 Mich 1228 (2006); *People v Parsons*, Docket No. 132975 (unpublished order issued March 6, 2007); *Ruiz v Clara's Parlor*, 477 Mich 1044 (2007); and *Neal v Dep't of Corrections*, 477 Mich 1049 (2007).

For example, in *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN stated that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." Justice YOUNG concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to parties' counsel and clients without any independent check on justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further, while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for *all* justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[2]

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal. I write separately to observe that there is more at issue in controversies involving successive federal and state claims than matters of res judicata, the convenience of parties, judicial economy, and the avoidance of opportunities for alleged gamesmanship. Also at issue is the effect of our rules and decisions upon judicial federalism and the extent to which, as a general proposition, federal claims should be heard in federal courts and state claims in state courts. Accord *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225, 1231 (2005) (MARKMAN, J., dissenting). While the federal judiciary has been specifically instructed by the United States Supreme Court to consider the effect of exercising pendent or supplemental jurisdiction upon our federal structure, see, e.g., *Aldinger v Howard*, 427 US 1, 15 (1976), the state judiciary also has an obligation to assist in preserving judicial federalism, in relevant part here through its exposition of what does and does not constitute res judicata where successive federal and state claims have been filed. Although the instant parties were specifically directed to address "whether the interests of federalism or state sovereignty are implicated by this case," little briefing or oral argument was submitted. I hope that the bench and bar will increasingly be prepared to assess Michigan court rules, see, e.g., MCR 2.203, and caselaw, see, e.g., *Pierson*

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[2] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

Sand & Gravel, Inc v Keeler Brass Co, 460 Mich 372 (1999), pertaining to res judicata, in the context of federalism concerns as well as in the context of practical concerns such as the efficiency of litigation and the economical use of judicial resources.

KELLY, J. (*dissenting*). I would grant the motion for stay. Regarding the merits of the case, I would reverse the order of the Court of Appeals and reinstate the April 5, 2005, order of the Wayne Circuit Court. See *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372 (1999). I do not participate in the decision regarding the motion for recusal. The Court's established procedure is to leave the decision to the discretion of the challenged justice. However, I continue to urge the Court to establish and put in writing a better procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

PEOPLE V ISLAM, No. 130435; Court of Appeals No. 257288.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal in this case. Although the planting of a bloody hacksaw in defendant's basement by the dog handler constituted an effort to taint evidence, defendant failed to demonstrate that it is more probable than not that this, in fact, affected the outcome of his trial.

The impact of the planted evidence was limited because the jury never heard about any *bloody* hacksaw blade. Rather, the jury merely heard about a broken hacksaw blade found in an area where the detection dog alerted, as well as testimony about several other saws. The trial court, however, stated three times that there were no saws with the victim's blood or remains on them and that each of the saws discovered was irrelevant as evidence. The expert witness also limited the type of saw used in committing the murder to a dovetail carpenter's saw, rather than a hacksaw. Finally, the prosecutor never mentioned the planted hacksaw blade to the jury.

In addition, there was abundant, untainted other evidence of defendant's guilt. The victim's blood was found underneath a coat of fresh paint on defendant's basement floor, on the paint roller, mop, vacuum cleaner, carpet, boots, and sink pump. The defense stipulated that it was the victim's blood, and the stipulation was consistent with an expert's testimony. Paint chips consistent with both the new paint and old paint on defendant's basement floor were found in the victim's remains. The fact that defendant dismembered the victim and freshly painted the basement floor are further indicators of a cover-up.

The timing of the murder was also such that it fit well with defendant's clear motive to kill the victim, his wife. The victim, who was involved with another man, had returned to Michigan to finalize her divorce. Shortly before her disappearance, the victim told independent witnesses that she feared defendant would kill her, and she would try to get an earlier flight to London. The victim's boyfriend testified that defendant and the victim had an argument when defendant caught her talking to him on the phone, and their conversation ended abruptly. The victim went missing very shortly after going to sleep in defendant's home, leaving her watch and toothbrush behind.

Defendant also was circumstantially tied to the disposal of the victim's body. He requested a neighbor's assistance to load a very heavy garbage can into a van he rented, which had a plastic sheet covering the backseat and the floor. On the day he rented the van, a man who looked like defendant and drove a van similar to the rented van was seen standing in a field in the Toledo area, near the property where the victim's torso was later found.

Defendant also tied himself to the crime with the statements he gave to the police, which expressed remorse and admitted some level of participation in the death. Defendant made inconsistent statements about his reasons for renting the van used to transport the victim's remains. He told the neighbor who helped him load the trash can into the van that he was taking it to a Christmas party, he told the van rental company he was picking up relatives from the airport, and he told the police that he was checking the van to see if luggage would fit for an upcoming trip to Washington, D.C. Defendant ultimately made his family trip in his Mazda sedan. However, the van was driven 213 miles, inconsistent with all of these explanations but consistent with a trip to Toledo to dispose of the victim's torso.

Thus, even absent the tainted evidence, the remaining evidence here supports the verdict. Because the admission of the planted evidence did not eventually lead to a miscarriage of justice, and because defendant was not actually prejudiced by such evidence, the error, in my judgment, was harmless.

SUPER MART INC v DEPARTMENT OF TREASURY, Nos. 132292, 132293; Court of Appeals Nos. 265758, 265759.

MARKMAN, J. (*dissenting*). The Court of Appeals erred, in my judgment, in holding that plaintiffs lacked standing to challenge the regulatory fee at issue in this case. Plaintiffs are wholesale and retail sellers of petroleum products. Although MCL 324.21508(1) states that the fee is "imposed on all refined petroleum products sold for resale in this state," MCL 324.21508(2) states that the regulatory fee is "precollect[ed]" from refiners and importers of petroleum. By holding that plaintiffs lacked standing to contest this statute, the Court of Appeals treated the term "precollect" as the equivalent of "collect," thereby rendering the prefix "pre" surplusage. However, the term "precollect" indicates that plaintiffs had a legitimate right to challenge the regulatory fee imposed on refiners and importers. I would remand this case to the Court of Appeals for consideration of plaintiff's constitutional arguments.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v PHILLIP COLEMAN, No. 132371; Court of Appeals No. 260309.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). The issue in this criminal sexual conduct case is whether prosecution witnesses improperly vouched for the complainant's testimony. Because I believe that they did and that this may have amounted to plain error, I would grant leave to appeal.

Defendant was convicted by a jury of sexually abusing a 12-year-old girl. There was no physical evidence supporting the charge. Rather, the conviction was based exclusively on the testimony of the complainant and

other witnesses. At trial, the prosecutor called a number of witnesses who testified regarding interviews with the complainant.

The first was Melissa Peterson. She was qualified as an expert on typical and atypical behaviors of children in response to sexual abuse. Peterson stated that there were no "red flags" indicating that the complainant had lied during the interview. The next witness was Shawn Baker, a Michigan State Police trooper. She claimed to have had special training in interviewing children about sexual abuse and had learned to look for "red flags." She stated that the complainant exhibited no "red flags" during the interview.

The third prosecution witness to testify about "red flags" was Sue Johnson, an expert in the field of child sexual abuse interviewing. She also testified that there was nothing to indicate that the complainant was lying. At closing argument, the prosecutor harped on the fact that these witnesses were trained to look for "red flags" and complainant had not exhibited any. Defense counsel did not object to these statements.

On appeal, defendant argues that the testimony of these witnesses regarding "red flags" constituted an improper vouching for the complainant's testimony. The essence of the argument is that, by testifying that the complainant exhibited no "red flags," the experts told the jury that the complainant was telling the truth. I think defendant makes a persuasive argument.

On prior occasions, this Court has been requested to offer guidance on the proper scope of expert testimony in child sexual abuse cases. In *People v Beckley*,[1] we held that "evidence of behavioral patterns of sexually abused children is admissible 'for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape.' " We cautioned, however, that it would be improper to allow testimony about the truthfulness of the complainant's allegations against the defendant. The underlying purpose of such testimony would be to enhance the credibility of the witness. *Id.* at 727.

This Court again dealt with this issue in *People v Peterson,* 450 Mich 349 (1995). In *Peterson*, we clarified our decision in *Beckley* and set strict parameters for the admission of opinion testimony in child sexual abuse cases. We reaffirmed that an expert may not testify that sexual abuse occurred, may not vouch for the credibility of the complainant, and may not testify that the defendant is guilty. *Id.* at 352. We held that an expert may (1) "testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id.* at 352-353.

In this case, the evidence was not presented for the purpose of explaining the complainant's specific behavior. Nor was it introduced to

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[1] 434 Mich 691, 710 (1990) (citation omitted).

rebut an attack on the complainant's credibility. The evidence was introduced for the sole purpose of bolstering the complainant's testimony. By stating that they were qualified to perceive "red flags," the witnesses essentially told the jury that they were human lie detectors. They then stated that the complainant did not exhibit any "red flags." The logical inference is that the complainant must have told the truth. It was improper to allow these witnesses to testify regarding the veracity of the complainant's testimony.

The defendant did not object to this testimony at trial. Therefore, the plain error standard of review applies. *People v Carines*, 460 Mich 750, 763 (1999). Reversal for plain error is mandated only if the defendant is actually innocent or if the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.* Because the only evidence linking this defendant to the crime was the complainant's testimony, I believe that it may have been plain error to admit this evidence. I would grant leave to appeal to allow full briefing and oral argument on the issue.

PEOPLE V QUEEN, No. 132473; Court of Appeals No. 265914.

KELLY, J. (*dissenting*). On November 26, 2003, defendant was charged with felony nonsupport[1] for the period of August 24, 1992, to November 4, 1999. A second count charged him with desertion[2] during the period of November 5, 1999, to November 21, 2003. The complaint averred that defendant owed child support arrearages that totaled $65,962.14.

On June 30, 2005, Stacy Queen, the mother of defendant's child, waived all the arrearages as well as future child support. The prosecutor told the court that defendant therefore owed only approximately $9,000 to the state of Michigan, because Ms. Queen had received public assistance from the state. The state was entitled to reimbursement and did not waive the amount owed to it. The prosecutor failed to specify the period during which Ms. Queen had received public assistance.

On August 25, 2005, defendant pleaded guilty of felony nonsupport in exchange for the dismissal of the desertion count and a recommendation of no jail time. He was sentenced to 24 months of probation and ordered to pay arrearages of $9,321.08.

Defendant filed a claim of appeal and a motion to remand to the trial court to allow him to withdraw his plea as involuntary. On September 21, 2006, the Court of Appeals dismissed the appeal for lack of jurisdiction because defendant had pleaded guilty of a crime committed after December 27, 1994.

Defendant has two potentially valid claims. First, because a six-year statute of limitations applies to the debt, it would be improper to hold him responsible for arrearages that are more than six years old. Second, defendant is entitled to an appeal as of right from any judgment for arrearages that arose in 1992 or 1993. The reason is that the right of

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[1] MCL 750.165.

[2] MCL 750.161.

appeal from a plea-based conviction was not removed until 1994. Without further findings of fact, it is impossible to pass judgment on the validity of these two claims.

At this time, the record is silent with respect to when Ms. Queen received public assistance. If she received welfare payments before November 26, 1997, it would appear that the order of restitution is improper. The court could not order repayment of amounts accrued as the result of crimes for which the statutory period of limitations has expired. If the arrearages date to 1992 or 1993, not only would the arrearages be unenforceable, the Court of Appeals would have erred in denying defendant an appeal as of right.

We should remand this matter to the trial court for further findings of fact. Important rights are at issue, and defendant is entitled to an accurate and just resolution of his cause.

CAVANAGH, J. I join the statement of Justice KELLY.

JAGER v ROSTAGNO TRUCKING COMPANY, INC, No. 132556; Reported below: 272 Mich App 419.

MARKMAN, J. (*dissenting*). I would grant defendant's application for leave to appeal to consider the following issues: (1) with regard to an industry-defined workers' compensation fund, such as the Logging Industry Compensation Fund, by what means is the covered "industry" to be defined; (2) whether "employment in the logging industry" in MCL 418.531 references the nature of work that an employee is engaged in at the time of an injury or the nature of the work performed by his or her employer; (3) whether Code No. 2702, as referenced by MCL 418.501, defines what activities are compensable under § 501 or what activities are compensable by § 501 only if one is employed within the "logging industry"; (4) whether the logging fund has a cause of action against a business or an insurer that, for purposes of insurance coverage, intentionally or negligently misclassifies the "industry" code of a particular business and thereby causes the fund to rely on such misclassification in setting its rates; and (5) whether the Workers' Compensation Appellate Commission in this case accurately concluded that "to permit recovery from the Fund under the circumstances of this case provides the employer with a form of double recovery anathema to the compensation system."

JONES v ELMORE, No. 132585; Court of Appeals No. 260879.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to further consider the relationship under MCR 2.603(D)(1) between the "good cause" and the "meritorious defense" standards for setting aside a default judgment, and to review the application of these standards in the instant case.

In re BEDNAR (DEPARTMENT OF HUMAN SERVICES v CURANOVIC), No. 133542; Court of Appeals No. 272974.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 20, 2007:

BROWN v SAMUEL WHITTAR STEEL, INC, No. 131358. We direct the clerk to schedule oral argument on May 23, 2007, at 9:30 a.m., on whether to

grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs no later than May 16, 2007, but they should not submit mere restatements of their application papers. Reported below: 270 Mich App 689.

Summary Disposition April 20, 2007:

REAUME v JEFFERSON MIDDLE SCHOOL, No. 132154. On April 11, 2007, the Court heard oral argument on the application for leave to appeal the August 15, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Monroe Circuit Court for entry of summary disposition in favor of defendant Ryan Nadeau. Even accepting as true the allegation that the defendant, without warning, grabbed the plaintiff from behind and took him to the wrestling mat, this did not produce the injury to the plaintiff. The injury occurred while the defendant and the plaintiff were engaged in wrestling activity. The plaintiff testified that after a completed body roll, he did what he had been taught to do—brace his arm to attempt an escape—and only then did the injury occur. The defendant's alleged failure to give adequate notice of the initial takedown, utilized by the Court of Appeals as the basis to affirm the denial of summary disposition, was not the proximate cause of the plaintiff's injury. *Robinson v Detroit,* 462 Mich 439 (2000). See also *Ritchie-Gamester v Berkley*, 461 Mich 73 (1999). Court of Appeals No. 268071.

CAVANAGH, J. I would deny leave to appeal.

WEAVER and KELLY, JJ. We would grant leave to appeal.

WEBBER v HILBORN, No. 132174. On April 11, 2007, the Court heard oral argument on the application for leave to appeal the August 17, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the portion of the judgment of the Court of Appeals holding that the plaintiff adequately stated a prima facie case of legal malpractice, reinstate the order of the Oakland Circuit Court granting summary disposition to the defendants pursuant to MCR 2.116(C)(8), and remand this case to the trial court for a determination of whether further amendment of the complaint to allege proximate cause would be futile. MCR 2.116(I)(5). It is well established that in order to survive summary disposition of a legal malpractice claim, "a plaintiff 'must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit.' " *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63 (1993) (emphasis deleted). In this case, the plaintiff failed to allege any facts in either her original or amended complaint showing that but for the defendants' negligence, she would have prevailed in the underlying suit. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 267582.

PEOPLE v RAYMOND DAVIS, No. 133484. In lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on March 23, 2007, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 276674.

Interlocutory Appeal

Leave to Appeal Denied April 20, 2007:

BEY v WRIGHT, No. 133582; Court of Appeals No. 276247.

Summary Dispositions April 24, 2007:

PEOPLE v GIACALONE, No. 132610. 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. 273676.

STOREY v RIEMERSMA, No. 132940. 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. 273460.

Leave to Appeal Denied April 24, 2007:

PEOPLE v HEARNS, No. 129929. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261627.

WESTFALL v MCCRIRIE, No. 131140; Court of Appeals No. 265386.

DUPUIS v UTICA MUTUAL INSURANCE COMPANY, No. 131274; Court of Appeals No. 250766.

GILLESPIE v RUSSELL FILTRATION, INC, No. 131457; Court of Appeals No. 268263.

PEOPLE v CARRODINE, No. 131850; Court of Appeals No. 259899.

PEOPLE v BENDER, No. 132176; Court of Appeals No. 260594.

PEOPLE v STANLEY, No. 132401; Court of Appeals No. 245456.

RAAG v BALAZSY, No. 132403; Court of Appeals No. 272567.

SMITH v KALAMAZOO CIRCUIT JUDGE, No. 132492; Court of Appeals No. 272223.

PEOPLE v HENSON, No. 132513. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268854.

PEOPLE v UNDERWOOD, No. 132514. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269489.

PEOPLE v WEISGERBER, No. 132516. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268972.

PEOPLE v ANTHONY ROGERS, No. 132519. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269912.

PEOPLE v DUKES, No. 132529. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268467.

PEOPLE v VINCENT WARD, No. 132534. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268923.

PEOPLE v TAMLIN, No. 132536. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272317.

PEOPLE v JOHN WILLIAMS, No. 132541. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269783.

KELLY, J. I would grant leave to appeal.

PEOPLE v SHAW, No. 132544. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270092.

PEOPLE v DILLARD, No. 132562. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 274013.

PEOPLE v BIBLER, No. 132568. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272797.

PEOPLE v WATKINS, No. 132570; Court of Appeals No. 271300.

PEOPLE v HOPE, No. 132571; Court of Appeals No. 271608.

PEOPLE v AARON TAYLOR, No. 132572. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269397.

PEOPLE v JARVI, No. 132576; Court of Appeals No. 263852.

PM INNSBROOK, LLC v INNSBROOK ASSOCIATES LIMITED PARTNERSHIP, No. 132581; Court of Appeals No. 268796.

PEOPLE v TILLMAN, No. 132591. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268709.

In re BORDINAT (PEOPLE v BORDINAT), No. 132599; Court of Appeals No. 261116.

PEOPLE v WITHERELL, No. 132616. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270185.

PEOPLE v BONDS, No. 132621. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269369.

PEOPLE v LEE ALLEN, No. 132625. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269871.

PEOPLE v GARCIA, No. 132629. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270439.

PEOPLE v WILLIAM BURNS, No. 132637. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273155.

PEOPLE v KEVIN MOORE, No. 132639. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269402.

MARIOTTI v JOHNSON, No. 132647; Court of Appeals No. 269006.

PEOPLE v TRIPP, No. 132667. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270034.

PEOPLE v SERVOSS, No. 132686 ; Court of Appeals No. 262862.

COSTCO WHOLESALE CORPORATION v CITY OF LIVONIA, No. 132721; Court of Appeals No. 258990.

PEOPLE v BOLDING, No. 132730; Court of Appeals No. 263349.

PEOPLE v CUMMINGS, No. 132740; Court of Appeals No. 262294.

PEOPLE v MALCOLM COLEMAN, No. 132743; Court of Appeals No. 261844.

PEOPLE v PIERMAN, No. 132748; Court of Appeals No. 262366.

MAGLINGER v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 132750; Court of Appeals No. 270851.

PEOPLE v LULOW, No. 132761; Court of Appeals No. 246110.

PEOPLE v SEARCY, No. 132762; Court of Appeals No. 263347.

NAKHLE v NAKHLE, No. 132767; Court of Appeals No. 267553.

PEOPLE v STANLEY, No. 132773; Court of Appeals No. 260312.

PEOPLE v COSTONDE, No. 132790; Court of Appeals No. 262114.

LARA v CITIZENS INSURANCE COMPANY OF AMERICA, No. 132793; Court of Appeals No. 271198.

PEOPLE v NANCY HINES, No. 132794; Court of Appeals No. 262280.

BARRONCAST, INC v OXFORD CHARTER TOWNSHIP, No. 132802; Court of Appeals No. 262739.

PEOPLE v ANTOINE HINES, No. 132811; Court of Appeals No. 261377.

PEOPLE v CARY, No. 132816; Court of Appeals No. 273381.

KELLY, J. I would grant leave to appeal to explore the issues presented by the Department of Corrections' handling of sentencing credit for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006).

PEOPLE v STEVE HENRY, JR, No. 132818; Court of Appeals No. 271384.

BANK ONE, NA v MOORE, No. 132822; Court of Appeals No. 263919.

PEOPLE v GARRETT PATTON, No. 132825; Court of Appeals No. 263283.

PEOPLE v VANIER, No. 132839; Court of Appeals No. 264852.

PEOPLE v MCCRAY, No. 132840; Court of Appeals No. 261851.

PEOPLE v JUAN JOHNSON, No. 132841; Court of Appeals No. 264595.

PEOPLE v PEREZ, No. 132846; Court of Appeals No. 274475.

PEOPLE v MONIQUE TILL, No. 132848; Court of Appeals No. 273379.

CELLEY v KATHLEEN STEVENS, No. 132851; Court of Appeals No. 273846.

PEOPLE v DARREN YOUNG, No. 132864; Court of Appeals No. 264960.

PEOPLE v SHALLAL, No. 132866; Court of Appeals No. 273934.

PEOPLE v COMBS, No. 132867; Court of Appeals No. 262695.

PEOPLE v TERRANCE HAYNES, No. 132869; Court of Appeals No. 264230.

PEOPLE v MYRON SMITH, No. 132870; Court of Appeals No. 264231.

PEOPLE v BAY, No. 132871; Court of Appeals No. 266739.

PEOPLE v MIELCAREK, No. 132872; Court of Appeals No. 264961.

PEOPLE v HAIRE, No. 132874; Court of Appeals No. 262958.

PEOPLE v CHRISTOPHER DEE JOHNSON, No. 132875; Court of Appeals No. 273561.

PEOPLE v REGINALD RIGGENS, No. 132879; Court of Appeals No. 263047.

PEOPLE v RANDY YOUNG, No. 132880; Court of Appeals No. 273599.

PEET v BESHORE, No. 132881; Court of Appeals No. 273270.

PEOPLE v KENNETH COLLINS, No. 132884; Court of Appeals No. 265464.

LINTON v ARENAC COUNTY ROAD COMMISSION, No. 132892; Reported below: 273 Mich App 107.

PEOPLE v HENRY PARKS, No. 132894; Court of Appeals No. 273812.

MEDLEY v BERGMAN, No. 132902; Court of Appeals No. 261087.

PEOPLE v SMILES, No. 132908; Court of Appeals No. 273449.

PEOPLE v HARRY PERRY, No. 132910; Court of Appeals No. 260152.

PEOPLE v TREMAIN JONES, No. 132912; Court of Appeals No. 274519.

PEOPLE v HANES, No. 132915; Court of Appeals No. 264229.

PEOPLE v CULBERSON, No. 132918; Court of Appeals No. 273208.

DEPARTMENT OF TRANSPORTATION v ALIBRI, No. 132922; Court of Appeals No. 260821.

PEOPLE v CHRISTOPHER REED, No. 132923; Court of Appeals No. 263509.

PEOPLE v ALVIN COLLINS, No. 132924; Court of Appeals No. 262289.

PEOPLE v COREY WILLIAMS, No. 132927; Court of Appeals No. 262679.

PEOPLE v JAMES BELL, No. 132928; Court of Appeals No. 263184.

PEOPLE v PRUITT, No. 132929; Court of Appeals No. 272884.

PEOPLE v BRIGGS, No. 132930; Court of Appeals No. 261842.

PEOPLE v ANKLAM, No. 132931; Court of Appeals No. 268287.

PEOPLE v WADE SCOTT, No. 132932; Court of Appeals No. 262671.

PEOPLE v ERIC THOMPSON, No. 132933; Court of Appeals No. 263585.

PEOPLE v MULKEY, No. 132934; Court of Appeals No. 261510.

PEOPLE v ROBERT PORTIS, No. 132937; Court of Appeals No. 264831.

PEOPLE v LEKELDRIC PORTER, No. 132938; Court of Appeals No. 274117.

PEOPLE v DRUMMOND, No. 132939; Court of Appeals No. 263560.

PEOPLE v HARDING, No. 132941; Court of Appeals No. 263267.

PEOPLE v JOHN POWELL, No. 132945; Court of Appeals No. 263277.

PEOPLE v DAVE HARRIS, No. 132947; Court of Appeals No. 263090.

PEOPLE v SCALES, No. 132958; Court of Appeals No. 262791.

PEOPLE v BYERS, No. 132959; Court of Appeals No. 262330.

PEOPLE v CETRIC SMITH, No. 132960; Court of Appeals No. 263180.

RONAN v HOFMANN, No. 132962; Court of Appeals No. 263106.

PEOPLE v DWIGHT SMITH, No. 132965; Court of Appeals No. 260242.

PEOPLE v POZYCZKA, No. 132969; Court of Appeals No. 273565.

PEOPLE v LEGGETT, No. 132972; Court of Appeals No. 265142.

PEOPLE v MICHAEL ALLEN, No. 132977; Court of Appeals No. 270764.

PEOPLE v WILLIAM TURNER, No. 132979; Court of Appeals No. 273978.

PEOPLE v THOMAS TURNER, No. 132981; Court of Appeals No. 263048

PEOPLE v JAMARINA JOHNSON, No. 132982; Court of Appeals No. 264829.

PEOPLE v KELLY BROOKS, No. 132989; Court of Appeals No. 262995.

PEOPLE v DONOVAN, No. 132996; Court of Appeals No. 263466.

PEOPLE v HEARN, No. 132997; Court of Appeals No. 274952.

PEOPLE v HENDRICKSON, No. 132998; Court of Appeals No. 263559.

PEOPLE v BEGAY, No. 132999; Court of Appeals No. 269772.

PORTER v ST CLAIR CIRCUIT JUDGE, No. 133000; Court of Appeals No. 274596.

PEOPLE v ROSE, No. 133004; Court of Appeals No. 263854.

PEOPLE v VINCENT CLARK, No. 133009; Court of Appeals No. 263322.

U S BANK NATIONAL ASSOCIATION v CLARK, No. 133012; Court of Appeals No. 274552.

PEOPLE v MICHAEL BERRY, No. 133018; Court of Appeals No. 256446.

PEOPLE v CLEVE BROWN, No. 133020; Court of Appeals No. 263700.

PEOPLE v TERRY NEAL, No. 133025; Court of Appeals No. 262686.

JOHNSON v FORD MOTOR COMPANY, No. 133026; Court of Appeals No. 271344.

CLOR v BUNTING, No. 133028; Court of Appeals No. 269011.

SOUTH COVE CONDO ASSOCIATION v DUNESCAPE @ NEW BUFFALO II, LTD, No. 133033; Court of Appeals No. 270571.

PEOPLE v SHELTON, No. 133035; Court of Appeals No. 274193.

PEOPLE v GORE, No. 133036; Court of Appeals No. 274107.

EASTERLING v HURLEY MEDICAL CENTER, No. 133038; Court of Appeals No. 271070.

PEOPLE v RAUCH, No. 133040; Court of Appeals No. 263185.

BENSON v GENERAL MOTORS CORPORATION, No. 133048; Court of Appeals No. 271094.

PEOPLE v KYES, No. 133054; Court of Appeals No. 273734.

PEOPLE v GEORGE WALTON, No. 133064; Court of Appeals No. 272471.

PEOPLE v DANNY SMITH, No. 133068; Court of Appeals No. 264891.

PEOPLE v MCDONALD, No. 133071; Court of Appeals No. 274693.

NICAJ v EAST-LIND HEAT TREAT, INC, No. 133076; Court of Appeals No. 270428.

PEOPLE v KENNETH SMITH, No. 133080; Court of Appeals No. 272280.

PEOPLE v HULDERMAN, No. 133084; Court of Appeals No. 273125.

PEOPLE v HARPER, No. 133085; Court of Appeals No. 274764.

HERNE v WATERFORD CHARTER TOWNSHIP, No. 133086; Court of Appeals No. 271400.

PEOPLE v HARHOLD, No. 133089; Court of Appeals No. 273966.

LIZZA v FORD MOTOR COMPANY, No. 133092; Court of Appeals No. 273979.

HOLUBOWICZ v JACKSON COUNTY, No. 133097; Court of Appeals No. 270992.

PEOPLE v FRALEY, No. 133107; Court of Appeals No. 262077.

PEOPLE v KEY, No. 133114; Court of Appeals No. 273352.

PEOPLE v GOMEZ, No. 133122; Court of Appeals No. 263942.

WORKING, INC v HEITSCH, No. 133133; Court of Appeals No. 264356.

SHANBURN v CARLESIMO PRODUCTS, INC, No. 133145; Court of Appeals No. 271434.

VANBOGELEN v TROY TECH SERVICES, INC, No. 133148; Court of Appeals No. 273609.

LELITO v MONROE, No. 133149; Reported below: 273 Mich App 416.

PEOPLE v GARANT, No. 133155; Court of Appeals No. 264732.

FAULMAN v AMERICAN HEARTLAND HOMEBUILDER, LLC, No. 133163; Court of Appeals No. 269287.

In re CONTEMPT OF DICKSON (PEOPLE v ANDERSON), No. 133166; Court of Appeals No. 263794.

ALPINE VALLEY SKI AREA LEASING, INC v ZONER, No. 133172; Court of Appeals No. 260787.

GROSSMAN v WELLS, No. 133190; Court of Appeals No. 263634.

PEOPLE v ALWARD, No. 133192; Court of Appeals No. 274405.

PEOPLE v SNOW, No. 133194; Court of Appeals No. 262078.

BARBER v COLEMAN, No. 133200; Court of Appeals No. 262733.

PEOPLE v HARDISON, No. 133202; Court of Appeals No. 264590.

PEOPLE v BORCHERT, No. 133203; Court of Appeals No. 274481.

BARNES v DEPARTMENT OF CORRECTIONS, No. 133235; Court of Appeals No. 272450.

HORTON v ARNESON, No. 133279; Court of Appeals No. 275060.

CREDIT ACCEPTANCE CORPORATION v 46TH DISTRICT COURT, No. 133292; Reported below: 273 Mich App 594.

WOLF v HOMECOMINGS FINANCIAL NETWORK, INC, No. 133333; Court of Appeals No. 270169.

JANICEK v BOUGHNER, No. 133386; Court of Appeals No. 272388.

Reconsiderations Denied April 24, 2007:

CLULEY v LANSING BOARD OF WATER AND LIGHT, No. 131316. Leave to appeal denied at 477 Mich 1003. Court of Appeals No. 264208.

KELLY, J. I would grant the motion for reconsideration.

MARIOTTI v JOHNSON, No. 131582. Leave to appeal denied at 477 Mich 914. Court of Appeals No. 269634.

PEOPLE v POSEY, No. 131965. Leave to appeal denied at 477 Mich 1031. Court of Appeals No. 259820.

PEOPLE v VANGEISON, No. 132015. Leave to appeal denied at 477 Mich 1015. Court of Appeals No. 254117.

PEOPLE v PIGEE, No. 132128. Leave to appeal denied at 477 Mich 1009. Court of Appeals No. 270511.

GARGES v TODD, No. 132281. Leave to appeal denied at 477 Mich 1017. Court of Appeals No. 260084.

EUG, LLC v RPL OF MICHIGAN, INC, No. 132398. Leave to appeal denied at 477 Mich 1005. Court of Appeals No. 268337.

PEOPLE v SHERWOOD, No. 132444. Leave to appeal denied at 477 Mich 1006. Court of Appeals No. 268715.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 25, 2007:

LATHAM v BARTON MALOW COMPANY, No. 132946. 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: (1) whether the proofs submitted at trial were sufficient to satisfy the standard for general contractor liability that is set forth in *Ormsby v Capital Welding, Inc,* 471 Mich 45, 54 (2004); and (2) whether the trial court should have granted summary disposition in the defendant's favor based on this issue. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of the arguments made in their application papers. Court of Appeals No. 264243.

Summary Dispositions April 25, 2007:

PEOPLE v PAVUK, No. 132632. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Monroe Circuit Court for clarification of the defendant's sentence for possession of cocaine. The trial judge stated at defendant's September 29, 2005, sentencing that he was sentencing the defendant at the high end of the sentencing guidelines, but the sentence imposed was in fact a departure from the guidelines. We further order the Monroe Circuit Court to file written clarification of the defendant's sentence with the clerk of this Court within 42 days from the date of this order. We retain jurisdiction. Court of Appeals No. 273151.

PEOPLE v WROBLEWSKI, No. 133032. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Allegan Circuit Court, and we remand this case to the trial court for resentencing. On remand, the trial court shall resentence the defendant within the appropriate sentencing guidelines range or state 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). Court of Appeals No. 274893.

Leave to Appeal Denied April 25, 2007:

PEOPLE v DOTSON, No. 131691; Court of Appeals No. 261411.

PEOPLE v GOODMAN, No. 131838; Court of Appeals No. 269924.

PEOPLE v JASMAN, No. 132033; Court of Appeals No. 268248.

AKOURI v STANDARD FEDERAL BANK, NA, No. 132550; Court of Appeals No. 267613.

PEOPLE v SPANGLER, No. 132754; Court of Appeals No. 266078.

Orders Granting Oral Argument in a Case Pending on Application for Leave to Appeal April 27, 2007:

VIP CUSTOMS BROKERAGE SERVICES v ADESA IMPORTATION SERVICES, INC, No. 132630. 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 plaintiff Johnny Cooper has standing to sue as an individual on his count for breach of the Oral Operations Agreement, including whether Cooper's claim is based on a duty that is distinct from defendant Adesa Importation Services, Inc.'s, alleged duty to the acquired corporations. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 259386.

Summary Dispositions April 27, 2007:

PEOPLE v EARLS, No. 132284. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Sanilac Circuit Court for further proceedings not inconsistent with this order. The Court of Appeals clearly erred in affirming the ruling of the Sanilac Circuit Court that suppressed evidence seized in violation of MCL 767A.1 *et seq.* This Court has held that where, as here, "there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." *People v Hawkins*, 468 Mich 488, 507 (2003); *People v Anstey*, 476 Mich 436, 448 (2006). The Legislature has given no indication in the text of MCL 767A.1 *et seq.* that "the drastic remedy of exclusion of evidence" was intended for a statutory violation. *Hawkins, supra* at 500; *Anstey, supra* at 447-449. The Court of Appeals also clearly erred in holding that defendant has standing to challenge the admission of records held by third parties. *People v Gadomski*, 274 Mich App ___ (Docket No. 268568, decided February 1, 2007). "As a general rule, criminal defendants do not have standing to assert the rights of third parties." *People v Wood*, 447 Mich 80, 89 (1994). Court of Appeals No. 267976.

WEAVER, J. (*concurring*). I concur in the order reversing the judgment of the Court of Appeals and remanding this case to the Sanilac Circuit Court for further proceedings. I dissent from the inclusion of the following statement in the order:

> The Court of Appeals also clearly erred in holding that defendant has standing to challenge the admission of records held by third parties. *People v Gadomski*, 274 Mich App ___ (Docket No. 268568, decided February 1, 2007). "As a general rule, criminal

> defendants do not have standing to assert the rights of third parties." *People v Wood*, 447 Mich 80, 89 (1994).

I do not think the above language is necessary, nor does this Court need, in dicta, to comment on the Court of Appeals position on whether the defendant had standing to challenge the admission of records held by third parties.

CAVANAGH, J. (*dissenting*). For the reasons stated in my dissent in *People v Hawkins*, 468 Mich 488 (2003), I would affirm the decisions of the trial court and the Court of Appeals. I would support applying the exclusionary rule here because this Court traditionally recognized a presumption in favor of using the exclusionary rule for statutory violations. *Id.* at 520 (CAVANAGH, J., dissenting). The investigative-subpoena statute is particularly appropriate for such a presumption. The protections of the statute, MCL 767A.1 *et seq.*, are couched in mandatory terms. Without an effective method of enforcing the statute, the provisions are inconsequential. Excluding the evidence from use at trial is the only meaningful way of remedying a violation. I would deny leave to appeal.

KELLY, J. (*dissenting*). This case arises from a home invasion in which a safe containing a large sum of money and other valuables was stolen. While investigating the crime, the Sanilac County Prosecutor's Office served on various institutions approximately 34 subpoenas seeking private documents relating to defendant and his wife. The subpoenas purported to be "investigative subpoenas" under MCL 767A.1 *et seq*., but, as the prosecutor has conceded, they were defective.

The trial court suppressed the evidence seized pursuant to the defective subpoenas and the Court of Appeals affirmed. I would affirm that decision for the reasons articulated in Justice CAVANAGH's dissenting statement. I write separately to discuss the prosecutor's willful violation of the statutory procedure.

During oral argument at the Court of Appeals, the prosecutor admitted that "her office routinely followed a process that entirely circumvented the process required by statute for acquiring investigative subpoenas." *People v Earls*, unpublished opinion per curiam, issued October 3, 2006 (Docket No. 267976). I am concerned that, in reversing the Court of Appeals judgment, this Court will appear to condone the practice, inviting prosecutors to disregard a statutory protection essential to the rights of individuals. I believe that it is serious error to allow the prosecutor to willfully violate the law without penalty. As Justice Brandeis eloquently stated:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may

> commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. [*Olmstead v United States*, 277 US 438, 485 (1928) (Brandeis, J., dissenting).]

PEOPLE v DAVID REED, No. 133043. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the defendant's sentence, and we remand this case to the Oceana Circuit Court for resentencing under properly scored guidelines. *People v Kimble*, 470 Mich 305 (2004). The record does not currently indicate that acts of sexual penetration occurred arising out of the sentencing offenses. If defendant is scored points for offense variable (OV) 11, the trial court must indicate that the acts of sexual penetration "arose out of" the sentencing offenses. MCL 777.41(2)(a). If defendant is not scored points for OV 11, to the extent that the record shows a continuing pattern of criminal behavior involving three or more crimes against a person, OV 13 should be scored at 25 points. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 273454.

Reconsideration Denied April 27, 2007:

COLLIER v PRUZINSKY, No. 132687. The motion for reconsideration of this Court's March 26, 2007, order is considered, and it is denied, because it does not appear that the order was entered erroneously. "No appeal" provisions in contracts have long been recognized by this Court as valid and binding. *Wyrzykowski v Budds*, 325 Mich 199, 201-202 (1949); *Cole v Thayer*, 25 Mich 211 (1872). Leave to appeal denied at 477 Mich 1057.

CAVANAGH, J. I would deny reconsideration without the further statement found in the majority's order.

Summary Disposition May 1, 2007:

PEOPLE v ALPHONZO WRIGHT, No. 130295. This Court granted leave to appeal, 475 Mich 906 (2006), to consider the November 29, 2005, judgment of the Court of Appeals, which reversed the defendant's conviction of knowingly maintaining a drug vehicle. MCL 333.7405(1)(d). The case was argued on December 12, 2006, and submitted together with *People v Thompson*, Docket No. 130825, which we decide today by opinion. We now vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration.

In its opinion in this case, the Court of Appeals reversed the defendant's conviction of maintaining a drug vehicle on the basis of language from *People v Griffin*, 235 Mich App 27, 32 (1999), that we reject today in our opinion in *People v Thompson*, 477 Mich 1114 (2007).

The Court of Appeals also said it would require piling inference upon inference in order to conclude that the defendant maintained a drug vehicle. But, in *People v Hardiman*, 466 Mich 417, 428 (2002), we expressly rejected the "no inference upon inference" rule.

Further, the Court of Appeals concluded its analysis by stating that

"we cannot conclude that the prosecution presented sufficient evidence to support Wright's maintaining a drug vehicle conviction." Unpublished Opinion per curiam, issued November 29, 2005 (Docket No. 256475), slip op at 4. But, the proper test is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Hardiman supra* at 421. Regarding "sufficiency of the evidence" claims, the United States Supreme Court held that the United States Constitution prohibits criminal convictions except upon proof of guilt beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 309 (1979) (citing *In re Winship*, 397 US 358 [1970]). A reviewing court need not " 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' " *Jackson*, 443 US at 319 (quoting *Woodby v Immigration & Naturalization Service*, 385 US 276, 282 [1966]). Rather, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 US at 319 (emphasis omitted).

Accordingly, on remand, the Court of Appeals shall reconsider this case and issue an opinion limited to whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of maintaining a drug vehicle in light of our opinion in *People v Thompson*, and without resort to the rejected no inference upon an inference rule. Court of Appeals No. 256475.

CORRIGAN, J. (*concurring*). I concur with the majority that the Court of Appeals applied an incorrect standard in determining whether the evidence was sufficient to sustain defendant's conviction for keeping or maintaining a drug vehicle, MCL 333.7405(1)(d). But as I explain in my partial dissent in *People v Thompson*, 477 Mich 1114 (2007), I dissent from the majority's holding that a conviction for keeping or maintaining a drug vehicle must be supported by evidence of continuity aside from an isolated incident. Instead, I would hold that evidence of an isolated incident of using a vehicle for keeping or selling controlled substances is sufficient to give rise to criminal liability under the unambiguous language of the statute if the offender keeps the vehicle by retaining it in his possession or power.

YOUNG, J. I join the statement of Justice CORRIGAN.

Summary Dispositions May 2, 2007:

PURCELL V STURGIS HOSPITAL, Nos. 130929, 130930, 130931. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals Nos. 266114, 267831, 267832.

PEOPLE V GANSKE, No. 131970. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's brief on appeal as having been timely filed and shall reinstate the appeal. The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and admits his sole responsibility for the error. Accordingly, the defendant was deprived of his appeal of right as a result of constitutionally

ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States,* 526 US 23, 28 (1999). Costs are imposed against the attorney, only, in the amount of $250, to be paid to the clerk of this Court. We do not retain jurisdiction. Court of Appeals No. 264004.

PEOPLE v DARRIN HENRY, No. 132967. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the charges against defendant, and remand this case to the Wayne Circuit Court for further proceedings.

The court plainly erred in holding that defendant did not abandon the bag he was carrying for purposes of the Fourth Amendment. Fourth Amendment abandonment is distinguishable from abandonment in the property law context:

> "The test for abandonment in the search and seizure context is distinct from the property law notion of abandonment: *it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object*. See, e.g., *United States v Colbert*, 474 F2d 174, 176 (CA 5, 1973)." [*People v Mamon*, 435 Mich 1, 6-7 (1990), quoting *United States v Thomas*, 275 US App DC 21, 23-24 (1989) (emphasis added).]

Thus, while abandonment in the property law context looks to whether the person relinquished his *ownership* interest in the property, abandonment under the Fourth Amendment inquires whether "the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy [in it]." *Colbert, supra* at 176.

In this case, defendant placed a bag containing illegally copied recordings on an electric box attached to a utility pole when he saw an unmarked police car approaching him. In doing so, defendant left the bag in a public place where any passerby could have access to it. Defendant thus voluntarily "left behind or otherwise relinquished his interest" in the bag. He had no reasonable expectation of privacy in the bag once he abandoned it by the pole. *Colbert*, *supra* at 176. Moreover, he did not object or assert his ownership when the police officer walked over to the bag and looked inside. Defendant's silence reflects his intent to distance himself from any connection with the bag when he set it down.

The Court of Appeals also erred in holding that the prosecution must establish that defendant "*unquestionably* relinquished any expectation of privacy in the bag." (Slip op at 2; emphasis added.) Although this Court noted in *Mamon, supra* at 7, that "the defendant unquestionably relinquished any expectation of privacy in the bag [he had been carrying]," it did not hold that a standard of proof beyond all doubt was necessary to show abandonment.

Accordingly, we reverse the judgment of the Court of Appeals, reinstate the charges against defendant, and remand to the trial court for further proceedings consistent with this order. We do not retain jurisdiction. Court of Appeals No. 266153.

Leave to Appeal Denied May 2, 2007:

PEOPLE v CRAIGHEAD, No. 130450; Court of Appeals No. 243856.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

GARCIA v SAGINAW POLICE AND FIRE RETIREMENT SYSTEM, No. 131209; Court of Appeals No. 266099.
CAVANAGH, J. I would grant leave to appeal

BUSHY v BERACY, No. 131229; Court of Appeals No. 262909.

PEOPLE v LAFOUNTAIN, No. 131484. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265709.
KELLY, J. I would grant leave to appeal.

HINER v MOJICA, No. 131797; reported below: 271 Mich App 604.
KELLY, J. I would grant leave to appeal.

PEOPLE v BREVICK, No. 132039; Court of Appeals No. 270789.
KELLY, J. I would grant leave to appeal.

PATTERSON v CABALA, Nos. 132105, 132106; Court of Appeals Nos. 260728, 265672.

PEOPLE v DEPRIEST, No. 132334; Court of Appeals No. 260165.

PEOPLE v MCMILLIAN, No. 132474; Court of Appeals No. 261515.

PEOPLE v STOLTE, No. 132524; Court of Appeals No. 272269.

ALLSTATE INSURANCE COMPANY v LEWERENZ, Nos. 132597, 132598; Court of Appeals Nos. 261296, 261299.

PEOPLE v BEVERLY, No. 132643; Court of Appeals No. 270130.
KELLY, J. I would grant leave to appeal.

KLOIAN v SCHWARTZ, No. 132649; Reported below: 272 Mich App 232.

PEOPLE v SNELL, No. 132737; Court of Appeals No. 273819.

PEOPLE v EVERSOLE, No. 132774; Court of Appeals No. 273650.
KELLY, J. I would remand this case for resentencing.

PEOPLE v FERGUSON, No. 132824; Court of Appeals No. 263275.

PEOPLE v RONALD MARTIN, No. 132978; Court of Appeals No. 273698.
KELLY, J., would grant leave to appeal.

Summary Dispositions May 4, 2007:

PEOPLE v BLACKMON, Nos. 132250. The motion for immediate consideration is granted. The motions for reconsideration or clarification of this Court's April 4, 2007, order is considered, and it is granted. We vacate our order dated April 4, 2007. On reconsideration, the application for leave to appeal the September 15, 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 Court of Appeals shall included among the issues to be considered: (1) whether the error that occurred is constitutional in nature; (2) whether the Court of Appeals, on direct appeal, therefore erred in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved federal constitutional error, *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967); (3) if so, whether the errors committed at trial were harmless beyond a reasonable doubt; (4) whether the defendant has shown good cause for failing to raise these issues on direct appeal; and (5) if so, whether defendant has shown actual prejudice and is therefore entitled to postappeal relief under MCR 6.508(D)(3). We do not retain jurisdiction. Court of Appeals No. 268628.

PEOPLE v MACKIN and PEOPLE v WOZNIAK, Nos. 132285, 132286. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portion of the Court of Appeals judgment that held evidence of the July 3, 2005, cross-burning was admissible. The ethnic intimidation statute, MCL 750.147b, requires the prosecutor to prove the defendant maliciously, and with specific intent to intimidate or harass another because of that person's race, color, religion, gender or national origin, did certain prohibited acts. The complainant's state of mind is not an element of the offense. The complainant's actions and observations are relevant, but the fact that a similar incident occurred the night before is not relevant and is therefore not admissible. MRE 402. Court of Appeals Nos. 268017, 268018.

CORRIGAN, J. (*dissenting*). I respectfully dissent. I would not order peremptory reversal of the Court of Appeals judgment.

Defendants were charged with ethnic intimidation under MCL 750.147b(1), which requires proof of "specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin." The prosecutor reasonably compares federal caselaw analyzing proof of specific intent to intimidate under 18 USC 241, which makes it unlawful for

> two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . . [18 USC 241.]

Particularly in cases involving cross burnings, the federal circuits commonly allow juries to consider evidence of the victims' reactions to

prove a defendant's intent to intimidate. When a threat is alleged, for instance, a victim's reaction may show both whether a reasonable person would perceive a threat and whether the person making the threat would have reasonably foreseen that the victim would perceive a threat. See *United States v Magleby,* 241 F3d 1306, 1311 (CA 10, 2001); *United States v Hartbarger,* 148 F3d 777, 782-783 (CA 7, 1998), overruled in part on other grounds *United States v Colvin,* 353 F3d 569 (CA 7 2003); *United States v JHH,* 22 F3d 821, 827-828 (CA 8, 1994); cf. *Watts v United States,* 394 US 705, 708 (1969) (analyzing a different statute requiring a "threat" and stating that it is appropriate to evaluate the threat "in context" and take into account the "reaction of the listeners").

Likewise, "evidence of victims' reactions to a cross-burning is relevant to a defendant's intent under 18 U.S.C. § 241." *Magleby, supra* at 1311 (court properly instructed the jury that they may consider the victims' reactions to the cross burned on their yard in determining the defendant's intent); *Hartbarger, supra* at 783-784 (evidence of the effect on an interracial couple of a cross burned on their lawn confirmed the defendant's intent to intimidate and interfere). The *Hartbarger* Court explained:

> [W]hile it [i]s not essential to show that the victims were actually intimidated, . . . such evidence [is] not irrelevant . . . .
>
> * * *
>
> [Here,] . . . the evidence regarding the victims' reaction was relevant to the issue of whether the defendants intended to threaten the [victims] by burning a cross, and therefore the court did not err in instructing the jury that
>
> "While a victim's reaction to a cross burning is not conclusive evidence of the defendant's intent, it may be considered nonetheless as some evidence of his intent." [*Hartbarger, supra* at 784-785.]

In the instant case, the occurrence of the first cross burning informed the victims' reactions and was arguably even more directly relevant to defendants' intent than in the cases cited above. As the Court of Appeals recognized, the evidence is not typical "other acts" evidence that may be excluded under MRE 404(b) because defendants were not specifically linked to the first cross burning. Rather, evidence that a cross was burned the night before, on the lawn of the very same interracial couple who had just moved into the neighborhood, is probative of the culprits' intent to intimidate on the second night, *regardless of who committed either the first or the second cross-burning*. As the prosecutor argues: multiple burnings negate intent-based defenses such as claims that the second burning was "some sort of accident, a holiday celebration, a practical joke, or the like."

Therefore, the Court of Appeals properly concluded that the evidence is admissible and that a carefully crafted limiting instruction under MRE 105 would be sufficient to counterbalance any possibility of prejudice. For these reasons, I would deny defendant's application for leave to appeal.

PEOPLE v DELAZZER, No. 132578. 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 remand this case to the trial court is denied. Court of Appeals No. 271708.

WEAVER, J. (*dissenting*). I dissent because I disagree with the majority's decision to remand this case to the Court of Appeals to determine whether the trial court articulated "a substantial and compelling reason" for this particular upward departure from the sentencing guidelines. I would deny leave to appeal on the basis that the trial judge gave a substantial and compelling reason for departure from the sentencing guidelines by explaining that this is defendant's sixth felony for a fraud type of crime and defendant clearly has not been rehabilitated. The sentencing guidelines enacted by the Michigan Legislature permit upward and downward departures:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [MCL 769.34(3).]

Remanding and demanding that the Court of Appeals spend time considering whether the trial court satisfied its requirement to articulate "a substantial and compelling reason" for the sentencing departure, or whether the sentence was proportionate, is a waste of judicial resources.[1]

For these reasons, I dissent from the order remanding this case to the Court of Appeals and I would deny leave to appeal.

CORRIGAN, 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 am not convinced that we must order the Court of Appeals to further review defendant's claim that the trial court failed to articulate a substantial and compelling reason for its upward departure from the sentencing guidelines.

Defendant took checks from the victim, Rita Rex, and fraudulently wrote checks for $2,250. He pleaded guilty of one count of uttering and publishing and of being a second-offense habitual offender in exchange for the dismissal of another count of uttering and publishing and a

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[1] In *People v Babcock*, 469 Mich 247, 282 (2003), I agreed with Justice CORRIGAN that the majority's approach in that case would result in the remand of innumerable cases and "create needless additional work for an already overburdened trial bench." It is apparent it will also create needless additional work for the Court of Appeals.

habitual offender, fourth, supplement. At the plea hearing, defendant admitted that he had taken a check and cashed it, knowing it to be a bad check.

The sentencing guidelines called for a minimum sentence of 7 to 30 months. The court departed from the guidelines and imposed a sentence of 10 to 21 years. The court noted that defendant had an extensive criminal history, having committed six fraud-related crimes. The court had obtained defendant's criminal records dating back to 1987, which showed that he had paid considerably less restitution than he claimed to have paid. The court also noted that the victim had suffered severe financial consequences, including bounced checks, as a result of defendant's actions. Moreover, defendant was on parole when he committed the offense in this case. In light of defendant's criminal history, the court stated:

> I am concerned that while you're on parole, you wind up doing the same type offense that you've done for a great majority of your life. That is you gained the confidence of someone and then you obtain their credit cards, you obtain their checks, or you steal their checks and take advantage of them. That's been going on for some period of time and seems to be a regular pattern and we would like to believe and the whole theory of being on parole is, you're on your good behavior. If we can't trust you to be on your good behavior while you're on parole, we can't trust you, ever, to be on your good behavior. At least that's the way it looks to me. The guidelines call for a minimum sentence of 12 to 30 months. The Court's deviating over the guidelines, as the guidelines, in the Court's opinion, do not adequately reflect that this is your sixth felony for a fraudulent type of crime. You're a scam artist who continues to scam citizens out of their money and/or property even while on parole status. You have not become rehabilitated even though you served, apparently, several prison sentences. And if you were released today, I'm satisfied you'd pull the same thing once again.

The court also completed a departure evaluation form that provided these reasons for departing from the guidelines range:

> 1. Guidelines do not adequately reflect that this is defendant's 6th felony for a fraud type of crime—defendant is a scam artist who continues to scam citizens out of their money and/or property even while on parole status. Defendant has not become rehabilitated even though having served several prison sentences.
>
> 2. I am persuaded that the Defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales [sic] for departure survive review.

The majority fails to explain why the Court of Appeals must undertake further review of this matter, nor does the majority explain why it questions whether the sentencing court's articulation was sufficient under *People v Babcock*, 469 Mich 247 (2003). The sentencing court explained why it imposed this particular departure.

Therefore, I am not persuaded that a remand is warranted where: (1) defendant was on parole at the time he committed this offense, and the guidelines do not account for the fact that he has committed six fraud-related crimes since 1984;[2] (2) defendant has not paid restitution for his crimes to the extent that he claimed, and he appears to have owed approximately $16,000 in restitution for his crimes; (3) the victim has suffered severe financial consequences as a result of defendant's actions; and (4) the sentencing court concluded that defendant would likely continue to commit fraud-related offenses given his extensive criminal history.[3]

For these reasons, I respectfully dissent from the order remanding this case to the Court of Appeals for consideration as on leave granted.

YOUNG, J. I join the statement of Justice CORRIGAN.

PEOPLE v HAMBLIM, No. 132780. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court erred in scoring ten points for serious psychological injury under MCL 777.34(1)(a). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 373818.

CORRIGAN, J. (*concurring*). Ten points should be scored for offense variable (OV) 4, under MCL 777.34(1)(a), if a victim suffers "serious psychological injury" that "may require professional treatment." MCL 777.34(2). "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). I note *People v Apgar*, 264 Mich App 321, 329 (2004), in which the Court of Appeals stressed that the victim need not actually receive treatment for purposes of OV 4. There, the ten-point score for OV 4 was supported by the victim's testimony that she was "fearful" during the encounter. *Id.* Here, at the preliminary examination, the victim attested that defendant's behavior "was traumatic to me." The record also reveals apparent domestic violence in the course of defendant's relationship with the victim, as is evident in the circumstances of the offense. Accordingly, I would request that, on remand, the Court of Appeals address *Apgar* in its opinion.

PEOPLE v KEITH GREENE, No. 132812. 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 the defendant's sentence, and remand this case

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[2] A defendant's continual commission of the same crime is a substantial and compelling reason to depart upwards. See *People v Solmonson*, 261 Mich App 657, 669, 671-672 (2004).

[3] I also note that defendant had a prior conviction for escaping from prison.

to the Kalamazoo Circuit Court for resentencing under properly scored sentencing guidelines. *People v Kimble*, 470 Mich 305 (2004). The defendant should have been scored zero points for OV 1 in light of MCL 777.31(2)(e), which prohibits a score of five points when the conviction offense is armed robbery, as it was here. 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. 263126.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the order insofar as it denies leave to appeal. I cannot accede to the order remanding for resentencing because of the alleged error in scoring offense variable (OV) 1. Because defendant explicitly stipulated to the scoring of that variable, he waived any error. Under our caselaw, a waiver *extinguishes* any error. *People v Carter*, 462 Mich 206, 215 (2000).

Defendant so far has not claimed in any court that his attorney was ineffective. Instead, the majority has injected this issue. The majority sua sponte concludes that defense counsel was ineffective for waiving the scoring issue, without the benefit of any argument by defendant or the prosecution. This action extends the holding of *People v Kimble*, 470 Mich 305 (2004), again without briefing or argument. I would deny leave to appeal and allow defendant to raise his claim through the proper means, a motion for relief from judgment under MCR 6.500 *et seq*. Alternatively, I would direct a response from the prosecution.

I. FACTS AND PROCEDURAL POSTURE

Defendant was convicted of armed robbery and resisting or obstructing a police officer. At sentencing, the prosecutor and defense counsel stipulated to score OV 1 (aggravated use of a weapon) at 5 points for each of the four victims for a total of 20 points because defendant implied to the four victims in the car that he had a weapon.[1] The trial court

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[1] OV 1 (aggravated use of a weapon) provides, in pertinent part:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (e) A weapon was displayed or implied ..... 5 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 1:
>
> (a) Count each person who was placed in danger of injury or loss of life as a victim.

calculated defendant's guidelines range at 126 to 262 months' imprisonment and sentenced defendant to 126 months' to 25 years' imprisonment for the armed robbery conviction.

The Court of Appeals affirmed. *People v Greene*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 263126). The Court of Appeals declined to review defendant's sentencing argument, raised for the first time in that Court:

> Defendant next argues that he is entitled to resentencing because the trial court improperly scored 20 points for offense variable (OV) 1 (aggravated use of a weapon) and ten points for OV 9 (number of victims). We decline to review defendant's challenge to the scoring of OV 1 and OV 9 because the record reflects defense counsel's on-the-record expression of satisfaction with those scores. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). [Slip op at 2.]

II. ANALYSIS

Although OV 1 was incorrectly scored, that error does not entitle defendant to resentencing. The Court of Appeals correctly ruled that defense counsel's stipulation waived the error under *Carter, supra* at 215. Indeed, defense counsel's express approval of the OV 1 score "*extinguished* any error." *Id.* (emphasis added). Defendant could have claimed ineffective assistance of counsel but did not do so in the trial court, the Court of Appeals, or this Court. Generally, an appellate court does not address issues that were not raised below or on appeal. *Tingley v Kortz*, 262 Mich App 583, 588 (2004). The majority not only raises the issue, it also decides the issue in defendant's favor. It does so without offering the prosecution a chance to respond or remanding for a *Ginther*[2] hearing. At the very least, the prosecution should be afforded notice and an opportunity to respond before the majority hands it a loss by extending new and heretofore unknown standards. Rudimentary fairness demands as much.

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* * *

> (c) Score 5 points if an offender used an object to suggest the presence of a weapon.

* * *

> (e) Do not score 5 points if the conviction offense is a violation of section 82 or 529 of the Michigan penal code, 1931 PA 328, MCL 750.82 and 750.529 [armed robbery]. [MCL 777.31.]

[2] *People v Ginther*, 390 Mich 436 (1973).

This order also extends the holding of *Kimble, supra*. In *Kimble, supra* at 309, 312, an offense variable was misscored, so the defendant's resulting minimum sentence exceeded the appropriate sentencing guidelines range. The defendant raised the scoring error for the first time in the Court of Appeals. *Id.* at 312. This Court held that because the defendant's sentence fell outside the appropriate guidelines range, his sentence was appealable, even though the scoring error was unpreserved. *Id.* Nonetheless, the defendant was required to satisfy the plain error standard set forth in *People v Carines*, 460 Mich 750, 763 (1999). *Kimble, supra* at 312.

Kimble is distinguishable from this case for two reasons. First, Kimble's unpreserved scoring issue was appealable because his sentence fell *outside* the appropriate guidelines range. Here, defendant's incorrectly scored minimum sentence (126 months) is not only *within* the appropriate guidelines range (108 to 225 months), it is also at the lower end of that range. In *Kimble, supra* at 310-311, this Court held that under MCL 769.34(10),[3] "if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand*." (Emphasis added.) Defendant did not raise the scoring error at sentencing, in a motion for resentencing, or in a motion to remand. Therefore, under *Kimble, supra*, defendant's sentence is not appealable.

Second, in *Kimble*, the defendant *forfeited* the scoring error by failing to raise it in the trial court. This Court held that the plain error standard applies to such unpreserved claim of error. *Id.* at 312. In the instant case, however, defendant *waived* the scoring issue by stipulating to his OV 1 score.

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.' " It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for

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[3] MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

> his waiver has extinguished any error." Mere forfeiture, on the other hand, does not extinguish an "error." [*Carter, supra* at 215 (citations omitted).]

Kimble, supra, does not afford defendant relief. The principle of *Kimble* does not apply to waivers of error. Defendant remains free to raise a claim of ineffective assistance of counsel in a motion for relief from judgment under MCR 6.500 *et seq.*, in which the question of ineffective assistance of counsel can be entertained in a proper forum for the receipt of proofs involving counsel's performance.

YOUNG, J. I join the statement of CORRIGAN, J.

Leave to Appeal Denied May 4, 2007:

PEOPLE v STELLNER, No. 132045; Court of Appeals No. 271381.

KELLY, J. (*dissenting).* Defendant argues that he was denied Equal Protection[1] because he was not given an appeal as of right from his sentence. He alleges that his sentence is too long because the trial court made errors in scoring the mandatory sentencing guidelines. Because I believe that there may be merit to his Equal Protection argument, I would grant defendant's application for leave to appeal.

In the trial court, defendant pleaded guilty of kidnapping and aggravated assault. At sentencing, the judge assessed points for numerous sentencing offense variables over defendant's objections. The guidelines range that resulted was 81 to 135 months' imprisonment. Had defendant prevailed on all of his scoring arguments, the guidelines range would have been as low as 0 to 18 months.

Defendant was sentenced to imprisonment of 8 to 30 years. Because he had pleaded guilty, he did not have an appeal of right in the Court of Appeals. MCR 7.203(A)(1)(b). Rather, he had to apply for leave to appeal in that court. The Court of Appeals denied his application.

Defendant points out that every defendant convicted, be it by plea or by guilty verdict, undergoes the same sentencing procedure. But one who is convicted after a jury or bench trial has a right to appeal on the basis of sentencing errors. By contrast, one who is convicted by plea has no right of appeal by which to raise sentencing issues. Defendant argues that the different treatment violates the Equal Protection Clause of the United States Constitution.

I think that defendant raises an important constitutional issue that affects many criminal defendants. Neither this Court nor the United States Supreme Court has considered the issue. Therefore, I would grant defendant's application to consider whether defendants convicted after pleading guilty must be given a right of appeal for the purpose of raising sentencing issues.

PEOPLE v BABCOCK, No. 132528; Court of Appeals No. 261162.

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[1] US Const Am XIV, § 1; Const 1963, art 1, § 2.

MARKMAN, J. (*concurring*). I concur in the denial of defendant's application for leave to appeal. Although the trial court committed error under the Confrontation Clause by admitting the deposition testimony of the police officer who was merely out of town on her honeymoon, any error was harmless, in my judgment, because a rational jury would have convicted defendant beyond a reasonable doubt on the basis of the remaining evidence.

Defendant was charged and convicted of being a felon in possession of a firearm. Defendant alleges that his rights under the Confrontation Clause were violated when the trial court permitted excerpts from an absent police officer's deposition testimony to be read to the jury. "Harmless error analysis applies to claims concerning Confrontation Clause errors . . . ." *People v Shepherd*, 472 Mich 343, 348 (2005). "A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " *People v Mass*, 464 Mich 615, 640 n 29 (2001), quoting *Neder v United States*, 527 US 1, 18 (1999). The harmless error analysis in this case thus rests on whether a "rational jury" would have convicted defendant "beyond a reasonable doubt" on the basis of untainted evidence.

In the instant case, the disputed issue concerned whether defendant possessed the firearm. Besides the police officer, two other witnesses testified that defendant possessed the firearm: Shawn Lester, defendant's ex-girlfriend, and Cindy Pero, the sister of one of defendant's friends. Lester testified that defendant selected a firearm at Wal-Mart and gave her money to purchase it. Lester bought the firearm and ammunition, and brought it home with her. Defendant took the firearm and showed Lester how to load it. Lester further testified that defendant removed the firearm from her home the next day.

Lester's testimony was corroborated by Pero. Pero testified that defendant brought the firearm to her home and told Pero that he intended to shoot skeet with her brother. Pero's testimony was corroborated in turn by Stella Sherman, who testified that Lester brought the firearm from Pero's home to Sherman's, thereby supporting Pero's testimony that the firearm had been at her home.

The trial court then read the police officer's deposition into evidence. The police officer stated that defendant admitted that he possessed the firearm. On cross-examination, the police officer acknowledged that she did not actually see defendant possess the firearm.

Thus, two witnesses besides the police officer testified that defendant possessed the firearm. Although the ex-girlfriend may have had some motivation to falsely accuse defendant based on the termination of their relationship, her testimony was corroborated by the testimony of Pero, which was further supported by Sherman. Moreover, Pero did not have a similar motivation to falsely accuse defendant. Under these facts, the deposition testimony of the police officer that defendant possessed the firearm was merely cumulative. Even without the admission of the police officer's deposition testimony, a "rational jury" would have found that defendant possessed the firearm "beyond a reasonable doubt." Conse-

quently, any Confrontation Clause error was harmless. For this reason, I concur in the denial of leave to appeal.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Denied May 7, 2007:

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE, No. 133661; Court of Appeals No. 276093.

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.

Rehearings Denied September 14, 2006:

COBLENTZ v CITY OF NOVI, No. 127715. Reported at 475 Mich 558.

GREENE v A P PRODUCTS, LTD, Nos. 127718, 127734. Reported at 475 Mich 502.

CAVANAGH and KELLY, JJ. We would grant rehearing.

BARNES v JEUDEVINE, No. 129606. Reported at 475 Mich 696.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant rehearing.

Order Entered September 19, 2006:

PROPOSED ADOPTION OF RULES 3.904 AND 5.738a OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering the adoption of Rules 3.904 and 5.738a 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 the 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 following proposals would become new rules if adopted.]

RULE 3.904. USE OF INTERACTIVE VIDEO TECHNOLOGY.

(A) Facilities. Courts in the family division may use two-way interactive video technology to conduct the proceedings outlined in paragraph (B) between a courtroom and a jail, prison, hospital, mental health facility, detention facility, or other placement facility.

(B) Hearings.

(1) Delinquency Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings under MCR 3.935(A)(1), postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.

(2) Child Protective Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings or review hearings.

(C) Mechanics of Use. The use of two-way interactive video technology must be conducted in accordance with any requirements and guidelines established by the State Court Administrative Office. All proceedings at which such technology is used must be recorded verbatim by the court.

RULE 5.738a. USE OF INTERACTIVE VIDEO TECHNOLOGY.

(A) Facilities. Probate courts may use two-way interactive video technology to conduct the proceedings outlined in paragraph (B) between a courtroom and a hospital, mental health facility, or other treatment facility.

(B) Hearings. Probate courts may use two-way interactive video technology to conduct hearings concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons receiving treatment in mental health facilities.

(C) Mechanics of Use. The use of two-way interactive video technology must be conducted in accordance with any requirements and guidelines established by the State Court Administrative Office. All proceedings at which such technology is used must be recorded verbatim by the court.

Staff Comment: Proposed Rule 3.904 would allow courts in the family division to use two-way interactive video technology to conduct certain hearings for delinquency and child protective proceedings in accordance with requirements and guidelines set forth by SCAO. Proposed Rule 5.738a would allow probate courts to use two-way interactive video technology to conduct hearings concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons received treatment in mental health facilities in accordance with requirements and guidelines set forth by SCAO. All proceedings in both the family division and the probate courts would be required to be recorded verbatim by the court.

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 January 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-09. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered September 22, 2006:

In re TRUDEL, No. 121995. The motions for appointment of a receiver and for relief from orders are considered, and they are denied, because the Court is not persuaded that it should grant the requested relief. Petitioner Judicial Tenure Commission seeks the appointment of a receiver in its ongoing collection efforts against respondent former judge.

Petitioner requests a receivership over respondent's real property but has not shown that all less intrusive means, such as a creditor's examination, were ineffective. *Reed v Reed*, 265 Mich App 131, 162 (2005). Indeed, petitioner has not exhausted other remedies to pursue payment by respondent. See *Petitpren v Taylor School Dist*, 104 Mich App 283, 295 (1981). Our cases note that the appointment of a receiver is a "harsh proceeding, which should only be resorted to in extreme cases." *People v Israelite House of David*, 246 Mich 606, 618 (1929); *Michigan Minerals, Inc v Williams*, 306 Mich 515, 525 (1943). The appointment of a receiver at this juncture would be premature.

WEAVER, J. (*concurring*). I concur in the order denying the motion for appointment of a receiver and for relief from orders. I write separately to note that my basis for denial of petitioner's motion is that there is no constitutional authority to assess costs against a judge. Subsection 2 of Const 1963, art 6, § 30 provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge . . . ." As I stated in my concurrence in *In re Noecker,* 472 Mich 1, 18-19 (2005), "Nothing in this constitutional provision gives this Court any authority to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her."

Orders Entered September 26, 2006:

PROPOSED AMENDMENT OF RULE 3.932 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.932 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, 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 proposals in its current form.

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

RULE 3.932 SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian agree to have the

case placed on the consent calendar. The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.

(1) Notice. Formal notice is not required for cases placed on the consent calendar except as required by article 2 of the Crime Victim's Rights Act, MCL 780.781 *et seq*.

(2) Plea; Adjudication. No formal plea may be entered in a consent calendar case unless the case is based on an alleged violation of the Michigan Vehicle Code, in which case the court shall enter a plea.~~, and t~~The court must not enter an adjudication.

(3) Conference. The court shall conduct a consent calendar conference with the juvenile and the parent, guardian, or legal custodian to discuss the allegations. The victim may, but need not, be present.

(4) Case Plan. If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan.

(5) Custody. A consent calendar case plan must not contain a provision removing the juvenile from the custody of the parent, guardian, or legal custodian.

(6) Disposition. No order of disposition may be entered by the court in a case placed on the consent calendar.

(7) Closure. Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. ~~No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar.~~

(8) Transfer to Formal Calendar. If it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition, citation, or appearance ticket. Statements made by the juvenile during the proceeding on the consent calendar may not be used against the juvenile at a trial on the formal calendar on the same charge.

(9) Abstracting. If the court finds that the juvenile has violated the Michigan Vehicle Code, MCL 257.1 *et seq*., the court must fulfill the reporting requirements imposed by MCL 712A.2b(d).

(D) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.932 would allow a court to enter a plea for violations of the Michigan Vehicle Code, and would require a court to report to the Secretary of State violations of the Michigan Vehicle Code that are handled on the court's consent calendar.

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 January 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-42. Your comments

and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 9.227 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.227 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, 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 proposals in its current form.

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

RULE 9.227. IMMUNITY.

A person is absolutely immune from civil suit for statements and communications transmitted solely to the commission, ~~or~~ its employees, or its agents, or given in an investigation or proceeding on allegations regarding a judge, and no civil action predicated upon the statements or communications may be instituted against a complainant, a witness, or their counsel. Members of the commission, ~~and~~ their employees and agents, masters, and examiners are absolutely immune from civil suit for all conduct in the course of their official duties.

Staff Comment: This proposal would extend immunity from civil suit for statements or communications made to agents of the Judicial Tenure Commission, and would add agents to the individuals who are immune from civil suit for conduct in the course of their official duties with the commission.

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 January 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-31. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED ADOPTION OF RULE 19 OF THE STATE BAR OF MICHIGAN. On order of the Court, this is to advise that the Court is considering proposed new Rule 19 of the Rules Concerning the State Bar of Michigan. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the

opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, 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 language that follows is new.]

RULE 19. CONFIDENTIALITY OF STATE BAR RECORDS.

Records maintained by the state bar pertaining to certain programs are confidential in nature and not subject to disclosure, discovery, or production unless the state bar is ordered to produce the record by a court after notice and a hearing. The programs to which this confidentiality rule applies include:

1. Ethics Committee and Ethics Hotline programs
2. Practice Management Resource Center program
3. Unauthorized Practice of Law program
4. Client Protection Fund program
5. Lawyers and Judges Assistance program.

Disclosure and production may be made in response to a lawfully issued subpoena from a law enforcement agency in connection with a criminal investigation, proceeding, or trial, or voluntarily by the State Bar of Michigan to a governmental agency that requests the assistance of the State Bar of Michigan in conducting an investigation pertaining to an Unauthorized Practice of Law complaint or a Client Protection Fund claim.

"Records" includes letters, memoranda, draft opinions, notes, applications, medical records, psychological and counseling records, and any other document maintained in whatever form that is not otherwise made public by the state bar in conducting its business.

Except as Michigan Rule of Professional Conduct 8.3(c)(2) provides, this rule does not abrogate an attorney's independent obligation under Michigan Rule of Professional Conduct 8.3(a) to report a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.

Staff Comment: The proposed new rule codifies the practice of the State Bar of Michigan with regard to confidentiality of records maintained relating to various state bar programs.

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 January 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2005-41.

Rehearing Denied October 2, 2006:

MICHIGAN CHIROPRACTIC COUNCIL v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICE, No. 126530. Reported at 475 Mich 363.

WEAVER and MARKMAN, JJ. We would grant rehearing.

Order Entered October 3, 2006:

PROPOSED AMENDMENT OF RULE 3.977 OF THE MICHIGAN COURT RULES. On order of the Court, the proposed amendment of Rule 3.977 of the Michigan Court Rules having been published for comment at 474 Mich 1216-1217 (2006), and an opportunity having been provided for comment in writing and at a public hearing, and consideration having been given to the comments received, the Court declines to adopt the proposed amendment.

Order Entered October 17, 2006:

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 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 6.106. PRETRIAL RELEASE.

(A)-(H) [Unchanged.]

(I) Termination of Release Order.

(1) If the conditions of the release order are met and the defendant is discharged from all obligations in the case, the court must vacate the release order, discharge anyone who has posted bail or bond, and return the cash (or its equivalent) posted in the full amount of the bail, or, if there has been a deposit of 10 percent of the full bail amount, return 90 percent of the deposited money and retain 10 percent.

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

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

(b) If the defendant does not appear and surrender to the court within 28 days after the revocation date ~~or does not within the period satisfy the~~

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

(c) The 10 percent bail deposit made under subrule (E)(1)(a)(ii)[B] must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court case, to the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.

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

Staff comment: This proposed amendment would clarify that bail agents would be liable only for the appearance of a defendant, and not for compliance with conditions imposed by the court as part of a conditional release pursuant to MCR 6.106. The proposed amendment also would prohibit a court from entering a judgment that includes the costs of the proceeding against a surety. MCL 765.28 limits judgment against the surety to an amount not more than the full amount of the surety bond.

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 February 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-03. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Amended Order Entered October 18, 2006:

On order of the Court, the order of October 17, 2006, is amended to correct a clerical error by adding the following proposed new text at the end of subrule 6.106(I)(2)(b):

If the defendant does not within that period satisfy the court that there was compliance with the conditions of release other than appearance or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant alone for an amount not to exceed the full amount of the bond, and costs of the court proceedings.

Staff comment: The additional language clarifies that a court may continue the revocation order and enter judgment against a defendant for failure to comply with the conditions of release or failure to satisfy the court that compliance with those conditions was impossible.

Rehearing Denied October 20, 2006:

COWLES v BANK WEST, No. 127564. The motion by Huntington National Bank for leave to file a brief amicus curiae is granted. Reported at 476 Mich 1.

CAVANAGH, J. (*concurring*). I concur completely with this Court's decision to deny the motion for rehearing. I write separately only to respond to the dissent.

First, the dissent states that "even under the new rule, Karen Paxson's claim that defendant violated § 1605 of the Truth in Lending Act (TILA), 15 USC 1605, does not share a factual and legal nexus with Kristine Cowles's previous claims." I respectfully disagree. Cowles's initial complaint stated that "the document preparation fee was disclosed on line 1105 in the HUD-1 as a charge for preparation of final legal papers" and that "the document preparation fee violated the Michigan Consumer Protection Act based on causing a probability of confusion or of misunderstanding as to the terms or conditions of credit and failing to reveal a material fact which was deceptive." Cowles's first amended complaint alleged that "Bank West misrepresented the fee as the actual expense of preparing final legal papers and by other inaccurate disclosures." Therefore, it is clear that Cowles's initial complaint and first amended complaint alleged problems with the way defendant reported its document preparation fee and the propriety of the services it provided in connection with the fee. Accordingly, Cowles's initial and first amended complaint had a sufficient factual and legal nexus to the TILA claim alleged in the second amended complaint.

Next, the dissent states that "[t]he majority also creates confusion by barring 'overhead charges' from inclusion in a 'bona fide' document processing fee under TILA." Again, I respectfully disagree. The majority held that a document preparation fee is not bona fide if it includes charges for items other than document preparation. There was testimony in this case from defendant's president that defendant's document preparation fee covered expenses other than those associated with document preparation. In fact, he testified that the document preparation fee was charged to defray the expense of "taking the loan through the entire sequence from the application through the closing." Contrary to the dissent's suggestion, this is quite different from overhead directly attributable to document preparation. This testimony could be viewed to mean that the document preparation fee was used to defray defendant's general overhead, and, thus, it would not be bona fide. Accordingly, a question of fact exists regarding whether the document preparation fee in this case is bona fide.

KELLY and MARKMAN, JJ. We join the statement of Justice CAVANAGH.

CORRIGAN, J. (*dissenting*). I would grant defendant's motion for rehearing. In *Cowles v Bank West,* 476 Mich 1, 20 (2006), the majority

established that a statute of limitations may be tolled in a class action for a new claim that shares a "factual and legal nexus" with a previous, timely claim. Apart from my dissent to the rule itself, *id.* at 38 (CORRIGAN, J., dissenting), defendant's motion for rehearing makes an excellent point that, even under the new rule, Karen Paxson's claim that defendant violated § 1605 of the Truth in Lending Act (TILA), 15 USC 1605, does not share a factual and legal nexus with Kristine Cowles's previous claims. Defendant argues that, because Paxson's § 1605 claim alleges actual damages, the claim requires proof that class members detrimentally relied on a misreported finance charge. Defendant therefore argues that the § 1605 claim would require proof of facts that share no factual or legal nexus with Cowles's previous claims and extend beyond the "evidence, memories, and witnesses" associated with the previous claims, which did not invoke the finance charge or class members' reliance on it. Moreover, Justice CAVANAGH's concurrence does not adequately address this issue. The facts and legal theories alleged in Cowles's complaints simply do not relate to the proofs required for Paxson's claim that class members relied on an inaccurate *finance charge*, as defined by § 1605, and that their reliance on the charge actually caused them financial harm.

The majority also creates confusion by barring "overhead charges" from inclusion in a "bona fide" document processing fee under TILA. *Cowles, supra* at 37. As defendant argues in its motion for rehearing, some overhead charges are practically indistinguishable from the cost of document processing. In his concurring statement, Justice CAVANAGH seems to allow for the fact that some overhead costs can be attributed to "document preparation." ("Contrary to the dissent's suggestion, this is quite different from overhead directly attributable to document preparation.") However, the majority opinion, which is the binding precedent, creates the impression that *no* overhead costs may be properly attributed to "document preparation." *Cowles, supra* at 37 ("For example, if defendant charges $250 for its document preparation fee, but only $10 of that total fee represents actual document preparation services and the remainder represents, for example, overhead charges, the fee would not be 'bona fide' within the meaning of the TILA.") Regardless of whether a question of fact exists on this issue as Justice CAVANAGH suggests, the majority's rule that all overhead charges must be excluded from a "bona fide" document processing fee reflects an ignorance of how financial institutions operate and unnecessarily harms struggling Michigan businesses. The majority should carefully reconsider its broad statement of this rule.

Accordingly, I would grant rehearing to clarify this latter point and to examine whether Paxson's § 1605 claim truly shares a factual and legal nexus with Cowles's earlier claims.

TAYLOR, C.J., and YOUNG, J. We join the statement of Justice CORRIGAN.

Certified Question Declined October 20, 2006:

In re CERTIFIED QUESTION FROM THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN, No. 130966. The motion to file *amicus*

curiae brief is considered, and it is granted. The question certified by the United States Bankruptcy Court for the Eastern District of Michigan is considered, and the Court respectfully declines the request to answer the certified question.

WEAVER, J. (*concurring*). I concur in the order declining to answer the question certified by the United States Bankruptcy Court for the Eastern District of Michigan, because I continue to question this Court's constitutional authority to hear questions certified from federal courts. See, e.g., *In re Certified Questions* (*Melson v Prime Ins Syndicate*, *Inc*), 472 Mich 1225 (2005); *Proposed Amendment of MCR 7.305*, 462 Mich 1208 (2000); *In re Certified Question* (*Wayne Co v Philip Morris, Inc*), 622 NW2d 518 (2001); *In re Certified Question* (*Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc*), 468 Mich 109 (2003). Justice YOUNG also questioned this Court's authority to answer questions certified by the federal courts.[1] Justice LEVIN also questioned this Court's authority.[2] Therefore, I decline to answer the question in this case.

CORRIGAN, J. (*concurring*). I concur in the order declining to answer the question certified by the United States Bankruptcy Court for the Eastern District of Michigan. The question certified is when an instrument should be deemed recorded where the register of deeds has failed to maintain an entry book as required by MCL 565.24. I concur in declining to answer this question because the failure of certain of our state's registers of deeds to comply with the statutory mandate presents a political issue that must be addressed and resolved by the political branches of our state government.

MCL 565.24 provides: "Every register of deeds shall keep an entry book of deeds and an entry book of mortgages . . . ." An instrument is deemed recorded at the time noted in the entry book. MCL 565.25(4). Despite this clear statutory mandate, it appears that the registers of deeds in several Michigan counties, including Wayne, Oakland, Macomb, and Kalamazoo counties, do not keep entry books.

This Court's obligation is to discern the legislative intent that may reasonably be inferred from the words expressed in a statute. *Jones v Dep't of Corrections*, 468 Mich 646, 655 (2003). The text of MCL 565.25(4) is very clear. An instrument is deemed recorded at the time noted in the entry book. The statutory scheme thus prescribes a particular method for determining the time of recordation. Certain of the registers have rendered it impossible to follow the statutorily mandated method by their failure to maintain entry books. It is not our role to rewrite the statute where the registers have failed to maintain entry books.

Although this Court lacks any authority to amend the statute to address this problem, I nonetheless recognize that the registers' failure to maintain entry books may seriously undermine the certainty and

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[1] See *In re Certified Question* (*Wayne Co v Philip Morris, Inc*), 622 NW 2d 518 (2001) (YOUNG, J., concurring).

[2] See *In re Certified Question* (*Bankey v Storer Broadcasting Co*), 432 Mich 438, 462-471 (1989) (separate opinion by LEVIN, J.).

stability of our system for recording deeds and mortgages. The registers' failure to follow the statutorily prescribed method tends to make it more difficult in many cases to discern when an instrument has been recorded. The responsibility for addressing this matter lies with the political branches of our government. The registers of deeds are executive branch officials over whom this Court does not exercise general supervisory authority.

A possible solution to this problem may lie with the Legislature. That body may wish to consider whether to modernize the statutorily prescribed method of recordation. An argument may exist that the mandatory use of entry books is an outdated means of recordation in light of technological advances in the ability to gather and store information. That is a policy judgment for the Legislature to make. It is not the role of this Court to second-guess the elected representatives of the people in deciding whether and how to address this problem.

YOUNG, J. (*concurring*). I concur with the order declining to answer this question certified by the United States Bankruptcy Court for the Eastern District of Michigan. In this matter, the United States Bankruptcy Court asks this Court to explain property priorities when the register of deeds has failed to comply with the state's recording statute. In effect, this Court is being asked to create extra-statutory rules regarding property priority claims. Given that our Legislature has prescribed how such priorities are to be resolved, the request essentially requires this Court to write a new priority statute. This is a task better suited to the legislative process.

I write separately to alert the citizens of this state that elected officials in many counties currently do not comply with the requirement of MCL 565.24 to maintain an entry book of deeds, mortgages, and levies to note the day, hour, and minute of receipt. By neglecting this duty, the registers of deeds permit a cloud of uncertainty to gather over every real estate instrument filed in these counties.

This is the second time in the recent past that this issue of noncompliance with the Michigan recording statute has been brought to this Court's attention. *See Central Ceiling & Partition v Dep't of Commerce*, 470 Mich 877 (2004); 474 Mich 990 (2005). In *Central Ceiling*, this Court fruitlessly monitored for 18 months the Wayne County Register of Deeds' purported effort to comply with its statutory recording responsibilities. The Wayne County Register's failure in this regard has led to a property crisis and increased costs to citizens buying and selling property in that county. See Paul Egan, *Wayne County Deed Logjam Will Cost You*, The Detroit News, April 6, 2006.

It is unsettling, to say the least, that register of deeds offices throughout the state are flouting the basic statutory obligation to record real estate instruments properly. Property rights hold such fundamental importance in our republic that every governmental entity entrusted with the responsibility to safeguard such rights ought to be fully committed to this endeavor. See *"Property,"* National Gazette, March 29, 1792, Hunt, ed., Writings of James Madison (New York; Putnam, 1906), vol VI, p 102. ("Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that

which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.") (emphasis in original).

Without question, the property interests of thousands of homeowners, mortgage companies, lienholders, and others are jeopardized when registers of deeds throughout the state are derelict in their statutory duty to note in an entry book the day, hour, and minute they receive an instrument for filing. Such noncompliance breeds insecurity in economic transactions, injects confusion into our laws (bankruptcy law, in this case), and raises serious questions about the commitment of elected officials in this state to protect basic property rights. Indeed, the Michigan Land Title Association, which appeared in this matter as amicus curiae, warns that increasing uncertainty in real estate filings will raise the cost of title insurance throughout the state.

For these reasons, I urge the state Legislature and county commissions to investigate and take the necessary steps to ensure that the property rights of Michigan citizens are protected.

MARKMAN, J. (*dissenting*). For the reasons set forth in my dissenting statement in *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225, 1231 (2005), I believe that this Court, in refusing to answer the instant certified question, not only demonstrates a lack of comity with the certifying court but even more significantly contributes to the distortion of our system of judicial federalism by ceding responsibility for the interpretation of Michigan law and thereby diminishing the control of the people of Michigan over the development of their own law.

What makes this Court's failure to carry out its constitutional responsibility particularly egregious in the instant case is that it pertains to one of a diminishing number of areas of law in which the state judiciary still maintains primary authority, property law. The erosion in recent decades of the position of the state judiciary within our federal system is unmistakable, and yet this Court acquiesces in the further relinquishment of its authority to interpret the law of this state on behalf of the people of this state. Instead, a court that is not accountable to the people of this state will render a determination concerning an essential question of Michigan property law.

The United States Bankruptcy Court has certified the following question to this Court: "When is an instrument deemed recorded when a recorder of deeds fails to maintain an entry book?" It is hard to imagine a more fundamental question concerning the orderly operation of a system premised upon private property rights. It is also hard to imagine a question that, if left unanswered, will sow more confusion and chaos in this system.

This same question was recently before this Court in *Central Ceiling & Partition, Inc v Dep't of Commerce*, 470 Mich 877 (2004). We resolved that case on the basis of its "limited facts," but avoided the larger question of when instruments are deemed recorded when the register of deeds fails to satisfy its statutory obligation to memorialize the filing of such instruments in a proper entry book. That the consequence of this question was well understood by this Court is evidenced by the extraor-

dinary monitoring that this Court subsequently undertook with regard to the operations of the Wayne County Register of Deeds.

Thus the question persists: When is an instrument deemed recorded? That is, at what point will certain fundamental rights in private property arise? What are the consequences for these rights when the government fails to carry out its legal duties? Which parties will be affected adversely in their property rights when the government fails to carry out such duties? There is perhaps no area of law in which certainty, clarity, and predictability are more essential than in the realm of property law, and it has always been a paramount responsibility of this Court to uphold these values.

The question certified here is a difficult one, as anyone reading *Central Ceiling* can surmise, and reasonable arguments have been made by both sides, as well as in amicus curiae briefs. But this is no argument for this Court to fail to address and resolve this question; rather, it is an argument to the contrary.

For, in the end, this question will not go unanswered; it will not be unresolved. The bench and bar, as well as all those affected by our system of property law, will eventually be made cognizant of what Michigan law requires and order will be restored to our state's recording system. But it will not be through any action undertaken by this Court in the fulfillment of its basic constitutional responsibilities, but instead through a decision of the federal bankruptcy court. And as a result, this Court, as the highest court of our state, will have failed to carry out its first obligation to interpret the law of this state. And, as a further result, the scope of self-government belonging to the people of our state will have been diminished.

When later chapters are written in the decline of American judicial federalism, the actions of this Court in regularly refusing to answer certified questions will be entitled to at least a footnote—one of bewilderment concerning the disinterest of this Court, almost alone among state courts in the United States, in asserting the sovereign interests of this state by answering certified questions. It is immensely regrettable that the United States Bankruptcy Court, as with the other federal courts before it whose certified questions have also gone unanswered, seems better to understand the role of the Michigan Supreme Court within our system of federalism than does this Court itself.[3]

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[3] In defense of their positions not to answer the certified question in this case, Justice CORRIGAN asserts that the question posed is a "political issue that must be addressed and resolved by the political branches of our state government," and Justice YOUNG asserts that the question posed "requires this Court to write a new priority statute." However, (a) the question posed—under MCL 565.24, when is an instrument deemed recorded when a recorder of deeds fails to maintain an entry book?—no more constitutes a "political question" than any other question of statutory interpretation. There is nothing in providing an answer to this question that would interfere in the remotest with any constitutional

Orders Entered November 7, 2006:

PROPOSED AMENDMENT OF RULE 3.411 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.411 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, 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 current form.

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

RULE 3.411. CIVIL ACTION TO DETERMINE INTERESTS IN LAND.

(A)-(G) [Unchanged.]

(H) Judgment Binding Only on Parties to Action. Except for title acquired by adverse possession, t~~T~~he judgment determining a claim to title, equitable title, right to possession, or other interests in lands under this rule, determines only the rights and interests of the known and unknown persons who are parties to the action, and of persons claiming through those parties by title accruing after the commencement of the action.

(I) [Unchanged.]

Staff Comment: This proposed amendment would clarify that a judgment determining an interest in land does not apply to claims settled under the principle of adverse possession. Under longstanding Michigan case law, interests in lands acquired by adverse possession are effective against all the world, not just those individuals who are parties to the action. See, for example, *Lawson v Bishop*, 212 Mich 691 (1920), and *Gorte v Dep't of Transportation*, 202 Mich App 161 (1993).

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commitment of the issue to a coordinate political department; (b) underscoring this is the fact that this Court dealt with this identical issue two years ago in *Central Ceiling* without so much as a murmuring that we might thereby be embroiling ourselves in a "political question"; (c) further underscoring this is the fact that the certifying court itself does not view this as a "political question" and will, in fact, now be deciding it for the people of Michigan in light of this Court's failure to do so; (d) moreover, *no one* is seeking to have this Court "rewrite" MCR 565.24 or any other law, but simply to exercise its core judicial power and say what the *present* law means.

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 this proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2006-29.

PROPOSED AMENDMENT OF RULES 7.204 AND 7.205 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 7.204 and 7.205 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 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

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

(1) [Unchanged.]

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

(a) in accordance with MCR.6.425~~(F)~~(G)(3);

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

(c) within 42 days after entry of the judgment or order appealed from; or

(d) within 42 days after the entry of an order denying a motion for a new trial, for ~~judgment~~ directed verdict of acquittal, or ~~for resentencing~~ to correct an invalid sentence, if the motion was filed within the time provided ~~by~~ in MCR 6.419(B), MCR 6.429(B)~~(1)~~, or MCR 6.431(A)~~(1)~~, as the case may be.

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

(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed within

(1) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule~~.~~; or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other post-judgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period.

For purposes of ~~this rule~~ subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(B)–(E) [Unchanged.]

(F) Late Appeal.

(1)–(3) [Unchanged.]

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

(a)–(c) [Unchanged.]

A motion for rehearing or reconsideration of a motion mentioned in subrule (F)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (F)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

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

(5) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The proposed amendment of Rule 7.204 of the Michigan Court Rules would make various technical changes. The proposed amendment of Rule 7.205 of the Michigan Court Rules would clarify how a motion for a new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief tolls the time within which to file an application for leave to appeal to the Court of Appeals.

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 March 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-36. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 8, 2006:

COBLENTZ V CITY OF NOVI, No. 127715. The motion for extension of time is granted. The motion for review of taxation of costs pursuant to MCR 7.318 and MCR 7.219(E) is denied because taxation of the plaintiffs' costs in this case was appropriate. See MCL 600.2445(2). We further conclude that the defendant's motion for review of taxation of costs constitutes a vexatious proceeding under MCR 7.316(D)(1), and we order the defendant to pay to the plaintiffs their actual damages attributable to responding to the motion in this Court. We remand this case to the Oakland Circuit Court for calculation of the amount of damages and entry of an appropriate order. We do not retain jurisdiction. Reported at 475 Mich 558.

Order Entered November 9, 2006:

PROPOSED AMENDMENT OF RULE 15 AND PROPOSED NEW RULE 18 OF THE STATE BAR OF MICHIGAN. On order of the Court, this is to advise that the Court is considering an amendment of Rule 15 and adoption of new Rule 18 of the Rules Concerning the State Bar of Michigan as recommended by the State Bar of Michigan. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the 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 15. ADMISSION TO THE BAR

Sec. 1. [Unchanged.]

~~Sec. 2. Foreign Attorney; Temporary Permission. Any person who is duly licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, may be permitted to engage in the trial of a specific case in a court or before an administrative tribunal in this State when associated with and on motion of an active member of the State Bar of Michigan who~~

~~appears of record in the case. Such temporary permission may be revoked by the court summarily at any time for misconduct.~~

Sec. ~~3~~2. [Renumbered but otherwise unchanged.]

[The language that follows is new.]

RULE 18. PRO HAC VICE Temporary Practice .

Sec. 1. Permission to Appear in Pending Litigation before a Court or Agency.

(A) Definitions

(1) An out-of-state lawyer is a person who is not admitted to practice law in this state but who is admitted in another state or territory of the United States or the District of Columbia and is not disbarred or suspended from practice in any jurisdiction.

(2) A client is a person or entity that retained the out-of-state lawyer for the purpose of performing legal services in this state before the out-of-state lawyer's performance of those legal services.

(3) An alternative dispute resolution proceeding includes all types of alternative dispute resolution, including, without limitation, arbitration or mediation, whether arranged by the parties or otherwise.

(4) "Regular practice" means performing legal services in more than three cases within a 365-day period.

(5) "Court" means a state court or state agency or tribunal from which an appeal may be taken to a state court.

(B) Eligibility to Appear. An out-of-state lawyer is eligible to appear *pro hac vice* if that lawyer:

(1) lawfully practices solely on behalf of the lawyer's employer and its commonly owned organizational affiliates; or

(2) neither resides nor regularly practices at an office in this state; or

(3) resides in this state, but

(i) lawfully practices from offices in another state, and

(ii) practices no more than temporarily in this state, whether pursuant to appearance *pro hac vice* or in other lawful ways.

(C) Authority of Court or Agency to Permit Appearance by Out-of-State Lawyer

(1) Court Proceeding. A court of this state may, in its discretion, permit an eligible out-of-state lawyer to appear *pro hac vice* as counsel in a proceeding pending before the court, pursuant to this rule.

(2) Administrative Agency Proceeding. If practice before an agency of this state is limited to lawyers, the agency may, using the same standards and procedures as a Michigan court, pursuant to this rule, permit an eligible out-of-state lawyer to appear *pro hac vice* as counsel in a proceeding pending before the agency.

(3) This rule does not apply to an agency proceeding or an alternative dispute resolution where nonlawyers are permitted to represent third parties. The question of whether nonlawyers may represent clients in agency proceedings or alternative dispute resolutions is a matter of Michigan and federal law, where applicable, and is not solely determined by the rules of the particular agency.

(4) This rule applies to all court-annexed ADR proceedings.

(5) This rule does not govern proceedings before a federal court or agency located in this state unless that body adopts or incorporates this rule.

(D) Association with a Michigan Lawyer

(1) The out-of-state lawyer shall associate with a Michigan lawyer and timely inform the Michigan lawyer of all proposed actions in the proceeding.

(2) Michigan Lawyer's Duties. When an out-of-state lawyer appears for a client in a proceeding pending in this state, either in the role of co-counsel of record with the Michigan lawyer, or in an advisory or consultative role, the Michigan lawyer remains responsible to the client and responsible for the conduct of the proceeding before the court or agency. It is the duty of the Michigan lawyer to advise the client of the Michigan lawyer's independent judgment on proposed actions in the proceeding if that judgment differs from that of the out-of-state lawyer.

(E) Application Procedure

(1) Motion and Verified Application. The Michigan lawyer shall file a motion with the court, moving for the *pro hac vice* appearance of the out-of-state lawyer as co-counsel of record with the Michigan lawyer in the matter. An eligible out-of-state lawyer seeking to appear *pro hac vice* in a proceeding pending in this state shall file a verified application with the court where the litigation is filed and with the State Bar of Michigan, at the same time as the Michigan lawyer files the motion with the court. If an application fee is required by subrule 1(G) of this rule, the fee must accompany the application filed with the State Bar of Michigan. A copy of the motion and application shall be served on all parties who have appeared in the case. The application filed with the State Bar of Michigan shall include proof of service. Failure to pay the motion fee to the local court and the application fee to the State Bar of Michigan shall result in denial of the application. On or after 21 days from the date of service of the motion and application, the court has the discretion to grant or deny the application summarily if there is no opposition filed.

(2) Objection to Application. The State Bar of Michigan, or a party to the proceeding, may file an objection to the motion or seek the court's imposition of conditions to its being granted. The State Bar of Michigan or objecting party must file with its objection a verified pleading containing information establishing a factual basis for the objection. The State Bar of Michigan or objecting party may seek denial of the motion or modification of it. If the motion has already been granted, the State Bar of Michigan or objecting party may move that the *pro hac vice* permission be withdrawn.

(3) Standard for *Pro Hac Vice* Permission. The courts and agencies of this state have discretion to grant applications for permission to appear pro hac vice to an out-of-state lawyer. An application ordinarily should be granted unless the court or agency finds any of the following:

(a) the permission may be detrimental to the prompt, fair and efficient administration of justice;

(b) the permission may be detrimental to legitimate interests of parties to the proceedings other than a client the applicant proposes to represent;

(c) one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk; or

(d) the applicant has engaged in regular practice in this state.

(4) Out-of-state lawyers who have been disciplined or held in contempt by reason of misconduct committed while engaged in representation that is permitted by this rule may thereafter be denied permission to appear *pro hac vice* under this rule.

(5) No lawyer is authorized to appear pursuant to this rule if the lawyer:

(a) is disbarred or suspended from practice in any jurisdiction;

(b) is a member of the Michigan Bar, but ineligible to practice law;

(c) has failed to provide notice to the State Bar of Michigan, or pay the filing fee as required by this rule; or

(d) is engaged in "regular practice" in Michigan, as "regular practice" is defined elsewhere in this rule.

(6) Revocation of Permission. Permission to appear as counsel *pro hac vice* in a proceeding, once granted, may be revoked for any of the reasons listed in subrule 1(E)(3) or 1(E)(5) of this rule.

(F) Application

(1) Required Information. An applicant shall submit a verified application containing the following:

(a) the applicant's residence and business addresses and business telephone number;

(b) the name, address and telephone number of each client sought to be represented and the caption of the case;

(c) the state or states in which the applicant is admitted to practice law; the applicant's attorney identification number in each state; the courts before which the applicant has been admitted to practice; and the respective period or periods of admission;

(d) the states to which the applicant has applied for admission within the last five years and the result of each application;

(e) whether the applicant has been denied permission to appear *pro hac vice* in Michigan, had *pro hac vice* status withdrawn in Michigan, or otherwise been formally disciplined or sanctioned by any court in Michigan. The applicant should specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and the nature of the findings made and action taken in connection with those proceedings;

(f) whether any formal, written disciplinary proceeding has been brought against the applicant by a disciplinary authority in any other jurisdiction within the last 5 years and, as to each proceeding:

(i) the nature of the allegations;

(ii) the name of the person or authority bringing such proceedings;

(iii) the date the proceedings were initiated and finally concluded;

(iv) the caption of the proceedings; and

(v) the factual findings and legal conclusions made, and discipline imposed, if any, in connection with those proceedings;

(g) whether the applicant has been held formally in contempt or otherwise sanctioned by any court in a written order in the last 5 years for disobedience to its rules or orders, and, as to each instance:

(i) the nature of the allegations;

(ii) the name of the court;

(iii) the date of the contempt order or sanction;

(iv) the caption of the proceedings; and

(v) the substance of the court's rulings and a copy of the written order or transcript of the oral rulings;

(h) the name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear *pro hac vice* in Michigan within the preceding 2 years, including the date of each application and whether the motion to appear *pro hac vice* was granted;

(i) an averment as to the applicant's familiarity with the Michigan Rules of Professional Conduct, Professional Disciplinary Proceedings Rules, local rules and court procedures of the court or agency before which the applicant seeks to practice;

(j) the name, business address and telephone number, and bar number of an active member in good standing of the State Bar of Michigan moving for the applicant's *pro hac vice* appearance; the bar member shall appear as counsel of record together with the out-of-state lawyer;

(k) any special experience, expertise, or other factor deemed to make it particularly desirable that the applicant be permitted to represent a client the applicant proposes to represent in the particular cause; and

(l) any other matter supporting permission to appear *pro hac vice* that the applicant wishes to include.

(G) Application Fee

(1) The first application to appear *pro hac vice* filed with the State Bar of Michigan by an applicant within a 365-day period must be accompanied by a nonrefundable fee in an amount equal to the dues paid by an active member of the State Bar of Michigan plus the Client Protection Fund Assessment. No application fee is required for a second or third application filed within a 365-day period.

(2) Exemption for Pro Bono Representation. An applicant shall not be required to pay the application fee established by subrule 1(E)(1) of this rule if the applicant will not charge an attorney fee to a client and is:

(a) employed or associated with a pro bono project or nonprofit legal services organization in a civil case involving a client of such programs; or

(b) involved in a criminal case or a habeas proceeding for an indigent defendant.

(H) Authority of the Attorney Grievance Commission and Attorney Discipline Board and Court: Application of Ethical Rules, Discipline, Contempt and Sanctions

(1) Authority over Out-of-State Lawyer and Applicant.

(a) An out-of-state lawyer submits to the authority of the Michigan courts, the Attorney Grievance Commission and the Attorney Discipline Board for the out-of-state lawyer's conduct relating in any way to the

proceeding in which the out-of-state lawyer seeks to appear, whether the conduct takes place within Michigan or outside Michigan. An applicant or out-of-state lawyer who has been granted permission to appear pro hac vice in these rules may be disciplined in the same manner as a Michigan lawyer.

(b) In handling matters related to *pro hac vice* appearance, Michigan courts, the Attorney Grievance Commission and the Attorney Discipline Board may rely, without limitation, on the Michigan Court Rules, the Michigan Rules of Professional Conduct, the Professional Disciplinary Proceedings Rules, contempt and sanctions orders, local court rules and court policies and procedures.

(2) An applicant shall become familiar with the Michigan Rules of Professional Conduct, the Professional Disciplinary Proceedings Rules, local court rules, and policies and procedures of the court in which the applicant seeks to practice.

Sec. 2. Out-of-State Proceedings, Potential Michigan and Out-of-State Proceedings, and Alternative Dispute Resolution.

(A) Michigan Ancillary Proceeding Related to Pending Out-of-State Proceeding. In connection with a proceeding pending outside this state, an out-of-state lawyer admitted to appear in that proceeding may render legal services regarding the proceeding in Michigan.

(B) Consultation by Out-of-State Lawyer.

(1) An out-of-state lawyer may consult in this state with a Michigan lawyer concerning the Michigan lawyer's client's pending or potential Michigan proceeding in this state.

(2) At the request of a Michigan resident who is contemplating filing a proceeding or is involved in any pending proceeding, an out-of-state lawyer may consult with the Michigan resident about retaining the out-of-state lawyer in connection with the proceeding.

(C) Preparation for Michigan Proceeding. On behalf of any client, the out-of-state lawyer may render legal services in this state in preparation for a potential Michigan proceeding, provided that the out-of-state lawyer reasonably believes himself or herself to be eligible for admission *pro hac vice* in Michigan.

(D) Preparation for Out-of-State Proceeding. In connection with a potential proceeding to be filed outside this state, an out-of-state lawyer may render legal services in this state for an existing or potential Michigan client, provided that the out-of-state lawyer is admitted or reasonably believes himself or herself eligible for admission generally, or to appear or to be admitted *pro hac vice*, in the other jurisdiction.

(E) Services Rendered Outside this State for Michigan Client. An out-of-state lawyer may render legal services while the lawyer is physically outside Michigan when requested by a Michigan client in connection with a potential or pending proceeding filed in or outside this state. An out-of-state lawyer must immediately seek permission to appear *pro hac vice* when commencing the rendering of legal services in connection with a case which has been filed in Michigan, regardless of whether the out-of-state lawyer anticipates having to physically appear in Michigan.

(F) Alternative Dispute Resolution. An out-of-state lawyer may render legal services in this state to prepare for any Alternative Dispute Resolution procedure.

Sec. 3. Scope.

(A) No Solicitation. An out-of-state lawyer rendering services in this state in compliance with this rule, or here for other reasons, is not authorized by anything in this rule to hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. Nothing in this rule authorizes out-of-state lawyers to solicit, advertise, or otherwise hold themselves out in publications as available to assist in litigation in this state.

(B) Temporary Practice. An out-of-state lawyer is only eligible for permission to appear *pro hac vice* or to practice in another lawful way on a temporary basis. For purposes of this rule, temporary practice means performing legal services in no more than three separate cases within a 365-day period. This limitation does not apply to an out-of-state attorney who has filed an application for admission to the State Bar of Michigan while the out-of-state attorney's application is pending.

(C) Authorized Services. It is not a violation of this rule to provide services to a client in this state by an out-of-state lawyer if *pro hac vice* permission is ultimately denied or a proceeding is not filed, provided the attorney reasonably expected to be admitted *pro hac vice*.

Staff Comment: The State Bar of Michigan Representative Assembly has endorsed in concept this proposal to adopt amendments of the Rules Concerning the State Bar of Michigan. Proposed new Rule 18 would establish the rules regarding *pro hac vice* appearance by attorneys in Michigan and would replace section 2 of current Rule 15. This proposal is being published for comment exactly as it was submitted to the Court by the State Bar of Michigan. It has not been amended by the Court before publication.

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 March 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-08. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 14, 2006:

PROPOSED AMENDMENT OF RULE 6.445 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.445 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 6.445. PROBATION REVOCATION.

(A)–(E) [Unchanged.]

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

(1)–(2) [Unchanged.]

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

(4) [Unchanged.]

(G)–(H) [Unchanged.]

Staff Comment: The November 14, 2006, proposed amendment of the rule would create uniformity between MCR 6.302, which deals with the requirements for pleas of guilty and nolo contendere to criminal offenses, and MCR 6.445, which deals with the requirements for pleas of guilty in probation revocations.

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 March 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-35. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered December 5, 2006:

PROPOSED AMENDMENT OF RULE 2.116 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.116 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, 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 current form.

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

RULE 2.116. SUMMARY DISPOSITION.

(A)-(C) [Unchanged.]

(D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:

(1) The grounds listed in subrule (C)(1), (2), and (3) must be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived.

(2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.

(3) The grounds listed in subrule (C)(4)~~, (8), (9), and (10)~~ and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401

(4) The grounds listed in subrule (C)(8), (9), and (10) may be raised at any time. It is within the trial court's discretion to allow a motion filed under this subsection to be considered if the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401.

(E)-(J) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.116 would clarify that motions for summary disposition based on governmental immunity or lack of subject-matter jurisdiction may be filed even if the time set for filing dispositive motions in a scheduling order has expired. Defects in subject-matter jurisdiction cannot be waived and may be raised at any time. *People v Erwin*, 212 Mich App 55, 64 (1995); *People v Richards*, 205 Mich App 438, 444 (1994). Likewise, governmental immunity may be raised at any time. See *Mack v Detroit*, 467 Mich 186, 197 n 13 (2002).

The amendments would also clarify that it is within the court's discretion to allow a motion for summary disposition to be considered for motions based on the grounds set out in (C)(8), (C)(9), or (C)(10) if it is filed after the period for dispositive motions established in a scheduling order has expired. This clarification would reflect the holding in *People v Grove*, 455 Mich 439 (1997), that it was within the trial court's discretion to decline to accept a plea agreement offered after the date for accepting such an agreement set forth in the scheduling order had passed.

This 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 this proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When submitting a comment, please refer to ADM File No. 2006-33.

Order Entered December 12, 2006:

PROPOSED AMENDMENT OF RULE 2.222 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.222 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 2.222. CHANGE OF VENUE; VENUE PROPER

(A)-(C) [Unchanged.]

(D) Filing and Jury Fees After Change of Venue

(1) An order changing venue under this rule shall not be entered until the ~~require the~~ party who moved for a change of venue provides proof that ~~to~~ payment of the statutory filing fee applicable to the court in which the action is transferred has been made.

(2) [Unchanged.]

(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.222(D)(1) would require the party who moved for a change of venue to prove that the statutory filing fee was paid to the court in which the action is transferred before the order changing venue is entered.

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 April 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-40. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered December 21, 2006:

GRIEVANCE ADMINISTRATOR v FIEGER, No. 127547. The respondent-appellee's motion for a stay of proceedings is denied.

This Court previously determined in this case that the First Amendment of the United States Constitution does not bar the application of the Michigan Rules of Professional Conduct to statements made by respondent-attorney Geoffrey Fieger in the course of a pending lawsuit in the Court of Appeals. Specifically, Mr. Fieger stated that he "declared war upon" the judges hearing his lawsuit, that such judges could "kiss his ass," that his client should "shove [his finger] up their asses," that they were "three jackass Court of Appeals judges," that "the only thing that's in their 'endo' should be a large plunger about the size of my fist," and that the judges had "changed their name from Adolf Hitler and Goebbels, and—what was Hitler's [mistress]—Eva Braun."

Such statements were determined to be in violation of MRPC 3.5(c) (which prohibits undignified or discourteous conduct by an attorney toward the court) and MRPC 6.5(a) (which requires an attorney to treat with courtesy and respect all persons involved in the legal process). As a result, in accordance with an agreement entered into between Mr. Fieger and the Attorney Grievance Commission, he is to be reprimanded but allowed without limitation to continue his practice of law.

We are now confronted with Mr. Fieger's motion that this Court "stay" its judgment pending his application for certiorari with the United States Supreme Court. Such "stay" would delay the implementation of the Attorney Grievance Commission's order of reprimand.

This Court may grant a "stay" of its judgments pending applications for certiorari when "irreparable injury would be suffered by the failure" to do so. *Red Star Motor Drivers Ass'n v Detroit*, 236 Mich 422, 424-425 (1926). That such a "stay" is truly extraordinary is reflected by the fact that we can identify only a single case over the past two decades in which such a stay has been granted by this Court. *Romein v Gen Motors Corp* (Docket No. 83830), December 27, 1990. Rather, it is almost always the case that the judgments of this Court, as with those of every other supreme court in the Union, are not "stayed" pending applications for United States Supreme Court review, in part because of the rarity of that Court granting such review.

Despite the arguments of our dissenting colleagues, Mr. Fieger's motion must be denied simply because there is no evidence whatsoever that he would suffer any "irreparable injury" by this Court's failure to grant a "stay." He can continue to practice law during his application for certiorari and, if he prevails in the United States Supreme Court, his reprimand will be undone. This is not a hard case or a close call, in our judgment.

In light then of this Court's very clear historical practice—that is, granting "stays" under only the most truly extraordinary circumstances—we can only observe with wonderment the dissenters' impassioned arguments that the present case involves such circumstances.

This Court (including without exception the dissenting justices) has not granted "stays" when persons were incarcerated in prison pending

United States Supreme Court review; it has not granted "stays" when persons' fortunes and properties were at stake pending such review; it has not granted "stays" when the interpretation of laws and constitutions was in controversy pending such review; and it has not granted "stays" even when matters of child custody and parental termination were in dispute pending such review. Yet, the dissenting justices insist that we must grant this almost unprecedented relief in the instant case in which they have barely labored to demonstrate any "irreparable injury." It is not this majority that must demonstrate why the law should not be applied in its normal fashion, but the dissenters that must demonstrate why the law should be applied, as they propose, in an abnormal fashion.

Finally, concerning the various proposals offered by the dissenting justices for resolving judicial disqualification motions—a majority of which have come from respondent in recent years—we do not believe that all such proposals are necessarily unreasonable, merely that it is also not unreasonable to continue to abide by disqualification procedures that have been followed in this Court since its inception, that obtain within the overwhelming number of state judiciaries—as well as within the federal courts and the United States Supreme Court—and that have been abided by each of the dissenting Justices themselves for periods of between ten and twenty-four years on this Court without apparent previous concern.

TAYLOR, C.J. (*concurring*). I concur in the order denying the stay. I write separately to state that I and my colleagues joining in this order cannot respond to Justice WEAVER's selective and misleading disclosures of our conference deliberations and internal memorandums because we view her disclosure as a violation of Administrative Order No. 2006-8, and a breach of this Court's deliberative process. We have struggled with this matter for months and, by order dated December 20, 2006, seek public comment on how the integrity of this Court's deliberative process can be maintained in the light of a justice who feels no obligation to respect the confidentiality that has always characterized the deliberations of this Court, the United States Supreme Court, and every other appellate court of the United States. It must be noted that, despite the fact that a justice of this Court has now engaged, and continues to engage, in the unprecedented act of revealing deliberative confidences, every word of every statement of hers has been made public exactly as she has written it.

I repeat again the questions that the Court has posed to the public for consideration at our public hearing on January 17, 2007: Should AO 2006-8, which formally establishes the deliberative privilege rule, be retained and, if it is retained, what means of enforcement or sanction, if any, are properly adopted in response if a justice violates it?

CORRIGAN, YOUNG, and MARKMAN, JJ. We join the statement of Chief Justice TAYLOR.

CAVANAGH, J. (*dissenting*). I would grant the motion for a stay of proceedings. As discussed in my dissent in *Grievance Administrator v Fieger*, 476 Mich 231 (2006), I believe that the majority violated attorney Geoffrey Fieger's First Amendment rights when it held that his com-

ments were not political speech protected by the United States and Michigan constitutions. Geoffrey Fieger is raising this issue in his petition to the United States Supreme Court for a writ of certiorari, as well as raising the matter of how judicial disqualifications are handled by our Court. Because I believe that our current disqualification process does not afford parties adequate constitutional protections, I also write to express my extreme disapproval of the majority's decision to abandon this Court's earlier determination that proposals for the disqualification of justices would be published for public comment. The closure of this administrative file without public comment is expressly contrary to the majority's earlier explicit guarantee that these proposals would indeed be published for public review and comment. See *Fieger*, *supra* at 327 n 17 (CAVANAGH, J., dissenting), and *In re Haley*, 476 Mich 180, 201 n 1 (2006) (CAVANAGH, J., concurring).

Publishing the proposals for public comment does not require the Court to adopt any of the proposals. It merely provides the public—the very people whom the law is meant to protect—the opportunity to express their opinions on a matter that is critical to ensuring fundamental fairness and due process for all Michigan citizens. The majority's disinterest in hearing from the public on this issue can only be viewed as evidence that the majority believes its actions are beyond public scrutiny or its recognition that there is no supportable reason for allowing only the justice asked to disqualify himself to be the determiner of whether disqualification is warranted. No other rational or reasonable explanations for the majority's determined efforts to veil its actions from the public exist.

Notably, in a poll taken by *Michigan Lawyers Weekly*, over 80 percent of the respondents indicated that a change in the disqualification process was warranted. Yet, even in the face of such overwhelming support, the majority chooses to not even *consider* remarks from the public on this issue. Instead of allowing the public to comment on a process that has far-reaching ramifications for Michigan's justice system, the majority chooses to favor continuing a process that provides no due process protections to the parties who appear before this Court.

The process by which justices are disqualified from hearing a case before this Court is not merely a theoretical matter. The disqualification process has very real consequences for the parties who seek justice from this Court, as well as the public at large. Our current practice provides no avenue to redress a decision by a justice who refuses to disqualify himself, no matter how much evidence is produced that the justice is indeed actually biased. To use an exaggerated example to illustrate the flaw in our current policy, consider the following example. Justice X attends a party. He remarks to several people that attorney Smith has nothing to worry about when his case appears before the Court because Justice X "has his back covered" and there is no way that attorney Smith can lose, no matter the merits of the case. These remarks are brought to the attention of attorney Jones, attorney Smith's opponent, who then files a motion to disqualify Justice X, supporting the motion with a number of well-detailed and well-supported affidavits. Under our current procedure —and with the full support of the majority—only Justice X decides whether he should disqualify himself from hearing the case. If Justice X chooses not to disqualify himself, then attorney Jones has no recourse.

He must proceed to argue a case in front of our state's highest court, knowing full well that at least one of the justices will not be deciding the case on its merits. The bias of even one justice taints the tribunal.

I am disturbed by attempts by the majority to keep the public from commenting on this issue. If my colleagues truly believe that our current practice is the best for Michigan's citizens, then they should have no problem explaining their rationale to the public and hearing the public's assessment of this rationale. However, I believe they know that there is no reasonable justification that can be proffered for allowing a justice accused of bias to be the only one who decides whether he should be disqualified. I can think of no reasonable explanation that would be acceptable to the public for maintaining this procedure because it is apparent that it is incongruous with reason. This is especially true in light of the fact that Michigan's own court rules—adopted by *this Court*—govern disqualifications for all other judges and explicitly provide the recourse of having the denial of a disqualification motion reviewed by another judge. See MCR 2.003(C)(3). Remarkably, the majority believes that members of this Court are above the same rules that it has adopted to apply to *all other judges in the state*.

For our system of justice to continue to have any validity, our citizens must have faith in judges. My colleagues' unabashed embrace of a procedure that does not afford due process and fundamental fairness to all parties who appear before the Court does nothing to instill confidence in an impartial judiciary. While the majority's willingness to breach its word does not bode well for the possibility that our disqualification procedure will be examined at any point in the near future, I strongly urge my colleagues to reconsider and remember that a fair and balanced procedure, made known to the public, would benefit our citizens now and in the future. It would apply to all justices, no matter the composition of the Court. This is not a partisan issue, but a matter of ensuring fundamental fairness and due process to all those who seek justice before this Court now and long after my colleagues and I are gone.

Finally, I disagree with Chief Justice TAYLOR's contention that Justice WEAVER's statement violates deliberative privilege. I have reviewed every aspect of the dissenting statement and have extensively researched the applicable areas of the law, including deliberative privilege. While the statement is obviously discomforting for the majority, I believe that the statement does not run afoul of any law. The statement merely references past actions taken and voted on by members of this Court on administrative matters. I further note that the statement does not contravene recent Administrative Order No. 2006-8, which the majority voted in favor of. The administrative order allows for the disclosure of any unethical, improper, or criminal conduct. While I do not believe that the administrative order is relevant to this case because no substantive information on a past or pending case is being disclosed, any arguably substantive information in the statement could reasonably be said to fall within the administrative order's parameters. Thus, I believe that Justice WEAVER has done nothing improper by releasing her statement.

WEAVER, J. (*dissenting*).

PREAMBLE

Given recent events since December 5, 2006, it has become incumbent upon me to provide an explanation as a preamble to my dissent filed on December 5, 2006 in this matter. On December 6, 2006, Administrative Order 2006-08 (AO 2006-08), the "gag order," was adopted by a 4-3 vote by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN.[1] Shortly thereafter, it was moved, seconded, and adopted by a 4-3 vote, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, to suppress my dissent in *Grievance Administrator v Fieger,* #127547, motion to stay. Justices CAVANAGH, WEAVER and KELLY dissented. Chief Justice TAYLOR then ordered the Clerk of the Court, who was present, not to publish my December 5, 2006 dissent to the denial of the motion to stay in this case, *Grievance Administrator v Fieger*.

On December 15, 2006, Chief Justice TAYLOR submitted a concurrence in which he stated, "with the concurrence of the majority of the court, I have directed the Clerk of Court not to include Justice WEAVER's dissenting statement in the Court's publications in this file."

On December 21, 2006, Chief Justice TAYLOR submitted yet another concurrence, withdrawing his December 15, 2006, concurrence, and announced by memorandum to the Court that he, as well as Justices CORRIGAN, YOUNG, and MARKMAN, after characterizing their December 6, 2006 formal vote ordering the suppression of my dissent as a "preliminary directive," had now decided to permit the publication of my dissent. The vote by the majority of four ordering the suppression of my dissent was not a "preliminary directive." It was a formal vote taken by the majority of four during a scheduled judicial conference, to which Justices CAVANAGH, KELLY and I formally dissented.

It is wise for the majority of four to have decided not to suppress my dissent in this case. However, I note that Chief Justice TAYLOR in his concurrence continues to assert that the majority of four have the power to suppress a dissenting justice's opinions. He further states that he wishes to explore "what means of enforcement or sanction, if any, are properly adopted in response if a Justice violates it [AO 2006-08, the "gag order"]."

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[1] Justices CAVANAGH, WEAVER and KELLY dissented to the adoption of AO 2006-08, the "gag order." My dissent to AO 2006-08, which I filed with the Clerk of the Court on December 19, 2006, is attached as Appendix D. On December 20, 2006, a majority of the Court agreed to publish my dissent to AO 2006-08 and to place the adoption of AO 2006-08 on the next public administrative hearing scheduled for January 17, 2007. See http://courts.michigan.gov/supremecourt/ (accessed on December 20, 2006). I concurred only with the decision to place AO 2006-08 on the January 17, 2007 public administrative hearing agenda. I dissented as to the remaining language of the order. See my concurring and dissenting statement to the December 20, 2006 order placing AO 2006-08 on the January 17, 2007 public administrative hearing agenda, attached hereto as Appendix E.

In addition to the disorderly manner in which the majority of four have withdrawn their prior formal votes to order the suppression of my dissent in this case, the substance of Chief Justice TAYLOR's latest concurrence dated December 21, 2006 still incorrectly asserts that no Justice until now has failed "to respect the confidentiality that has always characterized the deliberations of this Court, the United States Supreme Court, and every other appellate court in the United States." This statement is not true. There have been instances both in the past and present, in which Justices have made reference to matters discussed at conference, and to actions before the Court.[2]

Moreover, Chief Justice Taylor fails to substantiate the existence in Michigan, or anywhere else for that matter, of the so called "judicial deliberative privilege" allegedly based on unwritten traditions. Chief Justice TAYLOR's apparent absolutism regarding the nature of any Michigan so-called "judicial deliberative privilege" is misguided and would disserve the Michigan judiciary and the people of Michigan. It runs afoul of the First Amendment, common sense, good government, and Michigan Supreme Court history, as evidenced most recently by the concurring

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[2] For example, most recently, in Justice CAVANAGH's concurring statement in *In re Haley,* 476 Mich 180, 201 n 1 (2006), he stated:

> This Court is currently engaged in a discussion about the proper procedure for judicial disqualifications, as well as the ethical standards implicated in such a procedure. Further, this Court will soon be asking for public comment and input to further this discussion in a more open manner.

In addition, in his dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 327 n 17, Justice CAVANAGH stated:

> Further, while I do not join in the fray between the majority and my colleague Justice WEAVER, I take this opportunity to note that three alternate proposals, two of which have been crafted by this majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.

Note that Justice CAVANAGH's statements, published in his concurrence in *Haley* and in his dissent in *Fieger,* were not objected to by any Justice, including the majority of four.

In addition to these more recent references to matters discussed at judicial conferences, see *In re Mathers*, 371 Mich 516 (1963).

statement filed by Justice CAVANAGH in *In re Haley, supra* and the dissenting statement filed by Justice CAVANAGH in *Grievance Administrator v Fieger, supra*.[3] The majority of four's so-called "judicial deliberative privilege" wrongly casts "a cloak of secrecy around the operations" of the Michigan Supreme Court.[4] (See Appendix D.)

I also disagree with Chief Justice TAYLOR regarding the nature of what is revealed in my dissent. The information revealed in my dissent is not protected by AO 2006-08, the "gag order," nor is it protected by Administrative Order 1997-10 (AO 1997-10). AO 1997-10 addresses what this Court will reveal upon a *public demand for information*; it does not restrict a Justice from releasing information that a Justice deems is necessary for the public to know.

Further, AO 2006-08, the "gag order," as adopted by a 4-3 vote on December 6, 2006, by its own terms applies to "cases and controversies," not to every discussion that ever occurs among Justices. My dissent contains references to discussion of an *administrative file*, ADM 2003-26, which was not a *case or controversy* of the Court.

Only once did any justice of the majority of four point out exactly what within my dissent they wished removed. Upon her identification of the offending passages, this was my response in my December 1, 2006 memorandum to Justice CORRIGAN's memorandum of November 20, 2006:

> [W]hile Justice CORRIGAN identifies several statements in my dissent that she asserts should be removed, I will not be deleting any of the identified statements as explained as follows:
>
> 1) Justice CORRIGAN would like me to remove my discussion of her telephone call to me in 2003 during the *In re JK* [*infra*] case. It is simply a *fact* that she did call me. The call did not involve substantive discussion of or debate regarding the case, and thus was not privileged. The publication of her phone call to me should not concern her now, since over three years ago essentially the same information was published with no complaint in my statement of non-participation in that case. [*See* Appendix F for footnote.] Further, the *In re JK* case is not pending or impending in any court; thus under Canon 3A(6), I am free to disclose information regarding that case as well as under a *Pickering,* [*infra*] analysis.
>
> 2) Justice CORRIGAN objects to the reference to statements by members of the majority during conference regarding the ADM 2003-26 file. The statements are not privileged because they were made with regard to an administrative file and because they amounted to nothing more than personal attacks. The statements made during the conference regarding the refusal to publish the disqualification proposals were not substantive.

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[3] See n 2 , *supra*.

[4] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

3) Justice CORRIGAN objects to my reference to a statement in her July 11, 2006 memo that she circulated to the justices and Court staff with regard to the ADM 2003-26 file. However, Justice CORRIGAN sent that memo in reference to the justice disqualification administrative file, and thus it is not protected by Canon 3A. The memo does not qualify as a deliberation on the *Fieger* case. In the memo Justice CORRIGAN divulged that she would change her vote on the publication of the justice disqualification proposals because of my position on the merits of Mr. Fieger's motion for her disqualification in *Grievance Administrator v Fieger*. The memo reveals that improper, if not unethical, considerations motivated her decision to vote to close ADM 2003-26. Indeed, the memo could be seen as an attempt to persuade me to withdraw my dissent in *Grievance Administrator v Fieger* or risk abandonment of the progress that had apparently been made at that time on the ADM 2003-26 administrative file.

Chief Justice TAYLOR similarly suggested in an October 23, 2006 memo that he might change his vote and grant the stay in this case *if* I would not release my dissenting statement. Part of his proposed deal was that I "never again" attempt such a dissent. As I noted in my October 25, 2006 response, "Such deal-making would be unethical and interfere with the fair and orderly decision-making of this Court."

Thus, Justice CORRIGAN's statement is a legitimate matter of public concern and thus, it is not privileged from disclosure. Finally, even if Justice CORRIGAN's memo were characterized as relating to the substance of the *Fieger* case (which it does not) then it is not protected by Canon 3A(6) because once the order on respondent's motion for stay is published, the case will no longer be pending or impending in any court.

4) Justice CORRIGAN also objects to my reference to what she asserts were "preliminary votes" on the ADM 2003-26 file. However, when a majority of four justices votes to close an administrative file, or to adopt an IOP, nothing further is necessary to make the action final. As viewed on November 30, 2006, the disclaimer to the IOP's published at this Court's website still expressly state that:

"the internal procedures outlined in this document are only *general* guidelines and may be modified at any time without prior notice by a majority vote. These internal procedures create no enforceable rights in any litigant. http://courts.michigan.gov/supremecourt/ (accessed on November 30, 2006)."

Suggesting that such actions, as the March 1, 2006 vote to adopt the IOP on disqualification and the September 7, 2006 vote

to close the ADM 2003-26 file, were merely "preliminary," is not supportable. Whatever differing views of its scope or boundaries, the deliberative privilege does not prevent a justice from reporting the fact that this Court has taken formal actions or votes on an administrative file.

Similarly, Justice CORRIGAN has indicated by highlighting that she objects to my reference to the fact that ADM 2003-26 was opened in May 2003. An administrative file can be opened at the request of only one justice. It is wrong to suggest that I cannot refer to the fact that ADM 2003-26 was opened in 2003 at my request. That fact has been published and republished, [s]ee e.g. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 100 (2005), *McDowell v Detroit,* 474 Mich 999, 1000 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080, 1081 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006), so it is illogical for Justice CORRIGAN to suggest now that my mention of it is suddenly a problem.

Justice CORRIGAN also indicated by her highlighting that she objects to my reference to the closure of the ADM 2003-26 file on September 7, 2006. But the fact that the file was closed by a four to three vote is simply fact and reveals no substantive deliberation. If the file had not in fact been closed, I certainly would not have spent the time on a dissent to its closure. Both the vote at the table and the Clerk of the Court's notes circulated after conference on September 7, 2006 reveal that the ADM 2003-26 file was closed by a four to three vote. ADM 2003-26 has not been returned to an administrative agenda, because it was closed.

It has become apparent that the majority of four, Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN have great difficulty with dissent. Perhaps the issue at hand is too close to them. This is perhaps another reason why they should have recused themselves from this case, *Grievance Administrator v Fieger.* They have had many opportunities to recuse themselves during the two years that this case has been before this Court.

On December 20, 2006, without notice to fellow justices, during the regularly scheduled judicial conference, Chief Justice TAYLOR abruptly announced that he wanted to discuss this case, *Grievance Administrator v Fieger*, #127547, (motion to stay) despite the fact that this case was not listed on the December 20, 2006 conference agenda. Chief Justice TAYLOR stated that his basis for suddenly putting the matter on the Court's conference agenda was that attorney Geoffrey Fieger's appeal to the United States Supreme Court in *Grievance Administrator v Fieger* was scheduled on the United States Supreme Court's conference agenda for January 5, 2007.

On December 21, 2006, the majority of four, Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN, having characterized as straw

votes their December 6, 2006 formal votes to order the suppression of my December 5, 2006 dissent in this case, have decided to permit the publication of my dissent to *Grievance Administrator v Fieger,* #127547, motion to stay.

Here now is my December 5, 2006 dissent to *Grievance Administrator v Fieger,* #127547, motion to stay, which was ordered suppressed by the majority of four by a 4-3 vote on December 6, 2006, and which has now, on December 21, 2006, been magically "unsuppressed" by the same majority of four.

JUSTICE WEAVER'S DECEMBER 5, 2006 DISSENT:

I dissent from Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN's denial of respondent attorney Geoffrey Fieger's motion for a stay of proceedings in light of his intent to appeal this Court's decision in *Grievance Administrator v Fieger*, 476 Mich 231 (2006), to the United States Supreme Court. Because this majority of four's participation in this case violated respondent's due process rights, I would grant the motion for a stay.

Further, at an unannounced and unscheduled executive session on November 13, 2006, the majority of four adopted an Internal Operating Procedure (IOP)—a secret "gag rule"—in an attempt to prevent me from including information in this dissent that I believe needs to be known by the public for the sake of justice in this case and to alert the public to the serious attempts by the majority of four to advance a policy of more secrecy and less accountability for the justices of this Court.[5]

Let it be known that no Michigan law prohibits my publication of any information contained within this dissent. Further, were the majority's secret "gag rule" enforceable against me, which it is not, it does not cover any information within this dissent.

The public needs to have information on how the justices conduct the people's judicial business in order to assess the justices' performance of their duties and to hold the justices accountable. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts."[6]

Thus, this dissent addresses the majority of four's handling and abrupt closure of the administrative file, ADM 2003-26, that was opened to reform the standards governing justice disqualification decisions.

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[5] The majority of four's adoption of the IOP/secret "gag rule" is explained in detail in part V of this dissent.

Noted there is the fact that at the close of the November 29, 2006, conference, it was moved, seconded, and tabled that a slightly edited version of the new secret "gag rule" be adopted as an emergency *court rule* having immediate effect, without notice or public comment before its adoption.

[6] *Scott v Flowers,* 910 F2d 201 (CA 5, 1990).

Their actions on this administrative file raise questions regarding this Court's handling of disqualification decisions and their participation in this case.[7]

I. INTRODUCTION

The respondent moved for the disqualification of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN from this case. He moved a second time for the disqualification of Justices CORRIGAN and MARKMAN. The disqualification motions were denied.[8]

Consistent with our Michigan Court Rules, MCR 2.003, I did not participate in the decisions on the disqualification motions. However, on the merits of the case, I stated that the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN violated respondent's right to due process under the Fifth and Fourteenth amendments.[9] This is so because Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN have displayed bias and prejudice against Mr. Fieger during their judicial campaigns.[10] Moreover, Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have become so "enmeshed" in matters involving Mr. Fieger as to make it inappropriate for them to sit in a case in which he is a party.[11]

Respondent has indicated his intent to raise the issue of judicial disqualification in his petition to the United States Supreme Court for a writ of certiorari. In light of this, respondent's motion for a stay of proceedings should be granted because the majority of four has failed to follow fair and enforceable procedures in this case.

It cannot be disputed that the decision-making process of the Michigan Supreme Court is seriously flawed when a justice who is, or appears to be, biased or prejudiced against a party participates in a case. An unbiased judge is essential to the due process guarantees of the Fifth and Fourteenth amendments of the United States Constitution.

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[7] The majority of four's handling of justice disqualification motions and ADM 2003-26 is explained in detail in parts II, III, and IV of this dissent.

[8] See *Grievance Administrator v Fieger*, 472 Mich 1244 (2005), and *Grievance Administrator v Fieger*, 475 Mich 1211 (2006).

[9] See *Grievance Administrator v Fieger*, 476 Mich 231 (2006) (WEAVER, J., dissenting). The majority of four in a separate opinion attacked me personally for dissenting with respect to their participation in the case. I believed that it was my duty to give my reasons for my dissent, and I continue to believe that the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN violated and continues to violate respondent's due process rights. This Court is not a secret society. A justice's duty is first and foremost to the people of Michigan. This duty includes informing the public when justices fail to abide by due process by participating in a case when they should not.

[10] *Republican Party of Minnesota v White*, 536 US 765 (2002).

[11] *Johnson v Mississippi*, 403 US 212 (1971).

Thus, I write further on this motion to explain how the disposition of this case underscores this Court's need to reform its helter-skelter approach to motions for the disqualification of justices. It is a matter of serious public concern that this Court has not acted to ensure that there are clear, fair, and enforceable court rules concerning the participation or disqualification of justices and has, through decisions on adjudicated cases, lowered the standards that were there for justice disqualification decisions. Given that just one justice's decision to not participate in a case such as this case can alter the disposition of the case, minimal due process requires, and the public deserves, higher standards to be established and enforced regarding how justice disqualification decisions are made.

II. HOW THE RECENTLY CLOSED ADMINISTRATIVE FILE ON JUSTICE DISQUALIFICATION, ADM 2003-26 IS RELEVANT TO *GRIEVANCE ADMINISTRATOR v FIEGER*.

An administrative file on the standards that should govern how justices handle motions for their disqualification, ADM 2003-26, was opened at my request three years ago in May 2003. It was not until three years later, while this case was pending, that the Court actively considered the standards that should govern the participation and disqualification of justices. Yet, following the decision in this case, the majority of four abruptly voted to cease consideration of ADM 2003-26 and to close the file.

My request over three years ago that the Court open an administrative file to examine the rules governing justice disqualification decisions was motivated by my own experience in the case of *In re JK,* 468 Mich 202 (2003), when I had reason to examine the rules governing my own participation or disqualification in that case.[12]

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[12] My concern regarding the lack of clear, fair, and enforceable court rules governing justice disqualification was prompted by issues related to my own participation in *In re JK*, 468 Mich 202 (2003). (Mr. Fieger was not involved in the *In re JK* case.) In that case, a termination of parental rights case, my participation was questioned by then-Chief Justice CORRIGAN. She contacted me on May 2, 2003, to suggest that my contact with a staff person for the Governor's Task Force on Juvenile Justice (a federally mandated and funded task force on child abuse and neglect of which I am chairperson) who was also an employee of the Family Independence Agency central office in Lansing could be considered an ex parte communication, contrary to Canon 3 of the Code of Judicial Conduct.

I had the clerk of the Supreme Court send the parties and attorneys a letter detailing the substance of the communication, following the procedure outlined in MCR 2.003(D) for remittal of disqualification. In recognition of the need to expedite the case for the sake of the child, in deference to the respondent's decision not to waive any possible disqualification, and to maintain public trust and confidence in the judiciary, I decided not to participate in the case. Since May 2003, I have applied

During the consideration of *In re JK*, I was informed that unwritten "traditions" governed the decision and that MCR 2.003, the court rule concerning disqualification of all other Michigan judges, did not apply to justices of the Michigan Supreme Court. I was further informed that it was a "tradition" of the Court that the decision whether a justice would disqualify himself or herself was left to the individual justice and that no reasons for the decision whether to participate or not participate in a case were to be given.

I concluded that these unwritten traditions and the unfettered discretion violate Michigan's Constitution, which requires justices to give written reasons for each decision, including a decision to participate in or be disqualified from a case.[13]

Because the Court's traditions were clearly inadequate, in *In re JK, supra,* I followed the remittal of disqualification procedure provided by MCR 2.003(D). In light of my understanding of the requirements of Const 1963, art 6, § 6, I also provided an explanation in writing of my decision not to participate and asked that the Court open an administrative file to explore the rules that should govern justice disqualification decisions.[14]

In light of what I discovered during the consideration of *In re JK, supra*, I have since continuously called for this Court to adopt clear, fair, and enforceable procedures in court rules to govern the participation or disqualification of justices. Despite the importance of the issue, ADM 2003-26 did not receive substantive attention from the majority of four until the fall of 2005, when this case and an unrelated case involving motions for disqualification were before the Court. In addition to respondent's motions in this case, motions to disqualify Chief Justice TAYLOR and Justice MARKMAN were received in *Adair v Michigan*.[15]

MCR 2.003 to my own decisions on whether to participate in a case where there is a motion for my disqualification.

[13] Const 1963, art 6, § 6 provides:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[14] In my statement of nonparticipation in *In re JK, supra*, I also proposed for public comment amendments of MCR 2.003 that would require that a justice publish in the record of the case the reasons for the decision to participate or not participate in the case when the issue of disqualification was raised by a party, the justice himself or herself, or another justice. I further outlined the procedure for a justice to raise his or her potential disqualification with the parties and their attorneys. See *In re JK, supra,* 220-221.

[15] 474 Mich 1027 (2006). See part IV later in this statement.

ADM 2003-26 was placed on the March 1, 2006, administrative agenda. On April 19, 2006, nearly three years after ADM 2003-26 was opened, the Court voted unanimously to publish three alternative proposals to amend the court rules governing the disqualification of justices. The three proposals were scheduled to be published for public comment on June 15, 2006.[16] However, on June 14, 2006, while this case was still pending, it is a fact that Justice YOUNG without explanation held the proposals from publication. Earlier that day, I had indicated at a Court conference that I would be dissenting in this case.

On July 6, 2006, I circulated the first draft of my dissent in this case explaining why the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN violated respondent's due process rights.

Meanwhile, ADM 2003-26 was returned to the administrative agenda for July 12, 2006. On July 11, 2006, in a memorandum to the Court regarding ADM 2003-26, Justice CORRIGAN indicated:

> In light of Justice Weaver's opinion in *Fieger*, I am no longer certain that it is wise to consider tampering with our 169-year tradition of allowing each justice alone to decide whether recusal is warranted.

On the next day, July 12, 2006, the matter of setting a new date for the publication of the proposals was passed by the majority of four.

The decision in this case was released on July 31, 2006. Justice CAVANAGH'S dissenting opinion accurately noted that, at that time, the three alternative proposals from ADM 2003-26 regarding how this Court should handle disqualification motions had been "languishing in this Court's conference room for a substantial period of time."[17] Justice CAVANAGH further stated:

> In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.[18]

In light of the April 19, 2006, unanimous vote to publish these three proposals, it was understood and expected that they would soon be published.

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[16] See Appendix A for a discussion comparing the three alternative proposals, Appendix B for a summary chart, and Appendix C to review the proposals as they were set for publication on June 15, 2006.

[17] *Grievance Administrator v Fieger*, 476 Mich at 327 n 17 (CAVANAGH, J., dissenting). See also *In re Haley*, 476 Mich 180, 201 n 1 (2006) (CAVANAGH, J., concurring).

[18] *Grievance Administrator v Fieger*, 476 Mich at 327 n 17 (CAVANAGH, J., dissenting).

On August 21, 2006, this Court received respondent's motion for a stay of proceedings in light of his intent to appeal this Court's decision to the United States Supreme Court. When ADM 2003-26 returned to the administrative agenda on September 7, 2006, the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, voted four to three against a motion to publish the proposals for public comment, and abruptly voted four to three to close the justice disqualification file, ADM 2003-26.[19]

In light of this recent history, it is clear that this Court currently lacks sufficient standards to protect litigants' access to unbiased judicial decision-making, including access by the respondent in this case. It is also clear that the majority of four has no intent to adopt clear, fair, and enforceable procedures in the court rules governing judicial disqualification that would protect litigants' due process rights.

III. CASE LAW REVEALING THE NEED FOR REFORM IN THE STANDARDS GOVERNING JUSTICE DISQUALIFICATION DECISIONS

Since ADM 2003-26 was opened over three years ago, there have been numerous motions for the disqualification of various justices by parties coming before this Court. Some members of this Court have continued to urge that this Court publicly address the appropriate and lawful procedures for decisions regarding the participation or disqualification of justices.[20] There has also been increasing public recognition

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[19] The only rationale for the majority's closure of the file, if it can be so termed, was that provided by Justice YOUNG orally during the September 7, 2006, Court administrative conference. Rather than engage the issue under review, he attacked my character in highly offensive, personal terms and stated, with the concurrence of Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, that the majority of four would "never publish the proposals" on disqualification and would "not give [me] any more power" (whatever that means).

After Justice YOUNG'S baseless and irrelevant assertions, I moved to publish for public comment the three court rule proposals for the disqualification of justices. The motion was seconded, but was defeated by the majority of four in a four (4) to three (3) vote. It was then moved, seconded, and carried by the majority of four by a vote of four (4) to three (3) to close the justice disqualification file, ADM 2003-26.

[20] See, e.g., statements of WEAVER, J., in *In re JK*, 468 Mich 202, 219 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003), and *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 100 (2005), statements of KELLY, J., and WEAVER, J., in *McDowell v Detroit*, 474 Mich 999, 1000 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017, 1018 (2006), *Heikkila v North Star Trucking, Inc*, 474 Mich 1080, 1081 (2006), and *Lewis v St John Hosp*, 474 Mich 1089, 1090 (2006), and statements of CAVANAGH, J., and WEAVER, J. in *Adair*, *supra* at 1043-1044.

in the media of the significance of the issue of judicial disqualification.[21]

Moreover, during the past three years, the four majority justices of the Michigan Supreme Court have sometimes followed unwritten traditions and have sometimes not. At times, they have followed portions of the current court rule on disqualification, MCR 2.003. On a few occasions, the four majority justices have published their reasons for denying a motion for their disqualification consistent with Const 1963, art 6, § 6, which requires that justices of the Michigan Supreme Court give written reasons for all decisions. However, in the vast majority of cases, such as in this case, they have not given written reasons for their decision to deny a motion for their disqualification.

For example, in *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), the issue whether MCR 2.003 applies to a justice was squarely before the Court. On behalf of the plaintiff, attorney Geoffrey Fieger filed a motion for the disqualification of then-Chief Justice CORRIGAN and Justices WEAVER, TAYLOR, YOUNG, and MARKMAN. Then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied the motion without written explanation.[22]

Attorney Fieger then filed a motion for reconsideration of the Court's order denying the motion for disqualification of then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN. In the motion for reconsideration, attorney Fieger asked that one of two procedures be followed: either that the Court as a whole decide the motion for disqualification, or that the procedures in MCR 2.003(C)(3) for review of a judge's decision not to disqualify himself or herself be followed. The

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[21] Justices' wives: Questions about conflict of interest can't be ignored, Detroit Free Press, January 25, 2006; David Shepardson, High court justices refuse to step down from cases, The Detroit News, February 1, 2006; Chris Christoff, 2 justices to stay on cases, Detroit Free Press, February 1, 2006; Court conflict, Detroit Free Press, February 1, 2006; Conflicted: Justices' defense of conflict of interest rules reveals weaknesses, Lansing State Journal, February 3, 2006; Justices refuse to disqualify themselves, Michigan Lawyer's Weekly, February 6, 2006; Todd C. Berg, Is it time for MSC to reform how it handles recusal motions?, Michigan Lawyer's Weekly, March 14, 2006. A Michigan Lawyer's Weekly Web poll results show that 80 percent of the Internet users who have chosen to participate voted "yes" on the question whether Justice MICHAEL CAVANAGH'S proposed court rule is necessary, <http://www.milawyersweekly.com/poll/pollresults.cfm?poll=020606MIdisqualify> (accessed March 14, 2006).

[22] In response to the motion for my disqualification in *Gilbert, supra*, I followed the procedures of MCR 2.003 that each justice decides the motion for disqualification brought against himself or herself. In accordance with the Michigan Constitution, art 6, § 6, I also gave detailed reasons for my decision not to disqualify myself. *Gilbert, supra*, 469 Mich 883, 883-889.

four challenged justices ignored the requirements of MCR 2.003(C)(3) and simply entered an order denying the motion for reconsideration without any written reasons.[23] The majority of four has similarly failed to provide reasons for its decision to participate in most cases where the disqualification of those in the majority has been requested.[24]

However, in response to respondent's second motion for his disqualification in this case, Justice MARKMAN denied the motion and explained his reasons.[25] Similarly, in *Adair v Michigan,*[26] Chief Justice TAYLOR and Justice MARKMAN relied on MCR 2.003(B)(6) to explain their decisions not to recuse themselves from participating in a case after their spouses' employment in the office of the Attorney General was raised as an issue. In their joint statement, Chief Justice TAYLOR and Justice MARKMAN specifically recognized that they were required to comply with MCR 2.003, stating that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, *or if any of the other requirements of this court rule were not satisfied*." 474 Mich 1043. (Emphasis added.)

Justice YOUNG concurred with Chief Justice TAYLOR and Justice MARKMAN's joint statement in *Adair,* saying that he supported their assertions and fully concurred in the legal analysis of the ethical questions presented in it. Thus, at that time, Justice YOUNG apparently agreed that MCR 2.003 applied to justice disqualification decisions. In addition to Chief Justice TAYLOR and Justices MARKMAN and YOUNG's recognition of the applicability of MCR 2.003 to justices, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice CORRIGAN applied the remittal of disqualification process of MCR 2.003(D) when deciding whether to disqualify herself.

This Court's helter-skelter approach to the applicability of MCR 2.003 and to the constitutional requirement that reasons be given for decisions to participate despite a challenge is unacceptable. The lack of clear, fair, and enforceable procedures in court rules when deciding motions for disqualification violates litigants' due process rights.

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[23] There was no motion for reconsideration of my decision to participate in the case. However, I published a statement that I would have granted the motion for reconsideration "to address the proper procedure for the review of a judge's decision not to recuse himself or herself from a case," pointing out the procedures in MCR 2.003(C)(3). *Gilbert, supra*, 469 Mich 890.

[24] *Graves v Warner Bros*, 669 NW2d 552 (2003), *Gilbert v Daimler-Chrysler Corp*, 469 Mich 883 (2003), *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005), McDowell v Detroit, 474 Mich 999 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006), and *Lewis v St John Hosp*, 474 Mich 1089 (2006).

[25] *Grievance Administrator v Fieger*, 475 Mich 1211, 1212 (2006).

[26] 474 Mich 1027 (2006) (statement by TAYLOR, C.J., and MARKMAN, J.).

As Justice CAVANAGH observed in his statement of nonparticipation in *Adair, supra* at 1043, "Currently, our court rules do not address disqualification of a justice of this Court. I am now persuaded that minimal due process concerns demand that they should."[27]

IV. RECENT CASE LAW LOWERS THE STANDARDS GOVERNING JUSTICE DISQUALIFICATION DECISIONS

The majority of four's helter-skelter approach to motions for their disqualification and their decision to close the justice disqualification file, ADM 2003-26, are facts made more significant and damaging to the judiciary by recent decisions relevant to the standards governing justice disqualification.

For example, in *In re Haley*, *supra*, the majority of four trivialized one of the most fundamental standards that govern judicial conduct, the appearance of impropriety standard. Canon 2(A) of the Michigan Code of Judicial Conduct provides:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety.

However, the majority of four concluded in July 2006 in *In re Haley*, *supra* at 200, that the appearance of impropriety standard was a mere tool of an "evolving sense of conscience" and, thus, allegedly subject to abuse. Accordingly, the majority of four refused to apply the appearance of impropriety standard when imposing discipline for misconduct in *In re Haley*. Chief Justice TAYLOR and Justice MARKMAN also refused to apply the appearance of impropriety standard to the motion for their disqualification in *Adair*, *supra*.

In contrast, the majority of four fully supported the appearance of impropriety standard until the four themselves were challenged for the appearance of impropriety created by their own conduct during their campaigns for reelection and for the employment of Chief Justice TAYLOR's and Justice MARKMAN's respective spouses by the Michigan Attorney General. As I noted in my concurrence in *In re Haley*, *supra* at 209, just six years ago in *In re Brown*, 461 Mich 1291 (2000), the majority of four included the appearance of impropriety standard within the factors that the Judicial Tenure Commission must now consider to help ensure that "equivalent misconduct is treated equivalently."

The majority's perspective on the appearance of impropriety has deteriorated from its being necessary to ensuring the application of consistent standards to judicial misconduct, to its being a "vagary" that "countermands" other more specific court rules or canons of judicial conduct. *In re Haley*, *supra* at 194.

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[27] Justice CAVANAGH's proposed amendment of MCR 2.003 is published in *Adair, supra* at 1043-1044.

In another recent case, *Adair v Michigan,* 474 Mich 1027, 1040-1041 (2006), the majority of four lowered the threshold for a justice's participation when faced with a motion for disqualification. In *Adair, supra,* the plaintiff moved for the disqualification of Chief Justice TAYLOR and Justice MARKMAN. The Michigan Attorney General's office was representing the defendant. Chief Justice TAYLOR'S and Justice MARKMAN's spouses' employment by the Michigan Attorney General's office formed the grounds for the disqualification motions.

In *Adair, supra* at 1040-1041, Chief Justice TAYLOR and Justice MARKMAN asserted that they had a "duty to sit" similar to that which has been applied to United States Supreme Court justices. Justices CORRIGAN and YOUNG endorsed Chief Justice TAYLOR and Justice MARKMAN's argument. This new consideration that the majority of four would impose upon a Michigan Supreme Court justice's disqualification decision unnecessarily tips the scales in favor of participation despite an alleged impropriety that participation might create.

Although I agree that a justice should participate whenever appropriate, I disagree that the "duty to sit" rationale justifies the participation of a justice when his or her participation creates an appearance of impropriety. Neither the Michigan Constitution nor the Michigan Court Rules justify the majority of four's rationale in *Adair, supra*.[28]

The standards governing justice disqualification decisions should not be subject to change and manipulation through a series of complex adjudicated cases, but should be constant and easily accessible to anyone who needs to understand them in a court rule that is clear, fair, and enforceable after public comment and public hearing on the proposed rules.

V. RESPONSE TO THE "DELIBERATIVE PROCESS"

Contrary to Justice MARKMAN's assertion, my dissent does not reveal a single predecisional deliberation regarding an adjudicated case. My dissent does, however, outline important facts regarding the disposition of a now-closed administrative file of this Court, ADM 2003-26. This Court has both adjudicative responsibilities and administrative responsibilities.

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[28] Art 6, § 23 of the Michigan Constitution as amended in 1968 granted this Court the *discretionary* power to "authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." As I stated in *Adair, supra*, this power allows (but does not require) this Court to provide for the temporary replacement of a justice who recuses himself or herself or who is disqualified from a case. On the other hand, the constitution does not require that every decision of the Court be made by seven justices and MCR 7.316(C) indicates that a decision of this Court only requires a concurrence of a "majority of justices voting." The court rule anticipates that decisions can be made by fewer than seven justices.

No Michigan case establishes a judicial deliberative privilege, nor does any Michigan statute or court rule. Justice MARKMAN has not identified any law that requires a justice to be forever silent regarding the handling of administrative matters. In fact, quite the contrary is true. Canon 3(B) of the Code of Judicial Conduct addresses a judge's performance of his or her *administrative responsibilities*. Canon 3(B)(1) provides:

> A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

To "facilitate the performance of the administrative responsibilities of other judges and court officials," it may at times be necessary for a justice to inform the public of the Court's mishandling of its administrative responsibilities. This is such a time.

Nor is there any law requiring permanent silence regarding the Court's deliberations on cases. A judicial deliberative privilege, as it exists in Michigan, is articulated within the canons of the Michigan Code of Judicial Conduct. It is this judicial privilege that I have understood for my entire 32-year judicial career, and by which I strive to abide. Regarding public comment on "adjudicative responsibilities," Canon 3(A)(6) of the Code of Judicial Conduct provides:

> A judge should abstain from public comment about a *pending or impending* proceeding in any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions. [Emphasis added.]

Canon 3(A)(6) thus recommends against a judge speaking with regard to a case that is pending or impending in any court; however, Canon 3(A)(6) does not absolutely prohibit comment on such cases.[29]

Beyond the longstanding restriction imposed by Canon 3(A)(6) of the Code of Judicial Conduct, on November 13, 2006 during an unscheduled executive session from which Court staff were excluded, the majority of four adopted an Internal Operating Procedure (IOP)—a secret "gag rule"—attempting to *forever forbid* a justice from publicly revealing "memoranda and conference discussions regarding cases or controversies on the CR and opinion agendas . . . ."[30] Moreover, at the close of the November 29, 2006, conference, it was moved, seconded, and tabled that

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[29] To abstain is "[t]o refrain from something by one's own choice." *Webster's New World Dictionary, Second College Edition* (1982).

[30] The majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, voted to adopt the IOP/secret "gag rule." Justices

a slightly edited version of the new secret "gag rule" be adopted as an emergency court rule having immediate effect, without notice or public comment before its adoption.

I am guided by the fact that, as a justice, I am accountable first and foremost to the public. The public expects to be informed by a justice if something is seriously wrong within the operations of the Court. How else would the public know and be able to correct the problem through the democratic and constitutional processes? The public rightly expects the justices of this Court to act with courtesy, dignity, and professionalism toward one another. In matters of principle and legitimate public concern, however, the public does not expect a justice to "go along to get along." The public trusts, or should be able to trust, that the justices of this Court will not transform the Court into a secret society by making rules to protect themselves from public scrutiny and accountability.

Yet the public does not expect, and likely would not tolerate, being informed every time a justice changes positions on a matter before the Court, or every time a justice loses his or her temper with a colleague. The public expects justices to debate frankly, to be willing to change positions when persuaded by better argument, and to be willing to admit that they have changed their position. Moreover, momentary, human imperfections do not affect the work of the Court. The public would lose patience with and not support a justice who recklessly and needlessly divulged such information for intemperate or political reasons.

The public expects that justices will exercise wise and temperate discretion when disclosing information regarding the operations of the Court and the justices' performance of their duties. It is an elected or appointed justice's compact with the people that, whenever possible, he or she will make all reasonable efforts to correct problems in the Court from within.

But the public does need to know, and expects to be informed by a justice, when repeated abuses of power and/or repeated unprofessional conduct influence the decisions and affect the work of their Supreme Court. I believe it is my duty and right to inform the public of such repeated abuses and/or misconduct if and when they occur.

I recognize that there is a federal judicial deliberative privilege of *uncertain scope* in federal common law, but that is not Michigan law and is not binding on this Court. Moreover, the deliberative privilege articu-

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CAVANAGH and KELLY abstained. I voted against the IOP/secret "gag rule." The new IOP/secret "gag rule" provides:

> All memoranda and conference discussions regarding cases or controversies on the CR and opinion agendas are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical or criminal conduct to the Judicial Tenure Commission or proper law enforcement authority.

lated in federal law does not prevent a justice from speaking out regarding matters of legitimate public concern. *Pickering v Bd of Ed*, 391 US 563 (1968).

The federal deliberative privilege is narrowly construed and qualified. The privilege is not intended to protect justices, but rather operates to protect the public confidence in the integrity of the judiciary. For such public confidence to be warranted, this Court must be orderly and fair and must act with integrity, professionalism, and respect. By contrast, the majority's new secret "gag rule" is specifically designed to prevent public access to information that would allow the public to hold each justice accountable for the performance of his or her duties.

In a pertinent federal case, the Fifth Circuit Court of Appeals addressed whether a judge could be reprimanded for publicly commenting on the administration of justice as it related to a case in his court. *Scott v Flowers,* 910 F2d 201 (CA 5, 1990). The court cited *Pickering, supra,* in recognition that the deliberative privilege could not prevent the judge from truthfully speaking out regarding matters of legitimate public concern where the judge's First Amendment rights outweighed the government's interest in promoting the efficient performance of its function.

In light of *Pickering, supra*, the *Scott* court concluded:

> Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote. [*Id.* at 213.]

The *Scott* court thus held that the judge could not constitutionally be reprimanded for making public statements critical of the court.

The federal deliberative privilege as defined in the federal common law does not extend to every utterance and action within the Court's conferences and communications. It does not protect actions taken on nonadjudicative matters involving administrative responsibilities. It also does not extend to actions or decisions of the Court, because the actions and decisions of the Court are not *deliberations*, they are *facts* that occur at the end of a deliberative period.

Further, any judicial privilege does not extend to repeated resort to personal slurs, name calling, and abuses of power, such as threats to exclude a justice from conference discussions, to ban a justice from the Hall of Justice, or to hold a dissenting justice in contempt. Nor should it extend to conduct such as refusing to meet with justices on the work of the Court as the majority of four have now twice done on November 13 and November 29, 2006. The privilege certainly does not extend to illegal, unethical, and improper conduct. Abuses of power and grossly

unprofessional conduct are entirely unrelated to the substantive, frank, and vigorous debate and discussion of pending or impending adjudicated cases that a properly exercised judicial privilege should foster. Like all privileges, a judicial privilege can be waived.

An absolute judicial privilege (ancient or newly created) that members of this Court allege exists is not written in Michigan law. Perhaps, further attempts to define the scope of the judicial privilege in Michigan may or may not be warranted. However, the privilege cannot effectively be expanded beyond that expressed within the Code of Judicial Conduct through the recent adoption of the IOP/secret "gag rule." Nor should the new IOP/secret "gag rule" be adopted as an "emergency" court rule.

If the Court embarks on an attempt to further define the judicial deliberative privilege, it should do so by opening an administrative file on the issue and by inviting public comment before making any such decision. After all, any judicial deliberative privilege must serve the public's interest in maintaining an efficient and impartial judiciary, not the justices' personal interests in concealing conduct that negatively and seriously affects the integrity and operations of the Court. The public must, therefore, have a voice in defining the boundaries of any expanded deliberative privilege.

Moreover, any judicial privilege defined in any rule must not infringe on a justice's constitutional duties and rights. Const 1963, art 6, § 6 requires:

> When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

Any new court rule on deliberations that would force a dissenter to not include in his or her dissent any or all of his or her reasons would interfere with the dissenter's duty under art 6, § 6. In effect, such a rule would allow the majority to write the dissent and would be unconstitutional.

In my opinion, the majority of four mishandled the justice disqualification file. For over nine (9) months, dating back to March 1, 2006, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN have delayed action on, and thus publication of, the Court's minutes, and the dissents to the substance of those minutes, for critical administrative conferences involving the justice disqualification file, ADM 2003-26. Specifically, they have failed to act on the proposed March 1, 2006, minutes and to publish the minutes approved on September 7, 2006, because I have dissented to the substance of the minutes proposed for March 1, 2006, to the minutes for several of the dates approved on September 7, 2006, and to the September 7, 2006, action in closing the file on justice disqualification, ADM 2003-26.[31] Moreover, they have abruptly closed the file despite the overwhelming evidence of the need for reform.

Because there is a relationship between the majority of four's handling of the justice disqualification file and the disposition of this case, the fair administration of justice by this Court is at stake. The mishandling

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[31] But it is not necessary to reveal substantive conference discussions or debate to demonstrate how the justice disqualification file has been mishandled.

of the disqualification file has, coincidentally or not, occurred during the period that this case, which involves several motions to disqualify members of the majority of four, was pending before this Court. My silence on these matters would be more damaging to this institution than my speaking out, because I believe it is my duty and right to do so.

Finally, Justice MARKMAN engages in unjustifiable speculation by suggesting that I make notes during conference discussions "for the purpose of publicly disclosing" discussion or debate among the justices. I do keep notes during this Court's conferences. My note-taking permits me to better respond to and track the myriad issues that arise on cases and administrative matters that this Court addresses.

VI. CONCLUSION

I dissent from the majority of four's decision to deny respondent's motion for a stay of proceedings for the reasons stated in this statement.

I strongly encourage the public (citizens, judges, attorneys, and the media) to carefully review the three proposals as well as the current court rule, MCR 2.003. One thing is clear, the majority of four's continued reliance on the unwritten and often-secret "traditions" of this Court concerning justice disqualification will not ensure consistency, fairness, or due process. It surely has not in this case.

Among the rules that should be adopted to govern justice disqualification decisions is the requirement that a justice give reasons in writing when deciding to disqualify, or not to disqualify, himself or herself when the issue is raised in a case. It is past time to let some sunshine in to show how this Court conducts the people's business, and to end the movement toward greater secrecy and less accountability that this majority advances.

The public needs to have information on how the justices conduct the people's judicial business in order to assess the justices' performance of their duties and to hold the justices accountable. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts...."[32]

APPENDIX A:
THE ABANDONED PROPOSALS FOR NEW COURT RULES GOVERNING JUSTICE DISQUALIFICATION

While the majority of four has voted to close the justice disqualification file, ADM 2003-26, public discussion of the important issue of the rules that should govern justice disqualification decisions remains necessary. The public is entitled to study the proposals so that it can understand and encourage the adoption of critically needed rules governing the participation or disqualification of justices in pending cases. Therefore, I have included the three proposals below.

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[32] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

Because the differences between the proposed amendments to the court rules are complicated, the following is a list of pertinent questions and commentary to facilitate the discussion of the alternative proposals. Also attached as appendix B is a chart summarizing the distinctions between the alternative amendments. Public input is necessary at this time to ensure the independence and integrity of the judiciary and to restore the public's trust and confidence in the Michigan Supreme Court.

(1) *What form should a rule on the disqualification of Michigan Supreme Court justices take*?

Currently, justices of the Michigan Supreme Court sometimes follow unwritten traditions, not always known even to all the justices, when deciding a motion for disqualification. At other times, justices follow portions of the current court rule on disqualification, MCR 2.003. This helter-skelter approach of following "unwritten traditions" that are secret from the public is wrong because it violates the due process guarantees of the Fifth and Fourteenth amendments. There should be clear, fair, and enforceable court rules concerning the participation or disqualification of justices.

The three alternative proposed rules are either amendments of or additions to the Michigan Court Rules. Alternatives A and B are new court rules. Alternative C is an amendment of the current court rule governing the disqualification of judges, MCR 2.003.

(2) *Should the list of grounds for disqualification be exclusive or nonexclusive*?

The current court rule, MCR 2.003, provides that the grounds for disqualification listed in the rule are not exclusive. MCR 2.003 states that a judge is disqualified when he or she cannot impartially hear a case, "*including but not limited to*" instances covered by the specific grounds listed. (Emphasis added.)

Alternative C, like the current court rule, MCR 2.003, makes the list of grounds for disqualification *nonexclusive*, stating that "[d]isqualification of a judge is warranted for reasons *that include, but are not limited to*, the following . . . ."

By contrast, both alternatives A and B restrict the possible grounds for disqualification of justices to those on the *exclusive* list in the proposed rule. Alternative A not only provides an exclusive list of grounds for disqualification, it also specifies that "[u]nless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case."

(3) *Should there be a rule that a justice is disqualified when he or she cannot impartially decide a case*?

The current court rule, MCR 2.003(B), provides that a judge is "disqualified when the judge cannot impartially hear a case . . . ."

Alternative A entirely omits this language, thus narrowing the grounds for disqualification.

Alternatives B and C heighten the impartiality standard of MCR 2.003 by stating that disqualification of a judge, including a justice, is warranted whenever the judge's "impartiality might objectively and reasonably be questioned." This language is taken from the federal rules, and

has been interpreted as meaning whether "an objective, disinterested observer fully informed of the facts underlying the grounds on which [disqualification] was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc v McMillen*, 764 F2d 458, 460 (CA 7, 1985).

(4) *Does the proposed rule require or permit a justice to explain his or her decision whether or not to recuse himself or herself, and does it require or permit other justices to dissent*?

Article 6, § 6 of the 1963 Michigan Constitution states that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ."

Consistently with Const 1963, art 6, § 6, alternative C requires that a justice's decision and reasons to deny a motion for his or her disqualification be in writing. Further, when the full Court reviews a justice's decision to deny a motion for disqualification, in obedience to art 6, § 6, alternative C requires the Court to include the reasons for its grant or denial of the motion for disqualification.

By contrast, alternatives A and B do not require a written explanation of a justice's decision to deny a motion for his or her disqualification. In fact, alternative B *forbids* statements by any justice when the full Court reviews a justice's decision to deny a motion for his or her disqualification.

(5) *Should bias and prejudice against an attorney in a proceeding be a ground for disqualification*?

Alternatives A and B omit a provision found in both the current version of MCR 2.003 and alternative C that disqualification is warranted if the judge is biased or prejudiced for or against an *attorney* in the proceeding. Under alternative A, disqualification of a justice is required or warranted only if the justice "is actually biased against or for a *party* in the proceeding." Under alternative B, disqualification is warranted only if the justice "is actually biased or prejudiced against or for a *party* in the proceeding."

It is an important question whether bias and prejudice against an *attorney* in a proceeding are as serious of a concern as bias and prejudice against a *party* in a proceeding.

(6) *Should there be an opportunity for review of a justice's decision not to recuse himself or herself*?

Under MCR 2.003(C)(3), the party moving for a judge's disqualification can ask for review of that judge's decision to deny the motion. In a court having two or more judges, MCR 2.003(C)(3)(a) provides for review de novo by the chief judge of the court. In a single-judge court, or when the challenged judge is the chief judge, MCR 2.003(C)(3)(b) provides for review de novo by another judge assigned by the State Court Administrator.

Alternative C amends MCR 2.003(C)(3) to provide that the entire Supreme Court may review a justice's decision to deny a motion for his or her disqualification.

Alternative B allows for limited review of a justice's decision by the Chief Justice, or by the entire Court if the challenged justice is the Chief

Justice. However, as noted above, alternative B prohibits any statement or dissent in connection with the Court's decision to affirm or reverse a justice's decision to deny the motion for his or her disqualification. A question arises whether this prohibition violates Const 1963, art 6, § 6, which requires that all decisions of the Supreme Court, and all dissents by a justice, shall be in writing and shall include the reasons for the decision or the dissent.

Alternative A does not provide for any review of a justice's decision not to recuse himself or herself. Failing to provide for any review raises the question whether a person accused of bias and prejudice can be trusted to recognize the existence of his or her own bias and prejudice.

(7) *Is there a "duty to sit" applicable to Michigan Supreme Court justices?*

Alternative A asserts that a justice has a duty to "serve in every case" unless one of the exclusive grounds for disqualification enumerated in alternative A exists. Neither the Michigan Constitution nor the Michigan Court Rules impose a "duty to sit."[33]

The Michigan Constitution anticipates that a justice may be unable to sit in a case. Article 6, § 23, as amended in 1968, grants the Supreme Court the discretionary power to "authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." This provision does not distinguish among, but rather addresses all, "judicial duties" performed by judges and justices in Michigan. Moreover, nothing in the constitutional provision would preclude this Court from exercising its art 6, § 23 discretionary authority to fill a temporary vacancy created by a justice's disqualification from a case.

The text of art 6, § 23 expressly limits whom this Court may authorize to perform judicial duties to "persons who have been elected and served as judges . . . ."[34] It also provides that such authorizations must be for "limited periods or specific assignments." Thus, the 1968 amendment of art 6, § 23 allows this Court to ensure that judicial duties do not go unperformed, but it does not *require* this Court to exercise this authority.

Similarly, the court rules anticipate that not every justice will participate in every case. MCR 7.316(C) permits fewer than seven justices to render a decision of the Court, providing simply that "a decision of the Supreme Court must be made by concurrence of a majority of the justices

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[33] Alternative A's "duty to sit" rationale was first publicly articulated in Chief Justice TAYLOR and Justice MARKMAN's written explanation, concurred in by Justices CORRIGAN and YOUNG, of their decision to participate in *Adair v Michigan*, 474 Mich 1027, 1040-1041 (2006). In my *Adair* statement, I explained that there is no justification to impose the federal "duty to sit" doctrine on Michigan Supreme Court justices. *Adair*, *supra* at 1044-1045.

[34] Persons who have been "elected and served as judges" have already taken an oath of judicial office. Thus, the grant of discretionary authority in art 6, § 23 to the Supreme Court to "authorize persons" who have been elected and have served as judges to perform "judicial duties" is not a grant of an appointment power.

voting." MCR 7.316(C) also permits "affirmance of action by a lower court or tribunal by even division of the justices . . . ."

(8) *Should a justice be allowed to raise the issue of another justice's disqualification without filing a motion or an affidavit*?

Under alternative B, a justice could secretly raise the issue of a fellow justice's disqualification with no notice to the parties, no motion filed in the record, and no affidavit filed. Currently, when a justice has doubts about the propriety of a fellow justice's participation in a particular case, guidance is found in the Code of Judicial Conduct. Canon 3(B)(3) suggests that a justice can "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

The current court rule, MCR 2.003, requires that any party to a case wishing to raise a judge's disqualification must do so by motion[35] and that an affidavit must accompany the motion.[36] But under alternative B, a justice who is not a party to the case, would be allowed to raise the issue without filing a motion. Neither the parties nor the public would know that one justice had raised the issue of another justice's disqualification in a case. Further, the challenging justice is not required by alternative B to file an affidavit supporting the motion, because subsection C(2) of alternative B only requires that an affidavit be filed with a *motion* for disqualification, and in alternative B no motion is required for one justice to challenge another justice's participation.

(9) *Should a party or an attorney be precluded from bringing a motion for disqualification based on statements by a justice when those statements are made during an election campaign*?

There is currently no reference to or special protection for campaign speech in the current court rule, MCR 2.003, nor is any such special protection proposed in alternative A or C.

However, alternative B excludes "campaign speech" from consideration in assessing a justice's impartiality. Alternative B states that "campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765 (2002), [shall not] be a proper basis for the disqualification of a justice."

Judicial candidates enjoy the right to free speech, and a judicial candidate has the right to state his or her views on a subject. Nevertheless, the Due Process Clause also requires that litigants have access to an unbiased and impartial decision maker.[37] Highly political and polarizing campaign speech by a judicial candidate or the candidate's campaign committee may raise legitimate questions regarding a justice's ability to impartially decide a case.[38]

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[35] MCR 2.003(A).

[36] MCR 2.003(C)(2).

[37] *Johnson v Mississippi*, 403 US 212 (1971); *Tumey v Ohio*, 273 US 510 (1927); *Crampton v Dep't of State*, 395 Mich 347, 351 (1975); *Talbert v Muskegon Constr Co*, 305 Mich 345 (1943).

[38] *Republican Party of Minnesota v White*, 536 US 765 (2002).

(10) *Should disqualification based on a spouse's or relative's participation in a case be limited to cases in which the spouse or relative is the lawyer "of record"*?

Alternative B lowers the standard regarding motions for disqualification of a justice for possible familial[39] bias or influence. MCR 2.003 requires that a judge be disqualified whenever a family member is acting as a lawyer in a case. Alternative B provides that disqualification of a justice is required when the familial member is acting as a lawyer "of record" in the proceeding.

This proposed change from MCR 2.003(B)(6) would affect the outcome of cases such as *Adair, supra*, in which the plaintiff requested the disqualification of Chief Justice TAYLOR and Justice MARKMAN.[40] The proposed new rule would preclude challenges such as the one made in *Adair* unless a justice's spouse is the "lawyer of record" in the case.

(11) *Should the time limit for filing a motion for disqualification be shortened to 14 days after the grounds for disqualification should have been discovered?*

Alternatives B and C add a new constraint to the time within which a motion for disqualification must be filed. Alternatives B and C provide that such motions must be filed within 14 days after the moving party "*should have discovered*" the ground for disqualification. The existing court rule, MCR 2.003(C)(1), does not impose this heightened time constraint.

APPENDIX B: COMPARISON CHART

	Alternative RULE A	Alternative RULE B	Alternative RULE C	MCR 2.003
(1) What form does the proposed rule take?	New court rule	New court rule	Amendment of MCR 2.003	—
(2) Is the list of grounds for disqualification exclusive or nonexclusive?	Exclusive	Exclusive	Non-exclusive	Non-exclusive
(3) Is there a rule that a justice is disqualified when he or she cannot impartially decide a case?	No	Yes	Yes	Yes

[39] Bias or influence would be "familial" if it involves "the justice's spouse, or a person within the third degree of relationship to either [the justice or the spouse], or the spouse of such a person . . . ." MCR 2.003(B)(6).

[40] Chief Justice TAYLOR's wife and Justice MARKMAN's wife are lawyers employed by the Michigan Attorney General's office. Sharing a household and sharing income with a spouse who was given an at-will job by a public official whose office regularly appears before the Court formed the basis for the motion for disqualification filed against Chief Justice TAYLOR and Justice MARKMAN in *Adair, supra*.

(4) Are reasons for a justice's decision whether or not to recuse himself or herself required or permitted?	Not required	Not permitted	Required	Not required
(5) Is bias or prejudice against an attorney in a proceeding a ground for disqualification?	No	No	Yes	Yes
(6) Is there opportunity for review of a justice's decision not to recuse himself or herself?	No	Yes	Yes	Yes
(7) Is there a special "duty to sit" imposed on justices?	Yes	No	No	No
(8) Can a justice raise the issue of disqualification of another justice without filing a motion or an affidavit?	No	Yes	No	No
(9) Can a motion for disqualification be based on campaign speech?	Yes	No	Yes	Yes
(10) Are the grounds for disqualification when the justice is related to a lawyer in a case limited to when the relative is the lawyer "of record"?	No	Yes	No	No
(11) Is the time for filing a motion shortened to 14 days after the grounds *should have been* discovered?	No	Yes	Yes	No

APPENDIX C:
THE THREE ABANDONED PROPOSALS FOR REFORMING JUSTICE DISQUALIFICATION RULES

ALTERNATIVE A (proposed new Rule 2.003-SC of the Michigan Court Rules)

RULE 2.003-SC. DISQUALIFICATION OF A JUSTICE.

Unless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case. Each justice shall, on motion or sua sponte, decide whether grounds exist for his or her disqualification in a particular case. Disqualification of a justice is required if:

(1) The justice is actually biased against or for a party in the proceeding.

(2) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The justice has been consulted or employed as an attorney in the matter in controversy.

(4) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(5) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic interest in the subject matter in controversy or is a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

(6) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

A justice is not disqualified merely because the justice's former law clerk is an attorney of record for a party in an action that is before the justice or is associated with a law firm representing a party in an action that is before the justice.

ALTERNATIVE B (proposed new Rule 2.003-SC of the Michigan Court Rules)

RULE 2.003-SC. DISQUALIFICATION OF A JUSTICE.

(A) Who May Raise. A party may raise the issue of a justice's disqualification by motion, or any justice may raise it.

(B) Grounds for Disqualification. Disqualification of a justice is warranted if:

(1) The justice is actually biased or prejudiced against or for a party in the proceeding.

(2) The justice's impartiality might objectively and reasonably be questioned. Statements or conduct by anyone other than the justice shall not be considered in assessing the impartiality of a justice, nor shall campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002), be a proper basis for the disqualification of a justice.

(3) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(4) The justice has been consulted or employed as an attorney in the matter in controversy.

(5) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(6) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic or other interest in the subject matter in controversy.

(7) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer of record in the proceeding;

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

A justice is not disqualified merely because a former law clerk of the justice is an attorney of record for a party in an action that is before the Court or is associated with a law firm representing a party in an action that is before the Court.

(C) Procedure.

(1) *Time for filing*. A party must file a motion to disqualify a justice within 14 days after the moving party discovers or should have discovered the basis for disqualification. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. A justice may raise a question of disqualification at any time a potential justification for so doing arises.

(2) *All grounds to be included; Affidavit*. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling*. The challenged justice shall decide the motion for disqualification. If the challenged justice denies the motion for disqualification, the moving party may appeal to the Chief Justice, who shall decide the motion de novo. If the challenged justice is the Chief Justice, and the motion for disqualification is denied, the moving party may appeal to the entire Court, which shall decide the motion de novo.

(4) *Motion Denied*. If the Chief Justice denies the motion for disqualification, the Chief Justice shall issue an order to that effect without elaboration. If the challenged justice is the Chief Justice, and the Court denies the motion for disqualification, the Court shall issue a denial order without elaboration. No other additional statements are permitted.

(5) *Motion Granted*. When a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

ALTERNATIVE C (proposed amendment of MCR 2.003)

RULE 2.003. DISQUALIFICATION OF JUDGE.

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply

only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(BA) Who May Raise. A party may raise the issue of a judge's disqualification by motion, or the judge may raise it.

(CB) Grounds. ~~A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:~~

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a~~1~~) The judge is actually~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge's impartiality might objectively and reasonably be questioned.

(c~~2~~) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d~~3~~) The judge has been consulted or employed as an attorney in the matter in controversy.

(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f~~5~~) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has a~~n~~ more than de minimis economic or other interest in the subject matter in controversy. ~~or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.~~

(g~~6~~) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i~~a~~) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii~~b~~) is acting as a lawyer in the proceeding;

(iii~~c~~ is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(iv~~d~~) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification of a judge is not warranted~~A judge is not disqualified~~ merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(DC) Procedure.

(1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses or delaying the appellate process, a motion to disqualify must be filed within 14 days after the moving party discovers or should have discovered the ground for disqualification. In the trial court, if~~If~~ the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including, in the trial court, delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.*

(a) For courts other than the Supreme Court, ~~T~~the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i~~a~~) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii~~b~~) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification.

(4) *Motion Granted.*

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

(E~~D~~) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. In the Court of Appeals and the Supreme Court, the clerk of the court may contact the parties with a written explanation of the possible grounds for disqualification. If, following disclosure of any basis for disqualification other than actual~~personal~~ bias or prejudice concerning a party, the parties, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.

APPENDIX D: JUSTICE WEAVER'S DISSENT TO ADMINISTRATIVE ORDER 2006-08

WEAVER, J. (*dissenting*). I dissent to the unscheduled and abrupt adoption of Administrative Order 2006-08 (AO 2006-08) by the majority

of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN,[41] because it unconstitutionally restricts a justice's ability to perform his duty to the public by barring a justice from "giv[ing] in writing" his "reasons for each decision" and "the reasons for his dissent."[42] By adopting AO 2006-08 and ordering the suppression of my dissent in *Grievance Administrator v Fieger,* #127547, the majority of four are attempting to hide their own unprofessional conduct and abuse of power which has resulted in their failure to conduct the judicial business of the people of Michigan in an orderly, professional, and fair manner.

The majority's adoption of AO 2006-08 during an unrelated court conference, without public notice or opportunity for public comment, illustrates the majority of four's increasing advancement of a policy of greater secrecy and less accountability—a policy that wrongly casts "a cloak of secrecy around the operations" of the Michigan Supreme Court.[43]

Simply put, AO 2006-08 is a "gag order," poorly disguised and characterized by the majority of four as a judicial deliberative privilege. The fact is, no Michigan case establishes a "judicial deliberative privilege," nor does any Michigan statute, court rule, or the Michigan Constitution.

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[41] On December 6, 2006, moved by Chief Justice TAYLOR, and seconded by Justices CORRIGAN and YOUNG, the majority of four adopted AO 2006-08. Justices CAVANAGH, WEAVER, and KELLY dissented. As adopted the order states:

> The following administrative order, supplemental to the provisions of Administrative Order 1997-10, is effective immediately.
>
> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

CAVANAGH, WEAVER and KELLY, JJ., dissent. Dissenting statements by WEAVER and KELLY, JJ., to follow.

[42] Const 1963, art 6, § 6 requires that:

> Decisions of the Supreme Court, including all decisions on prerogative writs, *shall be in writing* and shall contain a concise statement of the facts and *reasons for each decision* and reasons for each denial of leave to appeal. *When a judge dissents in whole or in part he shall give in writing the reasons for his dissent*. (Emphasis added.)

[43] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

AO 2006-08—the "gag order"— has been hastily created and adopted by the majority of four, without proper notice to the public, and without opportunity for public comment, despite such requirements directed by Administrative Order 1997-11. Administrative Order 1997-11(B)(2) states:

> Unless immediate action is required, the adoption or amendment of rules or *administrative orders that will significantly affect the administration of justice* will be preceded by an administrative public hearing under subsection (1). If no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment on whether the rule should be retained or amended. (Emphasis added.)

The adoption of AO 2006-08 was not preceded by an administrative public hearing. Further, AO 2006-08 was not shown on the notice of public administrative hearing scheduled for January 17, 2007 agenda that was circulated and published on December 14, 2006. After learning that AO 2006-08 was not placed on the next public administrative hearing agenda as required by AO 1997-11, I informed by memo of the same date (December 14) the justices and relevant staff, that AO 1997-11(B)(2) requires that AO 2006-08 be included in the notice for the next public administrative hearing on January 17, 2007. That AO 2006-08 significantly affects the administration of justice is obvious given that the majority of four relied on it to order on December 6, 2006, the suppression of my dissent in *Grievance Administrator v Fieger,* #127547, motion to stay. As of today, December 19, 2006, AO 2006-08 has not been placed on the January 17, 2007 public hearing notice and agenda.[44]

The majority has not publicly articulated any reason why AO 2006-08 should be adopted, nor any reason why immediate action without prior notice to the public or a public hearing was necessary. Article 6, § 6 of the Michigan Constitution requires in writing reasons for decisions of the Court. However, AO 2006-08 can be employed by any majority to impermissibly and unconstitutionally restrict the content of a justice's dissent or concurrence. Thus any present or future majority can in essence censor and suppress a dissenting or concurring justice's opinions.

The public has a vested, constitutional interest in knowing the reasons for a dissenting or concurring justice's divergence from a majority opinion.[45] The majority of four's efforts to censor and suppress

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[44] Note that AO 2006-08 must be placed on the public hearing notice for January 17, 2007, by December 20, 2006, to conform to the 28 day notice requirement of AO 1997-11.

[45] By requiring that justices give reasons for their decisions in writing, Michigan Constitution, art 6, § 6 gives the people of Michigan an opportunity to improve justice by providing a window to learn how their Supreme Court is conducting Michigan's judicial business. Furthermore,

the opinions of other justices significantly affect the administration of justice and violate the Michigan Constitution's, art 6, § 6. The "gag order," AO 2006-08, is unconstitutional and unenforceable. As employed by the majority in *Grievance Administrator v Fieger*, #127547, the current majority is using AO 2006-08 to censor and suppress my dissent. I cannot and will not allow it to interfere with the performance of my duties as prescribed by the Michigan Constitution and with the exercise of my rights of free expression as guaranteed by both the Michigan Constitution and the United States Constitution.

The majority of four has adopted this "gag order" (AO 2006-08) in order to suppress my dissent in *Grievance Administrator v Fieger,* motion for stay, #127547. Finding no "gag rule" in the Michigan Constitution, statutes, case law, court rules and canons of judicial ethics, the majority of four has decided instead to legislate its own "gag order." The majority of four's "gag order" evidences an intent to silence me now, and to silence any future justice who believes it is his duty to inform the public of serious mishandling of the people's business. [46]

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requiring written decisions from justices provides information and guidance for case preparation to future litigants, who may have similar issues to decided cases.

[46] On November 13, 2006, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN voted to adopt an Internal Operating Procedure (IOP) of the Court, substantively identical to the "gag order" adopted by AO 2006-08. Justices CAVANAGH and KELLY abstained. I voted against the IOP/secret "gag rule." The majority of four adopted the IOP/secret "gag rule" in an unannounced executive session from which court staff were excluded. As adopted on November 13, the IOP/secret "gag rule" states:

> All memoranda and conference discussions regarding cases or controversies on the CR and opinion agendas are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical or criminal conduct to the Judicial Tenure Commission or proper law enforcement authority.

IOPs are unenforceable guidelines adopted by majority vote, without public notice or comment, and can be changed at any time, without public notice or comment, by a majority vote. (See Supreme Court internal operating procedures at <http://courts.michigan.gov/supremecourt/> (accessed on December 19, 2006), which provides in a disclaimer that the IOPs are unenforceable and only require a majority vote to be adopted.) The adoption of this IOP was never reported in the Supreme Court minutes. It appears that the majority found that the hastily adopted IOP "gag rule" would not be a proper vehicle to suppress my dissents because my dissents could not be suppressed by color of an unenforceable court guideline.

The majority's "gag order" purportedly protects the justices' deliberations under a so-called "judicial deliberative privilege" based on unwritten traditions.

But the Michigan Constitution, statutes, case law, and court rules do not establish a judicial deliberative privilege.[47] In fact, the closest thing to a "judicial deliberative privilege" in Michigan is contained within the Canons of the Code of Judicial Conduct. It is this so-called "judicial deliberative privilege" that I have understood for my entire 32-year judicial career, and by which I strive to abide.

As to a judge's ability to speak regarding "a pending or impending proceeding in any court," Canon 3A(6) provides:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar

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Thus, on November 29, 2006 the majority moved and seconded the adoption of an "emergency" Michigan Court Rule, another "gag rule," to suppress my dissents and concurrences. The majority discussed but tabled the new proposed emergency court rule that was substantively identical to AO 2006-08 "gag order" that was adopted on December 6, 2006.

Finally, on December 6, 2006, during an unrelated court conference, without public notice or opportunity for public comment, the majority adopted AO 2006-08, the "gag order." There was no notice given to the justices that an administrative order was to be considered, nor was the matter ever on an administrative agenda of this Court. Nonetheless, AO 2006-08 was adopted by a 4-3 vote by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. Shortly thereafter, it was moved, seconded, and adopted by a 4-3 vote, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, to suppress my dissent in *Grievance Administrator v Fieger*, #127547, motion to stay. Justices CAVANAGH, WEAVER and KELLY dissented. Chief Justice TAYLOR then ordered the clerk of court, who was present, not to publish my dissent in *Fieger*.

[47] In the order, AO 2006-08 states that AO 2006-08 is "supplemental to the provisions of Administrative Order 1997-10." I note that Administrative Order 1997-10 (AO 1997-10) does not prohibit a justice of the Supreme Court from disclosing information.

By its plain language, AO 1997-10 is inapplicable. It addresses *public* access to judicial branch administrative information. The order lists types of information that this Court can exempt from disclosure *when faced with a request from the public* for that information. Administrative Order 1997-10 is not relevant to and does not prohibit a justice of this Court from disclosing information, even information that might be considered deliberative, when disclosure involves matters of *legitimate public concern*.

> abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

Canon 3A(6) thus recommends against a judge speaking on a case that is pending or impending in any court; however, Canon 3A(6) does not absolutely prohibit comment on such cases.[48]

As to a judge's "administrative responsibilities," Canon 3B *does not* even address, much less recommend or require, abstention from public comment. Canon 3B(1) *does* state that

> [a] judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

One way to "facilitate the performance of the administrative responsibilities of other judges and court officials" is to inform the public when they need to know of a misuse or abuse of power, or know of repeated, unprofessional behavior seriously affecting the conduct of the people's business.

Certainly nothing in Canon 3 can be said to create any obligation of confidentiality or permanent secrecy like that adopted by the majority of four in AO 2006-08, and in the November 13, 2006, IOP. It should be noted that there have been instances both in the past and present, in which justices have made references in opinions to matters discussed at conference and in memorandum, and to actions before the Court.[49]

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[48] To abstain is "[t]o refrain from something by one's own choice." Webster's New World Dictionary, 2nd College Edition (1982).

[49] For example, most recently, in Justice CAVANAGH'S concurring statement in *In re Haley*, 476 Mich 180, 201 n 1 (2006), he stated:

> This Court is currently engaged in a discussion about the proper procedure for judicial disqualifications, as well as the ethical standards implicated in such a procedure. Further, this Court will soon be asking for public comment and input to further this discussion in a more open manner.

In addition, in his dissent in *Grievance Administrator v Fieger*, 476 Mich 231, 327 n 17 (2006), Justice CAVANAGH stated:

> Further, while I do not join in the fray between the majority and my colleague Justice WEAVER, I take this opportunity to note that three alternate proposals, two of which have been crafted by

In determining when one must speak out, or abstain from speaking out, I am guided by the fact that, as a justice, I am accountable first and foremost to the public. The public expects to be informed by a justice if something is seriously wrong with the operations of the Supreme Court and the justice system. How else would the public know and be able to correct the problem through the democratic and constitutional processes? The public rightly expects the justices of this Court to act with courtesy, dignity, and professionalism toward one another. In matters of principle and legitimate public concern, however, the public does not expect a justice to "go along to get along." The public trusts, or should be able to trust, that the justices of this Court will not transform the Court into a "secret society" by making rules to protect themselves from public scrutiny and accountability.

Yet the public also expects that justices will exercise wise and temperate discretion when disclosing information regarding the operations of the Court and the justices' performance of their duties. The public does not expect, and likely would not tolerate, being informed every time a justice changes positions on a matter before the court, or every time a justice loses his temper with a colleague. The public expects justices to debate frankly, to be willing to change positions when persuaded by better argument, and to be willing to admit that they have changed their positions. Moreover, momentary, human imperfections do not affect the work of the Court. The public would lose patience with and not support a justice who recklessly and needlessly divulged such information for intemperate or political reasons. It is an elected or appointed justice's compact with the people that, whenever possible, a justice will make all reasonable efforts to correct problems on the Court from within.

But the public needs and expects to be informed by a justice when repeated abuses of power and/or repeated unprofessional conduct influence the decisions and affect the work of their Supreme Court and the justice system. I believe it is my duty and right to inform the public of such repeated abuses and/or misconduct if and when they occur.

> this majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.

Note that Justice CAVANAGH's statements, published in his concurrence in *Haley* and his dissent in *Fieger*, were not objected to by any justice, including the majority of four.

In addition to these more recent references to matters discussed at judicial conferences, see *In re Mathers*, 371 Mich 516 (1963).

I recognize that there is a federal judicial deliberative privilege of *uncertain scope* in federal common law, but that is not Michigan law and is not binding on this Court. Moreover, the deliberative privilege articulated in federal law does not prevent a justice from speaking out regarding matters of legitimate public concern. *Pickering v Bd of Ed*, 391 US 563 (1968).

The federal deliberative privilege is narrowly construed and qualified and it does not apply to administrative actions. Furthermore, that privilege is not intended to protect justices, but rather operates to protect the public confidence in the integrity of the judiciary.

For such public confidence to be warranted, the Michigan Supreme Court must be orderly and fair and must act with integrity, professionalism, and respect. In a pertinent case, the federal Fifth Circuit Court of Appeals addressed whether a judge could be reprimanded for publicly commenting upon the administration of justice as it related to a case in his court. *Scott v Flowers,* 910 F2d 201 (CA 5, 1990). The court cited *Pickering, supra,* in recognition that the deliberative privilege could not prevent the judge from truthfully speaking out regarding matters of legitimate public concern where the judge's First Amendment rights outweighed the government's interest in promoting the efficient performance of its function.

In light of *Pickering, supra*, the *Scott* court concluded:

> Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote. [*Scott, supra* at 213.]

The *Scott* court thus held that the judge could not constitutionally be reprimanded for making public statements critical of the court.

The federal deliberative privilege as defined in the federal common law does not extend to every utterance and action within the Court's conferences and communications. It does not protect actions taken on non-adjudicative matters involving administrative responsibilities. It also does not extend to actions or decisions of the Court, because the actions and decisions of the Court are not *deliberations*, they are *facts* that occur at the end of a deliberative period.

Further, any judicial deliberative privilege does not extend to repeated resort to personal slurs, name calling, and abuses of power, such as threats to exclude a justice from conference discussions, to ban a justice from the Hall of Justice, or to hold a dissenting justice in contempt. Nor does any judicial privilege extend to conduct such as refusing to meet with justices on the work of the Court as the majority of four have now twice done on November 13 and November 29, 2006. The privilege

certainly does not extend to illegal, unethical, and improper conduct. Abuses of power and grossly unprofessional conduct are entirely unrelated to the substantive, frank, and vigorous debate and discussion of pending or impending adjudicated cases that a properly exercised judicial privilege should foster.

An absolute judicial deliberative privilege that the majority of four of this Court has wrongly created in AO 2006-08 does not exist in the Michigan Constitution, statutes, case law, court rules, or Code of Judicial Conduct, and should not be allowed to prohibit the publication of any justice's dissent or concurrence.

Perhaps further attempts to define the scope of the so-called "judicial deliberative privilege" in Michigan may be warranted. However, the privilege cannot effectively be expanded beyond that expressed within the Code of Judicial Conduct through the abrupt, unconstitutional adoption of Administrative Order 2006-08, the "gag order."

Most importantly, any judicial deliberative privilege defined in any rule or order must not infringe on a justice's constitutional duties and rights. Const 1963, art 6, § 6 requires that

> Decisions of the Supreme Court, including all decisions on prerogative writs, *shall be in writing* and shall contain a concise statement of the facts and *reasons for each decision* and reasons for each denial of leave to appeal. *When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.* (Emphasis added.)

Any new court rule or administrative order on deliberations that would force a dissenting or concurring justice to not include in his dissent or concurrence any or all of his reasons would interfere with the justice's duty under art 6, § 6. In effect, such a rule would allow the majority justices to re-write the dissent or concurrence, silence their opposition, and would be unconstitutional. AO 2006-08 is such an unconstitutional rule.

If the majority wanted to attempt to further define the so-called "judicial deliberative privilege" in Michigan, it should have done so by opening an administrative file on the issue and by inviting public comment before making a rash decision to adopt a "gag order" without public notice or comment and before implementing the "gag order" by ordering the suppression of a fellow justice's dissent. After all, any judicial deliberative privilege must serve the public's interest in maintaining an efficient and impartial judiciary, not the justices' personal interests in concealing conduct that negatively and seriously affects the integrity and operations of the Court. The public must, therefore, have a voice in defining the boundaries of any expanded so-called "judicial deliberative privilege" that the majority of this Court desires to legislate. I have already expressed in dissents on administrative matters (which the majority has refused to release) that the majority of four has repeatedly abused its authority in the disposition of and closure of ADM 2003-26, the Disqualification of Justices file. They have mischaracterized final actions

as straw votes and failed to correct, approve and publish minutes, and my dissents thereto, for conferences on the Disqualification of Justices file, ADM 2003-26, dating back almost ten (10) months to March 1, 2006.

Regrettably, under the guise of promoting frank discussion, the majority of four has tried to erect an impermeable shield around their abusive conduct—itself the cause of the breakdown of frank, respectful and collegial discussion on this Court. No law or rule exists to support this idea, anywhere. The majority of four have precipitously and abruptly adopted AO 2006-08 without notice to fellow justices or the public, and without opportunity for public comment.

Over the past year and longer, the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, have advanced a policy toward greater secrecy and less accountability. I strongly believe that it is past time to end this trend and to let sunlight into the Michigan Supreme Court. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts." *Scott, supra.*

APPENDIX E

WEAVER, J. (*concurring and dissenting).* I concur only with placing on the January 17, 2007 public administrative hearing the adoption of Administrative Order No. 2006-08 (AO 2006-08), adopted by a 4-3 vote on December 6, 2006, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. I dissent from the remaining language in the order.

As stated in my dissent to AO 2006-08 (filed yesterday, December 19, 2006), AO 2006-08 must be placed on the January 17, 2007, public administrative hearing because it significantly affects the administration of justice as it can be used to order the censorship and/or suppression of any justice's dissents or concurrences, as the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, did on December 6, 2006, by ordering the Clerk of the Court to suppress my December 5, 2006, dissent from *Grievance Administrator v Fieger*, Docket No. 127547 (motion for stay).

Censoring and/or suppressing a justice's written opinion is contrary to article 6, § 6 of the Michigan Constitution and the right to free expression as guaranteed by both the Michigan Constitution and the United States Constitution. Further, censoring and/or suppressing a justice's written opinion interferes with a justice's duty to inform the public of abuse of power and/or serious mishandling of the people's judicial business.

The issue that should be of most interest and given most attention at the January 17, 2007, public administrative hearing is the constitutionality of AO 2006-08.

APPENDIX F

Footnote omitted from page six:

I will re-circulate my draft dissent to the denial of the motion to stay to clarify that the person with whom I spoke was both staff of the

Governor's Task Force on Juvenile Justice, a federally mandated and federally funded task force on child abuse and neglect, and an employee of the state's central FIA office in Lansing.

Justice KELLY, joins the statement of Justice CAVANAGH, and will be submitting her own dissent.

Order Entered December 28, 2006:

PROPOSED AMENDMENT OF RULES 5.101, 5.105, 5.113, 5.125, 5.206, 5.302, 5.306, 5.307, 5.309, AND 5.403 OF THE MICHIGAN COURT RULES AND PROPOSED ADOPTION OF RULES 5.410 AND 5.411 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 5.101, 5.105, 5.113, 5.125, 5.206, 5.302, 5.306, 5.307, 5.309, and 5.403 and adoption of new Rules 5.410 and 5.411 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before final adoption or rejection. The schedule and agendas for public hearings are posted on the Court's website, 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 5.101. FORM AND COMMENCEMENT OF ACTION.

(A)-(B) [Unchanged.]

(C) Civil Actions, Commencement, Governing Rules. The following actions, must be titled civil actions, must be commenced by filing a complaint, and are governed by the rules which are applicable to civil actions in circuit court:

(1) Any action against ~~another~~ a nonfiduciary filed by a fiduciary, and

(2) Any action filed by a claimant after notice that the claim has been disallowed.

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A)-(C)[Unchanged.]

(D) Service on Persons Under Legal Disability or Otherwise Legally Represented. In a guardianship or conservatorship proceeding, a petition or notice of hearing asking for an order that affects the ward or protected individual must be served on that ward or protected individual if he or she is 14 years of age or older. In all other matters, service on an interested person under legal disability or otherwise legally represented may be made instead on the following:

(1) The guardian of an adult, conservator, or guardian ad litem of a minor or other legally ~~disabled person~~ incapacitated individual, except with respect to:

(a) a petition for commitment or

(b) a petition, account, inventory, or report made as the guardian, conservator, or guardian ad litem.

(2) The trustee of a trust with respect to a beneficiary of the trust, except that the trustee may not be served on behalf of the beneficiary on petitions, accounts, or reports made by the trustee as trustee or as personal representative of the settlor's estate.

(3) The guardian ad litem of any unascertained or unborn person.

(4) A parent of a minor with whom the minor resides, provided the interest of the parent in the outcome of the hearing is not in conflict with the interest of the minor and provided the parent has filed an appearance on behalf of the minor.

(5) The attorney for an interested person who has filed a written appearance in the proceeding. If the appearance is in the name of the office of the United States attorney, the counsel for the Veterans' Administration, the Attorney General, the prosecuting attorney, or the county or municipal corporation counsel, by a specifically designated attorney, service must be directed to the attention of the designated attorney at the address stated in the written appearance.

(6) The agent of an interested person under an unrevoked power of attorney filed with the court. A power of attorney is deemed unrevoked until written revocation is filed or it is revoked by operation of law.

For purposes of service, an emancipated minor without a guardian or conservator is not deemed to be under legal disability.

(E) [Unchanged.]

RULE 5.113. PAPERS; FORM AND FILING.

(A) Form of Papers Generally.

(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must

(a) be legibly typewritten or printed in ink in the English language, and

(b) include the

(i) name of the court and title of the proceeding in which it is filed;

(ii) case number, if any, including a prefix of the year filed and a two-letter suffix for the case-type code ~~(see~~ pursuant to MCR 8.117~~)~~ and according to the principal subject matter of the proceeding~~, and if the case is filed under the juvenile code, the petition number which also includes a prefix of the year filed and a two-letter suffix for the case-type code~~;

(iii) character of the paper; and

(iv) name, address, and telephone number of the attorney, if any, appearing for the person filing the paper~~;~~; and

(c) be substantially in the form approved by the State Court Administrator, if a form has been approved for the use.

(2) A judge or register shall not receive and file a nonconforming paper.

(B)-(D) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) [Unchanged.]

(B) Special Conditions for Interested Persons.

(1) Claimant. Only a claimant who has properly presented a claim pursuant to MCR 5.306(D) and whose claim has not been disallowed and remains ~~files a claim with the court, with a personal representative, or with a trustee of a trust required to give notice to creditors pursuant to MCL 700.7504, and whose claim remains undetermined or~~ unpaid need be notified of specific proceedings under subrule (C).

(2) Devisee. Only a devisee whose devise remains unsatisfied need be notified of specific proceedings under subrule (C).

(3) Trust as Devisee. If either a trust or a trustee is a devisee, the trustee is the interested person. If no trustee has qualified, the interested persons are the current trust beneficiaries and the nominated trustee, if any.

(4) Father of a Child Born out of Wedlock. Except as otherwise provided by law, the natural father of a child born out of wedlock need not be served notice of proceedings in which the child's parents are interested persons unless his paternity has been determined in a manner provided by law.

(5) Decedent as Interested Person. If a decedent is an interested person, the personal representative of the decedent's estate is the interested person. If there is no personal representative, the interested persons are the known heirs of the estate of the decedent, the known devisees, and the Attorney General.

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(2) [Unchanged.]

(3) The persons interested in a petition to determine the heirs of a decedent are the presumptive heirs.

(4)-(5) [Unchanged.]

(6) The persons interested in a proceeding for examination of an account of a fiduciary are the

(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),

(b) heirs of an intestate estate,

(c) protected person and presumptive heirs of the protected person in a conservatorship,

(d) ward and presumptive heirs of the ward in a guardianship,

~~(d)~~(e) claimants,

~~(e)~~(f) current trust beneficiaries in a trust accounting, and

~~(f)~~(g) ~~such~~other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.

(7)–(25) [Unchanged.]

(26) The persons interested in a petition by a conservator for instructions or approval of sale of real estate or other assets are

(a) the protected individual and

(b) those persons listed in subrule (C)(~~23~~24) who will be affected by the instructions or order.

(27) The persons interested in receiving a copy of an inventory or account of a conservator or of a guardian are:

(a) the protected individual or ward, if he or she is 14 years of age or older and can be located,

(b) the presumptive heirs of the protected individual or ward, ~~and~~

(c) the claimants; and

(d) the guardian ad litem.

(28)–(31) [Unchanged.]

(32) The persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6) and (C)(28) are:

(a) the trust beneficiaries affected by the relief requested,

(b) the current trustee,

(c) the proposed successor trustee, if any, and

(d) other persons whose interests are affected by the relief requested.

(D)-(E) [Unchanged.]

RULE 5.206. DUTY TO COMPLETE ADMINISTRATION.

A fiduciary and an attorney for a fiduciary must take all actions reasonably necessary to regularly administer an estate and close administration of an estate. If the fiduciary or the attorney fails to take such actions, the court may act to regularly close the estate and assess costs against the fiduciary or attorney personally.

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) [Unchanged.]

(B) Sworn Testimony Form. One or more ~~A~~ sworn testimony forms sufficient to establish the identity of ~~interested persons~~ heirs and devisees must be submitted with the application or petition that commences proceedings. ~~The~~ A sworn testimony form must be executed before a person authorized to administer oaths.

(C)-(D) [Unchanged.]

RULE 5.306. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A)-(C) [Unchanged.]

(D) Presentment of Claims. A claim shall ~~may~~ be presented to the personal representative by mailing or delivering the claim to the personal representative or the personal representative's attorney. A claim is presented

(1) on mailing, if addressed to the personal representative~~,~~ or the personal representative's attorney ~~or the court~~, or

(2) in all other cases, when received by the personal representative or the personal representative's attorney ~~court~~.

For purposes of this subrule, personal representative includes a proposed personal representative.

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) [Unchanged.]

(B) Notice of Continued Administration. If unable to complete estate administration within one year of appointment, the personal representative must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. The notice must be given within 28 days of the first anniversary of appointment and all subsequent anniversaries during which the administration remains uncompleted.

~~(B)-(D)~~ [Relettered (C)-(E) only.]

RULE 5.309. INFORMAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Notice of Intent to Seek Informal Appointment as Personal Representative.

(1) A person who desires to be appointed personal representative in informal proceedings must give notice of intent to seek appointment and a copy of the application to each person having a prior or equal right to appointment who does not renounce ~~waive~~this right in writing before the appointment is made.

(2)-(3) [Unchanged.]

(D) [Unchanged.]

RULE 5.403. PROCEEDINGS ON TEMPORARY GUARDIANSHIP.

(A)-(B) [Unchanged.]

(C) Temporary Guardian for Incapacitated Individual Where no Current Appointment; Guardian ad Litem. A petition for a temporary guardian for an alleged incapacitated individual shall specify in detail the emergency situation requiring the temporary guardianship. For the purpose of an emergency hearing ~~for appointment of a temporary guardian of an alleged incapacitated individual~~, the court shall appoint a guardian ad litem unless such appointment would cause delay and the alleged incapacitated individual would likely suffer serious harm if immediate action is not taken. The duties of the guardian ad litem are to visit the alleged incapacitated individual, report to the court and take such other action as directed by the court. The requirement of MCL 700.5312(1) that the court hold the fully noticed hearing within 28 days applies only when the court grants temporary relief.

(D) Temporary Guardian for Minor.

(1) ~~Prior to~~Before Appointment of Guardian. If necessary during proceedings for the appointment of a guardian for a minor, the court may appoint a temporary guardian after a hearing at which testimony is taken. The petition for a temporary guardian shall specify in detail the conditions requiring a temporary guardianship. Where a petition for appointment of a limited guardian had been filed, the court, before the appointment of a temporary guardian, shall take into consideration the limited guardianship placement plan in determining the powers and duties of the parties during the temporary guardianship.

(2) [Unchanged.]

[The language that follows is new.]

RULE 5.410. GUARDIAN AD LITEM FOR PROTECTED INDIVIDUAL.

(A) Appointment. A guardian ad litem shall be appointed in every adult conservatorship with unrestricted assets for the purposes of any hearing held unless the protected individual is represented by his or her own attorney or is mentally competent but aged or physically infirm. A guardian ad litem may be appointed in other proceedings as ordered by the court. A guardian ad litem may be ordered to continue to represent the protected individual during the period of the conservatorship.

(B) Duties. The duties of a guardian ad litem include but are not limited to the following:

(1) A guardian ad litem shall represent the interest of the protected individual at all times.

(2) A guardian ad litem shall review the inventory and accountings of a conservator for accuracy and appropriateness.

(3) A guardian ad litem shall require documentation from a conservator for income and disbursements that the guardian ad litem finds questionable on the inventory or accounting.

(4) A guardian ad litem shall report to the court or file an objection with the court if the inventory or accounting is not proper.

(5) A guardian ad litem shall determine if a conservator is properly preserving any estate plan of the protected individual.

(6) A guardian ad litem shall perform such other duties as may be required by statute, court rule or as may be required to protect the interest of the protected individual.

RULE 5.411. BOND OF CONSERVATOR.

The court may require a bond in all conservatorships in which there are unrestricted assets in the amount the court finds necessary to protect the estate or as required by statute. No bond shall be required of trust companies organized under the laws of Michigan or a bank with trust powers unless the court orders that a bond be required.

Staff Comment: These amendments are published in response to a proposal submitted by the Michigan Probate Judges Association and the State Bar of Michigan's Probate and Estate Planning Section. This was a joint effort to increase the oversight of guardianship and conservatorship proceedings, as well as to improve other procedures in probate court.

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 April 1, 2007, at P. O. Box 30052, Lansing, MI 48909, MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-37. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Request for Answer to Certified Question Granted December 29, 2006:

In re CERTIFIED QUESTION FROM THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS (MILLER v FORD MOTOR COMPANY), No. 131517. The motions to admit counsel pro hac vice and to file a surreply brief are granted. The question certified by the Texas Court of Appeals (Fourteenth District) is considered, and the request to answer the question is granted. If the parties wish to file further briefs, they must be prepared in conformity with MCR 7.306 through 7.309. The Michigan Manufacturers Association, the Michigan Trial Lawyers Association, the Negligence Law Section of the State Bar, and the Michigan Chamber of Commerce 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.

CAVANAGH, J. I would decline to answer the certified question.

WEAVER, J. (*dissenting*). I dissent from the order granting the request of the Texas Court of Appeals, Fourteenth District, for an answer to the question, because I continue to question this Court's constitutional authority to hear questions certified by other courts.[1] Justice YOUNG[2] and Justice LEVIN[3] have also questioned this Court's authority to answer certified questions. Therefore, I would decline to answer the question in this case.

Order Entered January 5, 2007:

CZYMBOR'S TIMBER, INC v CITY OF SAGINAW, No. 130672. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, on the Court's own motion pursuant to MCR 7.316(A)(3), the Court directs each party to file a supplemental brief not later than 42 days after the date of this order specifically addressing the following two questions: (1) whether privately owned land is generally open for hunting with the permission of the owner unless a local government has taken steps to close the land and, if so, what, if any, other procedures exist in addition to MCL 324.41901 to allow a local government to close land to hunting; or (2) whether, instead, privately owned land must first be established as a hunting area before hunting is allowed and, if so, what are the current statutory and regulatory procedures for establishing hunting areas. The Court further

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[1] See, e.g., *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225 (2005) (WEAVER, J., concurring); *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (2001) (WEAVER, J., dissenting); *Proposed Amendment of MCR 7.305*, 462 Mich 1208 (2000) (WEAVER, C.J., dissenting); *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc)*, 468 Mich 109,121 (2003) (WEAVER, J., concurring).

[2] See *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (2001) (YOUNG, J., concurring).

[3] See *In re Certified Question (Bankey v Storer Broadcasting Co)*, 432 Mich 438, 462-471 (1989) (separate opinion by LEVIN, J.).

directs the Michigan Department of Natural Resources to file a supplemental brief not later than 42 days after the date of this order specifically addressing the two questions set forth above and also addressing whether any municipal land in Michigan is currently closed to hunting and by what authority these lands were closed. Reported below: 269 Mich App 551.

Orders Entered January 9, 2007:

PROPOSED AMENDMENT OF RULES 3.963 AND 3.965 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.963 and 3.965 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 3.963. PROTECTIVE CUSTODY OF CHILD.

(A) [Unchanged.]

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. ~~When appropriate,~~ At the time it issues the order or as provided in 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.

(2)-(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A)-(C) [Unchanged.]

(D) Pretrial Placement; Reasonable Efforts Determination. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court.

(1) When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether ~~the agency has made~~ reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. Nunc pro tunc orders or affidavits are not acceptable.

(2) [Unchanged.]

(E) [Unchanged.]

Staff Comment: Revised Paragraph of staff comment as it pertains to Rule 3.963 from the order dated October 24, 2006: The amendment of MCR 3.963(B)(1) reflects the reality that Family Division judges or referees are not always presented with a petition when a request is made to remove a child from the home. In emergency circumstances, a police officer or social worker may seek the court's permission to remove a child from a home, but will not have an opportunity to draft a petition before seeking the child's removal. Other changes require orders authorizing the removal of a child to be in writing. The amendment also clarifies that the court should make a "reasonable efforts" finding at the child's removal, or within 60 days of the child's removal under MCR 3.965, or make a finding that "reasonable efforts" are not required.

Revised Paragraph of staff comment as it pertains to Rule 3.965 from order dated October 24, 2006: The amendments of MCR 3.965(D)(2) conform the rule language to that of the recent amendments of the "reasonable efforts" language in MCL 712A.19a, as amended by 2004 PA 473, and make its language consistent with the proposed "reasonable efforts" language in MCR 3.976(B)(1). The amendments add language to clarify that a court can determine that ~~an agency has made~~ reasonable efforts to prevent removal have been made or can determine that reasonable efforts to prevent removal are not required due to aggravated circumstances.

Revised Paragraph of staff comment as it pertains to Rule 3.972 from order dated October 24, 2006: The amendments of MCR 3.972 conform the rule language to the requirements of the Adoption and Safe Families Act and foster compliance with the timing requirements of that act, thereby helping to ~~ensure that children~~ increase the possibility that children in foster care will receive federal funding. The amendments require that a review hearing be held within 182 days of a child's removal from the home, even if the trial in the proceeding has not been completed.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 5.307 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amending Rule 5.307 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 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

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

(B)-(D) [Unchanged.]

Staff Comment: The proposed amendment of MCR 5.307 would eliminate the ability to reduce the value of property by the amount of secured loans for purposes of determining the inventory fee. The proposed amendment would conform the court rule to the requirement for setting the inventory fee in § 871 of the Revised Judicature Act, MCL 600.871, as expressed in *Wolfe-Haddad Estate v Oakland Co,* 272 Mich App 323 (2006).

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 May 1, 2007, at P. O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-45. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered January 19, 2007:

PEOPLE V NYX, No. 127897. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, on the Court's own motion

pursuant to MCR 7.316(A)(3), the Court directs each party to file a supplemental brief not later than 42 days after the date of this order specifically addressing the following questions: (1) whether MCL 768.32 satisfies the requirements of both Const 1963, art 1, § 20 that a defendant "be informed of the nature of the accusation" and the "doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him," *Schmuck v United States,* 489 US 705, 717 (1989), where the lesser degree offense does not constitute a lesser included offense as defined in *People v Cornell*, 466 Mich 335 (2002); (2) more specifically, whether a defendant charged with first-degree criminal sexual conduct is, under Const 1963, art 1, § 20, sufficiently informed that such charge carries with it the possibility that he may be convicted of an uncharged lesser degree of that offense on the basis of any conduct that would suffice to establish an offense of the lesser degree; and (3) most specifically, whether a defendant charged with first-degree criminal sexual conduct, MCL 750.520b, is, under Const 1963 art 1, § 20, sufficiently informed that such charge carries with it the possibility that he may be convicted of the uncharged offense of second-degree criminal sexual conduct, MCL 750.520c, where conviction of the latter requires the prosecutor to prove an element that is not at issue to obtain a conviction of the former—i.e., that defendant touched the victim's "intimate parts . . . for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . ." MCL 750.520a(o). Court of Appeals No. 248094.

PEOPLE V HOLT, No. 128034. The motion to supplement the record is granted. Court of Appeals No. 250580.

CORRIGAN, J. (*concurring*). I concur in the order granting the prosecution's motion to supplement the record. I write separately to explain the reasons for granting the motion.

This Court ordered oral argument on the application for leave to appeal to consider whether there was a violation of the 180-day rule, MCL 780.131, in this case in light of *People v Williams*, 475 Mich 245 (2006), and whether the time limitation set forth in MCL 780.131 is subject to waiver or extension. 477 Mich 860 (2006). The prosecution then moved to supplement the record to show that it did not receive written notice of defendant's imprisonment by certified mail from the Department of Corrections, as required by MCL 780.131(1). Defendant argues that the motion should be denied because the prosecution waived the notice issue when it conceded in the trial court that it received notice of defendant's incarceration from the district court on August 28, 2002. I disagree.

While this case was in the lower courts, MCR 6.004(D) provided in relevant part:

> (D) Untried Charges Against State Prisoner.
>
> (1) *The 180-Day Rule.* Except for crimes exempted by MCL 780.131(2); MSA 28.969(1)(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
>
> (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. [Emphasis added.]

Under this version of the court rule, the 180-day period commenced when the prosecutor simply knew that defendant was incarcerated. In conceding that it had such notice, the prosecution reasonably relied on the former court rule and stated that the 180-day period commenced on August 28, 2002, the date it had received notice of defendant's incarceration from the district court.

But as we recognized in *Williams, supra* at 259, the statutory trigger for commencement of the 180-day period conflicts with the court rule. MCL 780.131(1) provides, in pertinent part:

> 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*. [Emphasis added.]

Thus, the 180-day period commences only after the Department of Corrections sends a certified letter to the prosecutor giving notice of the inmate's incarceration and a request for final disposition of the charges. *Williams, supra* at 256. In *Williams, supra* at 259, this Court held that the court rule was invalid to the extent that it improperly deviated from the statutory language. The *Williams* opinion applies to all cases pending on appeal in which the 180-day issue has been preserved. *Id.* Therefore, *Williams* applies to the instant case.

The prosecution's concession of the notice issue did not amount to a waiver because the prosecution did not know, and could not have known, at the time of the concession that this Court would invalidate MCR 6.004(D) and enforce the notice requirements listed in the 180-day statute. A party does not waive error that, because of a change in the law, could not have been recognized until the party's case was pending on appeal. *State v Munninger*, 209 Ariz 473, 477 (Ariz App, 2005). Waiver requires "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215 (2000) (internal citations and quotation marks omitted). Here, the prosecution did not intentionally abandon a *known* right. Under MCL 780.131(1), the prosecution had a right to notice by certified mail from the Department of Corrections of defendant's incarceration and a request for final disposition of the pending charges. But the prosecution did not know it had this right at the time because MCR 6.004(D) improperly provided that the prosecutor need only have notice that the defendant was incarcerated. Thus, the prosecution could not have used its concession of the notice issue as an appellate parachute.[1] The prosecution's concession of the notice issue was based on the notice of defendant's incarceration it received *from the district court*. The prosecution did *not* concede that it had received the statutorily required notice of defendant's incarceration from the Department of Corrections by certified mail. If the prosecution had the benefit of the *Williams* opinion, it would not have conceded the notice issue, because it would have known that the only valid notice under the 180-day rule is the notice required by statute. Under the law that was in effect at the time, however, the prosecution abandoned the notice issue without knowing that it had an existing right to receive proper notice under MCL 780.131(1). This is not a waiver. " 'A contrary holding would place an unreasonable burden on [the parties] to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where [the parties] might hope that an established rule . . . would be changed on appeal.' " *People v Guzman*, 40 Cal App 4th 691, 696 (1995) (Premo, Acting P.J., dissenting), quoting *People v Kitchens*, 46 Cal 2d 260, 263 (1956).[2]

CAVANAGH, J. I would deny the motion to supplement the record.

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[1] I reject Justice KELLY's contention that we are allowing the prosecution to "escape its admissions and waivers because of ignorance of the law." When the prosecution conceded the notice issue, it was justifiably relying on the law as it existed at the time. Contrary to Justice KELLY's belief, the prosecution should not have ignored the language of the then-valid court rule and the case law applying that rule.

[2] Justice KELLY argues that even if the 180-day period did not begin on August 28, 2002, it must have begun at the time of defendant's arraignment on September 12, 2002. But this misses the point of the *Williams* opinion. As I have discussed, under *Williams, supra* at 256, the 180-day period commences under MCL 780.131 only after the Department of Corrections sends a certified letter to the prosecutor giving notice of the

KELLY, J. (*dissenting*). I dissent from the majority's decision to allow the prosecution to supplement the record. It represents an eleventh-hour attempt to change the record and demonstrate that plaintiff did not have notice of defendant's incarceration more than 180 days before trial. Earlier, the prosecution conceded that it had notice of defendant's incarceration more than 180 days before trial. Given this concession, it waived the issue.

This Court ordered oral argument on whether to grant the application or take other peremptory action pursuant to MCR 7.302(G)(1). Specifically, we ordered the parties to address

> whether there was a violation of the 180-day rule, MCL 780.131,[1] in this case in light of *People v Williams*, 475 Mich 245 (2006), and whether the time limitation set forth in MCL 780.131

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inmate's incarceration and a request for final disposition of the charges. The prosecution had not received such a letter from the Department of Corrections on September 12, 2002.

[1] MCL 780.131 provides:

> (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.
>
> (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 correc-

> is subject to waiver or extension for any reason, such as prosecutor good faith, mutual agreement of the parties, or time attributable to the defendant, including requests for adjournment. [*People v Holt*, 477 Mich 860 (2006).]

Later, instead of filing a supplemental brief, the prosecution filed a motion to permit it to supplement the record or for a remand of the case to settle the record. The prosecution claimed that it had never received written notice from the Department of Corrections. The claim directly contradicted its past statements.

On the first day of trial, May 21, 2003, defendant raised the issue of a 180-day-rule violation and asked the trial court to dismiss the charges with prejudice. In response to this motion, the prosecutor specifically stated that the 180 days began to run on August 28, 2002. The prosecution repeatedly stated that it had notice on that date. It also indicated that, on August 30, 2002, it prepared a writ to cause defendant to be brought to court from a state prison in Jackson. Defendant was arraigned on September 12, 2002.

On the first day of trial, the court agreed with the prosecution's starting date. It ruled that the prosecution had notice on August 28, 2002.[2] The prosecution agreed with this assessment and never appealed from the determination. In fact, it never even argued that the determination was erroneous. In his subsequent brief to the Court of Appeals and in his application to this Court, defendant made note of the prosecution's concession that the 180 days began to run on August 28, 2002. Not only did the prosecution not object to these statements, it accepted defendant's statements of fact without challenging this starting date.

Given the prosecution's repeated acceptance of the August 28, 2002, starting date, it is too late now for it to advocate for some other date as the correct starting point. The prosecution has waived the argument. " 'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.' " *People v Carter*, 462 Mich 206, 215 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Allowing the prosecution to change the date in the course of this appeal would allow the creation of an appellate parachute. Counsel may not harbor error in the trial court for use as a parachute to save the case in the appellate courts. *Carter*, 462 Mich 214. In this case, if any error exists, it was created by the prosecution's advocacy for the August 28, 2002, starting date. Because of this, the Court should not now allow the prosecution to change its position.

> tional facility and before he or she has been returned to the custody of the department of corrections.

[2] Defendant had been arguing for an earlier starting date. He claimed that the count should start from the date the prosecution received notice that defendant would be extradited from incarceration in another state.

Justice CORRIGAN argues that the prosecution did not waive this argument because it did not know that the statutory language would control. I disagree. Although this Court recently invalidated the former version of MCR 6.004(D) in part because it conflicted with the language of MCL 780.131,[3] the requirements of the statutory 180-day rule have never changed. The language of the statute has not changed since its amendment in 1989. These requirements were always in existence, regardless of the language of MCR 6.004(D).

Given that the prosecution is a sophisticated party, it should have known that it was bound to follow the statutes enacted by the Legislature. The prosecution should be bound to know the law. And it should not be allowed to escape its admissions and waivers because of ignorance of the law. Contrary to Justice CORRIGAN's contention, the prosecution always knew that it had a right to receive notice pursuant to MCL 780.131. Because the statute did not change, the prosecution's advocacy for the August 28, 2002, starting date waived any later argument for some other date. Therefore, I would deny the prosecution's motion.

I would also note that, even if the prosecution is allowed to escape the August 28, 2002, starting date, it certainly had notice of defendant's incarceration by the arraignment on September 12, 2002. This date is more than 180 days before the start of trial on May 21, 2003. Even giving the prosecution the benefit of this doubt, its motion to supplement the record is untimely. Therefore, I must dissent from the majority's decision to grant the motion.

Order Entered February 14, 2007:

PROPOSED AMENDMENT OF RULE 7.306 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 7.306 of the Michigan Court Rules. Before the Court determines whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of these alternatives does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of one of the proposals in its present form.

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[3] *Williams*, 475 Mich 259.

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

RULE 7.306. BRIEFS IN CALENDAR CASES.

PROPOSAL A

(A)-(C) [Unchanged.]

(D) Amicus Curiae Briefs.

(1) Except as provided in subsection (2), ~~A~~an amicus curiae brief may be filed only on motion granted by the Court and must conform to subrules (A) and (B) and MCR 7.309. The time for filing the brief corresponds with the time for filing the brief of the party whose position the amicus curiae supports. An amicus curiae may not participate in oral argument except by Court order.

(2) No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the people of the state of Michigan or the state of Michigan or any of its agencies by the Solicitor General, on behalf of any political subdivision of the state when submitted by its authorized law officer, or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

PROPOSAL B

(A)-(C) [Unchanged.]

(D) Amicus Curiae Briefs.

(1) Except as provided in subsection (2), ~~Aan amicus curiae brief may be filed only on motion granted by the Court and must conform to subrules (A) and (B) and MCR 7.309. The time for filing the brief corresponds with the time for filing the brief of the party whose position the amicus curiae supports.~~ The brief of an amicus curiae is to be filed within 28 days after the brief of the appellee, or at such other time as the Court directs. An amicus curiae may not participate in oral argument except by Court order.

(2) No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the people of the state of Michigan or the state of Michigan or any of its agencies by the Solicitor General, on behalf of any political subdivision of the state when submitted by its authorized law officer, or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

Staff Comment: These proposed amendments would alter the requirements for filing amicus curiae briefs with the Michigan Supreme Court. Proposal A would add a provision similar to Rule 37.4 of the rules of the Supreme Court of the United States to allow state agencies and attorneys operating on behalf of public agencies to submit an amicus curiae brief without filing a motion to seek permission to do so. Proposal B includes the same proposed change and, in addition, would allow an amicus curiae 28 days after the filing of the appellee's brief to file its amicus curiae brief unless the Court directs otherwise. This provision would replace the current rule requiring an amicus curiae to file a brief within the same time period in which the party it supports must file its brief.

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 of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments received within the public comment period will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2006-44.

Order Entered March 8, 2007:

PEOPLE V MCCULLER, No. 128161. On February 20, 2007, the United States Supreme Court entered an order that vacated this Court's opinion in this case, and remanded this case to this Court for further consideration in light of *Cunningham v California*, 549 US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007). On order of the Court, this case shall be argued and submitted to the Court together with the cases of *People v Burns* (Docket No. 131898), and *People v Harper* (Docket No. 130988), at such future session of the Court as the cases are ready for submission. The parties shall file supplemental briefs by April 4, 2007, addressing the effect, if any, of *Cunningham v California* on the prison sentence imposed in this case, and on this Court's vacated opinion in this case, *People v McCuller*, 475 Mich 176 (2006). The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae by April 4, 2007. 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 by April 4, 2007. Court of Appeals No. 250000.

Order Entered March 14, 2007:

PROPOSED AMENDMENT OF RULE 8.110 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.110 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter 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 8.110. CHIEF JUDGE RULE.

(A)-(C) [Unchanged.]

(D) Court Hours; Court Holidays; Judicial Absences.

(1)-(5) [Unchanged.]

(6) Medical Leave. A judge, a judge of the Court of Appeals, or a justice of the Supreme Court must provide medical documentation verifying the need for medical leave if requested by the chief judge or chief justice. A judge in a single-judge court must provide this medical documentation to the state court administrator at the state court administrator's request. The chief judge or chief justice shall report to the state court administrator any judge or justice who uses more than 12 consecutive weeks of medical leave or who provides medical documentation that the chief judge or chief justice deems insufficient. Upon receiving such notification, the state court administrator may require that judge or justice to submit to an independent medical examination.

~~(6)~~(7) [Unchanged]

Staff Comment: The proposed amendment of Rule 8.110 of the Michigan Court Rules would allow a chief judge or the chief justice to request medical documentation verifying the need for a judge's or justice's medical leave. The decision to request medical documentation would be at the discretion of the chief judge or chief justice. Failure to provide sufficient documentation for sick leave or a sick-leave absence that lasts for more than 12 consecutive weeks would require the chief judge or chief justice to report that fact to the state court administrator, who would then be authorized to order an independent medical examination.

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

A copy of this order will be given to the Secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2007, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2005-20.

Order Entered March 21, 2007:

PROPOSED AMENDMENT OF RULES 5.207, 5.302, 5.307, AND 5.409 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amending Rules 5.207, 5.302, 5.307, and 5.409 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 5.207. SALE OF REAL ESTATE.

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

(1) the terms and purpose of the sale,

(2) the legal description of the property,

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

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

(B) [Unchanged.]

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. When filing either an application or petition to commence a decedent estate, a copy of the death certificate must be attached. If the decedent's domicile as reflected on the death certificate is different than the domicile alleged on the application or petition, the applicant or petitioner must either file an amended death certificate or file a petition to determine domicile with a petition for a formal testacy proceeding and set the matter for hearing with the court. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. Requiring additional documentation, such as information about the proposed or appointed personal representative, is prohibited.

(B)-(D) [Unchanged.]

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) [Unchanged.]

(B) Notice to Personal Representative. At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. The notice should be substantially in the following form or in the form specified by MCR 5.310(E), if applicable:

"Inventory Information: Within 91 days of the date of the letters of authority, you must submit to the court the information necessary for computation of the probate inventory fee. You must also provide the name and address for each financial institution listed on your inventory at the time the inventory is presented to the court.

"Change of Address: You must keep the court and all interested persons informed in writing within 7 days of any change in your address.

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the original appointment and all subsequent anniversaries during which the administration remains uncompleted.

"Duty to Complete Administration of Estate: You must complete the administration of the estate and file appropriate closing papers with the court. Failure to do so may result in personal assessment of costs."

(C)-(D) [Unchanged.]

ALTERNATIVE A:

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

(A) [No change.]

(B) Inventories.

(1) [No change.]

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

(3) Contents. The guardian or conservator must provide the name and address of each financial institution listed on the inventory. Property that the protected individual owns jointly or in common with others must be listed on the inventory along with the type of ownership and value.

(C) Accounts.

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

(2)-(3) [Unchanged.]

(4) Exception, Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no assets have been received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within ~~14~~ 28 days of the conservator's qualification or as otherwise

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

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

(6) [Unchanged.]

(D)-(F) [Unchanged.]

ALTERNATIVE B:

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

(A) [No change.]

(B) Inventories.

(1) [No change.]

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

(3) Contents. The guardian or conservator must provide the name and address of each financial institution listed on the inventory. Property that the protected individual owns jointly or in common with others must be listed on the inventory along with the type of ownership and value.

(C) Accounts.

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

(2)-(3) [Unchanged.]

(4) Exception, Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no assets have been

received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within ~~14~~ 28 days of the conservator's qualification or as otherwise ordered by the court. The conservator must file with the court an annual verification of funds on deposit with a copy of the corresponding financial institution statement attached.

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

(6) [Unchanged.]

(D)-(F) [Unchanged.]

Staff Comment: These amendments were proposed by the Probate and Estate Planning Section of the State Bar of Michigan. They are intended to address and clarify practice issues within the amended rules. The proposed amendment of MCR 5.207(A)(4) provides the alternative to include a tax statement to show the state equalized value on property. The proposed amendment of MCR 5.302(A) clarifies the process for courts and petitioners when there is a discrepancy between the domicile of the decedent as noted on the death certificate and the petition or application for probate. The proposed amendments of MCR 5.307(B) and MCR 5.409(B)(3) require the name and address of each financial institution be added to the inventory. The proposed amendment of MCR 5.409(C)(1) requires any account filed with the court to comply with relevant court rules. The proposed amendment of MCR 5.409(C)(4) extends the time in which to file proof of a minor's assets in a restricted account from 14 to 28 days. The proposed amendment of MCR 5.409(C)(5), in Alternative A, requires an annual verification of funds on deposit be filed with each annual account rather than a copy of the financial institution statement. The proposed amendment of MCR 5.409(C)(5), in Alternative B, allows the option of filing an annual verification of funds on deposit or presenting a copy of a financial institution statement with an annual account.

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 July 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-28. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered March 27, 2007:

PROPOSED AMENDMENT OF RULE 3.602 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amending Rule 3.602 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Rule 3.602. ARBITRATION.

(A) [Unchanged.]

(B) Proceedings to Compel or to Stay Arbitration.

(1) ~~In a pending action an application to the court for an order~~ A request for an order to compel or to stay arbitration or for another order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. ~~An initial application for an order under this rule, other than in a pending action, must be made by filing a complaint as in other civil actions.~~ If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions.

(2) On ~~application~~motion of a party showing an agreement to arbitrate that conforms to the arbitration statute, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement and the arbitration statute. If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the ~~application~~ motion.

(3) On ~~application~~motion, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. If there is a substantial and good-faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration.

(4) ~~An application~~ motion to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown.

(C) Action Involving Issues Subject to Arbitration; Stay. Subject to MCR 3.310(E), an action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or a~~n application~~

motion for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If ~~an application~~ motion for an order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay.

(D)-(I) [Unchanged.]

(J) Vacating Award.

(1) A request for an order to vacate an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(~~1~~2) On ~~application~~motion 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~~3) A~~n application~~ motion to vacate an award must be ~~made~~filed within ~~21~~91 days after ~~delivery of a copy~~ the date of the award ~~to the applicant~~, except that if it is predicated on corruption, fraud, or other undue means, it must be ~~made~~ filed within 21 days after the grounds are known or should have been known.

(~~3~~4) 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~~5) If the ~~application~~ motion 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) A request for an order to modify or correct an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to correct or modify an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(~~1~~2) On ~~application made~~motion of a party filed within ~~21~~91 days after ~~delivery of a copy of~~ the date 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~~3) If the ~~application~~ motion 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~~4) A~~n application~~ motion to modify or correct an award may be joined in the alternative with a~~n application~~ motion to vacate the award.

(L)-(N) [Unchanged.]

Staff Comment: The proposed amendments from the State Bar of Michigan contain two material revisions. First, the proposed changes eliminate the term "application," and substitute the word "motion" or "complaint," depending on whether there is a pending action. "Application" is not a defined term within the Michigan Court Rules or in the Michigan arbitration act, MCL 600.5001-600.5035.

Second, the proposed revision clarifies that a complaint to stay or compel arbitration, or to vacate, modify, or correct an award must first be filed, and then a motion, consistent with the spirit of MCR 3.602(B)(1), must be filed. The amendment also sets timing deadlines consistent with the time frame allowed under the federal arbitration act, 9 USC 1 *et seq*. Under the proposal, a motion to vacate, modify, or correct an award would have to be filed within 91 days (except for claims that an award is based on corruption, fraud, or other undue means, in which case the current 21-day filing period after the grounds were known or should have been known would apply). Three months is the period allowed under the federal arbitration act for a party to bring a motion to vacate, modify, or correct an arbitration award. The proponents assert that the three-month period under the federal act and the 21-day period in MCR 3.602(J)-(K) create confusion with regard to the applicable period in cases that may start as state actions but eventually be removed to federal court on petition of one of the parties.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-31. Your comment and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/htm.

Orders Entered April 10, 2007:

PROPOSED NEW RULES 2E.001 *ET SEQ.* OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering a proposal to adopt new rules regarding electronic filing in Michigan courts. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website, 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 current form.

[The language that follows is new.]

SUBCHAPTER 2E.000. APPLICABILITY; CONSTRUCTION.

RULE 2E.001. APPLICABILITY; CITATION.

The rules in this chapter govern the electronic filing and service of documents in all courts established by the constitution and laws of the state of Michigan, and may be referred to as "e-filing rules." Citation for these rules is governed by MCR 1.101.

RULE 2E.002. DEFINITIONS.

For purposes of this chapter:

(A) "Authorized user" means a party or a party's attorney who is registered pursuant to Rule 2E.004 and who has satisfied any requirements imposed by the court relating to electronic filing and service procedures.

(B) "Electronic filing" or "e-filing" means the completed electronic transmission of documents to the court and from the court.

(C)"Electronic filing plan" means a plan prepared by a court in a form approved by the state court administrator addressing the electronic filing and service of documents in that court.

(D) "Electronic filing service provider" means a court, or vendor with court approval, that provides for the electronic service of documents through the Internet.

(E) "Electronic service" or "e-service" means the electronic transmission of documents to a party, a party's attorney, or a party's representative. Unless otherwise expressly authorized by a court, electronic service does not include service of process or summons to gain jurisdiction over persons or property.

(F) "Public access terminal" means a publicly accessible computer terminal maintained at or by the court at which documents may be filed or served under this chapter and on which public court records may be viewed.

RULE 2E.003. SCOPE.

(A) A court whose electronic filing plan has been approved by the state court administrator may do any of the following, consistent with the rules of this chapter:

(1) Accept electronic filing and permit electronic service of documents, except as prohibited by Rule 2E.003(B);

(2) Issue electronic filing guidelines consistent with this chapter. The guidelines must be posted prominently on the court's electronic filing portal;

(3) Mandate electronic filing and electronic service of documents in specified cases;

(4) Electronically issue, file, and serve notices, orders, opinions, and other documents, subject to the provisions of these rules.

(B) Unless expressly authorized by a court, the following documents may not be electronically filed or electronically served:

(1) Documents that are sealed by a court under MCR 8.119(F);

(2) Case evaluation awards, acceptances, and rejections;

(3) Documents for in camera review;

(4) Documents that have access restricted by statute, court rule, or court order.

If a court expressly authorizes the filing of such documents, specific requirements regarding service must be completed as prescribed by the court, such as redacting confidential information.

RULE 2E.004. AUTHORIZED USERS.

(A) Only authorized users may engage in electronic filing or service. To become an authorized user, a person must complete registration with an electronic filing service provider and the electronic filing service provider must approve the person's registration.

(B) A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach or failure to comply with system requirements.

(C) An authorized user must notify the court and the electronic filing service provider of any change in the authorized user's firm name, delivery address, telephone number, fax number, e-mail address, or other required registration information. This notice must occur as soon as practicable but no later than 7 days after the effective date of the change.

RULE 2E.005. SERVICE FEES.

Service fees approved by the court may be assessed by an electronic filing service provider.

RULE 2E.006. SIGNATURES.

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

(B) Documents containing signatures of third parties (i.e., affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing party. Signed copies shall be provided to the parties or court upon request.

RULE 2E.007. RETENTION OF DOCUMENTS.

Unless otherwise ordered by the court, copies of all documents filed or served electronically under this chapter shall be maintained by the party

filing those documents and shall be made available, upon reasonable notice, for inspection or copying. Parties shall retain such copies until final disposition of the case and the expiration of all appeal opportunities.

RULE 2E.008. TRANSMISSION FAILURES.

(A) In the event of a transmission failure, a party may file a motion requesting that the court enter an order permitting a document to be deemed filed *nunc pro tunc* on the date it was first attempted to be sent electronically. The moving party must prove to the court's satisfaction that:

(1) the transmission was attempted at the time asserted by the party;

(2) the transmission failed because of the failure of the electronic filing service provider to process the electronic document; and

(3) the transmission failure was not caused, in whole or in part, by any action or inaction of the party.

SUBCHAPTER 2E.100. ELECTRONIC FILING.

RULE 2E.101. TIME AND EFFECT.

(A) A pleading filed electronically shall be considered filed with the court when the transmission to the electronic filing service provider is complete. The court's e-filing plan must state the time by which transmissions must be completed to be considered filed by the close of business on that day.

(B) If the court rejects a submitted document pursuant to court rule, the court shall notify the filer of the rejection and the document shall not become part of the official court record.

RULE 2E.102. E-FILING TRANSACTION RECEIPT.

Upon completion of an electronic filing transmission to an electronic filing service provider, the electronic filing service provider shall issue to the authorized user and to the court a transaction receipt that includes the date and time of the transmission, and the size of the transmission.

RULE 2E.103. ELECTRONIC CASE FILE.

The court may maintain the official case file in electronic format, if it is able to conform to the retention period required in General Schedule 16.

RULE 2E.104. PAYMENT OF FILING FEES.

(A) Authorized users may pay filing fees electronically through an electronic filing service provider.

(B) A filing fee is due and payable at the time of the transmission of the electronic document unless the fee is waived by the court pursuant to court rule. Failure to timely pay a filing fee may result in the rejection of the filing by the court.

RULE 2E.105. PUBLIC ACCESS TERMINALS.

When an e-filing system becomes mandatory for some or all cases in a court, that court must provide a public access terminal that is available during the hours the court is open to enable electronic filings in conformity with this chapter.

SUBCHAPTER 2E.200. ELECTRONIC SERVICE.

RULE 2E.201. GENERAL PROVISIONS.

(A) Except as prohibited by Rule 2E.003(B), if authorized by the court, service of process may be accomplished electronically among authorized users through the electronic filing service provider.

(B) Delivery of documents through the electronic filing service provider in conformity with these rules and any applicable court order shall be considered valid and effective service.

RULE 2E.202. TIME AND EFFECT.

A document served electronically through an electronic filing service provider in conformity with all applicable requirements of this chapter shall be considered served when the transmission from the electronic filing service provider to the recipient's e-mail address is complete, except that for the purpose of computing time to respond, a document filed or served after 5:00 p.m. local court time shall be deemed to have been served on the next day that is not a Saturday, Sunday, or legal holiday.

RULE 2E.203. E-SERVICE TRANSACTION RECEIPT.

Upon completion of an electronic service transaction, the electronic filing service provider shall issue to the authorized user and to the court a transaction receipt that includes the date and time of service. The transaction receipt serves as proof of service.

Staff Comment: In May 2003, this Court adopted an order authorizing several e-filing pilot projects in trial courts, and instructed that an e-filing subcommittee be formed within the Technical Advisory Group (TAG). The subcommittee drafted rules, which were then adopted by the TAG. This proposal is drafted substantially as adopted by the TAG.

Under the proposed rules, an authorized user would file documents with an electronic filing service provider. The draft rules require a court to submit a plan to State Court Administrative Office for approval before implementing an e-filing system. Specified documents would not be allowed to be transmitted, unless expressly authorized by the court.

In the event of transmission failure, the draft rules would allow a party to file a motion with the court asking that the document be deemed filed *nunc pro tunc* on the date it was first attempted, if the failed transmission was not the filing party's fault. Upon completion of an electronic filing transmission, the electronic filing service provider must issue a receipt to the authorized user that records the date and time of transmission.

Courts would be allowed to maintain the official case file in electronic format under the proposal. Filing fees would be required to be paid at the time of transmission unless the fee is waived by the court. Further, a court that accepts electronic filings would be required to provide a public access terminal to enable electronic filings.

Service of process would also be authorized under the subcommittee's draft rules. Electronic service is defined in the draft rules as "the electronic transmission of documents to a party, an attorney, or a party's

representative." However, such service does not include service of process or summons to gain jurisdiction, unless expressly authorized by the court.

This 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 this proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When submitting a comment, please refer to ADM File No. 2002-37.

PROPOSED AMENDMENT OF RULE 2.107 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the court is considering an amendment of Rule 2.107 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

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

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A-B) [Unchanged.]

(C) Manner of Service. Service of a copy of a paper on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally;

(b) leaving it at the attorney's office with the person in charge or, if no one is in charge or present, by leaving it in a conspicuous place; or

(c) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there.

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally; or

(b) leaving it at the party's usual residence with some person of suitable age and discretion residing there.

(3) Mailing. Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing.

(4) E-mail. Some or all of the parties may stipulate service of papers by e-mail.

(a) The stipulation of service by e-mail shall set forth the following:

(i) the e-mail addresses of all stipulating attorneys of record and any of their paralegals or assistants charged with receipt of the attorney's e-mail;

(ii) a subject line that identifies the case by party name and case number, along with the title or legal description of the document(s) being sent; and

(iii) the primary document format through which the parties shall send and receive documents by e-mail.

(b) The sending e-mail address shall allow for receipt of a reply e-mail.

(c) E-mail transmission after 4:00 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday.

(D-F) [Unchanged.]

(G) Filing With Court Defined. The filing of pleadings and other papers with the court as required by these rules must be with the clerk of the court, except that the judge to whom the case is assigned may accept papers for filing when circumstances warrant. A judge who does so shall note the filing date on the papers and transmit them forthwith to the clerk. It is the responsibility of the party who presented the papers to confirm that they have been filed with the clerk. The date the pleadings are filed, which includes receipt by mail, shall be noted on the docketing statement if different from the date the pleadings are docketed.

Staff Comment: The proposed amendments were adopted by the State Bar of Michigan Representative Assembly for submission to the Supreme Court. The proposal would allow parties to stipulate to agree to electronic discovery, or service of papers among the parties, by e-mail. The proposal would also require that court clerks note the date pleadings are filed if that date is different from the date the filing is docketed.

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 State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2007, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2007-12.

Order Entered April 13, 2007:

PEOPLE v LARRY MCGHEE, No. 130031. On order of the Court, the application for leave to appeal the November 8, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. On the Court's own motion pursuant to MCR 7.316(A)(3), the Court directs each party to file a supplemental brief not later than 42 days after the date of this order, specifically addressing whether the prosecution has standing to seek review in this Court when a defendant's conviction has been affirmed in the Court of Appeals. In considering that question, the parties may address the relevance, if any, of potential federal habeas corpus proceedings following a final decision by the Court of Appeals affirming a defendant's conviction. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae on the issue described above. Other persons or groups interested in the determination of that issue may move the Court for permission to file briefs amicus curiae. Reported below: 268 Mich App 600.

Index-Digest

INDEX–DIGEST

ACTIONS

PLEADINGS

1. The court rule that provides that an amendment that adds a claim or a defense relates back to the date of the original pleading does not apply to the addition of new parties to the action (MCR 2.118[D]). *Miller v Chapman Contracting*, 477 Mich 102.
2. The misnomer doctrine, which applies to correct inconsequential deficiencies or technicalities in the naming of parties to an action, does not apply where the plaintiff seeks to substitute or add a wholly new and different party to the proceedings. *Miller v Chapman Contracting*, 477 Mich 102.

AFFIDAVIT OF MERIT—*See*

NEGLIGENCE 2

AFFIDAVITS OF MERIT—*See*

NEGLIGENCE 3

AMENDMENTS—*See*

ACTIONS 2

ANOTHER STATE—*See*

SENTENCES 1

BENCH TRIAL—*See*

MOTIONS AND ORDERS 1

CIVIL RIGHTS

PUBLIC ACCOMMODATIONS

1. The public accommodations provision of the Civil Rights Act does not limit its prohibition against discrimination

to members of the public; the provision prohibits unlawful discrimination against any individual's full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation (MCL 37.2302[a]). *Haynes v Neshewat*, 477 Mich 29.

COMMERCE CLAUSE—*See*

TAXATION 1

CONSTITUTIONAL LAW—*See*

TAXATION 1

CRIMINAL LAW

MAINTAINING DRUG VEHICLE

1. A conviction of knowingly keeping or maintaining a vehicle used for keeping or selling controlled substances may not be based on an isolated incident lacking evidence of continuity; however, the prosecution need not show that the defendant's actions occurred "continuously for an appreciable period"; "keep or maintain" is not synonymous with "use" and implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence that conduces to the same conclusion (MCL 333.7405[1][d]). *People v Thompson*, 477 Mich 146.

SENTENCES

2. A person convicted of the offense of indecent exposure by a sexually delinquent person must be sentenced to a term of imprisonment whose minimum is within the range provided in the sentencing guidelines, unless the sentencing court articulates on the record a substantial and compelling reason to depart from the range provided by the guidelines; a sentence of probation is one such departure that must be supported by a substantial and compelling reason (MCL 750.10a, 750.355a, and 769.34 *et seq*.) *People v Buehler*, 477 Mich 18.

DEFAULT—*See*

NEGLIGENCE 2

EXECUTION OF TRANSFERS—*See*

MOTOR VEHICLES 1

EXEMPTIONS—*See*

TAXATION 2

FOREIGN CONVICTIONS—*See*

SENTENCES 2

GOVERNMENTAL IMMUNITY—*See*

HIGHWAYS 1

HIGHWAYS

GOVERNMENTAL IMMUNITY

1. The plain language of MCL 691.1404(1) requires as a condition to any recovery for injuries sustained as a result of a defective highway, that notice of injuries sustained and highway defects be given to the appropriate governmental agency within 120 days of the injury; notice is adequate under the statute if it is served within 120 days, no matter how much prejudice is actually suffered by the governmental agency; the notice provision is not satisfied if notice is served more than 120 days after the injury, even where there is no prejudice suffered by the governmental agency. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197.

INDECENT EXPOSURE BY SEXUALLY DELINQUENT PERSON—*See*

CRIMINAL LAW 2

INDIVIDUALS—*See*

CIVIL RIGHTS 1

INSURANCE

POLICY LANGUAGE

1. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75.

JUDICIAL CONSTRUCTION—*See*

INSURANCE 1

JURY TRIAL—*See*

MOTIONS AND ORDERS 1

KEEP OR MAINTAIN—*See*

CRIMINAL LAW 1

MAINTAINING DRUG VEHICLE—*See*

CRIMINAL LAW 1

MASTER AND SERVANT—*See*

NEGLIGENCE 1

MEDICAL MALPRACTICE—*See*

NEGLIGENCE 2, 3

MISNOMER DOCTRINE—*See*

ACTIONS 2

MOTIONS AND ORDERS

SUMMARY DISPOSITION

1. A trial court has the discretion to conduct a bench trial to resolve disputed factual questions related to motions for summary disposition based on MCR 2.116(C)(1) through (6) and must conduct a jury trial only if the grounds asserted in a motion for summary disposition are based on MCR 2.116(C)(7), a jury trial has been demanded, and the issue raised by the motion is an issue as to which there is a right to trial by jury; a jury trial is not required with regard to a motion based on MCR 2.116(C)(7) where resolution of the motion depends solely on a determination of an issue raised under MCR 2.116(C)(1) through (6) (MCR 2.116 [I][3]). *Al-Shimmari v Detroit Medical Center*, 477 Mich 280.

WAIVERS OF OBJECTION

2. A defendant must raise an objection to the sufficiency of service of process under MCR 2.116(C)(3) in his or her first motion or responsive pleading to avoid waiver of the objection; a defendant may make a general appearance and still avoid waiver of an objection to service of process under MCR 2.116(C)(3) where the defendant raises the objection in his or her first motion or responsive pleading (MCR 2.116 [D][1]). *Al-Shimmari v Detroit Medical Center*, 477 Mich 280.

MOTOR VEHICLES

TRANSFERS OF TITLE

1. An application for title to a motor vehicle is "executed" and the title is transferred to the new owner the instant the application is signed; the sending or delivery of the

application to the Secretary of State is not required in order to complete the execution (MCL 257.233[9]). *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62.

MUNICIPAL CORPORATIONS—*See*

TAXATION 2

NAMING OF PARTIES—*See*

ACTIONS 2

NEGLIGENCE

MASTER AND SERVANT

1. Vicarious liability rests on the imputation of the negligence of an agent to a principal; vicarious liability cannot be found where a court dismisses negligence claims against an agent for the plaintiff's failure to comply with the court rules or a court order, unless the negligence claims have been dismissed for lack of jurisdiction or for failure to join a party under MCR 2.205 or the court otherwise specifies that the dismissal was something other than a dismissal on the merits; such a dismissal operates as an adjudication on the merits and prevents the plaintiff from demonstrating that the agent was negligent in order to impute the agent's negligence to the principal (MCR 2.504 [B][3]). *Al-Shimmari v Detroit Medical Center*, 477 Mich 280.

MEDICAL MALPRACTICE

2. Where an affidavit of merit is filed with a medical malpractice complaint, a defendant must timely answer or otherwise file some responsive pleading to the complaint, or else be subject to a default; a defendant's unilateral belief that the affidavit does not conform to statutory requirements does not constitute good cause for failing to respond timely to the medical malpractice complaint, and is not a proper basis to challenge the entry of a default. *Saffian v Simmons*, 477 Mich 8.

3. The methods for authenticating out-of-state affidavits provided in MCL 600.2102(4) of the Revised Judicature Act and in the Uniform Recognition of Acknowledgments Act, MCL 565.261 et seq., are alternative, coequal means for such authentication, and a party may use either method to validate an affidavit. *Apsey v Memorial Hosp*, 477 Mich 120.

NEW PARTIES—*See*

ACTIONS 1

NOTARIZATION—*See*

NEGLIGENCE 3

NOTICE OF INJURY—*See*

HIGHWAYS 1

PLEADINGS —*See*

ACTIONS 1, 2

POLICY LANGUAGE—*See*

INSURANCE 1

PRIOR RECORD VARIABLES —*See*

SENTENCES 1, 2

PUBLIC ACCOMMODATIONS —*See*

CIVIL RIGHTS 1

PUBLIC PURPOSES—*See*

TAXATION 2

QUESTIONS OF FACT—*See*

MOTIONS AND ORDERS 1

RECEIPTS FOR SERVICES PERFORMED—*See*

TAXATION 3

SENTENCES

See, also, CRIMINAL LAW 2

PRIOR RECORD VARIABLES

1. A "prior high severity felony conviction" for purposes of scoring prior record variable 1 is a conviction for a crime listed in offense class M2, A, B, C, or D or for a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D if the conviction was entered before the sentencing offense was committed; the term "another state" refers to one of the states, other than Michigan, that comprise the United States (MCL 777.51[2]). *People v Price*, 477 Mich 1.

2. Although convictions in a foreign country cannot be considered under prior record variable 1, they can, under appropriate circumstances, give rise to a substantial and compelling reason to justify a departure from the guidelines range consistent with the standards articulated in *People v Babcock*, 469 Mich 247 (2003) (MCL 777.51[2]). *People v Price*, 477 Mich 1.

SINGLE BUSINESS TAX ACT—*See*

TAXATION 1, 3

SUMMARY DISPOSITION—*See*

MOTIONS AND ORDERS 1

TAXATION

CONSTITUTIONAL LAW

1. The section of the Single Business Tax Act that provides that receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts does not violate the fair apportionment prong of the Commerce Clause (US Const, art I, § 8, cl 3; MCL 208.53[c]). *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170.

MUNICIPAL CORPORATIONS

2. Land that a city is actively annexing, assembling, marketing, and preparing for resale to attract economic development and ensure a healthy and growing tax base is being "used for public purposes" and is therefore exempt from taxation pursuant to MCL 211.7m. *City of Mt Pleasant v State Tax Comm*, 477 Mich 50.

SINGLE BUSINESS TAX ACT

3. Receipts derived from services performed for planning activities within this state, services performed for design activities within this state, and services performed for construction activities within this state are deemed Michigan receipts under the Single Business Tax Act as long as those activities take place within this state; the act does not require that the services performed must themselves be performed within this state in order for the receipts derived from such services to be deemed Michigan receipts; there is no geographic limit on where the services take place or

on what type of services are being performed. (MCL 208.53[c]). *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170.

TRANSFERS OF TITLE—*See*

MOTOR VEHICLES 1

VICARIOUS LIABILITY—*See*

NEGLIGENCE 1

WAIVERS OF OBJECTION—*See*

MOTIONS AND ORDERS 2

WORDS AND PHRASES

CRIMINAL LAW 1

SENTENCES 1