MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

May 11, 2007 to July 16, 2007

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

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

Commissioners

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

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

State Court Administrator: CARL L. GROMEK

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
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
	JAMES R. CHYLINSKI, Grosse Pointe Woods,	2011
	ROBERT J. COLOMBO, Jr., Grosse Pointe,	2013
	DAPHNE MEANS CURTIS, Detroit,	2009
	CHRISTOPHER D. DINGELL, Trenton,	2009
	GERSHWIN ALLEN DRAIN, Detroit,	2011
	PRENTIS EDWARDS, Detroit,	2013
	CHARLENE M. ELDER, Dearborn,	2009
	VONDA R. EVANS, Dearborn,	2009
	EDWARD EWELL, Jr., Detroit,	2013
	PATRICIA SUSAN FRESARD, Grosse Pointe Woods,	2011
	SHEILA ANN GIBSON, Detroit,	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009
	DAVID ALAN GRONER, Grosse Pointe Park,	2011

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

[1] From May 14, 2007.

		Term Expires January 1 of
	LEO BOWMAN, Pontiac,	2009
	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[2]
	EDWARD SOSNICK, Bloomfield Hills,	2013
	MICHAEL D. WARREN, Jr., Beverly Hills,	2013
	JOAN E. YOUNG, Bloomfield Village,	2011
7.	DUNCAN M. BEAGLE, Fenton,	2011
	JOSEPH J. FARAH, Grand Blanc,	2011
	JUDITH A. FULLERTON, Flint,	2013
	JOHN A. GADOLA, Fenton,	2009
	ARCHIE L. HAYMAN, Flint,	2013
	GEOFFREY L. NEITHERCUT, Flint,	2013
	DAVID J. NEWBLATT, Linden,	2011
	MICHAEL J. THEILE, Flushing,	2009
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011
	CHARLES H. MIEL, Stanton,	2009
9.	GARY C. GIGUERE Jr., Portage,	2009
	STEPHEN D. GORSALITZ, Portage,	2011
	J. RICHARDSON JOHNSON, Portage,	2011
	PAMELA L. LIGHTVOET, Kalamazoo,	2013
10.	FRED L. BORCHARD, Saginaw,	2011
	WILLIAM A. CRANE, Saginaw,	2011
	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

[2] To July 7, 2007.

		Term Expires January 1 of
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
	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
	PAUL J. SULLIVAN, Grand Rapids,	2009
	MARK A. TRUSOCK, Comstock Park,	2013
	DANIEL V. ZEMAITIS, Grand Rapids,	2009
18.	WILLIAM J. CAPRATHE, Bay City,	2011
	KENNETH W. SCHMIDT, Bay City,	2013
	JOSEPH K. SHEERAN, Essexville,	2009
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2009
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2013
	MELINDA MORRIS, Ann Arbor,	2013
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009

		Term Expires January 1 of
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.	WILLIAM M. FAGERMAN, Cadillac,	2009[3]
29.	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
	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

[3] From May 15, 2007.

		Term Expires January 1 of
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.	WILLIAM A. BAILLARGEON, Saugatuck,	2009[4]
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2013
	RONALD C. NICHOLS, Big Rapids,	2015
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2013
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Port Austin,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2013
55.	THOMAS R. EVANS, Beaverton,	2009
	ROY G. MIENK, Gladwin,	2013
56.	THOMAS S. EVELAND, Dimondale,	2013
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2013

[4] From May 8, 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.	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
14B.	JOHN B. COLLINS, Ypsilanti,	2009

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

		Term Expires January 1 of
	NANCY A. FARMER, Detroit,	2013
	DEBORAH GERALDINE FORD, Detroit,	2011
	RUTH ANN GARRETT, Detroit,	2013
	RONALD GILES, Detroit,	2013
	JIMMYLEE GRAY, Detroit,	2009
	KATHERINE HANSEN, Detroit,	2011
	BEVERLY J. HAYES-SIPES, Detroit,	2009
	PAULA G. HUMPHRIES, Detroit,	2011
	PATRICIA L. JEFFERSON, Detroit,	2009
	VANESA F. JONES-BRADLEY, Detroit,	2013
	KENNETH J. KING, Detroit,	2009
	DEBORAH L. LANGSTON, Detroit,	2013
	WILLIE G. LIPSCOMB, Jr., Detroit,	2009
	LEONIA J. LLOYD, Detroit,	2011
	MIRIAM B. MARTIN-CLARK, Detroit,	2011
	DONNA R. MILHOUSE, Detroit,	2013
	B. PENNIE MILLENDER, Detroit,	2011
	CYLENTHIA L. MILLER, Detroit,	2011
	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
37.	JOHN M. CHMURA, Warren,	2013
	JENNIFER FAUNCE, Warren,	2009
	DAWNN M. GRUENBURG, Warren,	2011
	WALTER A. JAKUBOWSKI, Jr., Warren,	2013
38.	NORENE S. REDMOND, Eastpointe,	2009
39.	JOSEPH F. BOEDEKER, Roseville,	2009
	MARCO A. SANTIA, Fraser,	2013
	CATHERINE B. STEENLAND, Roseville,	2011
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2013
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009
41A.	MICHAEL S. MACERONI, Sterling Heights,	2009
	DOUGLAS P. SHEPHERD, Macomb Twp.,	2013
	STEPHEN S. SIERAWSKI, Sterling Heights,	2011
	KIMBERLEY ANNE WIEGAND, Sterling Heights,	2013
41B.	LINDA DAVIS, Clinton Twp.,	2009
	SEBASTIAN LUCIDO, Clinton Twp.,	2013
	SHEILA A. MILLER, Clinton Twp.,	2011
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2013
43.	KEITH P. HUNT, Ferndale,	2013
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2013
45A.	WILLIAM R. SAUER, Berkley,	2009

45B.	MICHELLE FRIEDMAN APPEL, HUNTINGTON WOODS,	2009
	DAVID M. GUBOW, HUNTINGTON WOODS,	2009
46.	SHEILA R. JOHNSON, SOUTHFIELD,	2009
	SUSAN M. MOISEEV, SOUTHFIELD,	2013
	WILLIAM J. RICHARDS, BEVERLY HILLS,	2009
47.	JAMES BRADY, FARMINGTON HILLS,	2009
	MARLA E. PARKER, FARMINGTON HILLS,	2011
48.	MARC BARRON, BIRMINGHAM,	2011
	DIANE D'AGOSTINI, BLOOMFIELD HILLS,	2013
	KIMBERLY SMALL, WEST BLOOMFIELD,	2009
50.	MICHAEL C. MARTINEZ, PONTIAC,	2009
	PRESTON G. THOMAS, PONTIAC,	2011
	CYNTHIA THOMAS WALKER, PONTIAC,	2009
51.	RICHARD D. KUHN, JR., WATERFORD,	2009
	PHYLLIS C. MCMILLEN, WATERFORD,	2013
52-1.	ROBERT BONDY, MILFORD,	2013
	BRIAN W. MACKENZIE, NOVI,	2009
	DENNIS N. POWERS, HIGHLAND,	2013
52-2.	DANA FORTINBERRY, CLARKSTON,	2009
	KELLEY RENAE KOSTIN, CLARKSTON,	2011
52-3.	LISA L. ASADOORIAN, ROCHESTER HILLS,	2013
	NANCY TOLWIN CARNIAK, ROCHESTER HILLS,	2011
	JULIE A. NICHOLSON, ROCHESTER HILLS,	2009
52-4.	WILLIAM E. BOLLE, TROY,	2009
	DENNIS C. DRURY, TROY,	2013
	MICHAEL A. MARTONE, TROY,	2011
53.	THERESA M. BRENNAN, BRIGHTON,	2009
	L. SUZANNE GEDDIS, BRIGHTON,	2011
	CAROL SUE READER, HOWELL,	2013
54A.	LOUISE ALDERSON, LANSING,	2011
	PATRICK F. CHERRY, LANSING,	2009
	FRANK J. DELUCA, LANSING,	2013
	CHARLES F. FILICE, LANSING,	2009
	AMY R. KRAUSE, LANSING,	2011
54B.	RICHARD D. BALL, EAST LANSING,	2011
	DAVID L. JORDON, EAST LANSING,	2013
55.	ROSEMARIE ELIZABETH AQUILINA, EAST LANSING,	2011
	THOMAS P. BOYD, OKEMOS,	2009
56A.	HARVEY J. HOFFMAN, GRAND LEDGE,	2011
	JULIE H. REINCKE, EATON RAPIDS,	2009
56B.	GARY R. HOLMAN, HASTINGS,	2013
57.	STEPHEN E. SHERIDAN, SAUGATUCK,	2013
	JOSEPH S. SKOCELAS, PLAINWELL,	2009
58.	SUSAN A. JONAS, SPRING LAKE,	2009
	RICHARD J. KLOOTE, GRAND HAVEN,	2013
	BRADLEY S. KNOLL, HOLLAND,	2009
	KENNETH D. POST, ZEELAND,	2011
59.	PETER P. VERSLUIS, GRAND RAPIDS,	2011

		Term Expires January 1 of
60.	HAROLD F. CLOSZ, III, North Muskegon,	2009
	MARIA LADAS HOOPES, North Muskegon,	2009
	MICHAEL JEFFREY NOLAN, Twin Lake,	2013
	ANDREW WIERENGO, Muskegon,	2011
61.	PATRICK C. BOWLER, Grand Rapids,	2009
	DAVID J. BUTER, Grand Rapids,	2009
	J. MICHAEL CHRISTENSEN, Grand Rapids,	2011
	JEANINE NEMESI LaVILLE, Grand Rapids,	2013
	BEN H. LOGAN, II, Grand Rapids,	2013
	DONALD H. PASSENGER, Grand Rapids,	2011
62A.	PABLO CORTES, Wyoming,	2009
	STEVEN M. TIMMERS, Grandville,	2013
62B.	WILLIAM G. KELLY, Kentwood,	2009
63-1.	STEVEN R. SERVAAS, Rockford,	2009
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	2009
64A.	RAYMOND P. VOET, Ionia,	2009
64B.	DONALD R. HEMINGSEN, Sheridan,	2009
65A.	RICHARD D. WELLS, DeWitt,	2009
65B.	JAMES B. MACKIE, Alma,	2009
66.	WARD L. CLARKSON, Corunna,	2013
	TERRANCE P. DIGNAN, Owosso,	2009
67-1.	DAVID J. GOGGINS, Flushing,	2009
67-2.	JOHN L. CONOVER, Davison,	2009
	RICHARD L. HUGHES, Otisville,	2011
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2013
68.	WILLIAM H. CRAWFORD, II, Flint,	2013
	HERMAN MARABLE, Jr., Flint,	2013
	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
	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

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

MUNICIPAL JUDGES

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

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

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

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

21 CASES; 59 OPINIONS; 527 ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL GRANTED OR DENIED

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

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TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

ADMINISTRATIVE ORDER

Entered June 19, 2007, effectively immediately (File No. 2003-47)—REPORTER.

On August 9, 2006, this Court adopted Administrative Order No. 2006-6, which prohibited the "bundling" of asbestos-related cases. 476 Mich xliv-li (2006). At the same time, the Court stated that it would accept comments on the administrative order until December 1, 2006. Notice and an opportunity for comment at a public hearing having been provided, the order is retained.

CORRIGAN, J. (*concurring*). I concur with the order retaining Administrative Order No. 2006-6. I write separately to point out that, contrary to the dire predictions of the dissenters to the administrative order, the initial adoption of our antibundling order last August has not caused the sky to fall. The order has not disrupted the progress of the asbestos docket in the Third Circuit Court. Since the administrative order was adopted, we are informed that all the cases scheduled each month have been settled without trial, just as had occurred before the adoption of the order.

The only reported new effect of Administrative Order No. 2006-6 is that settlement negotiations occur among the parties without court participation. Contrary to the dire predictions, the asbestos docket has not come to a grinding halt nor has our order required ten additional Third Circuit judges or dramatically increased the

workload. In fact, the circuit court should have more time available because of the loss of court-ordered settlement conferences. I support Administrative Order No. 2006-6 because it continues to serve the sound and simple purpose of ensuring that each case is considered on its own individual merits.

I remain interested in further studying the administrative proposal regarding the development of an inactive asbestos docket.

WEAVER, J. (*dissenting*). I dissent to the retention of Administrative Order No. 2006-6 because I remain unconvinced that this "antibundling" order falls within the scope of our judicial powers.

KELLY, J. *(dissenting)*. I oppose the retention of Administrative Order No. 2006-6. The purported objective of the order is to ensure that the circuit courts consider each asbestos-related case on its own merits. Since the order was entered, we have received no indication that this objective has been even minimally attained. Not one asbestos-related case has been submitted to the courts for trial on its merits. Instead, these cases are settling in bundles, as before. But, because of AO No. 2006-6, they must now settle without the assistance of the courts. AO No. 2006-6 is confusing to those at whom it is directed and ineffectual for all intents and purposes. It should be rescinded.

CAVANAGH, J., concurred with KELLY, J.

ADMINISTRATIVE ORDER 2007-3

Entered June 19, 2007, effectively immediately (File No. 2002-37)—REPORTER.

On order of the Court, the 6th Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin August 1, 2007, or as soon thereafter as is possible, and shall remain in effect until July 30, 2009, or further order of this Court. The 6th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 6th Circuit Court Electronic Document Filing Pilot Project, the 6th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 6th Circuit Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

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

PROPOSED E-FILING PILOT PROJECT IN OAKLAND COUNTY

1. Construction

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

2. Definitions

(a) "Clerk" means the Oakland County Clerk.

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

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

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

(e) "Pilot program" means the initiative by the Sixth Judicial Circuit Court, the Oakland County Clerk, and the Oakland County Department of Information Technology in conjunction with Wiznet, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. All state courts in Michigan are envisioned as eventually permit-

ting e-filing (with appropriate modifications and improvements). The Oakland County pilot program will begin testing with four circuit judges with "C" or "N" type civil cases. The court plans to expand the pilot program to all circuit judges who wish to participate. The pilot program is expected to last approximately two years, beginning on August 1, 2007.

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

3. Participation in the Pilot Program

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

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

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

Signature

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

(b) Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Clerk's Office during the normal business hours of 8:00 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

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

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

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

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

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

(f) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory, or opposing party.

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

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

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

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand delivered. Where a praecipe is required by LCR 2.119(A), it must be e-filed along with the documents that require the praecipe, unless another court-approved mechanism is approved and used by the filer.

(b) The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon

request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

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

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

Type of Filing	Fee
EFO (e-filing only)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

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

6. Service

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

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

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties

(but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

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

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

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

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

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

7. Format and Form of E-filing and Service

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

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

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

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

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

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

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

(b) initiating documents, and

(c) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

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

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

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

(d) At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and public access in a manner consistent with the instructions of the court and the court rules.

10. Court Notices, Orders, and Judgments

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

11. Technical Malfunctions

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

receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

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

12. Privacy Considerations

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

1. Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

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

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

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

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

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

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

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

or

2. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the

redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

13. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the state court administrator.

14. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 30, 2009.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted May 22, 2007, effective September 1, 2007 (File No. 2006-33)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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) 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, unless a period in which to file dispositive motions is established under a scheduling order entered pursuant to MCR 2.401. 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 such period.

(E)-(J) [Unchanged.]

Staff Comment: The amendments of MCR 2.116 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 also clarify that it is within the court's discretion to consider a motion based on the grounds set forth in MCR 2.116(C)(8), (9), or (10), if the motion is filed after the period for dispositive motions established in a scheduling order has expired. This clarification reflects 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 set forth in the scheduling order for accepting such an agreement 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.

Adopted May 22, 2007, effective September 1, 2007 (File No. 2006-40)—REPORTER.

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

RULE 2.222. CHANGE OF VENUE, VENUE PROPER.

(A-C) [Unchanged.]

(D) Filing and Jury Fees After Change of Venue.

(1) At or before the time the order changing venue is entered, the party that moved for change of venue shall tender a negotiable instrument in the amount of the applicable filing fee, payable to the court to which the case is to be transferred. The transferring court shall send the negotiable instrument with the case documents to the transferee court.

(2) If the jury fee has been paid, the clerk of the transferring court shall forward it to the clerk of the court to which the action is transferred.

(E) [Unchanged.]

Staff Comment: This amendment was adopted to address the situation in which a party moves for change of venue and an order is entered changing venue but the movant fails to pay the filing fee in the transferee court. In such a situation, the original court loses jurisdiction upon entry of the order transferring venue, but the transferee court does not gain jurisdiction until the appropriate filing fee has been paid. The amendment requires that the moving party submit a negotiable instrument in the amount of the filing fee for the transferee court before or at the time the order changing venue is entered, thereby ensuring that there will not be a jurisdictional gap.

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

Adopted May 22, 2007, effective September 1, 2007 (File No. 2006-29)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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, the 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 amendment clarifies that MCR 3.411(H), under which a judgment determining an interest in land is effective only as to the parties to the action, does not apply to an action in which title was determined under the principle of adverse possession. Under longstanding Michigan caselaw, interests in land 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).

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

Adopted May 22, 2007, effective September 1, 2007 (File No. 2006-45)—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) 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. 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 amendment of MCR 5.307 eliminates the requirement to reduce the value of property by the amount of secured loans for purposes of determining the inventory fee. This amendment conforms 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.

Adopted May 22, 2007, effective September 1, 2007 (File No. 2006-03)—REPORTER.

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

(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 amendment clarifies that bail agents are liable only for the appearance of a defendant, and not for compliance with conditions imposed on a defendant by the court as part of a conditional release pursuant to MCR 6.106. The amendment also 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, regardless of whether the defendant failed to appear.

The amendment also prohibits 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.

Adopted May 22, 2007, effective September 1, 2007 (File No. 2006-35)—REPORTER.

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

(4) [Unchanged.]

(G)–(H) [Unchanged.]

Staff Comment: The amendment of the rule creates 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 to probation-revocation violations.

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

Adopted May 31, 2007, effective September 1, 2007 (File No. 2005-04)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise 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. At the time it issues the order or as provided in MCR 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 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) 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, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter, 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 3.976. 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 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 of the following:

(i) murder of another child of the parent;

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

(iii) aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter; 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)-(4) [Unchanged.]

(C)-(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 reasonable efforts to prevent removal have been made or can determine that reasonable efforts to prevent removal are not required due to aggravated circumstances.

An additional amendment of MCR 3.965(D)(2)(b)(iii) mirrors the provision in the federal Social Security Act at 42 USC 671(a)(15)(D)(ii)(III), which was suggested in a letter from the Department of Health and Human Services. For the full text of the letter, please see the staff comment of MCR 3.976.

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 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.

Staff Comment for MCR 3.976: The amendment of MCR 3.976(B)(1)(a) deletes a phrase ("guardian, custodian, or nonparent adult") to make the rule more consistent with the federal statute that requires a permanency planning hearing to be held if the court finds that reasonable efforts to prevent removal or reunite the family are not required because the parent (as opposed to the guardian, custodian, or nonparent adult) has subjected the child to aggravated circumstances.

The amendment of MCR 3.976(B)(1)(b)(iii), which is identical to a change made in MCR 3.965(D)(2)(b)(iii), mirrors the provision in the federal Social Security Act at 42 USC 671(a)(15)(D)(ii)(III), as pointed out by the Department of Health and Human Services.

Following the Court's adoption of the 2006 amendments to the juvenile rules, the Court asked the Department of Health and Human Services to review the rules and provide feedback on whether it believed the rules comply with federal regulations regarding Title IV-E cases. HHS responded by letter suggesting several minor amendments as follows:

Dear Chief Justice Taylor:

> Dr. Wade Horn has asked that I respond to your letter of November 15, 2006, requesting that the Department of Health and Human Services review and determine whether Michigan's recently amended Court Rules comply with title IV-E of the Social Security Act (the Act).
>
> The courts play an integral role in assuring that the protections afforded to children and families by the Act are achieved, and we appreciate the attention the Michigan court has given to the Federal requirements. We also appreciate the opportunity to provide input on the amended Court Rules. Our observations follow:
>
> (1) We note that Rule 3.976(B)(1)(a) specifies the circumstances under which a reasonable efforts determination is not required by the court and is broader than allowed by Federal statute at section 471(15)(D) [sic]. Federal statute does not require reasonable efforts be made by the State if certain acts have been committed by a parent. However, in addition to the parent, Rule 3.976(b)(1)(a) does not require reasonable efforts to be made if those acts are committed by a guardian, custodian or nonparent adult. To be in compliance with Federal law, the Court Rule must be limited to acts committed by the parent. [This change is made as part of this order.]
>
> (2) We note that under 3.976(E)(3)(b) that the court has the authority to "place the child" and under 3.975(G)(2) to "change the placement of the child." We encourage the court to be sensitive to the requirement under section 472(a)(2)(B) [sic] of the Act that the State agency must have responsibility for placement and care of a child as a condition of title IV-E eligibility. If a court-ordered placement involves the court taking placement responsibility away from the agency and assuming such responsibility by choosing a child's placement, the child would not be eligible for title IV-E foster care maintenance payments. This does not mean that the court must always concur with the agency's recommendation in order for the child to be eligible for title IV-E funding. As long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to

make appropriate placement decisions, the title IV-E requirement will be met. For further guidance on the requirement for the responsibility for placement and care, please refer to section 8.3A.12 of the Children's Bureau on-line Child Welfare Policy Manual available at: http;//www.acf.hhs.gov/j2ee/programs/ /cb/bylaws_policies/laws/cwpm/index/jsp. [Because judges in Michigan have been well-trained and are sensitive to the requirement that placement and care is typically a State agency (DHS) responsibility, and because HHS notes that even if a judge places a child, such placement may be eligible for federal reimbursement, and finally, because HHS does not recommend a change to this rule, the Court did not adopt a specific change related to this portion of the HHS letter.]

(3) We also note that the language in Rule 3.965(D)(2)(b)(iii) and Rule 3.976(B)(1)(b)(iii) do not contain the same language and that the language in neither mirror that of section 471(15)(D)(III) [sic] of the Act. While provisions, as written, do not conflict with Federal statute, we wanted to bring this to your attention. [The Court adopted language in these two rules conforming it to the federal statutory language.]

We hope these comments are useful as Michigan strives for compliance with title IV-E statutory and regulatory requirements. We encourage the judicial system to continue its close collaboration with the Michigan Department of Human Services. Your on-going collaboration, as well as a partnership, with the State Legislature is key in ensuring that State statute, Court Rules and agency policy are working in concert to comply with Federal child welfare requirements. We appreciate the collaborative approach that Michigan has embarked on to strengthen the State's mission to promote the safety, permanency and well-being of its children and families.

In light of HHS's letter, the Court presumes that in all other respects, the rules now comply with federal requirements for title IV-E purposes.

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

Adopted July 3, 2007, effective September 1, 2007 (File No. 2007-02) —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) [Unchanged.]

(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(21) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), 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)-(c) [Unchanged.]

(D)-(E)[Unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(G) [Unchanged.]

(H) Allegations of Additional Abuse or Neglect.

(1) Proceedings on a supplemental petition seeking termination of parental rights on the basis of allegations of additional child abuse or child neglect, as defined in MCL 722.622(f) and (j), of a child who is under the jurisdiction of the court are governed by MCR 3.977.

(2) Where there is no request for termination of parental rights, proceedings regarding allegations of additional child abuse or child neglect, as defined in MCL 722.622(f) and (j), of a child who is under the jurisdiction of the court, including those made under MCL 712A.19(1), are governed by MCR 3.974 for a child who is at home or MCR 3.975 for a child who is in foster care.

Staff Comment: These amendments correct references that were changed as a result of statutory amendments made in 2002 to the Child Protection Law, as well as 2005 amendments of the Mental Health Code.

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

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted May 22, 2007, 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 DISQUALIFICATIONS: 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 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.

Amendment of the last paragraph of the first staff comment: Rule 1.10(c) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c), unless the provisions of this rule are followed.

Staff Comment: MRPC 1.10(a) requires that if a lawyer practicing alone is prohibited from representing a person in particular situations (including under MRPC 1.9, which prohibits representation if such representation would create a conflict of interest with a former client), then no lawyers associated with that attorney may represent such a client. The amendment of MRPC 1.10(a) removes a reference to a provision (MRPC 1.9[c]) that is unrelated to the question whether a lawyer is prohibited from representing a client. MRPC 1.9(c) prohibits a

lawyer from using or revealing information gained during representation of a former client, and does not prohibit representation based on a conflict of interest. Thus, it is misplaced to use it as a basis for imputed disqualification in MRPC 1.10(a).

In addition, this order makes a correction to the reference to Rule 1.10 in the final paragraph of the current staff comment. That paragraph relates to application of the rule after a lawyer leaves a firm, which is covered by MRPC 1.10(c), and not to circumstances surrounding when a lawyer becomes associated with a firm, which is covered by MRPC 1.10(b).

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

SUPREME COURT CASES

In re PETITION BY WAYNE COUNTY TREASURER

Docket No. 129341. Argued October 5, 2006 (Calendar No. 10). Decided May 23, 2007.

The Wayne County Treasurer petitioned the Wayne Circuit Court for the tax foreclosure of a parcel owned by Perfecting Church. The treasurer sent the statutorily required notice to the previous owner of the parcel and did not post a notice on the parcel or on a second parcel that had been purchased from the seller at the same time and recorded in a single deed for both parcels. Therefore, the church had no notice of the foreclosure proceedings. The court, Mary Beth Kelly, J., entered a judgment of foreclosure. The county thereafter sold the parcel to Matthew Tatarian and Michael Kelly. After the sale, the church learned of the foreclosure and sale and filed a motion for relief from the foreclosure judgment in the circuit court. The church noted that before the treasurer initiated the foreclosure proceedings against the first parcel, the second parcel had been listed on the county foreclosure listing and that the church had paid the outstanding taxes on that parcel and had been assured by the treasurer that there were no further outstanding taxes on either parcel. Tatarian and Kelly were allowed to intervene in the action. The circuit court granted the motion for relief from the foreclosure judgment, vacated the judgment, and restored the church's title to the first parcel. The Court of Appeals, FORT HOOD, P.J., and TALBOT and MURRAY, JJ., denied the intervening parties' delayed application for leave to appeal. Unpublished order of the Court of Appeals, entered July 11, 2005 (Docket No. 261074). The Supreme Court granted the intervening parties' application for leave to appeal. 474 Mich 1059 (2006).

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

Under the General Property Tax Act, MCL 211.1 *et seq.*, if a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, MCL 211.78k(6) deprives the circuit court of jurisdiction to alter the judgment of foreclosure. MCL 211.78k(6) vests absolute title in the foreclosing governmental unit and, if the taxpayer does not redeem the property

or avail itself of the appeal process in MCL 211.78k(7), the governmental unit's title shall not be stayed or held invalid. The only possible remedy for such a property owner would be an action for monetary damages under MCL 211.78*l* based on a claim that the property owner did not receive any notice. The act does not provide relief for property owners who are denied due process. Therefore, in cases where the foreclosing governmental unit complies with the notice provisions of the act, MCL 211.78k is not problematic. However, where the foreclosing governmental unit fails to provide constitutionally adequate notice, as in this case, MCL 211.78k permits the property owner to be deprived of the property without due process of law. The Legislature cannot create a statutory scheme that allows for constitutional violations with no recourse. Therefore, the portion of the statute purporting to limit the circuit court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process. The order of the circuit court vacating the judgment of foreclosure and restoring the church's title to the property in question must be affirmed.

Justice CAVANAGH, joined by Justice KELLY, concurring in the result only, disagreed that the notice procedures of the General Property Tax Act necessarily satisfy due process.

Justice WEAVER, concurring in the result only, would have held that, under the relevant provisions of MCL 211.78 *et seq*. in effect at the time the petition for foreclosure was filed in this matter, the circuit court was not deprived of jurisdiction to grant relief to Perfecting Church pursuant to the relief from judgment court rule, MCR 2.612(C), and that Perfecting Church was not limited to a recovery of monetary damages because it was completely deprived of adequate notice of the pending foreclosure, which was a denial of the minimum due process required under the state and federal constitutions.

Affirmed.

TAXATION — CONSTITUTIONAL LAW — FORECLOSURES — DUE PROCESS.

The portion of the General Property Tax Act purporting to limit a circuit court's jurisdiction to modify judgments of tax foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process of law, such as where the foreclosing governmental unit fails to provide constitutionally adequate notice of the foreclosure proceedings (MCL 211.78k).

Howard & Howard Attorneys, P.C. (by *Jason D. Killips, Sara K. MacWilliams, Robert J. Curtis,* and *James Geary),* for Perfecting Church.

Aldrich Legal Services, PLLC (by *Brad B. Aldrich*), for Matthew Tatarian and Michael Kelly.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Kevin T. Smith*, Assistant Attorney General, for the Department of Treasury.

Michael A. Cox, Attorney General, *Thomas F. Schimpf,* Division Chief, and *Kevin L. Francart*, Assistant Attorney General, for the Michigan Land Bank Fast Track Authority.

Michael A. Cox, Attorney General, *Terrence Grady*, Division Chief, and *Matthew H. Rick*, Assistant Attorney General, for the Michigan State Housing Development Authority.

Dykema Gossett PLLC (by *Jill M. Wheaton, Theodore W. Seitz,* and *Stacy R. Owen*), for the Michigan Association of County Treasurers.

Simon, Galasso & Frantz, PLC (by *Kenneth G. Frantz*), for High Praise Cathedral of Faith Ministries.

Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by *Kevin J. Roragen* and *Michael H. Rhodes*), for Westhaven Manor LDHA LP.

John E. Johnson, Jr., Corporation Counsel, and *Joanne D. Stafford* and *James Noseda*, Assistant Corporation Counsels, for the city of Detroit.

YOUNG, J. This case concerns the jurisdiction of circuit courts to modify judgments of foreclosure when the foreclosing governmental unit deprives the property owner of due process. Generally, the provision of the General Property Tax Act (GPTA),[1] at issue in this case, as well as recent amendments of the GPTA, reflect a legislative effort to provide finality to foreclosure judgments and to quickly return property to the tax rolls. However, this legislative regime is problematic when the property owner is not provided with constitutionally adequate notice of the foreclosure. This is because MCL 211.78k(6) serves to insulate violations of the Due Process Clause of the United States Constitution and of the Michigan Constitution from judicial review and redress, thereby completely denying the property owner procedural due process. As applied to the limited class of property owners who have been denied due process in this statutory foreclosure scheme, this provision of the GPTA is unconstitutional. Therefore, for the reasons stated herein, we affirm the Wayne Circuit Court's order vacating the judgment of foreclosure and restoring the church's title to the property in question.

FACTS AND PROCEDURAL HISTORY

The property owner in this case, Perfecting Church, purchased two parcels for use as parking lots during its church services. Both parcels were transferred by a single deed that the church properly recorded. Nevertheless, after the church purchased and recorded a *single deed* for both the parcels, the Wayne County Treasurer listed one parcel on the Wayne County foreclosure listing. The church paid the outstanding taxes on that parcel and the treasurer assured the church

[1] MCL 211.1 *et seq*.

that there were no further outstanding taxes on either parcel. Despite those assurances, the treasurer initiated foreclosure proceedings against the other parcel. However, the church never received notice of the pending foreclosure because the treasurer did not comply with the notice provisions of the GPTA. Specifically, the treasurer sent the statutorily required notice to the *previous* owner and did not post a notice on either of the parcels.[2] Thus, the church had no notice of the foreclosure proceedings. The Wayne Circuit Court entered a judgment of foreclosure. After the redemption period passed, Wayne County sold the property to the intervening parties, Matthew Tatarian and Michael Kelly.

Subsequent to the sale, the church learned of the foreclosure and sale, and it filed a motion for relief from the foreclosure judgment in the Wayne Circuit Court. That court granted the church's motion and the Court of Appeals denied the intervening parties' delayed application for leave to appeal.[3] This Court granted their application for leave, directing the parties to address two issues:

> (1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to MCR 2.612(C), notwithstanding the provisions of MCL 211.87[*l*](1) and (2); and (2) whether MCL 211.78[*l*] permits a person to be deprived of property without being afforded due process.[4]

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[2] MCL 211.78i requires the foreclosing entity to notify the property owner by certified mail. Additionally, MCL 211.78i requires the foreclosing governmental unit to visit the property, determine whether it is occupied, and either inform the occupant of the foreclosure or post notice in a conspicuous place.

[3] Unpublished order of the Court of Appeals, entered July 11, 2005 (Docket No. 261074).

[4] 474 Mich 1059 (2006).

STANDARD OF REVIEW

This Court reviews questions of law, such as issues of constitutional and statutory construction, de novo.[5]

ANALYSIS

Under the GPTA, a "foreclosing governmental unit shall file a single petition with the clerk of the circuit court of that county listing all property forfeited and not redeemed to the county treasurer under [MCL 211.78g] to be foreclosed under [MCL 211.78k] . . . . "[6] Before the hearing on the petition, the foreclosing governmental unit must provide proof of service of the notices required under the statute, as well as proof of the personal visit to the property and publication.[7] The circuit court then must make a series of factual determinations to complete the foreclosure process.[8] At the time the county foreclosed the church's property, the GPTA provided:

> Except as otherwise provided in subsection (5)(c) and (e),[9] fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after the entry of judgment shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not

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[5] *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

[6] MCL 211.78h(1).

[7] MCL 211.78k(1).

[8] MCL 211.78k(5).

[9] MCL 211.78k(5)(c) and (e) provided exceptions for future installments of special assessments and liens recorded by the state or the foreclosing governmental unit under MCL 324.101 *et seq*., and certain easements and deed restrictions.

be stayed or held invalid except as provided in subsection (7).[10]

The statute also provides for an appeal to the Court of Appeals within 21 days of the judgment of foreclosure.[11] Finally, the GPTA provides property owners who claim they did not receive any notice an action for monetary damages in the Court of Claims.[12]

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[10] MCL 211.78k(6). This subsection has since been amended by 2006 PA 611 and now provides:

> Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

[11] MCL 211.78k(7).

[12] MCL 211.78*l*(1) states:

> If a judgment for foreclosure is entered under [MCL 211.78k] and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in [MCL 211.78k], the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

The intervening parties challenge the propriety of the grant of relief from judgment obtained by the church. They argue that MCL 211.78k(6) precludes the circuit court from staying or holding the governmental unit's title invalid. Furthermore, because the church did not avail itself of the redemption or appeal provision contained in subsections 6 and 7, it is limited to an action for monetary damages under MCL 211.78*l*.

The intervening parties accurately construe these provisions of the GPTA. If a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, then MCL 211.78k(6) deprives the circuit court of jurisdiction to alter the judgment of foreclosure. MCL 211.78k(6) vests *absolute title* in the foreclosing governmental unit, and if the taxpayer does not redeem the property or avail itself of the appeal process in subsection 7, then title "*shall not* be stayed or held invalid . . . ." This language reflects a clear effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA.[13] The only possible remedy for such a property owner would be an action for monetary damages based on a claim that the property owner did not receive any notice. In the majority of cases, this regime provides an appropriate procedure for foreclosing property because the statute requires notices that are consistent with minimum due process standards.

However, the church argues that because the county denied it due process when taking its property, the church can avoid the limitations of the statute. The intervening parties respond that regardless of the property owner's claim, the statute only provides for one

[13] The recent amendments of the GPTA add further support to this conclusion. See MCL 211.78k(5)(g).

remedy once the redemption and appeals period has passed—a claim for monetary damages under MCL 211.78*l*.

As stated, we believe that the intervening parties' interpretation of the GPTA is correct. The act does not provide an exception for property owners who are denied due process. Thus, the intervening parties correctly assert that the GPTA does not provide relief for the church or other property owners who are denied due process.

The question then becomes whether such a regime is constitutional when it operates to deprive a property owner of its property without due process. This Court must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional.[14] The United States Supreme Court recently has held that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' "[15] Furthermore, " 'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' "[16] However, "[d]ue process does not require that a property owner receive *actual notice* before the government may take his property."[17]

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[14] *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992), quoting *People v McQuillan*, 392 Mich 511, 536; 221 NW2d 569 (1974).

[15] *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 415 (2006), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).

[16] *Jones*, *supra*, 547 US at 229, quoting *Mullane*, *supra* at 315.

[17] *Jones*, *supra*, 547 US at 226 (emphasis added).

As noted above, the statute permits a foreclosing governmental unit to ignore completely the mandatory notice provisions of the GPTA, seize absolute title to a taxpayer's property, and sell the property, leaving the circuit court impotent to provide a remedy for the blatant deprivation of due process. That interpretation, allowing for the deprivation of due process without any redress would be patently unconstitutional.[18] Unfortunately, as noted above, the plain language of the statute simply does not permit a construction that renders the statute constitutional because the statute's jurisdictional limitation encompasses all foreclosures, including those where there has been a failure to satisfy minimum due process requirements, as well as those situations in which constitutional notice is provided, but the property owner does not receive actual notice. In cases where the foreclosing governmental unit complies with the GPTA notice provisions, MCL 211.78k is not problematic.[19] Indeed, MCL 211.78*l* provides in such cases a damages remedy that is not constitutionally required. However, in cases where the foreclosing entity fails to provide *constitutionally adequate* notice, MCL 211.78k permits a property owner to be deprived of the property without due process of law. Because the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that portion of the statute purporting to limit the circuit

[18] The United States Supreme Court "consistently has held that some form of hearing is required *before* an individual is finally deprived of a property interest." *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976) (emphasis added), citing *Wolff v McDonnell*, 418 US 539, 557-558; 94 S Ct 2963; 41 L Ed 2d 935 (1974).

[19] Even when the foreclosing governmental unit only partially complies with the GPTA notice provisions, MCL 211.78k is sound as long as there is constitutionally adequate notice. Because the notice provisions provide more notice than is required to satisfy due process, the constitution does not require strict compliance with all the statutory notice requirements.

court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process.

CONCLUSION

Because there is no construction of the GPTA that renders the statute constitutional in cases where the taxing authority has denied the taxpayer due process, the statute is unconstitutional as applied to those individuals. In the present case, the county completely failed to comply with the notice provisions in the GPTA. As such, the county deprived the church of its property without providing due process. Therefore, for the reasons stated, we affirm the order of the Wayne Circuit Court that restored the church's title to the property in question.

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

CAVANAGH, J. (*concurring in the result only*). I concur with the result reached by the majority. I write separately, however, to note that I do not agree that the notice procedures in the General Property Tax Act, MCL 211.1 *et seq*., necessarily satisfy due process. See *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 432, 434; 617 NW2d 536 (2000) (KELLY, J., dissenting). Despite being in compliance with the statute, an agency's action may still fail to give a property owner constitutionally required reasonable notice.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*concurring in the result only*). Recent amendments of Michigan's General Property Tax Act

(GPTA), MCL 211.1 *et seq.*, streamlined and expedited the real property tax foreclosure process.[1] The purpose articulated was to "strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes."[2] The question before this Court is whether a party that is deprived of property without the notice of foreclosure required under the GPTA is limited to monetary damages as a remedy. Specifically, does the GPTA deprive a circuit court of jurisdiction to grant relief under MCR 2.612(C) from its prior foreclosure judgment?

I would hold that the relevant provisions of MCL 211.78 *et seq.*[3] in effect at the time the petition for foreclosure was filed in this matter did not deprive the circuit court of jurisdiction to grant respondent Perfecting Church relief from the circuit court's foreclosure judgment. I therefore concur in the result reached by the majority affirming the circuit court's order granting Perfecting Church's motion for relief from the judgment of foreclosure.

I. FACTS

On July 1, 1999, respondent Perfecting Church purchased two vacant Wayne County properties for $100,000 and used both properties as parking lots for church service attendees.[4] On June 14, 2002, the Wayne County Treasurer filed a petition for foreclosure listing several thousand properties with unpaid taxes for the

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[1] See 1999 PA 123 and 2001 PA 101.

[2] MCL 211.78(1).

[3] MCL 211.78i(2), now MCL 211.78i(10); MCL 211.78k(6); MCL 211.78*l*.

[4] The two properties commonly known as 17833 Van Dyke (first lot) and 17843 Van Dyke (second lot) were both listed under one deed.

year 2000. The properties at issue here, the second lot and the first lot, were included in those foreclosure proceedings. On March 10, 2003, the Wayne Circuit Court entered a judgment of foreclosure regarding both of the vacant properties owned by Perfecting Church.

Pursuant to MCL 211.78i, the treasurer's office had a duty to mail notice of the pending foreclosure to the current owner, Perfecting Church. However, because of a recording error in the treasurer's office, the properties were not listed on the tax rolls as being owned by Perfecting Church, and so the treasurer's office sent the foreclosure notice to the *former* owner, *not to* Perfecting Church. In addition, the posted notice of foreclosure was incorrectly placed on a neighbor's adjacent lot, rather than on either the first lot or the second lot owned by Perfecting Church.

Consequently, Perfecting Church never received notice of the pending foreclosure. It was not until October 2003, seven months after the circuit court entered the foreclosure judgment, that Perfecting Church became aware of the tax delinquency pertaining to the first lot when the church's general manager saw it listed in the Wayne County forfeiture listing. After contacting the Wayne County Treasurer's office, Perfecting Church obtained and paid the tax bill for the first lot on October 14, 2003.

At that time, Perfecting Church also inquired about the tax status of the second lot and was advised by the treasurer's office that payment of taxes on the first lot would cover the second lot as well, because both properties were listed on the same deed. Apparently, this assertion by the treasurer's office was incorrect, and Wayne County subsequently sold the second lot at auction. On November 4, 2003, the treasurer conveyed the second lot by quitclaim deed to the purchasers at

the auction, intervening appellants Matthew Tatarian and Michael Kelly (appellants).

On May 14, 2004, pursuant to MCR 2.612(C)(1)(d) and (f), Perfecting Church filed a motion for relief from the judgment of foreclosure in the Wayne Circuit Court, alleging that it never received notice of the property foreclosure, which constitutes a violation of MCL 211.78i, MCL 211.78j, and MCL 211.78k; Const 1963, art 1, § 17; and US Const, Am XIV, § 1. On July 7, 2004, the circuit court granted Perfecting Church's motion and vacated the foreclosure judgment. Appellants filed a delayed application for leave to appeal in the Court of Appeals, asserting that MCL 211.78*l*(1) and (2) barred Perfecting Church from pursuing a motion for relief from the judgment of foreclosure, and that Perfecting Church was required to settle the matter in the Court of Claims. The Court of Appeals denied leave to appeal on the basis of lack of merit in the grounds presented.[5]

Appellants sought leave to appeal in this Court. This Court granted the application and directed the parties to include among the issues to be briefed: (1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to MCR 2.612(C), notwithstanding the provisions of MCL 211.78*l*(1) and (2); and (2) whether MCL 211.78*l* permits a person to be deprived of property without being afforded due process.[6]

II. STANDARD OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *Lapeer*

[5] *In re Petition by Treasurer of Wayne Co for Foreclosure,* unpublished order of the Court of Appeals, entered July 11, 2005 (Docket No. 261074).

[6] *In re Petition by Treasurer of Wayne Co for Foreclosure (Wayne Co Treasurer v Perfecting Church)*, 474 Mich 1059 (2006).

Co Clerk v Lapeer Circuit Judges, 465 Mich 559, 566; 640 NW2d 567 (2002). Questions of statutory construction are also reviewed de novo. *Grimes v Dep't of Transportation,* 475 Mich 72, 76; 715 NW2d 275 (2006). Finally, questions concerning the constitutionality of a statutory provision are subject to review de novo. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

III. ANALYSIS

The GPTA authorizes county treasurers to foreclose on tax-delinquent property and to sell the property at auction to satisfy tax delinquencies. *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 737; 690 NW2d 917 (2005). However, a person may not be deprived of property without due process of law. Const 1963, art 1, § 17; US Const, Am XIV, § 1. In *Dow v Michigan*, 396 Mich 192, 210; 240 NW2d 450 (1976), this Court held that due process requires that before the government takes a person's property by foreclosure, the person must be afforded notice and the right to contest the foreclosure. Following our decision in *Dow*, the Legislature added additional notice provisions to the GPTA to satisfy the constitutional due process requirements set forth in *Dow*. See, e.g., *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 428-429; 617 NW2d 536 (2000). As a result, the GPTA sets forth an extensive set of procedures to provide a property owner with notice in the tax foreclosure and sale process. *Id.* at 428.

This Court must presume that MCL 211.78 *et seq*. are constitutional. *People v McQuillan,* 392 Mich 511, 536; 221 NW2d 569 (1974). A presumption exists that the Legislature would not violate the constitution. *Id.* If a statute can be interpreted as being either constitutional

or unconstitutional, this Court must choose the constitutional interpretation of the statute. *Id.*

Among the foreclosure provisions of the GPTA, three are relevant to the disposition of this case: MCL 211.78i(10), MCL 211.78k(6), and MCL 211.78*l*(1) and (2).[7] MCL 211.78(2) affirms that "[i]t is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process . . . ." The reference to "the minimum requirements of due process" is substantially repeated in MCL 211.78i(10), which defines the notice required of governmental entities before foreclosure.

Section 78i(10)[8] states:

> The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

Essentially, § 78i(10) provides that as long as the property owner against whom foreclosure is sought is accorded notice satisfying minimum due process, the failure of the governmental entity to comply with other

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[7] Petitioner Wayne County Treasurer asserts that an additional provision is applicable to this case: MCL 211.78k(5)(g), enacted by 2003 PA 263 and effective January 5, 2004. Petitioner's argument is that this 2003 amendment is applicable because respondent Perfecting Church did not file its motion for relief from the judgment of foreclosure until May 2004, *after* the 2003 amendment took effect. I am satisfied that MCL 211.78k(5)(g) is inapplicable because petitioner Wayne County filed its petition for foreclosure on June 14, 2002, and the Wayne Circuit Court entered the judgment of foreclosure on March 10, 2003, *before* the January 5, 2004, effective date of MCL 211.78k(5)(g).

[8] The 1999 provision was found at MCL 211.78i(2).

provisions in this section does not invalidate the proceeding. The linchpin of a valid foreclosure then is that a property owner must be "accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States."[9]

The next relevant provision is MCL 211.78k(6), which defines the state of the title to the foreclosed property. The version of § 78k(6) in effect at the time of this foreclosure stated:

> Fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after the entry of judgment shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7).[10]

In other words, once a valid judgment of foreclosure is entered, MCL 211.78k(6) establishes that the fee simple title to the foreclosed property "shall vest absolutely in

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[9] MCL 211.78i(10).

[10] MCL 211.78k(6) was amended by 2003 PA 263 and presently states:

> Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property."

After title vests in the foreclosing governmental entity pursuant to § 78k(6), MCL 211.78*l* establishes what remedy is available to the owner of the extinguished property interest. It states, in pertinent part:

> (1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.
>
> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

MCL 211.78*l* thus provides that once the prior owner's interest in a foreclosed property has been extinguished, the prior owner "shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section." Moreover, MCL 211.78*l*(2) states that the Court of Claims has exclusive jurisdiction over "any action to recover monetary damages under this section."

Here, respondent Perfecting Church did not bring an action for possession against appellant subsequent owners. Instead, Perfecting Church sought relief from the foreclosure judgment on the basis that the judgment was void because Perfecting Church never received notice of the foreclosure action. Appellants do not contest that Perfecting Church was deprived of notice,

but argue that, despite this fact, MCL 211.78*l* precludes Perfecting Church from challenging the foreclosure. Appellants argue that MCL 211.78*l* limits Perfecting Church to seeking recovery for monetary damages, and establishes that the Court of Claims has exclusive jurisdiction over such an action. I disagree.

As a preliminary matter, I note that a circuit court has power to grant relief from a judgment under MCR 2.612(C). MCR 2.612(C)(1) states:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

Contrary to appellants' assertion, MCL 211.78*l* does not *divest* the circuit court of its power to grant relief from a judgment as specified by MCR 2.612(C)(1). Indeed, nothing in either MCL 211.78*l* or MCL 211.78k(6) removes the circuit court's power to grant relief from a judgment of foreclosure under MCR 2.612(C). MCL 211.78*l*(1) only prohibits a displaced property owner from bringing a new *action* for possession. An "action" is a proceeding in court. Black's Law

Dictionary (7th ed). A motion for relief from a judgment of foreclosure under MCR 2.612(C) is a *motion* to set aside an existing judgment. A "motion" is an application requesting a court to make a specified ruling or order. Black's Law Dictionary (7th ed). It does not constitute a separate action. Therefore, MCL 211.78*l* does not apply to situations where a property owner files a motion for relief from a judgment under MCR 2.612(C).

Further, MCL 211.78k(6) only addresses the state of the title that the government receives. Although MCL 211.78k(6) states that the government's title shall not be "stayed or held invalid," the government can only receive fee title to the property through a *valid foreclosure proceeding*. In situations where the property owner did not receive "the minimum due process required under the state constitution of 1963 and the constitution of the United States," the foreclosure proceeding is invalid under MCL 211.78i(10). *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 293; 698 NW2d 879 (2005).

It follows that a foreclosing governmental unit cannot receive fee title to property when the property owner was not provided with minimum due process notice of an impending foreclosure. Therefore, MCL 211.78k(6) does not preclude a circuit court from modifying its judgment pursuant to MCR 2.612(C) when a property owner has not been provided constitutionally adequate notice of the foreclosure. The majority and I disagree on this point. While the majority holds that the language of MCL 211.78k(6) vesting absolute title in the foreclosing governmental unit limits a court's ability to modify judgments, I believe the correct, and constitutional, interpretation of the GPTA is that MCL

211.78i(10) invalidates any foreclosure proceeding when a foreclosing governmental unit's failure to provide adequate notice results in the property owner not being "accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States."

Thus, it is necessary to determine whether the foreclosure on Perfecting Church's property met the minimum due process notice requirements. Both the Michigan and United States constitutions guarantee that a person shall not be deprived "of life, liberty or property, without due process of law." Const 1963, art 1, § 17; US Const, Am XIV, § 1. Due process of law entitles a person whose interest is at stake to " 'notice and an opportunity to be heard.' " *Dusenbery v United States*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002), quoting *United States v James Daniel Good Real Prop*, 510 US 43, 48; 114 S Ct 492; 126 L Ed 2d 490 (1993). Due process protects a real estate owner's interest in property. *Dow*, *supra* at 204. "People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." *Jones v Flowers*, 547 US 220, 234; 126 S Ct 1708; 164 L Ed 2d 415 (2006).

For the first component of due process—notice of an impending taking—to be constitutionally adequate, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950); *Smith*, *supra* at 429. This Court previously

held that the notice procedures contained within the GPTA satisfy the notice component of due process. *Smith*, *supra* at 428-429. However, in this case, the treasurer failed to follow the notice procedures of the GPTA.

The GPTA requires the foreclosing governmental unit to mail notice to the property owner as identified by the property's deed filed with the county register of deeds. MCL 211.78i(6). Here, however, the treasurer mailed notice to the *previous owner*; consequently, Perfecting Church never received the mailed notice to which it was entitled under MCL 211.78i(6). The GPTA also requires the foreclosing governmental unit to post notice at the property in question. MCL 211.78i(3)(d). But here, the treasurer posted the foreclosure notice on a lot *neighboring the property in question*. Thus, a foreclosure notice was never posted at Perfecting Church's property. There was an absolute failure to provide notice under the GPTA. Although actual notice is not a requirement of due process, the foreclosing governmental unit must make a reasonable effort to provide notice. *Dow*, *supra* at 211. When the government utterly fails to comply with any of the notice procedures provided in a foreclosure statute, the government has not made a reasonable effort to provide notice.

For the second component of due process—an "opportunity to be heard"—to be constitutionally adequate, the hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965); *Van Slooten v Larsen*, 410 Mich 21, 53; 299 NW2d 704 (1980). "A hearing would not be 'at a meaningful time' unless the owner of a significant interest in the property had an opportunity to cure any delinquency deter-

mined upon the hearing and avoid foreclosure and the taking of his property by the state." *Dow*, *supra* at 206 n 21. The property owner must be able to contest the government's right to foreclose. *Id.* at 210. If the only hearing available to a property owner is a hearing in the Court of Claims for money damages, the property owner is deprived of an opportunity to contest the foreclosure and to defend his or her land. " 'The opportunity to defend one's property before it is finally taken is so basic that it hardly bears repeating.' " *Id.* at 205 n 20, quoting *Arnett v Kennedy*, 416 US 134, 180; 94 S Ct 1633; 40 L Ed 2d 15 (1974) (White, J., concurring in part and dissenting in part).

The United States Supreme Court has held that the government does not always have to provide a hearing before the deprivation of a right. *Parratt v Taylor*, 451 US 527, 540-541; 101 S Ct 1908; 68 L Ed 2d 420 (1981). But the situations in which a postdeprivation hearing passes constitutional scrutiny are limited to those in which a predeprivation hearing would be unworkable. *Id.* at 541. The United States Supreme Court has held that the Due Process Clause is not implicated when the government negligently causes the loss of property. *Daniels v Williams*, 474 US 327, 328; 106 S Ct 662; 88 L Ed 2d 662 (1986). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* at 331. Appellants argue that the treasurer's negligence in providing notice means that a due process analysis does not apply. But the treasurer *deliberately* foreclosed on Perfecting Church's property. Therefore, the negligent-actor rule from *Parratt* and *Daniels* does not apply to this case.

Appellants also argue that the purpose behind the GPTA should prevail over the Due Process Clause. They

argue that the Legislature's express intention to streamline the foreclosure process should take precedence over a person's constitutional right to defend the person's property against a taking. It is true that, in enacting the GPTA, the Legislature intended to create a faster system in which purchasers of foreclosed property could receive clear title to put the land into productive use. Nevertheless, the United States Constitution requires that a person be provided with notice and a hearing before property can be taken. In *Dow*, *supra* at 209, the Court quoted *Stanley v Illinois*, 405 US 645, 656; 92 S Ct 1208; 31 L Ed 2d 551 (1972), in which the United States Supreme Court stated:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

The government "exert[s] extraordinary power against a property owner" when it takes and sells an owner's property. *Jones*, *supra,* 547 US at 239. The Due Process Clause is designed to protect citizens against that use of power. The Legislature cannot circumvent the constitutional obligation of due process in order to speed up the foreclosure process and convey clear title to land it acquired through foreclosure.

I note that the Legislature amended the GPTA in 2003 by enacting 2003 PA 263, which added a new

subsection, MCL 211.78k(5)(g), describing the finality of the circuit court's judgment of foreclosure.[11] MCL 211.78k(5)(g) states:

> A judgment entered under this section is a final order with respect to the property affected by the judgment and except as provided in subsection (7) shall not be modified, stayed, or held invalid after the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or for contested cases 21 days after the entry of a judgment foreclosing the property under this section.

That subsection effectively prohibits a circuit court from using MCR 2.612(C) to grant relief from the judgment of foreclosure for any reason because it states that the circuit court's judgment "shall not be modified, stayed, or held invalid . . . ." By prohibiting the circuit court from granting relief from judgment, MCL 211.78k(5)(g) leaves a displaced property owner deprived of notice, without the minimum due process accorded under the statute, only with the option of bringing a separate action. This result initiates MCL 211.78*l*(1), which in turn establishes that the property owner may only bring an action for monetary damages. Despite the fact that the property owner was deprived of property without notice, the owner is precluded from bringing an action to recover the property.[12] As such, I

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[11] Although any discussion of this amendment is dicta because it was not in effect at the time of the foreclosure filing in this case, I note that this amendment appears to be a further attempt by the Legislature to speed up the foreclosure process.

[12] I believe that MCL 211.78k(5)(g) takes an unconstitutional step further than MCL 211.78k(6) by making the *judgment* of the circuit court final. The language of MCL 211.78k(6) can be constitutionally reconciled with the language of MCL 211.78i(10) because MCL 211.78k(6) applies only to the *title* received by the government after a judgment of foreclosure is entered; it does not apply to the *judgment* of the court.

seriously question the constitutionality of MCL 211.78k(5)(g) because it deprives a person of his or her constitutionally protected right to due process before a deprivation of a property interest by the foreclosing government.

Unlike the majority, I am satisfied that the 1999 amendments of the GPTA can be construed so as not to violate the constitutional guarantee of due process when the government fails to provide notice before foreclosing on property. MCL 211.78*l* does not prohibit the circuit court from using MCR 2.612(C) to grant relief from a judgment of foreclosure. Therefore, a property owner can file a motion for relief from a judgment of foreclosure to defend against an unconstitutional governmental taking of property. A property owner deprived of notice still receives a meaningful opportunity to be heard by bringing a motion pursuant to MCR 2.612(C) for relief from the judgment. By using MCR 2.612(C), the property owner can still defend the property interest inasmuch as the circuit court still has the authority to set aside the foreclosure. In doing so, the circuit court preserves the property owner's interest in the land.

The circuit court correctly applied MCR 2.612(C) to grant Perfecting Church's motion for relief from the judgment of foreclosure. Perfecting Church is not limited to a suit for monetary damages under the 1999 amendments of the GPTA, which were in effect when the treasurer filed the foreclosure petition. Perfecting Church did not receive adequate notice to protect its property from the government's taking. Because the

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MCL 211.78k(5)(g), on the other hand, conflicts with MCL 211.78i(10) because it explicitly makes a judgment final, regardless of any due process concerns that may arise from the foreclosing government's failure to provide notice.

1999 amendments did not prohibit the circuit court from modifying its judgment, the circuit court properly retained jurisdiction to modify its judgment of foreclosure pursuant to MCR 2.612(C), thereby affording Perfecting Church the opportunity to defend its ownership interest in the parking lot.

IV. CONCLUSION

I would hold that under the relevant provisions of MCL 211.78 *et seq.* in effect at the time the petition for foreclosure was filed in this matter, the circuit court was not deprived of jurisdiction to grant relief to Perfecting Church pursuant to MCR 2.612(C). Perfecting Church was not limited to a recovery of monetary damages because Perfecting Church was completely deprived of adequate notice of the pending foreclosure. Because the absence of notice was a denial of the minimum due process required under both the Michigan Constitution, Const 1963, art 1, § 17, and the United States Constitution, US Const, Am XIV, § 1, Perfecting Church was entitled to relief from the circuit court's foreclosure judgment.

I would affirm the circuit court's order granting Perfecting Church's motion for relief from the judgment of foreclosure.

KARACZEWSKI v FARBMAN STEIN & COMPANY

Docket No. 129825. Argued October 4, 2006 (Calendar No. 11). Decided May 23, 2007.

Kenneth Karaczewski, a resident of Florida, applied in the Bureau of Worker's Compensation, now the Workers' Compensation Agency, for mediation or a hearing with regard to claims for medical and wage-loss benefits under Michigan law following a work-related injury that occurred in Florida. The defendant employer, Farbman Stein & Company, and its insurer, Nationwide Insurance Company, responded, alleging that the bureau lacked jurisdiction over the matter pursuant to MCL 418.845 because, although the plaintiff was originally hired in Michigan to work in Michigan, the plaintiff was not a resident of Michigan at the time of the injury in Florida. A magistrate concluded that the bureau did have jurisdiction under the interpretation of MCL 418.845 set forth in *Boyd v W G Wade Shows*, 443 Mich 515 (1993), which articulated that the statute does not contain a residency requirement. The Workers' Compensation Appellate Commission affirmed the magistrate's decision. The Court of Appeals, TALBOT, P.J., and WHITE and WILDER, JJ., affirmed in an unpublished opinion per curiam, issued October 18, 2005 (Docket No. 256172). The Supreme Court granted the defendants' application for leave to appeal. 474 Mich 1087 (2006).

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

1. The clear language of the statute provides that the agency has jurisdiction over an out-of-state injury only where the injured employee was a Michigan resident at the time of the injury and the contract of hire was made in Michigan. In this case, the agency lacks jurisdiction because the plaintiff was not a resident of Michigan at the time of the injury in Florida.

2. The opinion in *Boyd* must be overruled. The construction of the predecessor of MCL 418.845 in *Roberts v I X L Glass Corp*, 259 Mich 644 (1932), upon which *Boyd* relied, ceased to be the law because of subsequent amendments of the workers' compensation act that made the act mandatory. *Roberts* was abrogated by such amendments. The *Boyd* majority's reliance on the legislative acquiescence doctrine was unwarranted. Overruling *Boyd* is warranted under the doctrine of stare decisis as set forth in *Robinson v Detroit*, 462 Mich

439 (2000), because *Boyd* was wrongly decided and *Boyd* has not become so fundamental that overruling it would produce practical, real-world dislocations.

Reversed.

Justice WEAVER, concurring in part and dissenting in part, concurred in the decision to overrule *Boyd*, but dissented from applying that decision retroactively. Given the extensive reliance on *Boyd* by courts and nonresident injured employees, as well as the insurance decisions predicated on the *Boyd* interpretation of MCL 418.845, prospective application is appropriate and would minimize the effect on the administration of justice such as the new proceedings required to reverse benefit awards made pursuant to *Boyd*.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that the Court in *Roberts* and *Boyd* properly effectuated the Legislature's intent in enacting MCL 418.845 and its predecessors. The overruling of *Boyd* is not justified under the standard stated in *Robinson* for overturning precedent, because *Boyd* was properly decided, the Legislature has acquiesced in the *Roberts* and *Boyd* interpretation of MCL 418.845, *Roberts* and *Boyd* do not defy practical workability, reliance interests would work an undue hardship if those cases were overturned, and no changes exist in the law or the facts to justify questioning the *Boyd* decision. Considering the factors stated in *Pohutski v City of Allen Park,* 465 Mich 675, 696 (2002), which are to be weighed in determining when a decision should not have retroactive application, strongly indicates a need for prospective application of this decision. The judgment of the Court of Appeals should be affirmed.

WORKERS' COMPENSATION — OUT-OF-STATE INJURIES — JURISDICTION.

The Workers' Compensation Agency has jurisdiction over an out-of-state injury only where the injured employee was a Michigan resident at the time of the injury and the contract of hire was made in Michigan (MCL 418.845).

Kelman Loria, PLLC (by *James P. Harvey*), for the plaintiff.

Martin L. Critchell, for the defendants.

Amicus Curiae:

Kym L. Worthy, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the Wayne County Prosecutor's Office.

CORRIGAN, J. In this case, we consider whether a Florida resident who was injured in a Florida workplace accident may recover workers' compensation benefits in Michigan merely because he was hired in Michigan. We conclude that he cannot. The relevant portion of the Michigan Worker's Disability Compensation Act (WDCA), MCL 418.845, confers jurisdiction on the Bureau of Worker's Compensation, now the Workers' Compensation Agency, for out-of-state workplace injuries only if (1) the employee is a resident of Michigan when the injury occurs and (2) the contract of hire was made in Michigan. Accordingly, we reverse the contrary Court of Appeals judgment awarding benefits and overrule *Boyd v W G Wade Shows,* 443 Mich 515; 505 NW2d 544 (1993), upon which the Court of Appeals relied.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The parties stipulated the relevant facts:

> Plaintiff was hired by defendant on October 4, 1984 to work in Michigan as a maintenance engineer. As of the date of hire, plaintiff was a resident of Detroit, Michigan and defendant employer was a resident employer in Michigan. The Contract of hire was made in Michigan. The Farbman Group continues to be a resident employer and is currently located at 28400 Northwestern Hwy, Southfield, Michigan.
>
> Plaintiff worked for defendant in Michigan from the date of hire until September 1, 1986, when defendant transferred him to Fort Lauderdale, Florida to assume the position of building superintendent. On January 12, 1995, Plaintiff fell from a ladder in the course of his employment for defendant in Florida, breaking his left wrist and injuring his left knee. At the time of the injury, he was a resident of Florida. On September 27, 1996, plaintiff reinjured his knee while still working for defendant in Florida. He underwent surgery on November 6, 1996 for ACL [anterior cruciate ligament] reconstruction and microfracture ar-

throplasty. Plaintiff returned to work for defendant with restrictions on December 2, 1996.

He received certain benefits pursuant to Florida's worker's compensation law.

Plaintiff continued to work for defendant until September 15, 1997. Since that time, he has worked as a project manager for Rotella, Toroyan, Clinton Group, a Florida Corporation.

Plaintiff continues to have problems with his left knee. There is no wage loss at this time. He has, however, incurred further expenses for treatment and anticipates the need for additional surgery(ies) and future closed period(s) of disability. These claims are not covered under Florida law.

Plaintiff has filed an application for mediation or hearing, claiming medical and wage loss benefits under Michigan law. Defendant disputes jurisdiction. It does not dispute the existence of a work related knee injury.

The Court of Appeals summarized the proceedings before the magistrate and the Workers' Compensation Appellate Commission (WCAC):

In the proceedings below, defendants contended that pursuant to the plain language of the statute which determines the bureau's jurisdiction, MCL 418.845, to be entitled to benefits, an injured worker must be a resident of Michigan at the time of the injury. In response, plaintiff contended that pursuant to the interpretation of MCL 418.845, as set forth in *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), there is no residency requirement for an injured worker, and the bureau has jurisdiction over a petition filed by an injured worker when, as in the instant case, the contract of hire was executed in Michigan and the employer is a resident employer in Michigan. The magistrate agreed with plaintiff and concluded that the bureau had jurisdiction in this matter.

Defendant appealed the decision to the WCAC. The WCAC noted that the Supreme Court's decision in *Boyd*

> reaffirmed an interpretation of the jurisdictional statute originally set forth in *Roberts v IXL Glass Corp*, 259 Mich 644; 244 NW 188 (1932). The WCAC opined that *Roberts* contravened the express language of MCL 418.845, but agreed with the magistrate that *Boyd* and *Roberts* are binding. Defendants were granted leave to appeal the WCAC's decision. [1]

The Court of Appeals affirmed the WCAC decision because "pursuant to *Roberts* and *Boyd*, the WCAC properly concluded that the bureau has jurisdiction over plaintiff's petition for benefits." *Id.* at 5. We granted defendant's application for leave to appeal, directing the parties to address whether the "proposed overruling of [*Boyd*] is justified under the standard for applying stare decisis discussed in *Robinson v Detroit*, 462 Mich 439, 463-468 [613 NW2d 307] (2000)."[2]

II. STANDARD OF REVIEW

This case requires us to interpret the language set forth in MCL 418.845. We review de novo questions of statutory construction. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

III. ANALYSIS

A. STATUTORY INTERPRETATION

MCL 418.845 is clear and unambiguous. It grants the bureau "jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury *and* the contract of hire was made in this state." (Emphasis added.) The meaning of this provision is

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[1] Unpublished opinion per curiam, issued October 18, 2005 (Docket No. 256172), p 2.

[2] 474 Mich 1087 (2006).

straightforward: where the injury occurs outside Michigan, the bureau has jurisdiction only where (1) the injured employee was a resident of Michigan at the time of the injury and (2) the contract of hire was made in Michigan. Plainly, the use of the conjunctive term "and" reflects that *both* requirements must be met before the bureau has jurisdiction over an out-of-state injury.

This statute in its initial enactment in 1921 PA 173, was an amendment[3] of the Michigan Workmen's Compensation Act, 1912 (1st Ex Sess) PA 10.[4] This amendment was enacted after the decision in *Crane v Leonard Crossette & Riley,* 214 Mich 218; 183 NW 204 (1921). In *Crane*, this Court held that because participation in the workers' compensation system was elective, the requirements of the law were considered to be incorporated into the employment contract when an employer chose to participate in the system. Thus, it was irrelevant that the injury did not occur in Michigan.[5]

In 1932, this Court considered the 1921 amendment in *Roberts*, *supra*. The *Roberts* Court stated that the new statutory requirements focusing on residence at the time of the injury "would come with much, if not controlling, force if it were not in conflict with other

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[3] This statute was enacted as part III, § 19 of the act by 1921 PA 173. In the 1929 Compilation, it was numbered 1929 CL 8458. In the 1948 Compilation, it was renumbered 1948 CL 413.19. 1969 PA 317, § 898 repealed 1948 CL 413.19 and Act 317 also enacted MCL 418.845. While the statute has been renumbered, repealed, and reenacted over the years, the original language is virtually identical to the current statute, MCL 418.845.

[4] The creation of the Workmen's Compensation Act and the WDCA is discussed in *Cain v Waste Mgt, Inc (After Remand),* 472 Mich 236, 247-249; 697 NW2d 130 (2005).

[5] In *Hulswit v Escanaba Mfg Co,* 218 Mich 331; 188 NW 411 (1922), this Court reached a similar conclusion. Although this case was decided after the 1921 amendment, the act *before* the adoption of the amendment controlled that case.

portions of the statute." *Roberts, supra* at 647. That "other portion of the statute" was 1929 CL 8412, which this Court described as fixing "the rights and liabilities of employers and employees." *Id*. This Court said that the WDCA covered " 'all employees' regardless of residence or the locus of the accident." *Id.* Because of this conflict and the "radical change in the scope and effect," *id*. at 648, that the nullification of § 8412 by § 8458 would have, the Court declined to assume that the Legislature had intended such nullification when it enacted § 8458. The Court also opined that its construction was consistent with the "humane purposes" of the WDCA. This meant that § 8412 trumped § 8458, and workers' compensation coverage would be required without regard to residence or where the injury occurred, despite the language of § 8458.

In 1943 PA 245, the Legislature expressly repealed § 8412. With that action, the Legislature effectively eliminated the central rationale of the *Roberts* decision, i.e., the Court's declination to repeal by inference § 8412. The 1943 amendment thus left § 8458 as the unquestioned law. At that juncture, then, the Legislature had addressed the problem that had precluded the *Roberts* Court from enforcing § 8458, and the *Roberts* rationale for declining to enforce § 8458 no longer applied.

Indeed, the appellate courts of this state implicitly recognized this point in eight of nine cases where issues concerning § 8458 and its successor statutes arose from 1943 until the *Boyd* decision in 1992.

In *Daniels v Trailer Transport Co,* 327 Mich 525, 527, 530; 42 NW2d 828 (1950), this Court implicitly required that the statutory prerequisites of § 8458 be met. In that case, the Court concluded that where a Michigan employer had made an employment contract in Texas,

and where the employee was an Illinois resident who suffered an injury in Tennessee, jurisdiction did not exist to bring a workers' compensation action in Michigan.[6]

Without reconciling *Daniels,* however, the Court of Appeals in *Austin v W Biddle Walker Co,* 11 Mich App 311, 313, 318; 161 NW2d 150 (1968), followed what it understood to be the *Roberts* holding when it concluded that a nonresident of Michigan, hired in Michigan but injured outside Michigan, could collect workers' compensation benefits in Michigan.[7]

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[6] In her dissent, Justice KELLY argues that the "Court in *Daniels* relied on *Cline v Byrne Doors, Inc,* for the proposition that, ' "Under the provisions in the Michigan statute on which plaintiff relies [i.e., the precursor to § 845], his right to compensation depends on whether he was employed by virtue of a contract of hire made in this State." ' *Daniels*, 327 Mich at 530, quoting *Cline v Byrne Doors, Inc*, 327 Mich 540." *Post* at 58. This is simply not true.

In *Daniels,* this Court noted the plaintiff's argument that "neither the residence of the employee, the place or State of hiring, nor the place or State of injury is controlling." *Id.* at 528. It then noted that the defendant had relied on the predecessor to the statute at issue here in arguing that the Workmen's Compensation Commission had jurisdiction over out-of-state injuries only when "the injured employee is a resident of Michigan at the time of the injury and the contract of hire was made in Michigan." *Id.* at 529-530. Further, it found that the only decision in Michigan after the effective date of 1943 PA 245, the amendment that made the act compulsory, *Cline, supra,* "*does not decide the issue in the case at bar.*" *Id*. at 530. This Court then stated that under the facts before it, the Workmen's Compensation Commission exceeded its jurisdiction in making an award to the plaintiff. *Id*. While it is true that the Court never mentioned *Roberts,* the Legislature had by passing 1943 PA 245 destroyed the rationale and, with it, the viability of *Roberts*, so no other reading of the case can be sustained. Thus, the Legislature having effectively dispatched *Roberts,* the Court in *Daniels* simply chose to ignore *Roberts.*

[7] In dissent, then-Judge LEVIN made the following telling observation regarding the effect of the 1943 amendment:

> In eliminating the optional nature of coverage under the act and making coverage compulsory, and in eliminating the former statutory language that an electing employer agrees "to cover and

Returning to the *Daniels* understanding, the Court of Appeals held in *Rodwell v Pro Football, Inc,* 45 Mich App 408, 416-418; 206 NW2d 773 (1973), that where an employment contract was made in Michigan with a worker who lived in Michigan but the injury occurred out of state, the employee was eligible for Michigan workers' compensation.

Later, in *Crenshaw v Chrysler Corp,* 394 Mich 513, 515-516; 232 NW2d 166 (1975), this Court determined that the WDCA did not apply when the contract of hire with a Michigan company was executed in Ohio and the injuries occurred in Ohio.[8]

Next, in *Jensen v Prudential Ins Co of America,* 118 Mich App 501, 503-504; 325 NW2d 469 (1982), the Court of Appeals, after noting that both Michigan residence and a Michigan contract of hire are required, concluded that the WDCA did not apply because the employee was not a Michigan resident and the contract was not entered into in Michigan.

In *Shaw v Grunwell-Cashero of Milwaukee,* 119 Mich App 758, 761; 327 NW2d 349 (1982), the Court of Appeals found no indication of either a Michigan contract or a Michigan resident employee. Thus, no jurisdiction existed over a Wisconsin employer.

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protect all employees employed in any and all of his businesses," the legislature eliminated the fundamental bases of the *Crane*, *Huslwit*, and *Roberts* holdings. [*Id*. at 326-327 (LEVIN, P.J., dissenting).]

[8] The same understanding of the effect of 1943 PA 245 seen in *Daniels* explains why the *Crenshaw* Court neither distinguished nor overruled *Roberts,* and also why it did not cite *Roberts* as authority. Rather, it properly relied on the statute, which by its plain language required *both* that the employee was a resident of Michigan at the time of the injury *and* that the contract of hire was made in Michigan to deny the plaintiff benefits. Justice KELLY's assertion in her dissent that some other reading is possible is, we believe, not convincing in the context of this case and the *Daniels* case.

In *Wolf v Ethyl Corp,* 124 Mich App 368, 370; 335 NW2d 42 (1983), the Court of Appeals stated that jurisdiction required both Michigan residence and a Michigan contract. While the contract of hire between the employee and the employer was made in Michigan, the employee was a resident of Connecticut at the time of the injury. Because the employee was not a Michigan resident, jurisdiction was lacking.

After noting that MCL 418.845 plainly required both conditions, the Court of Appeals, in *Bell v F J Boutell Driveaway Co,* 141 Mich App 802, 812-813; 369 NW2d 231 (1985), stated that while the case apparently involved a Michigan employer, the employee was an Ohio resident who was injured in Ohio. Thus, the bureau lacked jurisdiction.

Finally, in *Hall v Chrysler Corp,* 172 Mich App 670, 672-673; 432 NW2d 398 (1988), the Court of Appeals held that no jurisdiction existed over an out-of-state injury because although the contract had been entered in Michigan with a Michigan company, the employee was not a Michigan resident.

At this point, two Supreme Court holdings and six Court of Appeals holdings left no doubt that § 8458 and its successors, 1948 CL 413.19 and MCL 418.845, were incontrovertibly the law[9] when this Court rejected this entire line of authority in *Boyd*.

Paying no heed to (1) the rationale of *Roberts*, (2) the unmistakable effect of the 1943 statutory amendment, and (3) the nine later cases implicitly recognizing these matters, the *Boyd* Court seized on the dicta in *Roberts* discussing the "humane purposes" of the WDCA. The *Boyd* Court asserted that MCL 418.845 could not be enforced because such a jurisdictional scheme was "not

[9] The one contrary decision, *Austin, supra,* was ignored by the seven decisions that followed.

only undesirable but also unduly restrictive." *Boyd, supra* at 524. The *Boyd* majority, in the face of all contrary evidence, nonetheless opined that the Legislature had acquiesced in the *Roberts* construction. In reality, however, even assuming that legislative acquiescence is a valid judicial interpretative tool,[10] the Legislature had no need to acquiesce because the Legislature had, responding to *Roberts,* repealed the section (§ 8412) that had caused the predecessor of MCL 418.845 to be inoperable.[11] Thus, MCL 418.845 should have been enforced, as it had been for many years. The *Boyd* Court erred in holding to the contrary.

B. STARE DECISIS

We conclude that overruling *Boyd* is warranted under the doctrine of stare decisis as set forth in *Robinson*.

[10] See the discussion in n 11 of this opinion for an explanation of this Court's repudiation of the legislative acquiescence doctrine.

[11] In her dissent in *Boyd*, Justice RILEY explained why she believed the majority's reliance on the legislative acquiescence doctrine was misguided:

> Considering the changes in the nature of the worker's compensation system, as well as the clarity of the statutory language, the principle of legislative acquiescence should not be used to continue a decision that lacks persuasive legal foundation. Moreover, the clarity of the conjunctive language used in MCL 418.845; MSA 17.237(845) also supports the argument that the Legislature could not change the language of the statute after *Roberts* to add a residency requirement, because the clear language already existed in the statute and nothing else needed to be added. Therefore, legislative acquiescence to the *Roberts* decision is not as clear as the majority suggests. [*Id*. at 536.]

Moreover, after *Boyd*, this Court strongly criticized the doctrine of legislative acquiescence. In *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 597 NW2d 574 (1999), we stated that " 'legislative acquiescence' 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." (Emphasis in original.)

Stare decisis is a principle of policy rather than an inexorable command, and this Court is not bound to follow precedent that is unworkable or badly reasoned. *Robinson*, *supra* at 464. In assessing whether to overrule a prior decision, we must consider whether the prior decision was wrongly decided, whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the decision. *Id*. "As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id*. at 466.

As discussed, the text of MCL 418.845 is so patently clear that its meaning is truly beyond any reasonable dispute. MCL 418.845 plainly grants jurisdiction to the bureau only where the injured employee was a resident of the state at the time of the injury *and* the contract of hire was made in Michigan. Because the *Boyd* Court (1) construed the statute to eliminate the residency requirement and (2) failed to recognize that the Legislature abrogated the *Roberts* decision by making the workers' compensation system mandatory in 1943, we conclude that *Boyd* was wrongly decided.

We discern no basis to conclude that *Boyd* has become so fundamental to expectations that overruling it would produce practical, real-world dislocations. Overruling *Boyd* will not affect any employees who are injured in Michigan because MCL 418.845 addresses jurisdiction *only for out-of-state injuries*. Nor will our decision affect any Michigan residents who are injured in another state. Rather, it is only residents *of other states* who are injured *outside Michigan* who would be affected by overruling *Boyd*. We discern no reason to

believe that persons who neither live in Michigan nor suffer an injury in Michigan harbor expectations of receiving Michigan workers' compensation coverage, let alone that any such expectations are so embedded and fundamental that real-world dislocations will arise.

Moreover, nonresidents who are injured in other states remain free to seek workers' compensation benefits from the states in which they live or suffer injury. For example, plaintiff suffered an injury in his home state of Florida and obtained benefits under the Florida workers' compensation system. We see no indication that, as a Florida resident who was injured in Florida, plaintiff harbored an expectation of receiving benefits under the Michigan workers' compensation system *in addition to* the benefits he received from the Florida system.[12]

In considering the reliance interests at stake, we believe it is significant that the holding in *Roberts* has *not* consistently been the law in Michigan since 1932. In truth, *Roberts* was legislatively overruled by the 1943 amendments of the workers' compensation act. Indeed, the *Wolf* decision recognized the legislative abrogation and properly applied the plain language of MCL 418.845 on the ground that the *Roberts* analysis was inapplicable to our modern, mandatory workers' compensation system. Plaintiff has offered no evidence that chaos erupted, or that practical, real-world dislocations arose,

[12] That states like Florida might not provide workers' compensation benefits as generously as does Michigan's system does not alter our conclusion. Any difference in the level of benefits afforded simply reflects a difference in the policy choices made by each sovereign state. The citizens of Florida through their elected representatives are free to fashion their workers' compensation system as they see fit. If a Florida resident (such as plaintiff) believes that more generous benefits should be provided, the remedy lies with the Florida legislature, not with this Court.

in the period between the Legislature's abrogation of *Roberts* in 1943 and this Court's *Boyd* decision in 1993.[13]

In addition, we believe that the clarity of the statutory language suggests that overruling *Boyd* will advance rather than disrupt reliance interests. Indeed, we made this very point in *Robinson*:

> 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

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[13] Notably, with the single exception of *Austin* in 1968, the published decisions before *Boyd* had not questioned that the Legislature's 1943 amendment superseded *Roberts*. Of the nine cases that cited MCL 418.845 or its predecessor between 1950 and 1992, no case other than *Austin* suggested that *Roberts* continued to govern despite the 1943 amendment. See *Daniels, supra*; *Austin, supra*; *Rodwell, supra*; *Crenshaw, supra*; *Jensen, supra*; *Shaw, supra*; *Wolf, supra*; *Bell, supra*; and *Hall, supra*.

Thus, overruling *Boyd* will not produce chaos or practical, real-world dislocations because we are not creating a "new" rule of law. On the contrary, our decision simply *restores* the law to that which existed before the aberrational decision in *Boyd*.

> 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.]

The same reasoning applies here. We decline to perpetuate the distorted construction of MCL 418.845 adopted in *Boyd*. Rather, we are obligated to give effect to the statutory text to serve the fundamental expectation of our citizens that *the law means what it says*. The statute here is written in a plain, straightforward manner. Rather than give effect to this language, the *Boyd* Court nullified the clear policy choice made by the Legislature and thereby undermined the legitimate expectations of Michigan citizens that the courts will carry out the laws *as they are written*.

IV. RESPONSE TO JUSTICE KELLY'S DISSENT

In her dissent, Justice KELLY disagrees with the legislative policy reflected in the clear language of MCL 418.845. She shares the *Boyd* majority's view that the Legislature's policy choice is " 'undesirable' " and " 'unduly restrictive.' " *Post* at 54 (quoting with approval from *Boyd*, *supra* at 523-524). Justice KELLY is certainly entitled to her personal opinion about what the law should be. She manifestly does *not*, however, possess the authority to rewrite the law that the people's elected representatives have duly enacted. She nowhere explains the source of her authority to do this.

Under our constitution, "all political power is inherent in the people." Const 1963, art 1, § 1. The people have chosen to vest the legislative power "in a senate and a house of representatives." Const 1963, art 4, § 1.

The people have not forfeited lawmaking authority to a judicial aristocracy that may simply rewrite laws with which they disagree.

Here is a law that is perfectly clear to the reader. MCL 418.845 grants jurisdiction to the bureau for out-of-state injuries where "the injured employee is a resident of this state at the time of injury *and* the contract of hire was made in this state." (Emphasis added.)

Despite this unassailably clear language, Justice KELLY asserts that the *Boyd* Court correctly identified the "intent behind § 845" as providing "jurisdiction over extraterritorial injuries *without regard to the employee's residence*, provided the employment contract was entered into in Michigan with a resident employer." *Post* at 51 (emphasis added). In other words, Justice KELLY says that the employee's residence is simply irrelevant, *despite the Legislature's express statement to the contrary*.

Presumably, Justice KELLY denies that she is arrogating to herself the power to rewrite the law. The clear statutory language quoted above naturally leads one to ask this question: Precisely what part of the word "and" is difficult to understand? Surely anyone who reads this statute can follow what it says without difficulty: jurisdiction is conferred where (1) the injured employee lives in Michigan at the time of injury *and* (2) the contract of hire was made in this state. MCL 418.845. The Legislature's use of the word "and" makes it perfectly clear to any reader that both requirements must be met.

Despite all this, Justice KELLY has opined that the Legislature did not mean what it so clearly said. Justice KELLY offers no explanation for how the language of MCL 418.845 supports her interpretation. Her construction would subvert the legislative policy reflected

in the clear statutory language. In accord with our constitutional duty, we have applied the statutory language to the facts of this case, consistent with earlier caselaw that had prevailed before the aberrational decision in *Boyd*.

Finally, we note that Justice KELLY repeats her criticisms about the overruling of a prior decision. See her dissent in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). Justice MARKMAN's concurrence in *Rowland* offers a thoughtful and illuminating response to those criticisms. I fully endorse the views that Justice MARKMAN expressed in that case.

V. CONCLUSION

We hold that under the plain language of MCL 418.845, the workers' compensation bureau has jurisdiction over out-of-state injuries only where the plaintiff was a resident of Michigan at the time of the injury *and* the employment contract was made in Michigan. We must therefore overrule the decision in *Boyd*.[14] The doctrine of stare decisis as explicated in *Robinson* supports the decision to overrule *Boyd*.[15]

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[14] Justice KELLY incorrectly asserts that in addition to *Boyd*, we are also overruling *Roberts*. As we have explained, *Roberts* was *legislatively* abrogated by the 1943 amendments of the workers' compensation act. It is unnecessary for this Court to overrule a decision that has already been overruled by legislative action.

[15] We disagree with the assertions by Justices WEAVER and KELLY that we should limit our decision to prospective application. Such prospective application "is, essentially, an exercise of the legislative power to determine what the law shall be for all *future* cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to *the case at hand*." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 n 57; 702 NW2d 539 (2005) (emphasis in original). This Court generally may not exercise powers properly belonging to another branch of government. Const 1963, art 3, § 2. Moreover, "prospective opinions are, in essence,

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

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to overrule *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), but dissent from applying this decision retroactively. It should not be applied against this plaintiff and should only be applied prospectively because there has been extensive reliance for years on *Boyd* and its predecessors.

The *Boyd* Court incorrectly held, contrary to MCL 418.845, that an out-of-state worker who is injured need not have been a resident of the state of Michigan at the time of injury in order to claim workers' compensation benefits. Given that MCL 418.845 grants jurisdiction to the Workers' Compensation Agency only if the injured employee was a resident of the state at the time of the injury and the contract for hire was made in Michigan, nonresident injured employees are not entitled to workers' compensation benefits.

I dissent from the majority's decision to apply its ruling retroactively, given that *Boyd* has been the law in this state for 14 years—a substantial period during which nonresident injured employees and related parties have relied on the elimination of the residency requirement. As this Court held in *Pohutski v City of Allen Park* 465 Mich 675, 696; 641 NW2d 219 (2002), there are

> 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

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advisory opinions, and our only constitutional authorization to issue advisory opinions is found in Const 1963, art 3, § 8, which does not apply in this case." *Devillers, supra* at 588 n 57. Accordingly, our holding in this case shall apply to all claimants for whom there has not been a final judgment awarding benefits as of the date of this opinion. *Id*.

the administration of justice. *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil 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. *Riley v Northland Geriatric Center (After Remand),* 431 Mich 632, 645-646; 433 NW2d 787 (1988) (Griffin, J.).

Weighing the three factors leads to the conclusion, as in *Pohutski*, that prospective application is appropriate here. First, the purpose of the new rule is to correct an error in the interpretation of MCL 418.845. Prospective application would further this purpose. Second, there has been extensive reliance for 14 years on *Boyd*'s interpretation of MCL 418.845. In addition to reliance by the courts, insurance decisions have undoubtedly been predicated on this Court's longstanding interpretation of MCL 418.845 under *Boyd*. Nonresident injured employees, like plaintiff, who initially entered into contracts for hire in Michigan, but later agreed to work outside Michigan, have relied on the ability to obtain workers' compensation benefits based on their employment relationship with Michigan employers. Prospective application acknowledges that reliance and assures the fair resolution of those pending workers' compensation cases. Finally, prospective application minimizes the effect of this decision on the administration of justice because retroactive application would require in many cases new proceedings before the agency to reverse any benefit awards made pursuant to *Boyd*.

KELLY, J. (*dissenting*). Today the majority adds to its exponentially growing list of overturned precedents.[1] The well-reasoned decision of *Roberts v I X L Glass*

[1] For a more detailed review of the majority's proclivity at overturning precedent, see my partial dissent in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007) (KELLY, J., concurring in part and dissenting in part).

Corp[2] has been the law of this state for the past 74 years. In 1993, this Court revisited the reasoning of *Roberts* in *Boyd v W G Wade Shows*,[3] affirmed the decision, and rejected many of the same arguments that the majority makes today. Nothing has changed since this Court's decision in *Boyd* other than the makeup of the Court. At no time has the Legislature taken steps to reenact or amend any precursor to, or the current version of, MCL 418.845 in response to this Court's decisions in *Roberts* or *Boyd*. Because I believe that in those cases this Court properly effectuated the Legislature's intent when enacting § 845, I must disagree with the decision to overrule *Boyd*.

I. MCL 418.845, *ROBERTS*, AND *BOYD*

The sole question here is whether appellants' proposed overruling of *Boyd* is justified under the standard for departing from the rule of stare decisis discussed in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

The statute at the heart of this question is MCL 418.845, which provides:

> The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act.

The landmark case interpreting the precursor to § 845[4] is *Roberts*. The question presented in *Roberts* was:

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[2] 259 Mich 644; 244 NW 188 (1932).

[3] 443 Mich 515; 505 NW2d 544 (1993).

[4] The precursor to § 845 is found at part III, § 19 of 1921 PA 173. 1929 CL 8458 provided:

> [W]hether an employee whose contract for employment is entered into in Michigan with a resident employer who is under the workmen's compensation act . . . for services to be rendered wholly outside of the State of Michigan is within the terms of the act so that, if otherwise entitled thereto, he may be awarded compensation notwithstanding the accident occurred in another State and that the employee was at no time a resident of Michigan. [*Roberts v I X L Glass Corp,* 259 Mich 644, 644-645; 244 NW2d 188 (1932).]

Like the appellants here, the appellants in *Roberts* contended that the residency requirement of the precursor to § 845 constituted a limitation on the jurisdiction of the Industrial Accident Board. *Id.* at 647. However, the *Roberts* Court concluded that the Legislature could not have intended such a result. Among other things, the residency requirement was embodied in the procedural part of the act, not in the part that defines and fixes the rights and liabilities of employers and employees. *Id.*

Additionally, the *Roberts* Court pointed out that part III, § 19 conflicted with § 6 of the act.[5] The Court stated that § 6 allowed that the act protected "all employees"

> The industrial accident board shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state, in those cases where the injured employee is a resident of this state at the time of the injury, and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act.

[5] Specifically, § 6, 1929 CL 8412, provided:

> [S]uch employer accepts the provisions of this act for all his businesses, and to cover and protect all employees employed in any and all of his businesses, including all businesses in which he may engage, and all employees he may employ while he remains under this act . . . .

regardless of the residence of the employee or the locus of the accident. *Roberts*, 259 Mich at 647. Section 7 defined "employee" as "[e]very person in the service of another under any contract of hire . . . ." 1929 CL 8413. This section was in full harmony with § 6. *Roberts*, 259 Mich at 648.

Moreover, the *Roberts* Court reasoned that, as a matter of legislative policy, it would be "inconsistent . . . to deny compensation to an injured employee on the ground that he was a nonresident, but in case of fatal injury to award compensation to his dependents regardless of residence or citizenship." *Id*. Therefore, it concluded, the "reasonable construction and the one necessary to carry out the legislative intent appearing from the whole act is that it covers nonresident as well as resident employees in those cases wherein the contract of employment is entered into in this State with a resident employer." *Id.* at 648-649. The *Roberts* Court added that its construction was in accord with the "humane purposes" of the act. *Id.* at 649.

Nearly 61 years later, in *Boyd*, this Court revisited the reasoning and holding of *Roberts*. In that case, the employee was an Illinois resident who entered into a contract of employment in Michigan and was injured on the job in Indiana. *Boyd v W G Wade Shows*, 443 Mich 515, 516; 505 NW2d 544 (1993). The Court determined that the Bureau of Workers' Disability Compensation had jurisdiction to award benefits under the Worker's Disability Compensation Act (WDCA). MCL 418.101 *et seq*. It noted that *Roberts* was the landmark case that interpreted an earlier version of § 845 and set forth the rule of law regarding extraterritoriality. *Id.* at 517-518.

The *Boyd* Court noted that, although the Court of Appeals had reaffirmed the holding and reasoning of

Roberts in *Austin v W Biddle Walker Co*,[6] the Court of Appeals had begun to interpret § 845 in contravention of *Roberts*. *Id.* at 521-522, citing *Wolf v Ethyl Corp*, 124 Mich App 368; 335 NW2d 42 (1983), and *Hall v Chrysler Corp*, 172 Mich App 670; 432 NW2d 398 (1988). *Boyd* expressly rejected the Court of Appeals reasoning in those cases that, because *Roberts* had been decided at a time when the act was elective, *Roberts* was no longer valid. *Boyd,* 443 Mich at 522-523.

Specifically, *Boyd* noted that "[t]he fact that the act became compulsory subsequent to *Roberts* is irrelevant; the requirements of § 845 have remained intact." *Id.* at 523. Moreover, the Court wrote, "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority. . . . Because this Court has never overruled *Roberts*, it remains valid precedent." *Id.* at 523.

Boyd also noted that, if *Roberts* were overruled, a "significant gap" in coverage would exist in Michigan's workers' compensation scheme. *Id.* Specifically, it opined, all Michigan employees who suffer an out-of-state injury in the course of their employment and who reside in neighboring states would not be entitled to benefits. *Id.* at 523-524. This Court determined that *Roberts* remained "an effective means of retaining a fair and consistent scheme for extraterritorial jurisdiction." *Id.* at 524.

Moreover, *Boyd* observed that, by that time, the Legislature had acquiesced for 60 years in extraterritorial jurisdiction as expressed in *Roberts*. *Id.* at 525. Following in the Legislature's footsteps, *Boyd* declined to disturb the *Roberts* interpretation. Accordingly, the *Boyd* Court concluded that "the Bureau of Workers'

[6] 11 Mich App 311; 161 NW2d 150 (1968).

Disability Compensation shall have jurisdiction over extraterritorial injuries without regard to the employee's residence, provided the contract of employment was entered into in this state with a resident employer." *Id.* at 526.

II. THE *ROBINSON* FACTORS

In its decision today, the Court overrules *Boyd*. The same four justices who signed the majority opinion signed *Robinson* in 2000. In it, they set forth the factors to consider in overruling a decision while giving deference to the doctrine of stare decisis. *Robinson, supra.* They indicated that a court must first consider whether the earlier decision was wrongly decided. *Robinson, supra* at 464. It must also consider 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.*

With regard to the first *Robinson* factor, I believe that *Boyd* was properly decided. The primary goal of statutory interpretation is to give effect to the Legislature's intent. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). In both *Roberts* and *Boyd,* this Court identified the intent behind § 845: to provide the workers' compensation bureau with jurisdiction over extraterritorial injuries without regard to the employee's residence, provided the employment contract was entered into in Michigan with a resident employer.

The Legislature has never indicated its disapproval of *Roberts* or *Boyd.*[7] It has revised the WDCA numerous

[7] The Legislature is presumed to be aware of judicial interpretations of existing law. *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006).

times since 1932 when *Roberts* was decided, but it has taken no action that would indicate its disapproval of *Roberts*. In 1993, this Court reaffirmed the reasoning and holding of *Roberts* in *Boyd*. However, the Legislature still has not amended the statute, stated another purpose behind it, or taken any action indicating disapproval of the *Roberts* and *Boyd* interpretation of § 845. This lack of legislative correction strongly indicates that *Roberts* and *Boyd* properly determined and effectuated the intent behind MCL 418.845. Where this Court has properly interpreted the intent of the Legislature, the primary goal of statutory interpretation has been achieved. *In re MCI*, 460 Mich at 411.

Justice CORRIGAN's opinion propounds that the text of MCL 418.845 "is so patently clear that its meaning is truly beyond any reasonable dispute." *Ante* at 39. However, the mere fact that the majority does not agree with the *Roberts* and *Boyd* interpretation of § 845 does not make the statute "beyond any reasonable dispute." As I noted in my opinion in *Rowland*, "[i]t 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." *Rowland*, 477 Mich at 256 (KELLY, J., concurring in part and dissenting in part). Moreover, the majority's suggestion that the Michigan Legislature could not have drafted language indicating its disapproval of the *Roberts* and *Boyd* interpretation of § 845 underestimates the ability of our legislators.[8]

[8] The majority suggests that I am rewriting the statute to reflect my personal opinions of what the law should be. That is not so. I view it my responsibility as a justice to interpret the law. For the reasons I have stated, I believe that the learned jurists who preceded me on the bench correctly interpreted the intent of the Legislature in writing this statute. Notably, the Legislature has acquiesced in their interpretation of it.

In its opinion, the majority again questions the use of legislative acquiescence as a valid judicial tool for statutory interpretation. However, as I noted in *Rowland*, legislative acquiescence is one of the many judicial tools a court properly uses when attempting to effectuate the intent of the Legislature. *Rowland*, 477 Mich at 261 (KELLY, J., concurring in part and dissenting in part). In fact, the use of legislative acquiescence as a recognized judicial tool can be traced to the late nineteenth century. See *id*. at 260, referring to *Douglass v Pike Co*, 101 US (11 Otto) 677, 687; 11 Otto 677; 25 L Ed 968 (1880). Significantly, the United States Supreme Court has recently reaffirmed its use:

> [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).]

Also, Michigan's history reveals a consistent and long use of this tool by the courts. See *Brown v Manistee Co Rd Comm*, 452 Mich 354, 367-368; 550 NW2d 215 (1996), *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 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 (1967), *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).

Accordingly, legislative acquiescence has been and continues to remain a valid tool with which the judiciary can interpret legislative intent. Although the majority of my colleagues has banished legislative acquiescence from its repertoire, I and others on the Court quite appropriately may continue to use it as a judicial tool.

I also believe that *Boyd* was properly decided for the reason that the public policy concerns that existed when *Boyd* was decided remain today. As *Boyd* stated:

> If the allegedly "out-dated" *Roberts* decision is overruled by this Court, then a significant gap in coverage will exist in this state's compensation scheme. Specifically, all Michigan employees who suffer an out-of-state injury in the course of their employment and who reside in neighboring states will not be subject to the bureau's jurisdiction. We believe that such a jurisdictional scheme is not only undesirable but also unduly restrictive. [*Boyd,* 443 Mich at 523-524.]

This concern over the gap in coverage correlates with the general principle that the WDCA, as a remedial statute, is to be liberally construed to grant, rather than deny, benefits. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The majority contends that *Boyd* was not properly decided. It reasons that *Boyd* relied on *Roberts* and, when the Legislature repealed 1929 CL 8412[9] in 1943, the foundation of *Roberts* crumbled.[10] This is untrue.

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[9] As noted above in footnote 5, § 8412 referred to § 6 of the act as it existed when *Roberts* was decided. Specifically, § 8412 provided:

> [S]uch employer accepts the provisions of this act for all his businesses, and to cover and protect all employees employed in any and all of his businesses, including all businesses in which he may engage, and all employees he may employ while he remains under this act . . . .

[10] I would also highlight that, even though the Legislature repealed § 8412 in 1943, it did not repeal or in any way substantively alter § 845.

As noted above, numerous other factors were considered by the *Roberts* Court in reaching its decision. Specifically, *Roberts* noted that the residency requirement was in the procedural part of the act, not in the part that defines and fixes the rights and liabilities of employers and employees. *Roberts*, 259 Mich at 647.

Moreover, *Roberts* held that, as a matter of legislative policy, it would be "inconsistent . . . to deny compensation to an injured employee on the ground that he was a nonresident, but in case of fatal injury to award compensation to his dependents regardless of residence or citizenship." *Id.* at 648. *Roberts* also noted that its construction was in accord with the "humane purposes" of the act. *Id.* at 649. Therefore, contrary to the majority's claim, the reasoning in *Roberts* did not rely solely on the existence of 1929 CL 8412.

The majority also contends that *Boyd* was not properly decided because *Boyd* relied on *Roberts* after the Legislature made the workers' compensation system mandatory. This argument was asserted before the *Boyd* Court and rejected. Specifically, *Boyd* noted that "[t]he fact that the act became compulsory subsequent to *Roberts* is irrelevant; the requirements of § 845 have remained intact." *Boyd,* 443 Mich at 523.

For the reasons stated above, I believe that *Boyd* was properly decided, hence the first *Robinson* factor is not satisfied. *Robinson,* 462 Mich at 464. The Legislature has acquiesced in the *Roberts* and *Boyd* interpretation of § 845. This strongly indicates that this Court's interpretation of this statute properly identified the Legislature's intent, and *Boyd* was correctly decided.

The remaining *Robinson* factors also support affirming *Boyd*. Those factors are: (1) whether the decision defies "practical workability," (2) whether reliance interests would work an undue hardship if the authority

were overturned, and (3) whether changes in the law or facts make the decision no longer justified. *Robinson*, 462 Mich at 464.

Roberts and *Boyd* do not defy practical workability. Rather, the interpretation of § 845 underlying both these cases has been an integral part of Michigan's workers' compensation scheme for 74 years.[11] As the Workers' Compensation Appellate Commission indicated in the instant case, regardless of whether the lower tribunals agreed with *Roberts* and *Boyd*, they have applied *Roberts* or *Boyd* for decades. Accordingly, there is no practical workability problem.

The next concern is whether reliance interests would work an undue hardship if the authority were overturned. *Robinson,* 462 Mich at 464. "[T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id*. at 466.

Overturning *Roberts* and *Boyd* would work an undue hardship. As has been repeatedly noted, the underlying rationale of *Roberts*, and therefore *Boyd*, has been in place for over seven decades. It is difficult to imagine a plausible argument that this rationale has not become a fundamental part of the workers' compensation regime.

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[11] Justice BRICKLEY stated in his concurrence in *Boyd* that even though he believed *Roberts* was incorrectly decided, he concurred with the majority in *Boyd* because he agreed with its determination that, "after fifty years of legislative acquiescence, the *Roberts* decision has become ensconced as part of the overall workers' compensation scheme." *Boyd*, 443 Mich at 527 (BRICKLEY, J., concurring). Justice BRICKLEY's concern is even more applicable to the instant case because an additional 13 years have passed since *Boyd* was decided. During that period, the *Roberts* decision has become even more embedded as part of the overall workers' compensation scheme.

Indeed, the rationale underlying *Roberts* and *Boyd* predates the jurists, litigators, and claimants involved in this case.

For decades, employers have been paying benefits to injured employees in reliance on *Roberts* and *Boyd*. Will those employees be required to return their benefits? At oral argument, appellate counsel for appellants suggested that his clients would forgo any attempts to retrieve previously paid benefits. While the appellants here might not seek a refund, there remain many other employers or insurance companies that may not view past benefits paid as "water under the bridge." Accordingly, it seems incontestable that reliance interests would work an undue hardship if *Roberts* and *Boyd* are overturned.

The final *Robinson* factor is whether changes in the law or facts make the decision no longer justified. *Robinson*, 462 Mich at 464. The majority attempts to argue that the state of the law regarding the jurisdiction of the Bureau of Workers' Disability Compensation over extraterritorial injuries has been in a state of flux. However, that argument crumbles under close analysis.

Only two decisions of this Court have thoroughly explored the issues presented in this case: *Roberts* and *Boyd*. Because neither had ever before been expressly overruled, both remained good law until now.

The majority relies on *Daniels v Trailer Transport Co*[12] for the proposition that this Court has previously required that, before the workers' compensation tribunal can exercise jurisdiction, both subsections of § 845 must be met. The plaintiff in *Daniels* was an Illinois resident hired by a Michigan employer under a Texas contract of hire. *Daniels v Trailer Transport Co*, 327

[12] 327 Mich 525; 42 NW2d 828 (1950).

Mich 525, 527; 42 NW2d 828 (1950). He was injured on the job in Tennessee and attempted to obtain benefits under the Michigan workers' compensation regime. *Id.* Like the appellants in the instant case, the employer contended that the workers' compensation commission's jurisdiction extended only to extraterritorial injuries where the employee resided in Michigan and contracted for employment here. *Id.* at 529-530.

This Court in *Daniels* relied on *Cline v Byrne Doors, Inc*,[13] for the proposition that, " '[u]nder the provisions in the Michigan statute on which plaintiff relies [i.e., the precursor to § 845], his right to compensation depends on whether he was employed by virtue of a contract of hire made in this State.' " *Daniels*, 327 Mich at 530, quoting *Cline*, 327 Mich at 540. Applying the *Cline* rationale to the facts in *Daniels*, this Court concluded that the facts of the case did not bring the plaintiff within the provisions of the act.[14]

Noticeably absent from the reasoning in *Daniels* was any attempt to distinguish or overrule *Roberts*. Additionally, *Daniels* did not specify that the commission had jurisdiction only over extraterritorial injuries of a Michigan resident whose contract of hire was made in Michigan. Rather, the *Daniels* Court simply noted that *Cline* required the contract of hire be made in this state.

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[13] 324 Mich 540; 37 NW2d 630 (1949).

[14] The *Daniels* Court did not explicitly overrule, or even mention, Roberts. Although the facts presented in *Cline* were not the same as those presented in *Daniels*, the Court in *Daniels* did rely on *Cline* for the proposition quoted above. *Daniels*, 327 Mich at 530. After quoting *Cline*, the *Daniels* Court noted that the contract of hire in that case was made in Texas, whereas the contract of hire in *Cline* was made in Michigan. *Daniels*, 327 Mich at 530. Where the contract of hire was not made in Michigan, the *Daniels* Court concluded that the workers' compensation commission exceeded its jurisdiction in making the award. *Id*. This holding is consistent with *Roberts* and, I believe, reasonable notwithstanding the majority's contrary view.

Daniels, 327 Mich at 530. This proposition is consistent with the holding in *Roberts*.

Moreover, in *Austin v W Biddle Walker Co*,[15] the Court of Appeals opined that the reasoning in *Daniels* was consistent with that of *Roberts* The sole issue before the Court of Appeals in *Austin* was whether the Michigan Workers' Compensation Appeal Board had jurisdiction over a nonresident employee injured while working out of state under a Michigan employment contract. *Austin v W Biddle Walker Co,* 11 Mich App 311, 313; 161 NW2d 150 (1968). Employing the reasoning above, the Court of Appeals in *Austin* concluded that *Daniels* and *Cline* were consistent with *Roberts*. *Id.* at 318. It further concluded that *Austin* was governed by *Roberts*. Therefore, it opined, the Workers' Compensation Appeal Board properly exercised jurisdiction, and, to be entitled to benefits, the nonresident claimant had only to be injured while under a Michigan contract of hire. *Id.* at 313, 318.

The majority also points to another decision by this Court, *Crenshaw v Chrysler Corp*,[16] to support its proposition that the law after *Roberts* has been in a state of flux. However, that argument also withers under close analysis.

In *Crenshaw*, the plaintiff employee was injured while working out-of-state under an Ohio contract of hire. *Crenshaw v Chrysler Corp*, 394 Mich 513, 515; 232 NW2d 166 (1975). This Court quoted § 845 and italicized the phrase "contract of hire was made in this state." *Id.* at 516 n 1. In finding that the out-of-state injuries were not compensable in Michigan, this Court noted that the plaintiff had entered into his contract of hire in Ohio. *Id.* at 516.

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[15] 11 Mich App 311; 161 NW2d 150 (1968).

[16] 394 Mich 513; 232 NW2d 166 (1975).

Again, noticeably absent from the reasoning in *Crenshaw* was any attempt to distinguish or overrule *Roberts*. This Court in *Crenshaw* did not specify that the commission had jurisdiction over extraterritorial injuries only if the employee was hired in Michigan and was residing here when injured. Rather, this Court simply implied that, in order to be eligible for benefits, the plaintiff had to have entered into a Michigan contract of hire. This proposition is consistent with *Roberts*.[17]

Therefore, the majority's claim that two decisions of this Court have called the reasoning of *Roberts* into question is inaccurate. The two decisions it cites neither explicitly nor implicitly overruled *Roberts*. Rather, both *Daniels* and *Crenshaw* were consistent with *Roberts*. Accordingly, *Roberts* was still good law at the time this Court decided *Boyd*.

The majority also cites numerous Court of Appeals decisions that have questioned the *Roberts* decision. However, all of them predate *Boyd*. As this Court noted in *Boyd*:

> [I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority. While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. Because this Court has never overruled *Roberts*, it remains valid precedent. The rule of

[17] The majority disagrees with my interpretation of *Crenshaw*. However, it is undisputed that the Court in *Crenshaw* did not explicitly overrule, or even mention, *Roberts*. Rather, the Court noted that the contract of hire in that case was made out of state. It then emphasized, using italics, that the statute required that the contract of hire be made in Michigan in order for the bureau to have jurisdiction. *Crenshaw*, 394 Mich at 515-516 and 516 n 1. Such a holding is consistent with *Roberts*.

> law regarding extraterritorial jurisdiction as expressed in *Roberts* should have been applied by the bureau in the present case. [*Boyd*, 443 Mich at 523 (internal citations omitted).]

Accordingly, contrary to the majority's argument, *Roberts* and *Boyd* have continued to remain good law until today. In conclusion, none of the *Robinson* factors supports overruling *Boyd*.

III. RETROACTIVITY

I agree with Justice WEAVER that the majority's decision warrants prospective application. Generally, judicial decisions are given full retroactive effect. *Pohutski v City of Allen Park*, 465 Mich 675, 695; 641 NW2d 219 (2002). But there are well-established exceptions to this rule. The Court should consider the equities involved and, if injustice would result from full retroactivity, should adopt a more flexible approach. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). Prospective application is appropriate where the holding overrules settled precedent. *Id*. As was noted in *Pohutski*:

> 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 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).]

It is apparent that the majority in this case states a new rule of law. In fact, it overturns decades of prece-

dent. And, 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.

The first *Pohutski* factor is the purpose to be served by the new rule. The majority's purpose in its opinion here is to correct a statutory interpretation that it has found to be incorrect. Both prospective and retroactive application further such a purpose. *Id.* at 697.

The second factor is the extent of reliance on the old rule. *Id.* at 696. There are significant reliance concerns implicated by the overturning of *Roberts* and *Boyd*. The underlying rationale of these cases has been in place for seven decades. Attorneys, employers, insurance carriers, and various employees have relied on the holdings of *Roberts* and *Boyd*. Prospective application acknowledges the extensive reliance placed on the rationale of *Roberts* and *Boyd*. Retroactive application does not.

The final *Pohutski* factor is the effect of retroactivity on the administration of justice. *Id.* Retroactive application of this case could have serious adverse implications for the administration of justice. Many employees have received benefits in accord with *Boyd*. Under the majority's holding, the employees could be called on to give up or repay those benefits. Prospective application would eliminate this harsh result and thus promote the administration of justice.

Accordingly, application of the *Pohutski* factors strongly indicates a need for prospective application of this decision.

IV. CONCLUSION

The majority continues at its unparalleled rate of overturning this Court's precedent. For the reasons stated above, none of the *Robinson* factors supports

overruling *Boyd*. It was properly decided. The Legislature has taken no action to show disagreement with the interpretation of MCL 418.845 in *Roberts* or *Boyd*. The public policy concerns at issue when *Boyd* was decided remain unchanged to this day.

Boyd does not defy "practical workability." Indeed, various workers' compensation tribunals have been effectively applying *Boyd* since 1993 and *Roberts* since 1932. Reliance interests will work an undue hardship once *Boyd* is overturned because its underlying principles have been enmeshed in Michigan's workers' compensation regime for decades. Benefits paid to numerous injured employees in reliance on *Roberts* and *Boyd* lie in jeopardy. Finally, no changes exist in the law or facts to justify questioning the *Boyd* decision. Contrary to the majority's argument, the holdings of *Roberts* and *Boyd* remained good law until today.

Accordingly, for the reasons I stated earlier, giving appropriate deference to the 74-year precedent established in *Roberts* and upheld by *Boyd*, I would affirm the judgment of the Court of Appeals. Given that the majority has overruled *Boyd* and *Roberts,* the *Pohutski* factors should be applied to determine whether the new decision should be given retroactive application. Once those factors are weighed, it is obvious that the decision in this case should be applied prospectively.

CAVANAGH, J., concurred with KELLY, J.

PEOPLE v RANDY SMITH

Docket No. 130245. Decided May 23, 2007. Rehearing denied 478 Mich 1201.

Randy R. Smith was convicted by a jury in the Oakland Circuit Court, Edward Sosnick, J., of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The defendant appealed, alleging that the trial court erred in denying his request for a jury instruction on statutory involuntary manslaughter under MCL 750.329. The Court of Appeals, COOPER, P.J., and FORT HOOD and BORRELLO, JJ., reversed the convictions and remanded for a new trial, holding that the jury should have been instructed as requested by the defendant. Unpublished opinion per curiam, issued December 22, 2005 (Docket No. 256066). The Supreme Court directed the clerk to schedule oral argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action, stated that the defendant's cross-application for leave to appeal remained pending, and heard argument on the prosecution's application. 474 Mich 1100 (2006).

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

The trial court correctly denied the defendant's request for an instruction on statutory involuntary manslaughter. Statutory involuntary manslaughter is not an "inferior" offense of second-degree murder under MCL 768.32(1) because it contains elements —that the death resulted from the discharge of a firearm and that the defendant intentionally pointed the firearm at the victim— that are not subsumed in the elements of second-degree murder. Statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder.

Justice MARKMAN, concurring in the result only, would reverse the judgment of the Court of Appeals and remand the matter to the trial court for the reinstatement of the defendant's convictions of second-degree murder and felony-firearm. The term "manslaughter" in MCL 750.329(1) should be construed and understood consistently with the common-law meaning of the term absent evidence that the Legislature intended to alter the common-law definition for purposes of MCL 750.329(1). In *People v Holtschlag*,

471 Mich 1 (2004), this Court concluded that common-law involuntary manslaughter is a "catch-all" offense that encompasses all homicides committed without a *mens rea* of malice that are not either legally justified or voluntary manslaughter. Because MCL 750.329(1) is defined as a homicide that is committed without a *mens rea* of malice and that is neither legally justified nor voluntary manslaughter, defendant was entitled to an instruction on statutory involuntary manslaughter. However, because the jury concluded that the defendant committed the instant homicide with a *mens rea* of malice, given that the jury refused either to convict the defendant of common-law involuntary manslaughter or to acquit him, the failure to instruct on statutory involuntary manslaughter was harmless error.

Reversed in part; convictions reinstated; cross-application for leave to appeal denied.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the construction of MCL 768.32 by the Court in *People v Cornell*, 466 Mich 335 (2002), misinterprets the plain language of the statute and contravenes Supreme Court precedent. This construction, which permits jury instructions only on necessarily included lesser offenses of a charged offense, should not be applied. MCL 750.329 is properly interpreted as allowing instructions on lesser or inferior offenses of the crime charged if such instructions are supported by the evidence. The evidence at trial in this case would have supported an instruction on statutory involuntary manslaughter. The defendant should be granted a new trial in which the requested instructions are given.

CRIMINAL LAW — STATUTORY INVOLUNTARY MANSLAUGHTER — SECOND-DEGREE MURDER.

Statutory involuntary manslaughter is not an "inferior" or necessarily included lesser offense of second-degree murder (MCL 750.317, 750.329, and 768.32[1]).

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

Robin M. Lerg, for the defendant.

Amicus Curiae:

Ronald Frantz, President, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Assistant Prosecuting Attorney, for the Prosecuting Attorneys Association of Michigan.

CORRIGAN, J. Defendant was charged with and convicted of second-degree murder, MCL 750.317, after he killed the victim with a single gunshot to the head. The trial court denied defendant's request to instruct the jury on statutory involuntary manslaughter, MCL 750.329. At issue is whether the trial court should have instructed the jury on statutory involuntary manslaughter because it is a necessarily included lesser offense of second-degree murder. We hold that the court correctly denied defendant's request for the instruction. Statutory involuntary manslaughter is not an "inferior" offense of second-degree murder under MCL 768.32(1) because it contains elements—that the death resulted from the discharge of a firearm and that the defendant intentionally pointed the firearm at the victim—that are not subsumed in the elements of second-degree murder. Thus, statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder. We reverse the part of the judgment of the Court of Appeals that held to the contrary and reinstate defendant's convictions of second-degree murder and possession of a firearm during the commission of a felony, MCL 750.227b. We also deny defendant's cross-application for leave to appeal because we are not persuaded that the questions presented should be reviewed by this Court.

I. FACTS AND PROCEDURAL POSTURE

Defendant shot and killed a 16-year-old girl who was visiting his home. Defendant and the victim were sit-

ting on a couch when defendant pointed a loaded gun at the victim's head and told her, "Say I won't do it." A witness in the next room looked away briefly and then heard a gunshot. When the witness looked back, she saw the victim lying motionless on the floor while defendant sat on the couch with the gun in his hand. Defendant told the witness to say that the victim shot herself. The two then fled the house.

Defendant was charged with second-degree murder and felony-firearm. The trial court instructed the jury on the lesser offense of common-law involuntary manslaughter based on gross negligence. The trial court denied defendant's request to instruct on statutory involuntary manslaughter under MCL 750.329, because it contains elements that are not included in the offense of second-degree murder. The court explained that statutory involuntary manslaughter is therefore a cognate offense, rather than a necessarily included lesser offense, of second-degree murder. The jury found defendant guilty as charged of second-degree murder and felony-firearm.

The Court of Appeals reversed defendant's convictions and remanded for a new trial on the basis that the trial court erred in failing to instruct the jury on statutory involuntary manslaughter. Unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket No. 256066). The Court of Appeals explained that in *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), this Court held that manslaughter, both voluntary and involuntary, is a necessarily included lesser offense of murder. Thus, under *Mendoza*, a defendant who is charged with murder is entitled to an instruction on voluntary or involuntary manslaughter if a rational view of the evidence would support it. Although the holding in *Mendoza* pertained to *common-*

law manslaughter under MCL 750.321, the Court of Appeals here assumed, without explanation, that *Mendoza* also somehow held that *statutory* involuntary manslaughter under MCL 750.329 is a necessarily included lesser offense of murder. The Court of Appeals made no attempt to ascertain whether the elements of statutory involuntary manslaughter are subsumed in the offense of second-degree murder. The Court of Appeals also asserted, again without explanation, that *Mendoza* "appears to contradict" *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In any event, the Court of Appeals concluded that the trial court had "violated the mandate of *Mendoza* by rejecting defendant's requested manslaughter instruction," and that defendant's convictions must therefore be reversed.

The prosecution sought leave to appeal on the instructional issue. This Court directed the clerk to schedule oral argument regarding whether to grant the prosecution's application or take other peremptory action.[1] 474 Mich 1100 (2006). We directed the parties to address

> (1) whether statutory involuntary manslaughter, MCL 750.329, is a necessarily included lesser offense of murder; and, if so (2) whether a rational view of the evidence in this case supports a conviction of statutory involuntary manslaughter; and, if so (3) whether the Oakland Circuit Court's failure to give a jury instruction on statutory involuntary manslaughter was harmless error. [*Id*.]

II. STANDARD OF REVIEW

Whether statutory involuntary manslaughter is an inferior offense of second-degree murder under MCL

[1] Defendant also filed a cross-application for leave to appeal. In the order directing the clerk to schedule oral argument on the prosecution's application, this Court stated that defendant's cross-application remains pending. 474 Mich 1100 (2006).

768.32 is a question of law that this Court reviews de novo. *Mendoza, supra* at 531.

III. ANALYSIS

The trial court did not err in refusing to instruct the jury on statutory involuntary manslaughter under MCL 750.329. MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

In *Cornell,* this Court approved of the following explanation of the word "inferior" in MCL 768.32(1):

> "We believe that the word 'inferior' in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." [*Cornell, supra* at 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997).]

This Court then held that an "inferior" offense under MCL 768.32(1) is limited to necessarily included lesser offenses. *Cornell, supra* at 353-354. In conclusion, we held:

> [A] requested instruction on a necessarily included lesser offense 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. [*Id.* at 357.]

In *Mendoza*, this Court applied *Cornell* and concluded that *common-law* voluntary manslaughter and involuntary manslaughter are necessarily included lesser offenses of murder and thus "inferior" offenses under MCL 768.32(1). *Mendoza, supra* at 533, 541. We explained that the only element distinguishing murder from common-law manslaughter is malice, and that all the elements of common-law manslaughter are completely subsumed in the offense of murder. *Id.* at 540-541.

To apply the *Cornell*/*Mendoza* test, we must compare the elements of statutory involuntary manslaughter and second-degree murder. The statutory involuntary manslaughter statute at the time defendant killed the victim provided, in relevant part:

> Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter. [MCL 750.329.]

The elements of statutory involuntary manslaughter are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the death resulted from the discharge of a firearm, (4) at the time of the discharge, the defendant was intentionally pointing the firearm at the victim, and (5) the defendant did not have lawful justification or excuse for causing the death. *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). By contrast, the elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

Comparing the elements of these offenses, we conclude that statutory involuntary manslaughter under MCL 750.329 is not a necessarily included lesser offense of second-degree murder because it is not an "inferior" offense under MCL 768.32(1). It is plain that the elements of statutory involuntary manslaughter are not completely subsumed in the elements of second-degree murder. Statutory involuntary manslaughter contains two elements that are not required to prove second-degree murder: (1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim. Second-degree murder, on the other hand, may be committed without a firearm or even without a weapon of any kind. Because it is possible to commit second-degree murder without first committing statutory involuntary manslaughter, statutory involuntary manslaughter cannot be a necessarily included lesser offense of second-degree murder. *Cornell, supra* at 361; *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

Our holding is consistent with *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004), where this Court held:

> [I]t must be kept in mind that "the sole element distinguishing manslaughter and murder is malice," *Mendoza* at 536, and that "involuntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.' " [*People v Datema*, 448 Mich 585, 594-595; 533 NW2d 272 (1995)]. (Citation omitted.) If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser

> mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.

Holtschlag applies to common-law manslaughter, not statutory manslaughter. *Holtschlag* does not, and could not, hold that every killing of a human being is statutory involuntary manslaughter if it was committed without malice, was not voluntary, and was not excused or justified. One who involuntarily kills a person without malice and without excuse or justification does not necessarily commit statutory involuntary manslaughter. Similar to our second-degree murder analysis, statutory involuntary manslaughter contains two elements that are not required to prove common-law involuntary manslaughter: (1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim. Thus, just as statutory involuntary manslaughter is not included in the offense of second-degree murder, it is not included in the offense of common-law involuntary manslaughter. We reject defendant's and the concurrence's argument that statutory involuntary manslaughter is merely but one form of common-law involuntary manslaughter.[2]

Further, our conclusion that statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder is consistent with pre-

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[2] Justice MARKMAN concedes in his concurrence that statutory involuntary manslaughter requires proof of an element not required to prove second-degree murder. The discussion should end there. Because all the elements of statutory involuntary manslaughter are not completely subsumed in the elements of second-degree murder, statutory involuntary manslaughter cannot be an inferior offense to second-degree murder under MCL 768.32(1) and *Cornell, supra* at 354. Justice MARKMAN's discussion of the relationship between statutory and common-law manslaughter is thoughtful but is irrelevant to our analysis.

Cornell caselaw. In *Heflin, supra* at 497, this Court held that statutory involuntary manslaughter is a cognate lesser offense[3] of murder, not a necessarily included lesser offense.[4] MCL 768.32(1) does not permit consideration of cognate lesser offenses. *Cornell, supra* at 354.

It does not matter that, in the particular case before us, a firearm was used to commit the murder. As *Cornell* makes clear, when deciding whether a lesser offense is necessarily included in the greater offense, the determination whether all the elements of the lesser offense are included in the greater offense requires an abstract analysis of the elements of the offenses, *not* the facts of the particular case. *Id.* at 360-361.[5] The facts are instead considered to determine whether an instruction on a necessarily included lesser offense is proper in that particular case, i.e., whether the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and whether a rational view of the evidence supports the instruction. *Cornell, supra* at 357.

Finally, we disagree with the Court of Appeals that *Mendoza* and *Cornell* are inconsistent. In *Mendoza*, we applied the *Cornell* test and concluded that common-law manslaughter under MCL 750.321, either voluntary or involuntary, is an "inferior" offense of murder. *Mendoza, supra* at 540-541. We reached this conclusion

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[3] "Cognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Mendoza, supra* at 532 n 4.

[4] In *Heflin, supra* at 505, this Court held that the trial court did not err in refusing to instruct the jury regarding the offense of statutory involuntary manslaughter despite giving instructions on murder and voluntary manslaughter.

[5] Justice MARKMAN falls into the trap of comparing *facts* that could support a second-degree murder conviction with the *elements* of statutory involuntary manslaughter.

because common-law manslaughter does not contain any additional elements beyond those required for murder. *Id.* The only distinction between manslaughter and murder is the element of malice. *Id.* at 540. For voluntary manslaughter, proof of adequate provocation negates the existence of malice. *Id.* For involuntary manslaughter, gross negligence is a form of *mens rea* that is included in the greater *mens rea* of murder. *Id.* at 540-541. Thus, we concluded that the elements of common-law manslaughter are completely included in the elements of murder. *Id.* at 541. A defendant cannot commit murder without first satisfying the elements of common-law manslaughter. The Court of Appeals does not explain how this holding is inconsistent with *Cornell*, and we do not see any inconsistency.

IV. CONCLUSION

Because statutory involuntary manslaughter under MCL 750.329 contains elements that are not included in second-degree murder, it is not an "inferior" offense under MCL 768.32(1), and no instruction was permitted under *Cornell*. Thus, the trial court did not err in refusing to instruct the jury on statutory involuntary manslaughter. We reverse this aspect of the Court of Appeals judgment and reinstate defendant's convictions of second-degree murder and felony-firearm. We deny defendant's cross-application for leave to appeal because we are not persuaded that the questions presented should be reviewed by this Court.

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

MARKMAN, J. *(concurring in the result only)*. The majority concludes that defendant was not entitled to

an instruction on statutory involuntary manslaughter, MCL 750.329(1), on the basis that statutory involuntary manslaughter is not an "inferior" offense of second-degree murder under MCL 768.32(1). I respectfully disagree. In *People v Holtschlag*, 471 Mich 1; 684 NW2d 730 (2004), this Court concluded that common-law involuntary manslaughter is a catch-all offense that encompasses all homicides committed without a *mens rea* of malice that are not either legally justified or voluntary manslaughter. Just as this distinction required the Court in *Holtschlag* to find that a defendant who committed a homicide during a felony could be convicted of involuntary manslaughter, I believe that it requires the Court in this case to find that defendant was entitled to an instruction on statutory involuntary manslaughter. However, in this case the jury convicted defendant of second-degree murder and rejected the lesser offense of common-law involuntary manslaughter. Because the jury concluded that defendant committed the instant homicide possessing a *mens rea* of malice, I believe that the trial court's failure to instruct the jury on statutory involuntary manslaughter was harmless error. Accordingly, I agree with the result reached by the majority and would reverse the judgment of the Court of Appeals and remand this case to the trial court to reinstate defendant's convictions of second-degree murder and possession of a firearm during the commission of a felony.

Defendant shot and killed a 16-year-old girl who was visiting his home. Defendant was charged with second-degree murder and felony-firearm. The trial court instructed the jury on common-law involuntary manslaughter, but denied defendant's request for an instruction on statutory involuntary manslaughter, MCL 750.329(1). Defendant was convicted by the jury of second-degree murder and felony-firearm. The Court

of Appeals reversed the judgment of conviction and remanded for a new trial because the trial court erred in failing to instruct the jury on statutory involuntary manslaughter.

MCL 750.329(1) and MCL 768.32(1) state respectively:

> A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.
>
> * * *
>
> Except as provided in subsection (2),[1] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

Therefore, defendant is only entitled to an instruction on statutory involuntary manslaughter if that crime can be considered an "offense inferior to that charged in the indictment [i.e., second-degree murder]." In *People v Cornell,* 466 Mich 335, 354; 646 NW2d 127 (2002), this Court defined the language "offense inferior to that charged in the indictment" as an " 'offense [that] can be proved by the same facts that are used to establish the charged offense.' " (Citation omitted.) In other words, for crimes not formally divided into degrees, a defendant can be convicted of either the charged offense or a necessarily included lesser offense of the charged offense. This Court further concluded that, in order for a

[1] The provisions in subsection 2 do not apply in this case.

defendant to be entitled to an instruction on a necessarily included lesser offense, it must be supported by a "rational view of the evidence . . . ." *Id.* at 357.

Common-law involuntary manslaughter is a necessarily included lesser offense of second-degree murder. *People v Mendoza,* 468 Mich 527, 534; 664 NW2d 685 (2003). Under the common law, "the presence of malice became both synonymous with the absence of mitigating circumstances and the sole element distinguishing murder from manslaughter." *Id.* at 540. Therefore, this Court concluded:

> Regarding involuntary manslaughter, the lack of malice is evidenced by involuntary manslaughter's diminished mens rea, which is included in murder's greater mens rea. See *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995), stating:
>
> " '[P]ains should be taken not to define [the mens rea required for involuntary manslaughter] in terms of a wanton and wilful disregard of a harmful consequence known to be likely to result, because such a state of mind goes beyond negligence and comes under the head of malice.'
>
> "Unlike murder, involuntary manslaughter contemplates an unintended result and thus requires something less than an intent to do great bodily harm, an intent to kill, or the wanton and wilful disregard of its natural consequences. [Citations omitted; emphasis added.]"
>
> See also *United States v Browner*, 889 F2d 549, 553 (CA 5, 1989), stating, "In contrast to the case of voluntary manslaughter . . . the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to reach the traditional malice requirements."
>
> Thus, we conclude that the elements of involuntary manslaughter are included in the offense of murder be-

> cause involuntary manslaughter's mens rea is included in murder's greater mens rea. [*Id.* at 540-541 (emphasis omitted).]

This Court came to a similar conclusion in *Holtschlag, supra*. In *Holtschlag,* the defendants were convicted of involuntary manslaughter after placing gamma hydroxybutyric acid (GHB)[2] in the drink of a 14-year-old girl who subsequently became sick and died. The defendants argued that they could not be convicted of involuntary manslaughter under these facts, because involuntary manslaughter had been defined, in part, as a homicide that occurs during the commission of an unlawful act that is not a felony.[3] Because the act of placing GHB in an unsuspecting person's drink is a felony, the defendants argued that they could not have committed involuntary manslaughter.

This Court undertook its analysis in *Holtschlag* by noting that, under the common law, all homicides committed with a *mens rea* of malice constituted murder. *Holtschlag, supra* at 5-6. Involuntary manslaughter was a " 'catch-all concept including all manslaughter not characterized as voluntary: "Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse." ' " *Id.* at 7, quoting *Datema*, *supra* at 594-595, quoting Perkins & Boyce, Criminal Law (3d ed), p 105. In other words, involuntary manslaughter is defined by what it is *not*—if a homicide is not murder, voluntary

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[2] GHB is sometimes known as the "date rape drug."

[3] See *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923) (defining involuntary manslaughter as " 'the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty' ") (citation omitted).

manslaughter,[4] or a justified killing, it must be involuntary manslaughter. The traditional definition of malice included the felony-murder rule, which held that when a homicide occurred during the commission of a felony, the intent to commit that felony by itself established the existence of malice. Therefore, a homicide that occurred during the commission of an unlawful act only fell within the "catch-all" concept of involuntary manslaughter if the unlawful act was *not* a felony. However, in *People v Aaron,* 409 Mich 672, 727-728; 299 NW2d 304 (1980), this Court abolished the traditional felony-murder rule, holding that a homicide that occurred during the commission of any unlawful act, including a felony, constitutes murder only if the prosecutor demonstrates the existence of a *mens rea* of malice. Because a homicide that occurs during the commission of a felony is no longer murder per se, this Court concluded that the scope of the "catch-all" concept of involuntary manslaughter must necessarily encompass a homicide that occurred during the commission of a felony where the defendant acted with a lesser *mens rea*. In other words, the appropriate question to be asked to distinguish murder from involuntary manslaughter, post-*Aaron,* is whether the homicide was committed with malice. If the homicide was committed with malice, it is murder. If the homicide was not committed with a *mens rea* of malice, and is neither legally justifiable nor voluntary manslaughter, then it *must* be involuntary manslaughter. *Holtschlag, supra* at 11-12.

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[4] Common-law voluntary manslaughter occurs when " 'the act of killing, though intentional, [is] committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition . . . .' " *Mendoza, supra* at 535, quoting *Maher v People*, 10 Mich 212, 219 (1862).

At first blush, it would appear that statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder. The elements of second-degree murder are: (1) a death; (2) caused by the defendant's act; (3) with malice; and (4) without justification. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The elements of statutory involuntary manslaughter are: (1) a death; (2) caused by the defendant; (3) without lawful justification or excuse; (4) resulting from the discharge of a firearm; (5) at the time of the discharge, the defendant was pointing or aiming the firearm at the deceased; and (6) defendant intended to point or aim the firearm at the deceased. *People v Heflin,* 434 Mich 482, 497; 456 NW2d 10 (1990). As correctly noted by the majority, statutory involuntary manslaughter requires proof of an element not required for second-degree murder—namely that the defendant intentionally pointed or aimed a firearm at the victim. Because of this, the majority concludes that the elements of statutory involuntary manslaughter are not completely subsumed by the elements of second-degree murder, and thus the former is a cognate lesser offense and may not be considered by the jury. *Cornell, supra*.[5]

In my judgment, the majority misperceives the relationship between statutory and common-law manslaughter. According to the majority, when the Legislature enacted the statute, it created a separate and

[5] The majority also cites for support this Court's conclusion in *Heflin,* that statutory involuntary manslaughter is a cognate lesser offense of murder. *Ante* at 73. However, I find *Heflin* to be of dubious value in this regard, because the opinion also concluded that common-law involuntary manslaughter was a cognate lesser offense of murder, a holding that was later overruled by *Mendoza*. In addition, at the time *Heflin* was decided, the distinction between cognate and lesser included offenses was far less relevant, given the Court's then-existing precedent holding that MCL 768.32(1) applied equally to cognate and necessarily included lesser offenses. See *Cornell, supra*.

distinct crime of manslaughter. That is, statutory manslaughter represents a departure from the common-law understanding of manslaughter and, therefore, the only relationship between the two is in name. Because statutory manslaughter exists outside the realm of the common law, the usual common-law relationship between murder and manslaughter is inapplicable.

But the majority's conclusion fails to give sufficient regard to the language and context of the statute. MCL 750.329(1) defines the act of intentionally aiming or pointing a firearm at another and, without malice, discharging that firearm and causing the victim's death as "manslaughter." Yet, the latter term is nowhere defined by the statute. However, the term "manslaughter" in the general manslaughter statute, MCL 750.321,[6] *has* been interpreted and has always been understood to refer to common-law manslaughter. See, e.g., *Mendoza, supra*; *Holtschlag, supra*. Because this common-law term is not defined in MCL 750.329(1), it should be interpreted in a manner consistent with how it has been interpreted and understood in the general manslaughter statute, absent evidence that the Legislature intended to alter or repeal that common-law definition.

This Court has held that where "a statute dealing with the same subject invokes a common-law term, and where there is no clear legislative intent to alter the common law, this Court will interpret the statute as having the same meaning as under the common law." *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716

[6] MCL 750.321 states:

> Manslaughter—Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court.

NW2d 247 (2006), citing *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994). Neither the majority nor the parties in this case have asserted that the Legislature intended to replace the common-law definition of "manslaughter" for the purposes of MCL 750.329(1). Nor could such an argument be reasonably made because, while the Legislature *could* alter the common law, it has not done so in the instant context. Nothing in the language of either MCL 750.329(1) or the general manslaughter statute demonstrates any legislative intent, clear or otherwise, to alter or abrogate the common law. Accordingly, in the absence of such intent, the term "manslaughter" set forth in MCL 750.329(1) should be construed and understood consistently with the common-law meaning of the term.

Once the premise that statutory manslaughter does not displace common-law manslaughter becomes accepted, the majority's determination that statutory manslaughter operates outside the context of the common law becomes untenable. The statutory *form* of manslaughter at issue in this case does not independently define the term "manslaughter," nor does it set forth a separate and distinct term of imprisonment.[7] Rather, it merely sets forth one specific form of manslaughter. Thus, when the Legislature defined the criminal act set forth in MCL 750.329(1) as "manslaughter," it incorporated that criminal act into the general manslaughter statute and its 15-year maximum term of imprisonment. Just as the term "manslaugh-

[7] Just as in MCL 750.329(1), other forms of statutory manslaughter do not set forth separate and distinct terms of imprisonment. See, e.g., the willful killing of an unborn quick child by means of an assault on the mother, MCL 750.322, and the killing of an unborn quick child or mother "from use of medicine, etc., with intent to destroy such child," MCL 750.323.

ter" in the statute should be construed and understood in a manner consistent with the general manslaughter statute, it should also be understood to define the criminal act set forth in the statute as *part* of the general manslaughter statute. In other words, statutory manslaughter is a specific instance of the general crime of manslaughter set forth in MCL 750.321 and is subject to the same prison term as any other form of manslaughter recognized at common law. On the basis of that understanding, I believe that statutory manslaughter under MCL 750.329(1) is simply one form of manslaughter recognized in this state and, therefore, is subject to the 15-year maximum term set forth in MCL 750.321.

The remaining question then is how MCL 750.329(1) fits within the common-law definition of manslaughter. In *Holtschlag*, *supra* at 21, this Court held that "[i]f a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter." The language of MCL 750.329(1) makes clear that a homicide committed by a defendant who intentionally points or aims a firearm at a victim is not excused or justified. Further, the statute only applies to circumstances in which the defendant commits the homicide *lacking* a *mens rea* of malice. Because a violation of MCL 750.329(1) cannot be voluntary manslaughter or murder, and is not excused or justified, it must necessarily be considered involuntary manslaughter. In other words, the statute is merely one instance of the more general crime of common-law involuntary manslaughter. Because this crime is a necessarily included lesser offense of second-degree murder, *Mendoza, supra,* the specific *type* of involuntary manslaughter created by the statute must also be a necessarily included lesser offense of second-degree murder. Further, if a defendant is charged with second-degree

murder, and the offense was committed with a firearm, the charge necessarily includes all the elements of MCL 750.329(1). Just as the defendants in *Holtschlag* who committed a homicide that occurred during the commission of a felony, but lacking malice, were properly convicted of common-law involuntary manslaughter, the defendant in the instant case who claimed that he committed a homicide while intentionally pointing or aiming a firearm at the victim, but lacking malice, was entitled to an instruction on a specific form of common-law involuntary manslaughter, i.e., statutory involuntary manslaughter. Accordingly, I believe that the trial court erred by not giving the requested jury instruction.

While the trial court erred by failing to give the jury instruction, the error was harmless, in my judgment, because the jury *was*, in fact, instructed on common-law involuntary manslaughter and rejected that offense. In cases of nonconstitutional preserved error, the defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, the jury was instructed both on second-degree murder and on common-law involuntary manslaughter. As noted above, *Holtschlag* establishes that a homicide committed without malice is involuntary manslaughter. MCL 750.329(1) only applies where the defendant intentionally points or aims a firearm at the victim without malice. By convicting defendant of second-degree murder, the jury necessarily determined that defendant acted with the *mens rea* of malice when he shot the victim. Had the jury concluded that defendant did *not* commit the instant homicide with the *mens rea* of malice, it would have either convicted defendant of common-law involuntary manslaughter or acquitted him. Therefore, defendant cannot demonstrate that,

had the jury been instructed on a *statutory* form of involuntary manslaughter, it would have determined that defendant lacked the *mens rea* of malice. See, e.g., *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006) (noting that "[g]iven the jury's refusal to either acquit or convict of the lesser offense [of second-degree murder], defendant has failed to demonstrate that a 'miscarriage of justice' occurred when the trial court failed to instruct on involuntary manslaughter").

In conclusion, the Legislature's use of the term "manslaughter" to define the criminal act set forth in MCL 750.329(1) indicates that the statute has defined a particular form of common-law manslaughter. *Holtschlag* recognized that the sole relevant question in determining whether a homicide is murder or common-law involuntary manslaughter is whether the homicide was committed with malice. Where a defendant acts with a *mens rea* of malice, it is murder. Where a defendant acts with a lesser *mens rea*, and the homicide is not voluntary manslaughter or excused or justified, then it is common-law involuntary manslaughter. Thus, common-law involuntary manslaughter is a catch-all offense that encompasses *all* homicides committed without a *mens rea* of malice that are not either legally justified or voluntary manslaughter. By its own terms, MCL 750.329(1) applies only to homicides committed with a firearm, but without a *mens rea* of malice and under circumstances that are neither legally justified nor compose the elements of voluntary manslaughter. Just as this distinction required the Court in *Holtschlag* to find that a defendant who committed a homicide during a felony could be convicted of involuntary manslaughter, I believe that it requires the Court in this case to hold that defendant was entitled to an instruction on statutory involuntary manslaughter.

However, given that the jury refused either to convict defendant of common-law involuntary manslaughter or to acquit him, it necessarily concluded that defendant committed the instant homicide with a *mens rea* of malice. Therefore, I conclude that the trial court's failure to instruct the jury on statutory involuntary manslaughter was harmless error. Accordingly, I agree with the result reached by the majority and would reverse the judgment of the Court of Appeals and remand this case to the trial court to reinstate defendant's convictions of second-degree murder and felony-firearm.

CAVANAGH, J. (*dissenting*). I agree with the majority that *People v Mendoza,* 468 Mich 527; 664 NW2d 685 (2003), is not inconsistent with *People v Cornell,* 466 Mich 335; 646 NW2d 127 (2002), because *Mendoza*'s holding only concerned common-law manslaughter. Additionally, I do not question the accuracy of the majority's comparison of the elements of second-degree murder, MCL 750.317, and statutory involuntary manslaughter, MCL 750.329. Nevertheless, I dissent from the continued application of *Cornell*, which permits jury instructions only on necessarily included lesser offenses of a charged offense. I reiterate my belief that *Cornell*'s construction of MCL 768.32 misinterprets the statute's plain language and contravenes this Court's precedent. See *Mendoza*, *supra* at 549-555 (CAVANAGH, J., concurring). I maintain that the proper interpretation of MCL 750.329 allows instructions on lesser or "inferior" offenses of the crime charged if such instructions are supported by the evidence.

The evidence presented at defendant's trial would have supported an instruction on statutory involuntary manslaughter. The defense approach was to admit that defendant caused the fatality but dispute the element of

intent. There was sufficient evidence for the jury to find that defendant had intentionally aimed a gun at the decedent, yet had shot her without malice. But without an instruction on statutory involuntary manslaughter, the jury did not have the option to return such a verdict. Accordingly, I would grant defendant a new trial in which the requested instructions are given to the jury.

KELLY, J., concurred with CAVANAGH, J.

KNUE v SMITH

Docket No. 130377. Decided May 23, 2007.

Daniel and Jacqueline Knue brought an action in the Ottawa Circuit Court against Joan, Steve, and Cornelius C. Smith, seeking to quiet title to a strip of land that the plaintiffs claimed to have acquired through adverse possession or acquiescence. During the pendency of the lawsuit, the plaintiffs' attorney sent the defendants' attorney an offer to stipulate the entry of a judgment dismissing the action with prejudice and without costs in return for plaintiffs' paying the defendants $3,000 and the defendants' transferring the property to the plaintiffs by way of a quitclaim deed. The defendants rejected the offer. Following a bench trial, the court, Calvin L. Bosman, J., entered a judgment and order quieting title in favor of the plaintiffs. The plaintiffs then moved for costs and attorney fees under MCR 2.405(D)(1), the offer of judgment court rule. The defendants objected on several grounds, including that the court rule does not apply to equitable actions such as actions to quiet title. The court entered an opinion and order granting the plaintiffs' request for offer of judgment sanctions. The Court of Appeals, WHITBECK, C.J. and BANDSTRA and MARKEY, JJ., affirmed the award of offer of judgment sanctions in an opinion per curiam. 269 Mich App 217 (2005). The Supreme Court directed the clerk to schedule oral argument on whether to grant the defendants' application for leave to appeal, 477 Mich 854 (2006), and heard oral argument regarding the matter.

In separate opinions, the Supreme Court *held*:

MCR 2.405 does not apply to this case.

Chief Justice TAYLOR, joined by Justices CAVANAGH and CORRIGAN, stated that the offer of judgment rule does not apply to lawsuits, where the putative offer would not result in a judgment for a sum certain. An offer for an exchange of cash for the execution of a recordable real estate document culminating in a judgment of dismissal with prejudice and without costs falls outside the scope of MCR 2.405(A)(1), and no costs may be awarded under MCR 2.405(D)(1) in a case involving such an offer.

Justice KELLY, concurring, stated that the American rule governing the payment of attorney fees permits the recovery of fees and costs only when expressly authorized by statute or court rule. The offer of judgment court rule, MCR 2.405, does not expressly authorize the recovery of attorney fees and costs in equitable cases. Therefore, such fees and costs are not recoverable as sanctions under MCR 2.405(D). The judgments of the lower courts should be reversed and the matter should be remanded to the trial court for the entry of an order denying the plaintiffs' motion for offer of judgment sanctions.

Justice YOUNG, joined by Justice WEAVER, concurring in the result only, stated that the plaintiffs' offer was not for a sum certain because it required a quitclaim deed in addition to the payment of $3,000. Thus, MCR 2.405 does not apply to this case.

Court of Appeals judgment reversed; trial court order granting offer of judgment sanctions reversed; case remanded to the trial court for the entry of an order denying the plaintiffs' motion for offer of judgment sanctions.

Justice MARKMAN, dissenting, would deny leave to appeal. The Court of Appeals correctly held that the offer of judgment rule, MCR 2.405, may apply to cases seeking equitable relief and that the offer in dispute in this case was an offer of judgment under the court rule. The plaintiffs provided written notification to the defendants of the plaintiffs' willingness to stipulate the entry of a judgment in a sum certain and that offer was more favorable to the defendants than the resulting verdict, thus entitling the plaintiffs to an award of actual costs under the court rule.

Ledford & Associates (by *Paul A. Ledford* and *Gregory P. Bierl*), for the plaintiffs.

Plunkett & Cooney, P.C. (by *Jeffrey C. Gerish, Steven F. Stapleton*, and *Kristen M. Tolan),* and *Law, Weathers & Richardson, P.C.* (by *Steven F. Stapleton*), for the defendants.

TAYLOR, C.J. At issue in this case is whether the requirement of the offer of judgment rule, MCR 2.405, to stipulate "to the entry of a judgment in a sum certain" such as to trigger the operation of the rule, and

its sanction provisions, is met if the putative offer would culminate in a judgment, not for a sum certain but in a dismissal with prejudice and without costs only. The trial court and Court of Appeals held that an offer in a quiet title action in which the plaintiffs offered $3,000 to defendants in return for a quitclaim deed, after which a judgment for dismissal with prejudice and without costs would enter, was the offer of a sum certain such as to establish the predicate for the operation of the offer of judgment rule. Because we conclude this was not an offer for "the entry of a judgment of a sum certain" we reverse the judgments of the lower courts and remand to the trial court for entry of an order denying plaintiffs' motion for offer of judgment sanctions.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs filed an action to quiet title asserting that they had acquired title to a small strip of land through adverse possession or acquiescence. During the pendency of the lawsuit, plaintiffs' counsel sent defense counsel a letter on May 16, 2003, presenting an offer for settlement that he characterized as a "stipulation of entry of judgment" pursuant to MCR 2.405. The offer was that in return for payment by plaintiffs to defendants of $3,000 the defendants would convey the disputed land to plaintiffs by quitclaim deed and the parties would stipulate a dismissal of all claims "with prejudice and without costs." Counsel for defendants replied by letter, acknowledging the offer but contesting that this qualified as an offer of judgment pursuant to MCR 2.405.

The offer was not accepted and a bench trial was held. The trial court entered a judgment and order quieting title in plaintiffs' favor. Plaintiffs subsequently

filed a motion seeking actual costs and attorney fees under the offer of judgment rule, MCR 2.405(D)(1). They asserted that the offer of settlement of May 16, 2003, qualified under the offer of judgment rule and, as the adjusted verdict at the conclusion of the trial was more favorable to the plaintiffs than the offer, they were entitled to offer of judgment sanctions.[1]

Defendants opposed the motion, arguing that the offer was not for a sum certain because this was an equitable action, and even if this argument was unavailing the court should decline to award sanctions under the "interest of justice" exception set forth in MCR 2.405(D)(3).[2]

The trial court rejected the argument that the offer of judgment rule did not apply to equitable actions, noting that the rule contains no distinction between cases decided in equity and those decided at law and determined that $3,000 was a sum certain. The court further rejected the claim that the demand for a quitclaim deed was the attachment of a condition that took the offer outside the scope of the court rule, holding rather that the offer was only in the form necessary to resolve plaintiffs' equitable claim. Finally, the trial court declined to apply the interest of justice exception.

Upon appeal, the Court of Appeals affirmed in a published opinion per curiam.[3] The Court first rejected the argument that the offer of judgment rule does not apply to equitable actions, distinguishing *Hessel v Hes-*

[1] The case was not submitted to case evaluation pursuant to MCR 2.403. Per MCR 2.405(E), costs may not be awarded under the offer of judgment rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.

[2] This rule provides, "The court may, in the interest of justice, refuse to award an attorney fee under this rule."

[3] 269 Mich App 217; 711 NW2d 84 (2005).

sel, 168 Mich App 390; 424 NW2d 59 (1988), which had held that the rule does not apply to proposed property settlements in divorce actions, which are, of course, equitable. While acknowledging that, the Court opined that because $3,000 is a sum certain and the quiet title demand was akin to a dismissal, the rule of *Hessel* was inapplicable. Finally, the Court of Appeals concluded that the trial court had not abused its discretion in failing to invoke the interest of justice exception.

Defendants applied to this Court for leave to appeal, and we directed the clerk to schedule oral argument on whether to grant the application, asking the parties to brief (1) 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 (2) whether the $3,000 offer in plaintiffs' counsel's letter was an offer of judgment under MCR 2.405(A)(1), in light of that rule's requirement of a "sum certain" and given plaintiffs' additional demand for a quitclaim deed. 477 Mich 854 (2006).

II. STANDARD OF REVIEW

The proper interpretation and application of a court rule is a question of law that this Court reviews de novo. *CAM Constr v Lake Edgewood Condo Ass'n,* 465 Mich 549, 553; 640 NW2d 256 (2002).

III. ANALYSIS

When called on to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation. *Grievance Administrator v Underwood,* 462 Mich 188, 193; 612 NW2d 116 (2000). Accordingly, we look to the language of the court rule and in particular to that section which defines what an offer must be to qualify as an "offer of judgment."

MCR 2.405 provides, in relevant part:

> (A) Definitions. As used in this rule:
>
> (1) "Offer" means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule.

Thus, to be an "offer" the offer must propose to stipulate the entry of a *judgment in a sum certain.* There is no latitude given in this rule for offers of judgment that culminate in something other than a "judgment for a sum certain." That is, it is nonconforming for the offer to require a reciprocal exchange of cash for the execution of a recordable real estate document culminating in a judgment of dismissal with prejudice and without costs. For such an offer, the offer of judgment rule is simply inapplicable and no consideration of the distinctions between equity and law is required to resolve this matter.

Accordingly, contrary to the holdings of the trial court and Court of Appeals, the plaintiffs' offer that a quitclaim deed be provided for $3,000 and then a judgment of dismissal with prejudice and without costs would enter would not have culminated in a "judgment for a sum certain." Thus, the tendered offer fell outside the scope of MCR 2.405(A)(1), and no costs and fees may be awarded under the rule.

IV. CONCLUSION

We hold that the offer of judgment rule does not apply to lawsuits where the putative offer would not result in judgment for a sum certain. Because the offer plaintiffs made here was nonconforming with the offer

of judgment rule, possible sanctions under that rule are unavailable. Thus, we reverse the contrary judgment of the Court of Appeals and the trial court order granting offer of judgment sanctions. The case is remanded to the trial court for the entry of an order denying plaintiffs' motion for offer of judgment sanctions.

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

KELLY, J. (*concurring*). I concur in the decision to reverse the judgments of the lower courts and remand this case to the trial court for an order denying plaintiffs' motion for offer of judgment sanctions. However, I would hold that the offer of judgment rule, MCR 2.405, is inapplicable when equitable relief is sought.

This Court's recent unanimous decision in *Haliw v Sterling Hts*,[1] in which we discussed case evaluation sanctions under MCR 2.403, is instructive. In *Haliw*, after the trial court granted the defendant's motion for summary disposition, the defendant sought case evaluation sanctions. *Haliw v Sterling Hts,* 471 Mich 700, 702-703; 691 NW2d 753 (2005). Included in this amount were the defendant's appellate costs and attorney fees. *Id.* at 703. The trial court rejected the defendant's request, but the Court of Appeals reversed. *Id.* at 703-704.

This Court reversed the Court of Appeals judgment and reinstated the trial court's order noting, among other things, that Michigan follows the "American rule" with respect to the payment of attorney fees and costs. *Id.* at 706. Under this rule, attorney fees generally are not recoverable as costs absent an exception set forth in a statute or court rule expressly authorizing such an

[1] 471 Mich 700; 691 NW2d 753 (2005).

award. *Id*. at 707. Therefore, although MCR 2.403(O)(6) authorizes recovery of "a reasonable attorney fee" and "costs," the rule does not mention appellate attorney fees and costs. *Id.* Accordingly, this Court in *Haliw* found that the Court of Appeals erred in concluding that, where MCR 2.403(O) did not exclude such expenses, they are recoverable. *Haliw,* 471 Mich at 707. The Court of Appeals conclusion runs "contrary to the American rule governing the payment of attorney fees. . . . [The rule] permits recovery of fees and costs where *expressly authorized.*" *Id.* (emphasis in original).

The rationale in *Haliw* undermines the instant plaintiffs' contention that, because MCR 2.405 does not distinguish between equitable and legal claims, a court may award sanctions when equitable relief is sought. As noted in *Haliw*, the American rule governing payment of attorney fees permits recovery of fees and costs only when expressly authorized. MCR 2.405(D) does not expressly authorize the recovery of attorney fees and costs in equitable cases. Therefore, when such fees and costs are not expressly authorized, they are not recoverable as sanctions under MCR 2.405(D).

Furthermore, the intent of a court rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. *Haliw*, 471 Mich at 706. Both MCR 2.405(D) and MCR 2.403(O) are located in chapter 2 of the Michigan Court Rules, which addresses matters of civil procedure. Although the rules are in the same chapter, the absence of any reference to equitable claims in MCR 2.405(D) is in stark contrast to the reference to equitable claims made in MCR 2.403(O). Specifically, MCR 2.403(O)(5)(b) expressly authorizes attorney fee awards in cases involving equitable claims. Although this Court forewarned litigants that MCR

2.403(O) applies if equitable relief is sought, it provided no such warning in MCR 2.405(D).

There are also practical considerations that support the conclusion that MCR 2.405(D) is inapplicable when equitable relief is sought. An offer made pursuant to MCR 2.405 is controlled solely by a party to the litigation. However, an award made pursuant to MCR 2.403 is controlled by a panel of three neutral persons who must unanimously agree on an award before a prevailing party may obtain costs. See MCR 2.403(D)(1) and (O)(7).

Hence, an offer made pursuant to MCR 2.405 can be more easily manipulated for strategic purposes than an award made pursuant to MCR 2.403. An offeree faced with a case evaluation award in an equitable action is explicitly forewarned by MCR 2.403(O)(5) that sanctions are possible if the offeror prevails. Moreover, the deterrent to rejecting the offer is more justified than in the offer of judgment setting because the award represents three unbiased evaluators' unanimous opinion about the worth of the claim. MCR 2.405(D) stands in contrast. It does not forewarn that sanctions are possible where the principal nature of the dispute is equitable and the offer represents the opposing party's biased opinion about the worth of the claim. Accordingly, the absence of any reference to equitable relief in MCR 2.405 can be rationally distinguished from the explicit reference to equitable relief in MCR 2.403(O)(5).

Moreover, the conclusion that offer of judgment sanctions are not applicable where equitable relief is sought is supported by MCR 2.405(A)(5), which provides: " 'Adjusted verdict' means the verdict plus interest and costs from the filing of the complaint through the date of the offer." The offer of judgment rule assumes an

automatic adjustment of prejudgment interest. However, in actions to quiet title, there can be no adjusted verdict because the judgment consists of a decision by the court regarding which party owns the disputed real property.

For the above reasons, I would hold that the offer of judgment rule, MCR 2.405, is inapplicable when equitable relief is sought. I would reverse the judgments of the trial court and the Court of Appeals and remand the case for entry of an order denying plaintiffs' motion for offer of judgment sanctions.

YOUNG, J. (*concurring*). I concur in the result only. Because plaintiffs' offer required a quit claim deed in addition to the transfer of $3,000, the offer could not be for a sum certain. Therefore, MCR 2.405 does not apply to this case.

WEAVER, J., concurred with YOUNG, J.

MARKMAN, J. (*dissenting*). I would deny leave to appeal on the application. I believe that the Court of Appeals correctly held that the offer of judgment rule, MCR 2.405, may apply to cases, like this, in which the relief sought is equitable, and that the offer in dispute here constituted an offer of judgment within the meaning of MCR 2.405.

The language of MCR 2.405 does not differentiate between legal and equitable claims. Under MCR 2.405(D)(1), if a verdict is more favorable to the offeror than the offer, the offeree must pay the offeror's actual costs. "Offer" is defined as "a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain." MCR 2.405(A)(1). Here, plaintiffs notified defendants in writing that they were willing to stipulate to the entry of a

judgment, i.e., a judgment awarding plaintiffs the property, for a sum certain, i.e., $3,000.

Defendants contend that plaintiffs' offer did not constitute an offer of judgment under MCR 2.405 because it was not unconditional since plaintiffs' offer to pay defendants $3,000 was "conditioned" on defendants' transferring the deed to the property to plaintiffs. I respectfully disagree. Because this is a quiet-title action, an "entry of a judgment" in plaintiffs' favor would necessarily have required defendants to transfer the deed to the property to plaintiffs. Therefore, although plaintiffs' offer may have been more explicit than necessary in referencing the transfer of the deed, it was nevertheless, for all practical purposes, an unconditional offer.

Moreover, the offer was for a "sum certain" because plaintiffs offered to pay defendants $3,000 and $3,000 constitutes a sum certain.

Because plaintiffs offered to pay defendants $3,000 for the entry of a judgment in their favor, and because they ended up having to pay defendants $0 for the entry of a judgment in their favor, the trial court did not abuse its discretion by awarding costs to plaintiffs under MCR 2.405(D)(1).

TAXPAYERS OF MICHIGAN AGAINST CASINOS
v STATE OF MICHIGAN

Docket Nos. 129816, 129818, 129822. Argued October 5, 2006 (Calendar No. 15). Decided May 30, 2007.

Taxpayers of Michigan Against Casinos (TOMAC) and State Representative Laura Baird brought an action in the Ingham Circuit Court against the state of Michigan, seeking to have declared unconstitutional compacts between the state and Indian tribes concerning casino gaming on tribal lands in Michigan. The compacts were negotiated by the Governor on behalf of the state, were concluded pursuant to the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., and were approved by the Michigan House of Representatives and Senate by joint resolution. Gaming Entertainment, LLC, the Little Traverse Bay Bands of Odawa Indians, and North American Sports Management Company were allowed to intervene as defendants. The court, Peter D. Houk, J., ruled that legislative approval of the compacts by resolution violated Const 1963, art 4, § 22 (which provides that all legislation shall be by bill), that compact provisions allowing the Governor to amend the compacts without legislative approval violated art 3, § 2 (separation of powers), but that the compacts do not implicate art 4, § 29 (which prohibits local or special acts where a general act can be made applicable) and therefore did not violate that provision. The Court of Appeals, HOOD, P.J., and HOLBROOK, JR., and OWENS, JJ., affirmed in part and reversed in part, holding that legislative approval of the compacts by joint resolution rather than by bill enactment did not violate art 4, § 22, that the issue whether the separation of powers doctrine is violated by allowing the Governor to amend the compacts without legislative approval was not ripe for review because the Governor had not yet attempted to amend the compacts, and that the local acts clause was not implicated by the compacts. 254 Mich App 23 (2002). The plaintiffs sought leave to appeal. The Supreme Court granted the application for leave to appeal. 469 Mich 902 (2003). The Supreme Court affirmed the judgment of the Court of Appeals that the compacts were properly approved through a resolution and that the resolution was not a local act. The Supreme Court also remanded the matter to the Court of Appeals to determine whether the provision in the

compacts allowing the Governor to amend the compacts without legislative approval violates the Separation of Powers Clause, noting that the Governor had exercised the amendatory authority after the Court of Appeals had released its decision. 471 Mich 306 (2004). On remand, the Court of Appeals, OWENS, P.J., and SCHUETTE, J. (BORRELLO, J., dissenting), held that the amendatory provision violates the Separation of Powers Clause. During its proceedings on remand, the Court of Appeals struck the portion of TOMAC's brief that sought to address whether the compacts violate the Appropriations Clause, Const 1963, art 9, § 17, and did not address that issue on the basis that consideration of the issue was beyond the scope of the Supreme Court's order of remand. 268 Mich App 226 (2005). The Supreme Court granted applications for leave to appeal by TOMAC, the state, and the Little Traverse Bay Bands of Odawa Indians. 474 Mich 1097 (2006).

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

The amendatory provision and the exercise of that provision do not violate the Separation of Powers Clause because the amendatory provision was properly approved by legislative resolution and the Governor's exercise of the amendatory provision was within the limits of the Michigan Constitution. The issue regarding the alleged violation of the Appropriations Clause was beyond the parameters of the order remanding the matter to the Court of Appeals and is therefore not properly before the Supreme Court. The part of the judgment of the Court of Appeals that found a violation of the Separation of Powers Clause must be reversed and the part of the judgment striking the portion of TOMAC's brief that sought to address the Appropriations Clause issue must be affirmed. The matter must be remanded to the circuit court for the entry of a judgment of summary disposition in favor of the defendants.

Affirmed in part, reversed in part, and remanded to the circuit court for the entry of a judgment of summary disposition in favor of the defendants.

Justice WEAVER, dissenting, would hold that the compacts are void because they are legislation and were required to be enacted by bill rather than a joint resolution. Because the compacts are void, the amendatory provisions contained within them are also void. Justice WEAVER would also hold that the amendatory provisions within the compacts are unconstitutional as a violation of the separation of powers.

Justice MARKMAN, dissenting, would affirm the judgment of the Court of Appeals and hold that the amendments to the compact are unconstitutional for three reasons. First, the original ratification of the compact by legislative resolution did not conform to the constitutional requirements for the passage of legislation. Second, the amendments themselves constitute legislation, and their unilateral adoption by the Governor violates the constitutional procedures for the enactment of legislation. Third, the Legislature delegated to the Governor amendatory power over the compact without specifying any standards for its exercise, and therefore the Legislature delegated legislative power to the Governor in violation of the Separation of Powers Clause of the Constitution. The majority expands the "casino exception" to representative government established in *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306; 685 NW2d 221 (2004), under which, with respect to Indian casinos: (1) the Legislature may approve legislation by something other than the regular legislative process; (2) the Governor may enact the equivalent of legislation without the involvement of the Legislature; and (3) the Legislature may delegate its legislative power by authorizing the Governor to exercise such power without supplying an adequate standard for its exercise.

INDIANS — TRIBAL-STATE CASINO COMPACTS — AMENDMENTS — CONSTITUTIONAL LAW — SEPARATION OF POWERS.

A provision in a compact between the state and an Indian tribe pertaining to tribal casinos that allows amendment of the compact by the Governor without legislative approval does not violate the Separation of Powers Clause of the Michigan Constitution where the provision is properly approved by legislative resolution and the Governor's exercise of the provision is within the limits of the constitution (Const 1963, art 3, §2).

Warner Norcross & Judd LLP (by *Robert J. Jonker, William C. Fulkerson, Daniel K. DeWitt,* and *John J. Bursch*) for Taxpayers of Michigan Against Casinos.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Barris, Sott, Denn & Driker, P.L.L.C.* (by *Eugene Driker* and *Thomas F. Cavalier*), Special Assistant Attorneys General, for the state of Michigan.

Dykema Gossett PLLC (by *Richard D. McLellan, R. Lance Boldrey,* and *Kristine N. Tuma*) for Little Traverse Bay Bands of Odawa Indians and Gaming Entertainment, LLC.

Kanji & Katzen, P.L.L.C. (by *Riyaz A. Kanji* and *Laura Sagolla*), and *James Bransky*, General Counsel, Little Traverse Bay Bands of Odawa Indians, for Little Traverse Bay Bands of Odawa Indians.

Amici Curiae:

Jo Anne House, Office of Legal Counsel, Little River Band of Ottawa Indians (*Drummond Woodsum & MacMahon*, by *Kaighn Smith, Jr.*, and *Jeffrey Piampiano*, of counsel), for Little River Band of Ottawa Indians.

Wheeler Upman, P.C. (by *Geoffrey L. Gillis*)(*Sonosky, Chambers, Sachse, Endreson & Perry, LLP*, by *Reid Peyton Chambers* and *Vanessa L. Ray-Hodge*, of counsel), for Nottawaseppi Huron Band of Potawatomi.

Michael G. Phelan, Tribal Attorney, Pokagon Band of Potawatomi Indians (*Drummond Woodsum & MacMahon*, by *Kaighn Smith, Jr.*, and *Jeffrey Piampiano*, of counsel), for Pokagon Band of Potawatomi Indians.

Alfred H. Hall, Senate Majority Counsel, and *Michael G. O'Brien*, Deputy Counsel, for Ken Sikkema, Senate Majority Leader, and *Shirley Johnson*, Chair of the Senate Appropriations Committee.

CAVANAGH, J. We granted leave to appeal to determine whether the amendatory provision in the compacts at issue and the exercise of that provision by the Governor violate the Separation of Powers Clause of the Michigan

Constitution. 474 Mich 1097 (2006).[1] We hold that the amendatory provision and the exercise of that provision do not violate the Separation of Powers Clause because the amendatory provision was properly approved by legislative resolution and the Governor's exercise of the amendatory provision was within the limits of the constitution. Further, we hold that the issue whether the compacts violate the Appropriations Clause of the Michigan Constitution is not properly before this Court because the issue is beyond the parameters of this Court's prior order remanding this matter to the Court of Appeals. Thus, we reverse in part the judgment of the Court of Appeals and hold that the amendatory provision and the current exercise of that provision do not violate the Separation of Powers Clause. We further affirm in part the judgment of the Court of Appeals that struck the portion of plaintiff's brief that sought to address the Appropriations Clause issue. Accordingly, we remand this case to the circuit court for the entry of a judgment of summary disposition in favor of defendants.

I. STATEMENT OF FACTS AND PROCEEDINGS

In January 1997, Governor John Engler and four Indian tribes signed tribal gaming compacts. The four tribes were the Little Traverse Bay Bands of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi. In *Taxpayers of Michigan*

[1] We note that while Laura Baird is a named plaintiff in this case, she has been inactive during the appellate process. In fact, Baird filed a motion with the Court of Appeals asking that she be dismissed as a party. While this motion was denied, her inactivity has rendered the issue of standing as it relates to legislators moot. Accordingly, the term "plaintiff" when used in this opinion only refers to plaintiff Taxpayers of Michigan Against Casinos.

Against Casinos v Michigan, 471 Mich 306; 685 NW2d 221 (2004) (*TOMAC I*), this Court considered three aspects of the alleged unconstitutionality of these tribal gaming compacts between the state and the tribes. This Court affirmed the Court of Appeals judgment, 254 Mich App 23; 657 NW2d 503 (2002), that held that the compacts were properly approved by the Legislature through a resolution, rather than a bill; that this did not violate art 4, § 22 of the Michigan Constitution; and that the resolution was not a "local act" in violation of art 4, § 29 of the Michigan Constitution. However, this Court also held that the question whether the amendatory provision in the compacts was constitutional under the Separation of Powers Clause, Const 1963, art 3, § 2, was not ripe for review because the Court of Appeals had not considered the issue. Governor Jennifer Granholm's exercise of the amendatory authority had not occurred until after the Court of Appeals decision. Thus, this Court remanded the matter to the Court of Appeals to determine whether the amendatory provision violates the separation of powers doctrine.

On remand, the Court of Appeals held that the compacts' amendatory provision, which allows the Governor to amend the compacts without legislative approval, violates the Separation of Powers Clause. *Taxpayers of Michigan Against Casinos v Michigan (On Remand)*, 268 Mich App 226, 228; 708 NW2d 115 (2005). Judge BORRELLO dissented and stated that the Separation of Powers Clause was not violated because the Legislature's approval of the compacts included approval of the amendatory provision.

II. STANDARD OF REVIEW

This Court reviews de novo a decision regarding a motion for summary disposition. *Herald Co v Bay City*,

463 Mich 111, 117; 614 NW2d 873 (2000). This Court also reviews constitutional issues de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003). Decisions involving the meaning and scope of pleadings are reviewed for an abuse of discretion. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

III. ANALYSIS

Under the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., an Indian tribe may conduct gaming within the borders of a state if the activity conforms to a compact between the state and the tribe. The compacts at issue were signed by Governor Engler, and the Legislature approved the compacts by resolution. In 2003, Governor Granholm consented to an amendment of the compact with the Little Traverse Bay Bands of Odawa Indians.

A. SEPARATION OF POWERS CLAUSE

Michigan's Separation of Powers Clause states: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. "This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998). An overlap or sharing of power may be permissible if "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other . . . ." *Id*. at 297. The Separation of Powers Clause "has not been interpreted to mean that

the branches must be kept wholly separate." *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752; 330 NW2d 346 (1982).

The amendatory provision at issue provides:

> Section 16. Amendment
>
> This Compact may be amended by mutual agreement between the Tribe and the State as follows:
>
> (A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendment as follows:
>
> (i) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments *to the Governor who shall act for the State*.
>
> (ii) *The State, acting through the Governor,* shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.
>
> (iii) Neither the tribe nor the State may amend the definition of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact. . . .
>
> * * *
>
> (B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:
>
> (i) That the receiving party agrees to the proposed amendment; or
>
> (ii) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the proposed amendment.
>
> (C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.

> (D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan Legislature and the Michigan Attorney General. [Emphasis added.]

Governor Granholm and the Little Traverse Bay Band of Odawa Indians agreed to amend the compact in a number of ways. Among other items, the amendment permitted a second casino to be constructed on eligible Indian lands of the Little Traverse Bay Bands of Odawa Indians, contingent on the approval of the local unit of government; changed the age of legal gambling from 18 to 21 at this casino; mandated that tribal payments must now be sent to the state, as directed by the Governor or a designee of the Governor, as opposed to sending the payments to the Michigan Strategic Fund or its successor; and mandated that the compact was binding for 25 years from the effective date of the amendments, instead of being binding for 20 years from the effective date of the compact.

The amendatory provision allows the Governor to act for the state in reviewing and approving amendments submitted by the tribes and in proposing amendments to the tribes. This amendatory provision expresses the bilateral agreement between the parties that the Governor will represent the state in matters involving amendments. The Legislature reviewed the language of this amendatory provision and approved the amendment procedure, which gives the Governor broad discretion—within the limits of the constitution—to amend the compacts.

The compacts were properly approved by legislative resolution.[2] As stated in *TOMAC I*, "our Constitution

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[2] While Justice MARKMAN again revisits his arguments that the compacts were legislation under *Blank v Dep't of Corrections*, 462 Mich 103;

does not require that our Legislature express its approval of these compacts through bill rather than resolution." *TOMAC I*, *supra* at 313. The compacts—when approved by the Legislature—included the amendatory provision. As this Court held in *TOMAC I*, *supra* at 313, a resolution was sufficient for legislative approval of the compacts. Similarly, the resolution also amounted to sufficient approval for the amendatory provision within the compacts.

The Legislature's approval of the amendatory provision gave consent to amendments that conform to the approved procedure. The Legislature chose to approve an amendment procedure that gives the Governor broad power to amend the compacts, and the Legislature was well within its authority to make such a decision. See *id*. at 329. This Court has long recognized the ability of the Legislature to confer authority on the Governor. See, e.g., *People ex rel Sutherland v Governor*, 29 Mich 320, 329 (1874). This Court has further recognized that discretionary decisions made by the Governor are not within this Court's purview to modify. See, e.g., *People ex Rel Ayres v Bd of State Auditors*, 42 Mich 422, 426; 4 NW 274 (1880).[3]

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611 NW2d 530 (2000), this Court already explained its position and addressed the flaws in Justice Markman's rationale in *TOMAC I*, *supra* at 318-333; thus, there is no reason to reiterate this reasoning. Further, Justice MARKMAN's discussion that MCL 432.203(5) suggests that casino gaming must be authorized by legislation in the absence of a compact is irrelevant here because there *is* a compact in this case in accord with IGRA and the compact properly allows for amendments.

[3] Contrary to Justice MARKMAN's claims, we note that the Governor's authority to negotiate amendments is not without limits. Some limits are in the compacts themselves, and the Governor cannot negotiate amendments that extend beyond these limits. And, of course, the Governor cannot agree to an amendment that would violate the constitution or invade the Legislature's lawmaking function.

As this Court stated in *TOMAC I*, *supra* at 328, "We have held that our Legislature has the general power to contract unless there is a constitutional limitation." There is no limitation in Michigan's Constitution on the Legislature's power to bind the state to a compact with a tribe. "State legislatures have no regulatory role under IGRA aside from that negotiated between the tribes and the states." *Id*. at 320. The Legislature's approval of the compacts only follows the assent of the parties to the compacts. This does not establish, "in the realm of Indian casinos, 'government by contract' " that avoids the restrictions and provisions of the constitution, as argued by Justice MARKMAN. *Post* at 134. The amendments—just as the compacts themselves—"only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities." *TOMAC I*, *supra* at 324. Our constitution does not prohibit the Legislature from approving compacts by concurrent resolution. *Id*. at 327-328. Thus, it is entirely permissible for the Legislature to provide, by resolution, that the Governor may negotiate subsequent amendments to the compacts. Because the agreed-to amendments are permissible, plaintiff has failed to establish that the amendatory provision and the exercise of that provision are unconstitutional. The amendatory provision survives both a facial and an as-applied challenge under the Separation of Powers Clause because all the amendments negotiated by the Governor are permissible. See *Judicial Attorneys Ass'n*, *supra* at 303; *Woll v Attorney General*, 409 Mich 500, 535 n 50; 297 NW2d 578 (1980). Specifically, the amendments "do not impose new obligations on the citizens of the state subject to the Legislature's power; they simply reflect the contractual terms agreed to by two sovereign entities." *TOMAC I*, *supra*

at 327;[4] see also *TOMAC I*, *supra* at 344 (KELLY, J., concurring) (The compacts "place no restrictions or duties on the people of the state of Michigan. They create no duty to enforce state laws on tribal lands.").

Finally, today's decision is not in conflict with this Court's past decision in *Roxborough v Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944). In *Roxborough*, *supra* at 510, this Court stated that the Governor could "exercise only such authority as was delegated to him by legislative enactment." This Court held that the Governor could not increase compensation for an employee of the appeal board of the Unemployment Compensation Commission because the Legislature had passed legislation to limit the compensation of this employee to the maximum amount permitted by the Social Security Board. The Governor could not ignore this limitation. *Roxborough* is inapplicable because that case dealt with a unilateral act of the Legislature. The compacts, however, are bilateral agreements. Further, the Legislature's approval by resolution of the compacts—which included the amendatory provision—provides the Governor with authority to negotiate and agree to amendments on behalf of the

[4] Justice MARKMAN is simply incorrect when he states that the fact that the amendments reflect the contractual terms agreed to by two sovereign nations is "irrelevant to the necessary constitutional analysis." *Post* at 145. As thoroughly explained in *TOMAC I*, *supra* at 324, "the hallmark of legislation is unilateral imposition of legislative will. Such a unilateral imposition of legislative will is completely absent in the Legislature's approval of tribal-state gaming compacts under IGRA." Thus, the Legislature's role in approving the compacts and amendatory provision "requires mutual assent by the parties—a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating." *Id*. Justice MARKMAN's dissent is largely premised on the notion that the compacts and the amendments constitute legislation; thus, it is perplexing why a statement showing the contrary is irrelevant to the analysis.

state. Thus, the amendatory provision—on its face and as it was exercised by the Governor—does not violate the Separation of Powers Clause of the Michigan Constitution.

B. APPROPRIATIONS CLAUSE

Michigan's Appropriations Clause states, "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Const 1963, art 9, § 17. On remand in the Court of Appeals, plaintiff argued that the compacts violate Michigan's Appropriations Clause because this Court determined that the compacts are contracts. Plaintiff argued that consideration must have been exchanged by the parties to each compact. Therefore, the tribal payments under the compacts are state funds that the Legislature must appropriate by legislation. Plaintiff raised this issue for the first time in the Court of Appeals when this case was remanded, and plaintiff argued that the issue was within the scope of this Court's remand order and could not have been raised earlier because it was based on this Court's ruling in *TOMAC I*. Intervening defendant Gaming Entertainment, LLC, moved to strike the portion of plaintiff's brief dealing with the Appropriations Clause because the issue went beyond this Court's remand order. The Court of Appeals granted the motion to strike and, thus, did not address this issue.

We agree with the Court of Appeals that the appropriations issue was not properly before it. This Court remanded this matter to the Court of Appeals to address a specific issue—"whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2." *TOMAC I*, *supra* at 333. The appro-

priations issue is outside the scope of this Court's remand order; thus, the Court of Appeals correctly held that the issue was not properly before it. See, e.g., *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987); *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). Plaintiff cannot raise any issue it chooses merely because this Court remanded this case to the Court of Appeals to address another issue. Simply, if this Court had not remanded the matter to the Court of Appeals to address the separation of powers issue, plaintiff would not be able to raise a new issue directly in the Court of Appeals. Similarly, plaintiff cannot do so now.

IV. CONCLUSION

We hold that the amendatory provision and the Governor's exercise of that provision do not violate the Separation of Powers Clause because the amendatory provision was properly approved by legislative resolution and the Governor's use of the amendatory provision was exercised within the limits of the constitution. Thus, we reverse in part the judgment of the Court of Appeals and hold that the amendatory provision and the current exercise of that provision do not violate the Separation of Powers Clause. We further hold that the issue whether the tribal payments under the compacts violate the Appropriations Clause of the Michigan Constitution is not properly before this Court because it is beyond the parameters of this Court's prior remand order. Thus, we affirm in part the judgment of the Court of Appeals that struck the portion of plaintiff's brief that sought to address the Appropriations Clause issue. Accordingly, we remand this case to the circuit court for entry of a judgment of summary disposition in favor of defendants.

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

WEAVER, J. (*dissenting*). I dissent from the majority's decision holding that the amendatory provision in the compacts at issue, and the exercise of that provision by Governor Granholm, does not violate the Separation of Powers Clause, because the compact containing the amendatory provision was not properly enacted by a legislative bill and the Governor's exercise of the amendatory provision is outside the limits of the constitution. I would hold that the compacts are void because they are legislation, required to be enacted by bill. As a result, I would hold that the amendatory provisions contained within the compacts are also void.[1]

ANALYSIS

Michigan's Constitution separates the powers of government: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The executive power is vested in the Governor, Const 1963, art 5, § 1, and the legislative power is vested in the Senate and the House of Representatives, Const 1963, art 4, § 1. The executive power is, first and foremost, the power to enforce the laws or to put the laws enacted by the Legislature into effect. *People ex rel Sutherland v Governor,* 29 Mich 320, 325 (1874); *People ex rel Attorney General v Holschuh,* 235 Mich 272, 275;

[1] See *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 353-354; 685 NW2d 221 (2004) (WEAVER, J., concurring in part and dissenting in part).

209 NW 158 (1926); 16A Am Jur 2d, Constitutional Law, § 258, p 165, and § 275, p 193.

The legislative power is the power to determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal laws. *Id.* The Governor has no power to make laws. *People v Dettenthaler,* 118 Mich 595, 602; 77 NW 450 (1898). "[T]he executive branch may only apply the policy so fixed and determined [by the legislative branch], and may not itself determine matters of public policy, change the policy laid down by the legislature, or substitute its own policy for that of the legislature." 16 CJS, Constitutional Law, § 359, pp 599-600.

Binding the state to a compact with an Indian tribe involves determinations of public policy and the exercise of powers that are within the exclusive purview of the Legislature. The compacts at issue in this case contain examples of policy decisions made for each of the seven issues recognized in 25 USC 2710(d)(3)(C)(i) through (vii).[2]

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[2] As allowed under 25 USC 2710(d)(3)(C)(i), tribal law and regulations, not state law, are applied to regulate gambling. But the compact applies state law, as amended, to the sale and regulation of alcoholic beverages encompassing certain areas. See § 10(A) of the compact. Under 25 USC 2710(d)(3)(C)(ii), the tribe, not the state, is given responsibility to administer and enforce the regulatory requirements. See Compact § 4(M)(1). As provided in 25 USC 2710(d)(3)(C)(iii), to allow state assessments to defray the costs of regulating gaming, the compact states that the tribe shall reimburse the state for the costs up to $50,000 it incurs in carrying out functions that are authorized within the compact. See Compact § 4(M)(5). Also, the compact states that the tribe must pay two percent of the "net win" at each casino derived from certain games to the county treasurer. See Compact § 18(A)(i). Under 25 USC 2710(d)(3)(C)(iv), the tribe could tax the gaming activity, but the compact does not allow such taxation. As allowed by 25 USC 2710(d)(3)(C)(v), the compact provides for dispute resolution procedures in the event there is a breach of contract. See Compact § 7. As allowed by 25 USC 2710(d)(3)(C)(vi), the compact includes standards for whom a tribe can

These compact provisions necessarily require fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation, criminal and civil jurisdiction, and standards of operation and maintenance require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under the constitutional separation of powers. See *Saratoga Co Chamber of Commerce v Pataki,* 100 NY2d 801, 823; 766 NYS2d 654; 798 NE2d 1047 (2003).

The approval of a compact with an Indian tribe involves numerous policy decisions. The executive branch does not have the power to make those determinations of public interest and policy, but may only apply the policy as fixed and determined by the Legislature. I would hold that committing the state to the myriad policy choices inherent in negotiating a gaming compact constitutes a legislative function. Thus, the Governor did not have the authority to bind the state to a compact with an Indian tribe, as this Court wrongly concluded in *Taxpayers of Michigan Against Casinos v Michigan,* 471 Mich 306; 685 NW2d 221 (2004), and the Governor does not now have the power to unilaterally exercise the amendatory provisions contained within the compacts.

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license and hire in connection with gaming, Compact § 4(D), sets accounting standards the gaming operation must follow, Compact § 4(H), and stipulates that gaming equipment purchased by the tribe must meet the technical standards of the state of Nevada or the state of New Jersey, Compact § 6(A). Under 25 USC 2710(d)(3)(C)(vii), the compact addresses the "other subjects that are directly related to the operation of gaming activities" throughout the document. For example, it allows for additional class III games to be conducted through the agreement of the tribe and the state. Compact § 3(B). Also, the compact states that the tribe must purchase the spirits it sells at the gaming establishments from the Michigan Liquor Control Commission and that it must purchase beer and wine from distributors licensed by the commission. Compact § 10(B).

CONCLUSION

I would hold that the power to bind the state to a compact with an Indian tribe is an exercise of the legislative power, and that the Legislature must exercise its power to bind the state by enacting a bill, not by passing a joint resolution. I conclude that the compacts are void and, accordingly, so are the amendatory provisions contained within the compacts. I would hold that the compacts are void and that the provisions that permit the Governor to amend the compacts are unconstitutional.

MARKMAN, J. (*dissenting*). I respectfully dissent. The majority here expands the "casino exception" to representative government that it effectively established in *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306; 685 NW2d 221 (2004) (*TOMAC I*). Pursuant to this exception, in the realm of Indian casinos: (1) the Legislature may approve legislation by something other than the regular legislative process; (2) the Governor may enact the equivalent of legislation without the involvement of the Legislature; and (3) the Legislature may delegate its legislative power by authorizing the Governor to exercise this power without imposing adequate standards on its exercise. As I asserted in *TOMAC I*, the original ratification of the instant compact by legislative resolution did not conform to the constitutional requirements for the passage of legislation. Therefore, because this compact was unconstitutionally established, the 2003 amendments of the compact at issue are unconstitutional as well. Moreover, these amendments themselves constitute legislation, and their unilateral adoption by the Governor violates provisions of the Michigan Constitution that establish the procedures for the enactment of legisla-

tion. Const 1963, art 4, §§ 25, 26, and 33. Further, even if I accepted the rationale of the majority in *TOMAC I* that the compact did not constitute legislation, I would still conclude that the Legislature's purported grant of power to the Governor to amend the compacts gives her amendatory authority without standards, and thereby violates the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2. The ultimate effect of the majority's decision is, in the realm of Indian casinos, to establish "government by contract" in lieu of "government by constitution," under which the Governor and the Legislature may circumvent the charter of this state through the formation of contracts with outside entities. This "government by contract" deprives the people of Michigan of the right to exercise self-government with regard to Indian casino policy by permitting the Governor to enact the equivalent of legislation, with little or no role for the people's elected representatives in the Legislature. For these reasons, I would affirm the judgment of the Court of Appeals.

I. STATEMENT OF FACTS

In 1998, the state of Michigan and four Indian tribes entered into Indian gaming compacts to allow casino gaming on tribal land pursuant to the federal Indian Gaming Regulatory Act. 25 USC 2710(d)(1)(C). According to the compacts' terms, the compacts would take effect when House Concurrent Resolution 115 was adopted by the Michigan Legislature on December 10, 1998. In § 16, the compacts provide for their own amendment, stating:

> This Compact may be amended by mutual agreement between the Tribe and the State as follows:

(A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendment as follows:

(i) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the State.

(ii) The State, acting through the Governor, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.

* * *

(B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:

(i) That the receiving party agrees to the proposed amendment; or

(ii) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the proposed amendment.

This amendment process thus allows the Governor, acting on behalf of the state, to propose an amendment to the tribes, which the tribes may or may not accept. The tribes may also propose amendments to the Governor, who may accept or not accept the proposed amendments on behalf of the state. Although the Legislature initially ratified the compacts by resolution, the compacts exclude the Legislature from the amendment process.

In July 2003, the Governor consented to amendments that had been proposed by the Little Traverse Bay Bands of Odawa Indians (LTBB). These amendments alter several features of the original compact. First, the amendments allow the LTBB to create a second casino, subject to the approval of the local

government. Second, the amendments provide that the gambling age in the second casino would be 21, instead of 18 as in the tribe's first casino. Third, the duration of the compact is lengthened from 20 to 25 years from the date of the amendments. Fourth, the tribe would now make payments as directed by the Governor, and not directly to the Michigan Strategic Fund. Fifth, the percentage of the "net win" accorded to the state would be modified for the second casino. Sixth, if another tribe was permitted more than two casinos, the LTBB would be allowed to operate an equal number. Finally, the LTBB agreed to make payments to the state as long as the state did not permit the erection of new casinos within a specified ten-county area.

II. *TOMAC I*

In *TOMAC I*, I dissented from the majority's decision to acquiesce to the approval of the compacts by resolution. I continue to believe that *TOMAC I* was wrongly decided. The compacts, in my judgment, constitute legislation under the test adopted by this Court in *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000). Because they are legislation, the Legislature and the Governor were required to approve the compacts by the legislative process set forth in the constitution. This method was not followed. Accordingly, the first reason that the present amendments of the LTBB compact are unconstitutional is simply because the compact itself was never constitutionally enacted. Moreover, as I sought to explain in *TOMAC I*, the amendment procedure in the compacts violates the Separation of Powers Clause, because this procedure allows the Governor to amend legislation.

In *TOMAC I*, the critical issue was whether the compacts themselves are legislation, and are thus sub-

ject to constitutional requirements for the enactment of legislation. In *Blank*, this Court adopted a four-factor test developed by the United States Supreme Court in *Immigration & Naturalization Service v Chadha*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983), to determine whether governmental action constitutes legislation. I applied these factors in evaluating the compacts in *TOMAC I* and concluded that the compacts were legislation.[1] The four factors are

> (1) whether the compacts at issue " 'had the purpose and effect of altering . . . legal rights, duties and relations of persons . . . outside the legislative branch,' " *Blank, supra* at 114; (2) whether the Governor's action in negotiating the compacts and the Legislature's resolution vote on the compacts supplanted legislative action; (3) whether the compacts involved determinations of policy; and (4) whether Michigan's Constitution explicitly authorizes the Legislature to approve these compacts by a resolution vote even if they otherwise constitute "legislation." [*TOMAC I*, *supra* at 378 (opinion by MARKMAN, J.).]

For the reasons elaborated upon in *TOMAC I*, the compacts between the state and the tribes constitute legislation. Concerning the first *Blank* factor, the compacts alter the legal rights of persons outside the legislative branch, because Indian casino gaming was illegal in Michigan under state and federal law before

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[1] The majority rejects the application of the *Blank* framework, stating that "this Court already explained its position and addressed the flaws in Justice MARKMAN's rationale in *TOMAC I*, *supra* at 318-333 . . . ." *Ante* at 108 n 2. Indeed, the majority concluded in *TOMAC I* that the *Blank* framework was "not relevant because the compacts [did] not constitute legislation." *TOMAC I, supra* at 378 n 9 (opinion by MARKMAN, J.). However, as I responded at the time, "the very point of utilizing the [*Blank*] framework is to determine *whether* the compacts constitute legislation." *Id*. (emphasis in original). The majority does not even purport to apply the *Blank* framework to the amendments to the compact.

the enactment of the compacts. Under 18 USC 1166(a), in the absence of a compact, "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." See *TOMAC I*, *supra* at 379-381. Because casino gaming would be illegal on Indian lands under this provision if state law prohibits such gaming, it was necessary in *TOMAC I* to determine whether Michigan law prohibits Indian casino gaming in the absence of a compact. In fact, Michigan law generally prohibits casino gaming. MCL 750.301. Casino gaming in Michigan is only allowed pursuant to the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*., which does not apply to "[g]ambling on Native American land," MCL 432.203(2)(d). Further, under the Indian Gaming Regulatory Act, class III gaming,[2] like that allowed in this case, is lawful on Indian lands only if the gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 USC 2710(d)(1)(C). Therefore, under both federal and state law, casino gaming by these tribes would have been illegal in the absence of the compacts. Moreover, the compacts require local units of government either to

[2] "[C]lass III gaming" is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 USC 2703(8). "[C]lass I gaming" is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 USC 2703(6). "[C]lass II gaming" is defined as "bingo" and "card games" that are either "explicitly authorized by the laws of the State" or "not explicitly prohibited by the laws of the State . . . ." 25 USC 2703(7)(A). However, class II gaming does not include "any banking card games, including baccarat, chemin de fer, or blackjack," or slot machines. 25 USC 2703(7)(B).

create a local revenue sharing board to receive a percentage of tribal gaming profits or to pay for the additional municipal burdens created by the casinos, such as increased costs for public services. *TOMAC I*, *supra* at 382. Regardless of which option is chosen by local units, the compacts impose new duties on government. The compacts therefore alter the legal rights and duties of persons outside the legislative branch by permitting the tribes to operate casinos, and by requiring local units of government to undertake certain actions.

Concerning the second *Blank* factor, passage of the compacts by resolution supplanted legislative action. Because federal law dictates that state laws apply within Indian reservations in the absence of a compact, 18 USC 1166, the sole alternative method for allowing Indian gaming in this state would have been through an alteration of state law. As I earlier explained:

> [I]n the absence of a compact, if the Legislature wanted to make gambling on Indian land lawful, the only way it could do that would be by either changing the gambling laws that are generally applicable within the state or by changing the reach of the [Michigan Gaming Control and Revenue Act]. Changing those laws would, it cannot seriously be disputed, require "legislation." [*TOMAC I*, *supra* at 384.]

With regard to the third *Blank* factor, enactment of the compacts involved numerous policy determinations, of which "the most significant . . . was the initial decision to make lawful what was otherwise unlawful—casino gambling on the subject Indian lands." *Id*. at 385. Other considerations, including how many casinos to allow, what the gambling age should be, what percentage of "net win" the tribes should be required to pay to the state, whether to extend the state employ-

ment security act and workers' compensation benefits to casino workers, and who should enforce the rules and regulations of the compacts, are all significant policy decisions. *Id*.

Concerning the final *Blank* factor, the Michigan Constitution does not allow the passage of legislation by resolution, except in specified instances that were not relevant in *TOMAC I*.[3]

Because each of the *Blank* factors suggests that the Indian gaming compacts are legislation, I concluded in *TOMAC I* that the compacts must be approved by the regular constitutional process of enacting legislation.

Under the Michigan Constitution, "[a]ll legislation shall be by bill . . . ." Const 1963, art 4, § 22. The constitution requires that "[n]o bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. Once the Legislature approves a bill, it is then presented to the Governor. If the Governor signs the bill, the bill is enacted into law. Const 1963, art 4, § 33. If the Governor does not sign the bill, the Governor may return the bill to the Legislature with her objections. *Id*. The Legislature may enact the bill despite the Governor's objections if two-thirds of the members of each house vote for the bill. *Id*. If the Governor does not return the bill, and the Legislature continues in session, the bill "shall become law as if [the Governor] had signed it." *Id*. After a bill becomes law, the constitution specifies how a law may be amended: "The section or sections of the act altered or amended shall be re-enacted and published at length." Const 1963, art 4, § 25. Under these constitutional provisions, in order to enact legislation, a bill must be passed by both houses of

[3] See Const 1963, art 4, §§ 12, 13, and 37; art 5, § 2; art 6, § 25.

the Legislature and then either approved by the Governor or, if vetoed, by two-thirds of each house of the Legislature. To amend a law once created, those sections amended must be reenacted by the same process.

Because the Legislature approved the compacts by resolution, and such compacts are legislation, the compacts were not validly approved under the constitution. By approving the compacts, the majority in *TOMAC I* established the first provision of the "casino exception" to representative government: the Legislature may approve an Indian gaming compact by resolution, and is not required to abide by the regular legislative process established in the state constitution.

A second issue presented in *TOMAC I* concerned the constitutionality of the amendment provisions in the compacts. Although the Court in *TOMAC I* remanded this issue to the Court of Appeals, I addressed it because I believed that it was ripe for our consideration. Under the compacts, the Governor possesses amendatory authority; such authority allows the Governor, on behalf of the state, to unilaterally modify the compacts. However, as already noted, the Michigan Constitution requires that an amendment of legislation—including an Indian gaming compact—be effected through the reenactment of the pertinent sections of the statute. Const 1963, art 4, § 25. This reenactment must occur by the constitutional method for the passage of legislation. The exercise of the legislative power of amendment by the executive violates the provisions of the Michigan Constitution that establish the procedure for enacting and amending legislation, as well as the Separation of Powers Clause, which states: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to

another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. Therefore, in *TOMAC I*, I would have held the amendatory provision of the compacts unconstitutional and would not have remanded to the Court of Appeals.

III. 2003 AMENDMENTS AND *BLANK* FACTORS

At issue in this case are the 2003 amendments of the LTBB compact. Because the compact itself is unconstitutional, the amendments of the compact are unconstitutional. Moreover, under the *Blank* factors, the 2003 amendments themselves constitute legislation. The amendments alter the legal rights and duties of persons outside the legislative branch, they supplant legislative action, they involve determinations of public policy, and they are not authorized by the Michigan Constitution. Because these legislative acts were undertaken unilaterally by the Governor acting on behalf of the state, the enactment of these amendments violated multiple provisions of the Michigan Constitution.

A. LEGAL RIGHTS AND DUTIES

The first *Blank* factor examines the effect of the amendments on the legal rights, duties, and relations of persons outside the legislative branch. The 2003 amendments alter the rights and relations of persons outside the legislative branch. The amendments allow a new casino to be built, which would not have been legal under state and federal law before the 2003 amendments.[4] As explained above, under 18 USC 1166, state

[4] Because the building of the second casino is "contingent on the approval of the affected local unit of State government (either city, village, or township)," § 2(F) of the amended LTBB compact, one might assert that the legal rights of the tribe have not been altered; that is, the LTBB has no "right" to build a second casino until the local unit of

law applies to casino gaming on Indian lands. Under MCL 750.301, such gaming is generally prohibited in Michigan. Although MCL 432.203(1) allows for gaming "conducted in accordance with this act," MCL 432.203(2)(d) states that the act does not apply to "[g]ambling on Native American land and land held in trust by the United States for a federally recognized Indian tribe on which gaming may be conducted under the Indian gaming regulatory act, Public Law 100-497, 102 Stat. 2467." Under MCL 432.203(2)(d), Indian casino gaming is not allowed on Indian land subject to the Indian Gaming Regulatory Act. Thus, by allowing another casino to be built by the LTBB, the amendments alter the legal rights of the LTBB, which now possesses a legal right to build a second casino without violating state law.

Moreover, the amendments extend the duration of the compact from 20 years to 25 years from the date of the amendments. Because the compact was effective in 1998, and the amendments became effective in 2003, the amendments will enable the LTBB to operate casinos for ten years longer than the original compact. From 2018 through 2028, the LTBB will be able to operate casinos, something it could not have done lawfully in the absence of the amendments.

Further, under the original compact, if certain criteria were met, the LTBB would no longer be required to make tribal gaming payments to the state. For example, if the state were to allow a person to operate commercial casino games, and that person was neither a federally recognized Indian tribe operating a casino pursuant to a compact nor a person operating a casino in Detroit

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government approves the location of the casino. However, the 2003 amendments of the compact ensure that the LTBB will face no opposition from the state of Michigan when it builds its second casino.

pursuant to MCL 432.201 *et seq.*, then the tribe could cease making payments to the state. The 2003 amendments add additional criteria: under the amended compact, if the prior criteria apply, or if the state permits casinos to be built within ten specified counties, the tribe will no longer be bound to make payments to the state. Therefore, this amendment alters the legal duty of the tribe in terms of its gaming payment obligations.[5]

Because the 2003 amendments alter the legal rights and duties of persons outside the legislative branch in at least several ways, the first *Blank* factor indicates that the 2003 amendments constitute legislation.

B. SUPPLANTING LEGISLATIVE ACTION

The second *Blank* factor considers whether the Governor's 2003 amendments of the compact supplant legislative action. Federal law requires a tribe to abide by state law in the absence of an Indian gaming compact. 18 USC 1166. As described above, Michigan law generally forbids the creation of new casinos unless allowed by statute. MCL 750.301; MCL 432.203. Thus, in the absence of an amendment of the Indian gaming compact, the LTBB could build a second casino only if Michigan law was changed through legislation.

Moreover, the amendments extend the period that the tribe may operate its casinos from 20 years to 25 years from the date of the amendments. As described earlier, casino gaming by the LTBB is only legal pursuant to its compact under the Indian Gaming Regulatory Act. In the absence of these amendments, it would have

[5] The 2003 amendments also effect changes in the minimum gambling age and in the percentages of "net win" that must be paid to the state. These changes, however, only pertain to the second casino.

been illegal in Michigan for the tribe to operate casinos from 2018 to 2028, and the only way the tribe could operate casinos during that period would be through a change in Michigan law through legislation.

Indeed, MCL 432.203(5) suggests that casino gaming must be authorized by legislation, in the absence of a compact:

> If a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land or land held in trust by the United States for a federally recognized Indian tribe, *the legislature shall enact legislation* creating a new act consistent with this act to regulate casinos that are operated on Native American land or land held in trust by the United States for a federally recognized Indian tribe. The legislation shall be passed by a simple majority of members elected to and serving in each house. [Emphasis added.]

Under current federal law, a state does not possess the right to regulate gambling on Native American land. *California v Cabazon Band of Mission Indians*, 480 US 202, 207; 107 S Ct 1083; 94 L Ed 2d 244 (1987); 25 USC 2710(d). However, in the event that federal law changes, MCL 432.203(5) requires the Legislature to regulate Indian gaming through legislation.[6] Thus, MCL 432.203(5) strongly suggests that the enactment of legislation is the authorized method for regulating

[6] The majority opines that MCL 432.203(5) is "irrelevant [to this case] because there *is* a compact . . . and the compact properly allows for amendments." *Ante* at 108 n 2 (emphasis in original). The majority misapprehends my argument. Although I agree that MCL 432.203(5) is not *directly* applicable because federal law does not currently entrust regulation of Indian gaming to Michigan, the statute is nonetheless relevant. The second *Blank* factor considers whether the action taken by the government would normally entail legislation. Because MCL 432.203(5) indicates that regulation of Indian gaming would normally entail legislation, it contributes to the conclusion that the instant amendments supplant legislative action.

Indian gaming in Michigan, *if* the state is accorded the power by federal law to regulate such gaming.

In the absence of the instant amendments, the building of a new casino and the ten-year extension of the period the LTBB may operate its casinos would only be permitted through legislation. Thus, the amendments can fairly be said to supplant legislative action, indicating that the amendments also constitute legislation under the second *Blank* factor.

C. POLICY DETERMINATIONS

The third *Blank* factor considers whether a governmental action involves "determinations of policy." *Blank*, *supra* at 114 (opinion by KELLY, J.). Indisputably, the enactment of these amendments involved policy determinations of considerable and far-reaching consequence. The clearest example of such a determination is obviously that the LTBB has been allowed to build a second casino, and will be allowed to operate its existing casino for ten years longer than the original compact allowed. Presumably, the enlargement of casino operations must have been premised at least in part on a determination that casinos generally, and the LTBB casino in particular, have benefited the people of Michigan.

Such a determination is a policy determination of the sort routinely undertaken by the elected representatives of the people in the Legislature. Absent the "casino exception" to representative government, these legislators would be required to confront a wide range of questions implicated by the expansion of casino gaming in Michigan: whether the growth of casinos has adversely affected the social environment of the state and, if so, whether there are ways by which this can be ameliorated; whether any such adverse effect would be

exacerbated by an increase in the number of casinos; whether casinos have benefited or harmed non-casino businesses in their communities; whether casinos have affected rates of personal and business bankruptcies; whether casinos have affected crime rates; whether casinos have resulted in the congestion of particular roads or otherwise affected state and local infrastructure; whether casinos have had an adverse effect on the quality of life in rural communities near casinos; whether casinos have harmed aspects of the environment; and whether casinos have adversely affected other tourist-related businesses within the state.

To confront these and other similar questions, legislators would normally seek out the views of their constituents and interested organizations, both through committee hearings and through less formal means, and debate these matters with their colleagues. However, the result of the present amendment process for matters pertaining to Indian casinos is that such traditional decision-making, characteristic of a republican form of government, see US Const, art IV, § 4, has been replaced by unilateral decision-making on the part of a single person not part of the legislative branch. The third *Blank* factor thus also counsels in favor of finding that these amendments constitute legislation.

D. MICHIGAN CONSTITUTION

The fourth *Blank* factor essentially examines whether the constitution authorizes an exception to the normal legislative processes, in this case permitting the Governor to undertake amendments of the law. Of course, the constitution neither states nor implies such an exception. Rather, it defines the Governor's power by simply stating, "The executive power is vested in the governor." Const 1963, art 5, § 1. With several very

specific exceptions,[7] the constitution does not identify any traditionally legislative actions that the Governor may undertake, and I am aware of no inherent executive power within Michigan that allows the Governor to undertake such actions.

Indeed, the constitution expressly sets forth the procedures for the amendment of legislation: "The section or sections of the act altered or amended *shall be re-enacted* and published at length." Const 1963, art 4, § 25 (emphasis added). Because the original LTBB compact constitutes legislation, the amendment of the LTBB compact could only occur through "reenactment," i.e., through legislation. As described above, the elaborate process for the enactment of legislation established in article 4 nowhere allows the Governor to reenact legislation on her own volition. Consequently, the Michigan Constitution does not grant the Governor the executive authority to amend Indian gaming compacts.

Nor does any other provision of the constitution grant the Governor the power to amend the compact absent involvement by the Legislature. The only arguably appropriate provision, as I discussed in *TOMAC I*, *supra* at 400-402, is Const 1963, art 3, § 5, which states:

> Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution.

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[7] See Const 1963, art 5, § 19, pertaining to the Governor's line-item veto authority, and Const 1963, art 5, § 2, enabling the Governor to reorganize the executive branch after the Legislature has organized the executive branch "by law."

By its terms, this provision applies only to agreements with other states, the federal government, Canada, or any political subdivision of these. This provision does not refer to Indian tribes, and therefore the Governor does not appear to possess the authority under this provision to unilaterally enter into agreements with Indian tribes, even with legislative authorization. See *TOMAC I*, *supra* at 400-402 (opinion by MARKMAN, J.). Even supposing that this provision does allow the Governor to amend a compact with Indian tribes, such agreements are limited to "agreements for the performance, financing or execution of their respective functions," the latter presumably referring to the Governor's exercise of her authority as the chief executive of this state. Const 1963, art 3, § 5. As I stated in *TOMAC I*, *supra* at 402, "[T]he duty and power to set the parameters for casino gambling on land within Michigan's borders is not in any comprehensible sense a 'function' of the executive branch." The amendments at issue here—extending the duration of the compacts, enabling a new casino, adjusting the gambling age for that casino, altering tribal gaming payments—are not related in any coherent sense to the Governor's executive role. Because there is no constitutional warrant for the authority exercised here by the Governor, the fourth *Blank* factor also suggests that the amendments of the compact constitute legislation.

The *Blank* factors thus demonstrate, I believe, that the 2003 amendments constitute legislation. This conclusion accords with the decisions of other courts that have held that Indian gaming compacts constitute legislation. *State ex rel Clark v Johnson*, 120 NM 562, 573; 904 P2d 11 (1995) (holding that the governor's unilateral approval of an Indian gaming compact was "an attempt to create new law," in violation of New Mexico's separation of powers clause); *Saratoga Co Chamber of*

Commerce, Inc v Pataki, 100 NY2d 801; 766 NYS2d 654; 798 NE2d 1047 (2003) (holding that approval of Indian gaming compact by the governor usurped the power of the legislature and violated the state constitution and the separation of powers doctrine); *Narragansett Indian Tribe of Rhode Island v State*, 667 A2d 280 (RI, 1995) (holding that the legislature, not the governor, has power to approve compacts under the state constitution); *Panzer v Doyle*, 271 Wis 2d 295, 338; 680 NW2d 666 (2004) (holding that "committing the state to policy choices negotiated in [Indian] gaming compacts constitutes a legislative function"), overruled in part on other grounds by *Dairyland Greyhound Park, Inc v Doyle*, 295 Wis 2d 1; 719 NW2d 408 (2006); *American Greyhound Racing, Inc v Hull*, 146 F Supp 2d 1012 (D Ariz, 2001) (holding that power to enter into Indian gaming compacts is "legislative"), vacated on other grounds 305 F3d 1015 (CA 9, 2002); *State ex rel Stephan v Finney*, 251 Kan 559; 836 P2d 1169 (1992) (holding that the power to bind the state to an Indian gaming compact is "legislative").

Because the amendments constitute legislation, they can only be effected by the procedures set forth in the constitution. As noted earlier with regard to amending a legislative act, Const 1963, art 4, § 25 requires the "section or sections of the act altered or amended" to be "re-enacted." Amendments to laws are therefore subject to the same procedural requirements as newly enacted laws.

The amendment process established in the LTBB compact violates this procedure. Instead of the Legislature originating a bill to amend the compact, the Governor effected the amendments on her own authority. No bill was passed by the Legislature, and no bill was presented to the Governor. The process that was followed violated a variety of sections of the Michigan Constitution concerning how a bill becomes a law: Const 1963, art 4, §§ 25, 26,

and 33. As a result, the Governor has exercised—and the Legislature has allowed her to exercise—powers granted solely to the Legislature.[8] Thus, the amendments violate the Separation of Powers Clause, Const 1963, art 3, § 2, which states: "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." By approving the Governor's exercise of amendatory power, the majority establishes the second provision of the "casino exception" to representative government: in the realm of Indian casinos, the Governor may enact the equivalent of legislation without the involvement of the Legislature.

The majority opinion, which permits the Governor to undertake legislative acts by contracting with the affected Indian tribe, may be aptly described as establishing, in the realm of Indian casinos, "government by contract" in lieu of "government by constitution." Pursuant to this, the Governor and the Legislature may avoid restrictions, i.e., checks and balances, imposed under our "government by constitution," which provides that the Legislature alone may exercise "[t]he legislative power of the State of Michigan," Const 1963, art 4, § 1, and that the Governor may exercise only "[t]he executive power," Const 1963, art 5, § 1.

IV. ACCEPTING THE PREMISE OF *TOMAC I*

Even accepting the premise of the majority in *TOMAC I* that the instant compact does not constitute

[8] The Legislature's acquiescence in the enlargement of the Governor's power is irrelevant in assessing the propriety of this grant: "the acceptance by one branch of the expansion of the powers of another branch is not dispositive in whether a constitutional power has been properly exercised." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 616; 684 NW2d 800 (2004).

legislation, I would still dissent. The amendment procedure in the LTBB compact improperly delegates the legislative power to contract to the Governor because the Legislature has failed to impose adequate standards on the Governor's exercise of that power.

As already noted, the Michigan Constitution grants the legislative power—the entirety of it—to the Legislature. Const 1963, art 4, § 1. The Legislature retains the general power to contract. See *TOMAC I*, *supra* at 328 ("[O]ur Legislature has the general power to contract unless there is a constitutional limitation."); *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311, 318; 254 NW2d 544 (1977). Here, the Legislature has authorized the Governor to carry out the contracting power through the amendment provision in the compact. Even if the compact as a whole had been validly approved by the Legislature under the rationale of *TOMAC I*, the Legislature was still required to have properly authorized the exercise of the contracting power in the amendment provision. If the exercise of the contracting power was improperly authorized, then the Legislature essentially delegated its legislative power to the Governor and thereby violated the Separation of Powers Clause.

"Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v United States*, 488 US 361, 419; 109 S Ct 647; 102 L Ed 2d 714 (1989) (Scalia, J., dissenting) (emphasis in original). In determining whether a delegation of legislative power has occurred, the Court should inquire whether the Legislature has "authorize[d] the exercise of executive or judicial power without adequate standards." *Id*. Justice Scalia elaborated: "The focus of controversy . . . has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particu-

lar field is so unacceptably high as to *amount to* a delegation of legislative powers." *Id*. (emphasis in original). A determination whether the Legislature has improperly delegated legislative power to the Governor requires that this Court examine whether the authorization of amendatory power provides "adequate standards" for the Governor's exercise of amendatory power, and whether the "degree of generality . . . is so unacceptably high as to amount to a delegation of legislative powers." *Id*.

> "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." [*Id.* at 418 (emphasis in original), quoting *Field v Clark*, 143 US 649, 693-694; 12 S Ct 495; 36 L Ed 294 (1892).]

This Court considered whether an authorization of executive power violated the principle of separation of powers in *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728; 330 NW2d 346 (1982). *Soap & Detergent* considered a separation of powers challenge to the Governor's power to reorganize executive agencies. *Id*. at 751. Although the Governor possesses the power to reorganize under Const 1963, art 5, § 2, *Soap & Detergent* nonetheless characterized this power as a "legislative" power.[9] *Id*. After noting that the grant of power to the Governor under the constitution pre-

[9] It is axiomatic that when the constitution grants a specific power to the executive branch, that power becomes an "executive" power, however it might have been characterized in the absence of such a grant. Cf., e.g., Const 1963, art 3, § 8 (advisory opinions as part of the "judicial power" in Michigan). I cite *Soap & Detergent* here only because it illustrates the criteria for determining when a violation of the separation of powers occurs.

cluded a separation of powers claim, *Soap & Detergent* argued that inherent checks in Michigan's constitutional scheme barred the conclusion that the principle of separation of powers had been violated:

> Article 5, § 2, does not by any means vest "all" or any considerable legislative power in the executive. While it is true that broad legislative power has been delegated to the Governor to effectuate executive reorganization, this power is clearly limited. Three limitations must be emphasized. First, the area of executive exercise of legislative power is very limited and specific. Second, the executive branch is not the sole possessor of this power; the Legislature has concurrent power to transfer functions and powers of the executive agencies. Third, the Legislature is specifically granted the power to veto executive reorganization orders before they become law.
>
> Therefore, the specific intent of the constitutional convention in fashioning art 5, § 2, having been to delegate a very limited and specific legislative power to the executive, and this provision having been adopted into the constitution with sufficient checks to restrain an improper exercise of this power, we find no constitutional infirmity negating the Governor's ability to transfer rulemaking authority from one agency to that agency's department head. [*Id*. at 752-753.]

Under *Soap & Detergent*, when one branch authorizes the use of power by another branch, the authorizing branch must provide "sufficient checks" on the exercise of power. Whether the Legislature has provided sufficient checks on the exercise of power depends on whether the authorization of power is "limited and specific," whether the branch authorizing the power retains concurrent power, and whether the branch authorizing the power may veto the decisions of the branch exercising the power.

Although I would prefer to cast this inquiry in terms of whether the power being conferred has, by the

constraints placed upon its exercise, been effectively transformed from a power properly exercised by the grantor branch into a power properly exercised by the grantee branch, *Soap & Detergent* does identify important aspects of this analysis.

Although this Court has never before addressed an authorization of amendatory power in the context of Indian gaming compacts, the Wisconsin Supreme Court addressed a similar question in *Panzer v Doyle*, *supra.* In *Panzer*, the Wisconsin legislature had statutorily authorized the governor to enter into and amend compacts with Indian tribes. *Id.* at 303. "The delegation of power to a sister branch of government must be scrutinized with heightened care to assure that the legislature retains control over the delegated power . . . ." *Id*. at 335. *Panzer* held that the Wisconsin legislature had properly authorized the governor to enter into Indian gaming compacts because the legislature retained "procedural safeguards" against the abuse of this power. *Id*. at 340-341. First, the legislature could repeal the statute enabling the governor to enter into Indian gaming compacts; second, the legislature could amend the statute to require that modifications be subject to legislative ratification; third, the governor would be held accountable for his actions at the ballot box. *Id*. at 341.

Panzer next addressed whether the legislature had properly authorized the governor to extend the duration of an Indian gaming compact indefinitely by later amendments of the compact entered into solely by the governor. *Id*. at 341-342. The governor had amended the compact to effectively prevent the state from rescinding the compact in the future, thereby rendering the duration of the compact indefinite. *Panzer* stated:

> We think it is extremely unlikely that, in the factual and legal atmosphere in which [Wis Stat] 14.035 was enacted,

> the legislature intended to make a delegation that could terminate its ability to make law in an important subject area. If such a far-reaching delegation were in fact intended, the delegation would be unconstitutional. [*Id*. at 347-348 (citation omitted).]

Panzer concluded that the Wisconsin legislature could not have authorized the governor to extend the duration of the compacts, even if it had intended to do so, because the legislature would lose all ability to control the power that it had authorized the governor to wield. "The legislature would be powerless to alter the course of the state's position on Indian gaming" by changing state law. *Id*. at 345.

The authorization of the Governor's use of amendatory power in the LTBB compact constitutes a similar delegation of legislative power and hence violates the Separation of Powers Clause. Legislative power has been delegated here because the authorization of power does not impose "adequate standards" on the exercise of that power, and the "degree of generality . . . is so unacceptably high as to amount to a delegation of legislative powers." *Mistretta*, *supra* at 419 (Scalia, J., dissenting). The Legislature placed a single restriction on the Governor's ability to amend the compact: the Governor merely cannot expand the counties in which the LTBB may operate casinos. Beyond this stricture, the Governor possesses plenary authority, subject to no constraint beyond her own discretion, in the exercise of the contracting power. The compact imposes no limit on where or when the Governor may authorize new casinos. The compact imposes no limit on when or for how long the Governor may extend its duration. The compact imposes no procedural standards or obligations upon the Governor. For example, the Governor is not required to submit proposed amendments to the Legislature, to the affected local unit of government, or to

any other governmental body, before enacting amendments of the compact. The compact contains no overarching standard to guide the Governor in her exercise of the amendatory power, not even one as general as those that have sustained delegations of power by the Congress to federal administrative agencies, e.g., the Federal Communications Commission must regulate to promote the "public convenience, interest, or necessity . . . ." 47 USC 303. The LTBB compact contains *no* standard, broad or narrow, substantive or procedural, that would transform the legislative power being delegated into an executive power. Consequently, the authorization of the amendatory power constitutes an unconstitutional delegation of legislative power.

Thus, the majority establishes the third provision of the "casino exception": in the realm of Indian casinos, the Legislature may authorize the exercise of power without imposing any standard on the Governor's exercise of power, thereby effectively delegating legislative power to the Governor.

Moreover, *Soap & Detergent* directs this Court to consider whether the authorization of power is "limited and specific," whether the branch authorizing the power retains "concurrent power," and whether the branch authorizing the power "is specifically granted the power to veto" the other branch's exercise of that power. *Soap & Detergent*, *supra* at 752. None of these considerations alters the conclusion that the Governor here is exercising a legislative power. First, the authorization of the amendatory power is not "limited" or "specific." Pursuant to these amendments, the Governor has already allowed another casino and extended the duration of the compact for 25 years; there is nothing that precludes the Governor and her successors from allowing 50 or 100 casinos and extending the

compact indefinitely. Second, unlike in *Soap & Detergent*, the Legislature here does not retain any power to amend compacts with the LTBB. Third, the Legislature cannot thwart actions of the Governor by legislative veto. The Governor's ability to expand the scope of the compacts is plenary.

Moreover, under the rationale in *Panzer*, the Legislature should never be allowed to completely "terminate its ability to make law in an important subject area." *Panzer*, *supra* at 347. In this case, the Legislature has wholly ceded its ability to effect future amendments of the compact. The Legislature's acquiescence to the amendment procedure "terminate[d] its ability to make law in an important subject area." *Id*. Such acquiescence transforms both the legislative and executive powers of our state by precluding the Legislature in the future from reasserting its proper authority over both state contracting and Indian casinos. Rather, it will remain bound indefinitely by the actions of the Legislature in 1998.

The majority argues: (1) because the Legislature properly approved the compacts under *TOMAC I*, any amendment approved by the Governor pursuant to the amendment process would be permissible, but only as long as the amendment is "within the limits of the constitution," *ante* at 103, 107, and 112; (2) the Legislature acquiesced in the authorization of the Governor's exercise of amendatory power by approving the compacts by resolution; (3) the Legislature may properly confer amendatory authority on the Governor, citing *People ex rel Sutherland v Governor*, 29 Mich 320 (1874), and discretionary decisions made by the Governor pursuant to delegated authority are not reviewable by this Court, citing *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422; 4 NW 274 (1880); (4) the

conferral of amendatory power on the Governor was "limited and specific," *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291; 586 NW2d 894 (1998); and (5) the amendments " '[did] not impose new obligations' " on the people of Michigan because the amendments " 'simply reflect the contractual terms agreed to by two sovereign entities.' " *Ante* at 109, quoting *TOMAC I*, supra at 327. I will briefly respond to these arguments.

First, the majority argues that the Legislature validly approved the amendment procedure in the compact, thereby "giv[ing] the Governor broad discretion—within the limits of the constitution—to amend the compacts." *Ante* at 107. However, this ignores that our constitution itself limits the methods by which the LTBB compact may be amended, by defining and limiting the powers of the three branches of government. An amendment procedure in violation of the separation of powers is made unconstitutional by Const 1963, art 3, § 2.

Second, the majority also argues that the Legislature acquiesced to the delegation of power to the Governor. While this may be true, it is this Court's obligation to uphold the constitution in service to the people, not in service to a particular branch of government. Moreover, it is our obligation to uphold the permanent interests of the separate branches, not those of its particular members at a particular moment in time. That one branch agrees to the exercise by another of an unconstitutional power does not mitigate the breach of the constitution. The premise of a government of defined and limited constitutional powers is that the rights of "*we the people*" will most securely be maintained by this method. "The acceptance by one branch of the expansion of the powers of another branch is not dispositive in whether a constitutional power has been properly exercised." *Nat'l Wildlife Federation*, *supra* at 616.

Third, the majority contends that *Sutherland* allows the Legislature "to confer authority on the Governor." *Ante* at 108. It further contends that "discretionary decisions made by the Governor are not within this Court's purview to modify." *Ante* at 108, citing *Ayres*, *supra* at 426. Who could doubt either of these propositions? However, the relationship these propositions bear to the majority's conclusion that the Legislature may "confer authority" upon another branch of government *in any way or to any extent* the Legislature chooses is hard to comprehend. *Sutherland* did not assert that courts should be disinterested in the nature of the authority being conferred, and *Ayres* did not assert that all decisions made by a Governor were "discretionary." Indeed, neither *Sutherland* nor *Ayres* even addressed delegations of "legislative power" to the executive.[10] The majority's casual assertion of governmental authority simply bears no resemblance to any traditional understanding of American constitutionalism.

Fourth, the majority invokes the test from *Judicial Attorneys Ass'n v Michigan* in support of its decision, but fails to properly apply that test. The majority states:

> An overlap or sharing of power may be permissible if "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of

[10] In *Sutherland*, the Legislature had granted the Governor the discretion to issue certificates stating that a canal and harbor had been built in conformity with federal law. The dispute in *Sutherland* centered on whether this power was an "essentially executive" duty or a ministerial duty. *Sutherland, supra* at 329. In *Ayres*, the Legislature had authorized the Board of State Auditors to solicit contracts for the printing of Supreme Court reports. *Ayres* noted that "State officers inferior to the Governor have many duties which courts can compel them to perform . . . ." *Ayers, supra* at 427. The dispute in *Ayres* was whether the Board of State Auditors could be compelled to perform its duties in a manner similar to an inferior officer.

> one branch at the expense of the other . . . ." [*Ante* at 105, quoting *Judicial Attorneys*, *supra* at 297.]

Judicial Attorneys concluded that a statute that allowed a local county to become the employer of judicial employees was not "limited and specific" and constituted an "aggrandizement" of the Legislature at the expense of the judicial branch. *Id*. at 301-303.[11] In the instant case, the Governor has been given the power to unilaterally amend the compact, constrained only by her inability to alter the definition of "eligible Indian lands." This near-plenary power is neither "limited" nor "specific," and permits the "aggrandizement" of the executive branch at the expense of the legislative, which will play a sharply limited role in the formulation of Indian casino policy.

The majority further contends that the authorization of power in this case is limited by the "compacts themselves" and by the Governor's inability to "agree to an amendment that would violate the constitution or invade the Legislature's lawmaking function." *Ante* at 108 n 3. However, as already mentioned, there is only a single relatively insignificant limitation upon the Governor in the compact itself, and the majority apparently understands constitutional violations only in terms of substantive and not procedural terms. That is, while the Governor presumably could not set different mini-

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[11] I dissented in part from the Court of Appeals opinion in the *Judicial Attorneys* cases and would have found that the Separation of Powers Clause was not violated. See *Detroit Mayor v Michigan*, 228 Mich App 386; 579 NW2d 378 (1998). I concluded that "any potential separation of powers concerns are not ripe for decision," *id*. at 427, and that the law in dispute "could be construed or applied in many ways, in many combinations and permutations, anticipated and unanticipated, some of which would engender no serious constitutional difficulties and others of which might be inconsistent with Const 1963, art 3, § 2 in whole or in part." *Id*. at 439. This case is distinguishable in that the Governor's exercise of power engenders "serious constitutional difficulties" under all circumstances.

mum age limits for gambling in new casinos on the basis of race or nationality, the fact that she has exercised legislative power in this realm in the first place apparently does not implicate the constitution, no matter how much "aggrandizement" of one branch has occurred at the expense of another.

Finally, the majority concludes by saying, "[T]he amendments 'do not impose new obligations on the citizens of the state subject to the Legislature's power; they simply reflect the contractual terms agreed to by two sovereign entities.' " *Ante* at 109, quoting *TOMAC I*, *supra* at 327. The issue in the instant case is not whether the 2003 amendments were agreed to by "two sovereign entities"; obviously they were.[12] Rather, the issue is whether the procedure undertaken to approve the 2003 amendments complied with the requirements of our constitution. Just as the United States cannot enter into a treaty with Belgium, and Michigan cannot enter into a compact with Ohio, by extra-constitutional procedures, neither can Michigan negotiate an Indian casino compact by extra-constitutional means. The amendment procedure utilized here involves an unconstitutional delegation of legislative power to the Governor because it fails to provide "adequate standards"—indeed it fails to provide any standards—for the Governor's exercise of such power. Such standards are necessary to transform a legislative power into an executive power. The majority's conclusion that the amendments " 'simply reflect the contractual terms agreed to by two sovereign entities' " is simply irrelevant to the necessary constitutional analysis.[13]

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[12] See *TOMAC I*, *supra* at 397 ("I do not dispute that the compacts are akin to contracts of a unique nature.").

[13] The majority asserts that the contractual nature of the compact and the amendments is relevant because " 'mutual assent' " is " 'a charac-

Moreover, the majority's assertion that the amendments are not legislation because they " 'do not impose new obligations on the citizens of the state' " simply ignores the reality that the citizens of this state are now obliged to admit a new casino and an indefinite number of future casinos into their communities, replete with the attendant economic and social consequences, without their elected representatives having had a voice in this determination. It is hard to conceive of a greater "obligation" being imposed upon a free citizenry than to be deprived of its ability to *effectively* communicate with its elected representatives.

V. CONSEQUENCES OF MAJORITY OPINION

The separation of powers among our three branches of government is not an afterthought to our constitutional structure. "The framers of Michigan's Constitution understood well the importance of separating the powers of government." *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006). "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Nat'l Wildlife Federation*, *supra* at 613. With regard to this state's Separation of Powers Clause, the official proposal at the Constitutional Convention stated:

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teristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating.' " *Ante* at 110 n 4, quoting *TOMAC I*, *supra* at 324. I do not disagree that the compact and its amendments are contractual. Where I disagree is in the majority's assertion that, when acting pursuant to a contract, the Governor and the Legislature are no longer bound by the grants and limitations of authority set forth in our constitution. The fundamental flaw in the majority opinion is that it never explains why the LTBB contract should be permitted to prevail over the contract between the people and their government embodied in our constitution.

> The doctrine of the separation of powers prevents the collection of governmental powers into the hands of 1 man, thus protecting the rights of the people. It is as old as our American governmental system, and was devised by our founding fathers, greatly influenced by the French political theorist, Montesquieu. Desirous of protecting a free people, their idea was that if, somehow, the powers of government could be divided, it could not grow so large as to enslave them. [1 Official Record, Constitutional Convention 1961, at 601.]

In equally strong language, former Justice COOLEY explained that the separation of powers "operates as a restraint upon such action of the [other branches of government] as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guaranties against attempts at tyranny." Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown & Co, 1880), p 43.

The majority allows the Governor, with the acquiescence of the Legislature, to circumvent the separation of powers principle embedded in Const 1963, art 3, § 2; art 4, § 1; art 5, § 1; and art 6, § 1. The grant of power from the Legislature in this case authorizes the Governor to enter into a *contract*. By some unexplained alchemy, such contract—one authorized by constitutionally-designated officials in the legislative branch and one negotiated by a constitutionally-designated official in the executive branch—is somehow permitted to trump a precedent contract that is part of the constitution. This precedent contract, entered into between "[w]e, the people of the State of Michigan" and its government, "ordain[ed] and establish[ed] *this* constitution." Const 1963, Preamble (emphasis added). "[T]his constitution" sets forth an architecture and a process of government instituted

for the "equal benefit, security and protection" of the people. Const 1963, art 1, § 1. Governmental officials are to operate within *these* constraints. Here, the majority allows these officials to act in disregard of constraints placed upon them by the constitution and thereby to impose new obligations upon the people.

As a result, a matter of public policy significance—the nature of Indian gaming within this state—is exempted from the regular processes of government. Through an improper delegation and exercise of legislative power, the Legislature has been deprived of its future authority to act on behalf of the people in this realm, the people have lost the effective opportunity to "instruct their representatives" in this same realm, Const 1963, art 1, § 3, and communities across the state have had diluted their ability to influence their local representatives in the law-making process in this realm. It is fair to describe the effect of the majority opinion, in conjunction with its opinion in *TOMAC I*, as the creation of a "casino exception" to representative government. Within the realm of the "casino exception," government is undertaken by contract rather than by regular constitutional processes, and public policy decisions normally within the contemplation of the legislative process are made by executive branch negotiators rather than by elected legislators.

Because of the majority opinion, the LTBB will be allowed to build a second casino in a second Michigan community, unburdened by the involvement of the people's elected representatives in the Legislature. Perhaps this will prove to be a wise judgment. Perhaps the effect of these casinos—as well as the effect of an unknown number of future casinos to be established by this same process over the next quarter-century—will prove salutary. Perhaps the effect of these and later

casinos on traffic, the environment and pollution, nearby schools, rural lifestyles, the character of communities, levels of noise, rates of crime, the competitiveness of state and local businesses, the incidence of bankruptcies, and the moral and social fabric of our state will all turn out well. Even if so, however, decisions such as these should be undertaken by the people through their elected representatives and not through the processes of the "casino exception" to representative government. The result of the majority's approach will be that, in the realm of Indian casinos, the authority of the people will be eroded, local influence will be eroded, and self-government itself will be eroded.

VI. CONCLUSION

In my judgment, the Governor's approval of the 2003 amendments violates the constitution, and the majority errs in affirming this action through what I view as the effective creation of a "casino exception" to representative government. By this exception, the majority enables the following:

First, in the realm of Indian casinos, the majority allows the Legislature to approve legislation through something other than the regular legislative process established by the constitution, as in this case where the Legislature approved the LTBB compact by a simple resolution vote. Because the compact constitutes legislation, it was unconstitutionally enacted in deviation from the regular legislative process. Consequently, the amendments of the compact are themselves unconstitutional.

Second, in the realm of Indian casinos, the Governor may enact the equivalent of legislation without the involvement of the Legislature, as in this case where the Governor has unilaterally approved amendments of

the LTBB compact. Because the amendments of the compact themselves constitute legislation under the *Blank* factors, unilateral enactment of these amendments violated the provisions of our constitution that establish the procedure for the passage of legislation, Const 1963, art 4, §§ 25, 26, and 33, as well as the clauses pertaining to the separation of powers, Const 1963, art 3, § 2; art 4, § 1; art 5, § 1; art 6, § 1. Consequently, the amendments are unconstitutional.

Third, in the realm of Indian casinos, the Legislature may delegate legislative power without supplying an adequate standard for its exercise, as in this case where the Legislature delegated to the Governor amendatory power over the compact without specifying *any* standards for its exercise. Consequently, the compact unconstitutionally delegates legislative power, and the Governor's exercise of that power by enacting the 2003 amendments is unconstitutional.

The majority allows the Governor and the Legislature to act outside their authority and beyond the limitations of our constitution. As a result, in the realm of Indian casinos, I believe that the authority of the people to exercise self-government will be diminished. For these reasons, I respectfully dissent.

BARNETT v HIDALGO

Docket Nos. 130071, 130073. Argued January 10, 2007 (Calendar No. 2). Decided May 30, 2007.

Wapeka B. Barnett, as personal representative of the estate of James O. Barnett, III, deceased, brought a medical malpractice action in the Oakland Circuit Court against Cesar D. Hidalgo, M.D.; Renato Albaran, M.D.; Muskesh S. Shah, M.D.; Crittenton Hospital; and others relating to the decedent's death from an undiagnosed and untreated blood disorder. Shah and his professional corporation and Crittenton Hospital and Crittenton Corporation settled with the plaintiff before trial. The trial court, Colleen A. O'Brien, J., denied motions by Albaran and Hidalgo for leave to file notice of nonparty fault pursuant to MCR 2.112(K). At the start of the trial, the court denied the plaintiff's motion to exclude admission of her experts' affidavits of merit and eventually admitted the affidavits of merit as substantive evidence and permitted defense counsel to cross-examine the plaintiff's experts regarding the differences between the affidavits of merit and the experts' trial testimony. The jury found in favor of the defendants and the court entered a judgment thereon. The plaintiff appealed by right, alleging error in the admission of the affidavits of merit as substantive and impeachment evidence and in the use of Shah's deposition testimony. The Court of Appeals, COOPER, P.J., and FORT HOOD and R.S. GRIBBS, JJ., agreed with the plaintiff and reversed the trial court's judgment. 268 Mich App 157 (2005). The Supreme Court granted applications by Albaran and Hidalgo for leave to appeal. 477 Mich 851 (2006).

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

1. The affidavits of merit were admissible as substantive evidence under MRE 801(d)(2)(B) and (C) because they constitute admissions by a party opponent, i.e., they are statements of which the plaintiff has manifested an adoption or belief in their truth or, alternatively, they are statements by a person authorized by the plaintiff to make a statement concerning the subjects listed in MCL 600.2912d (1) pertaining to such affidavits. The affidavits of

merit were also admissible as impeachment evidence because they constitute prior inconsistent statements of the plaintiff's expert witnesses, meet the requirements of MRE 613, and were not offered on a collateral matter.

2. The fact-finder's obligation to apportion fault among all liable persons is not altered by the creation of joint and several liability in medical malpractice actions. Under MCL 600.2957 and 600.6304, which generally provide that the trier of fact in a tort action shall determine the comparative negligence of each person who contributed to the plaintiff's injury, regardless of whether that person is or could have been named as a party, a plaintiff is permitted to refer to the involvement of nonparties. Therefore, the jury may consider affidavits of merit that reference a settling defendant.

3. Even if Shah's deposition was improperly used as substantive evidence, any error was harmless because the information was introduced to the jury through alternative and permissible means.

Justice CAVANAGH concurred in the result only.

Reversed.

Justice KELLY, dissenting, would hold that it was not harmless error to allow the unredacted affidavits of merit into evidence because the jury could have inferred that Dr. Shah had been dismissed from the lawsuit.

1. EVIDENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT.

Affidavits of merit submitted with a plaintiff's medical malpractice complaint may be admitted as substantive evidence because they constitute admissions by a party opponent and as impeachment evidence showing prior inconsistent statements of the experts (MRE 613, 801[d] [2][B] and [C]).

2. TORTS — COMPARATIVE NEGLIGENCE — NONPARTIES — DISMISSED PARTIES.

MCL 600.2957 and 600.6304 provide that the trier of fact in a tort action shall determine the comparative negligence of each person who contributed to the plaintiff's injury, regardless of whether that person is, or could have been, named as a party; because the jury is required to allocate fault of all persons, parties as well as nonparties, a jury may hear evidence regarding every alleged tortfeasor who has been involved, even parties who have been dismissed, and a party must be permitted to refer to the involvement of nonparties; the parties are not allowed to inform the jury about the existence of a settlement with a nonparty or the amount of such a settlement.

3. EVIDENCE — WITNESSES — DEPOSITIONS — HEARSAY.

When a witness is available at trial, the deposition testimony of the witness is inadmissible, as hearsay, for substantive purposes (MRE 804).

Sommers Schwartz, P.C. (by *Charles R. Ash, III,* and *Richard D. Toth*), for the plaintiff.

Grier & Copeland, P.C. (by *Rhonda Y. Reid Williams*), for Cesar D. Hidalgo, M.D.; and Cesar D. Hidalgo, M.D., P.C.

O'Connor, DeGrazia, Tamm & O'Connor, P.C. (by *Julie McCann O'Connor* and *James E. Tamm*), for Renato Albaran, M.D.; and Renato Albaran, M.D., P.C.

Amicus Curiae:

Thomas A. Biscup, for Michigan Trial Lawyers Association.

MARKMAN, J. We granted leave to appeal to consider the following issues: (1) whether the trial court committed error requiring reversal by admitting affidavits of merit as substantive and impeachment evidence; (2) whether the trial court committed error requiring reversal by allowing the jury to consider affidavits of merit that referenced a settling defendant; and (3) whether the trial court committed error requiring reversal in this case by admitting the deposition of a settling defendant as substantive evidence.

We reverse the judgment of the Court of Appeals because of its determinations regarding each of these issues. Regarding the first issue, we hold on the basis of MRE 801(d)(2)(B) and (C) and MRE 613 that the affidavits of merit were properly admitted as substantive evidence because they constitute admissions by a party opponent, and as impeachment evidence because

they constitute prior inconsistent statements of witnesses. Regarding the second issue, we hold on the basis of MCL 600.2957 and MCL 600.6304 that the parties were permitted to refer to the involvement of nonparties and, therefore, the jury could have considered the affidavits of merit that referenced a settling defendant. Regarding the third issue, we hold that even if the deposition in this case was improperly used as substantive evidence, the error was harmless because the information was alternatively introduced through other permissible means.

I. FACTS AND PROCEDURAL HISTORY

In this medical malpractice case, the decedent, James Otha Barnett, III, died from a rare blood disorder after undergoing gall bladder surgery performed by defendant Dr. Renato Albaran, a general surgeon at defendant Crittenton Hospital. After surgery, Albaran detected Barnett's low blood-platelet count. The most common cause of a low platelet count after surgery is disseminated intravascular coagulation (DIC) from postsurgical infection. Albaran consulted with defendant Dr. Muskesh Shah, a hematologist, and ordered a DIC screen to rule out postsurgical infection as a cause of Barnett's low platelet count. Shah concluded that Barnett was suffering from an exacerbation of a preexisting platelet disorder, idiopathic thrombocytopenic purpura (ITP), and not from DIC. Because there was no evidence of internal bleeding or postsurgical infection, and because he felt that Shah had provided a reasonable explanation for the low platelet count, Albaran indicated that Barnett could be discharged after he was cleared for release by Shah.

Two days after being discharged from the hospital, Barnett returned with complaints of disorientation. Dr.

William Bowman, the attending physician, consulted with Albaran, who concluded that there were no surgery-related problems. Bowman also consulted with defendant Dr. Cesar Hidalgo, a neurologist, who initially concluded that Barnett had suffered a stroke. At Hidalgo's recommendation, Bowman consulted with Shah regarding the low-platelet condition, and a second DIC screen was ordered, but the results were not received until after Barnett passed away. After a computerized tomography (CT) scan indicated that Barnett had not suffered a stroke, Hidalgo recommended further testing, including a magnetic resonance imaging (MRI) evaluation, but Barnett died before the tests could be performed. It turned out that Barnett suffered from a rare clotting disorder, thrombotic thrombocytopenic purpura (TTP), that required immediate blood plasma infusions and transfusions. If left untreated, as it was here, TTP is nearly always fatal.

As the personal representative of the estate of her deceased husband, plaintiff Wapeka Barnett filed a medical malpractice action against Albaran and his professional corporation, Hidalgo and his professional corporation, Shah and his alleged employer Oncology & Hematology of Oakland, Crittenton Hospital, and Crittenton Corporation. Plaintiff's affidavits of merit were signed by a general surgeon, Dr. Scott Graham; a neurologist, Dr. Eric Wassermann; and a hematologist, Dr. Rachel Borson. Graham's affidavit of merit stated that Albaran failed to take sufficient precautions to prevent a postsurgical infection before he discharged Barnett. Wassermann's affidavit of merit stated that Hidalgo misdiagnosed Barnett's condition as a stroke and failed to take proper precautions when Barnett was transferred to a different medical facility for the MRI testing. Finally, Borson's affidavit of merit stated that Shah should have performed further testing, should

have stabilized Barnett before discharging him from the hospital, and should have diagnosed TTP and initiated treatment.

Before trial, plaintiff settled with Crittenton Hospital, Crittenton Corporation, Shah, and Oncology & Hematology of Oakland. Albaran filed a motion for leave to file notice of nonparty fault pursuant to MCR 2.112(K), which the trial court initially granted. When Hidalgo filed a similar motion, the trial court adopted plaintiff's position that the court rule was inapplicable in medical malpractice cases, because liability remains joint and several, and denied both Hidalgo's and Albaran's motions.

At trial, the testimony of plaintiff's three experts differed from their statements in their depositions and affidavits of merit. They stated that as part of their preparation for trial they had reviewed the hospital records and the doctors' depositions and that Albaran and Hidalgo had violated standards of care by, among other reasons, failing to review and follow up on blood tests, and failing to diagnose or recognize TTP. Albaran and Hidalgo sought to establish that, as a general surgeon and a neurologist respectively, they could not be expected to diagnose TTP, which is purely a blood disorder, and that Shah, as the hematologist, was the doctor responsible for such a diagnosis. Graham conceded that he no longer believed that Albaran had violated the standard of care with regard to protecting Barnett against postoperative infection. However, Graham stated that it was inexcusable that neither Albaran nor Shah had reviewed the results of Barnett's DIC screen. In response, defense counsel examined Graham with regard to the depositions of Albaran and Shah, where both testified that they had reviewed the DIC screen results. Albaran testified that he had reviewed

the DIC screen results, that he had complied with the appropriate standard of care by requesting a hematology consultation, and that he had reasonably relied on Shah's assessment of Barnett's condition. Similarly, Hidalgo argued that he had reasonably relied on Shah's diagnosis and that Bowman, the attending physician, had been responsible for ordering a hematology consultation.

At the outset of trial, plaintiff moved to exclude the admission of her experts' affidavits of merit for any purpose and to exclude any reference to the fact that Shah had settled. The remaining defendants agreed that they would not mention the settlement at trial. Plaintiff and Albaran also agreed that Shah's deposition would not be read to the jury and that, in return, plaintiff would not read to the jury the deposition of one of the defense experts, in lieu of their live testimony at trial. The trial court admitted plaintiff's affidavits of merit as substantive evidence, including the ones referring to Shah, and permitted defense counsel to cross-examine plaintiff's experts regarding the differences between the affidavits of merit and their trial testimony. The jury found in favor of defendants, and plaintiff filed a motion for a new trial, which the trial court denied.

Plaintiff appealed by right, claiming that she was entitled to a new trial because the admission of the affidavits of merit as substantive and impeachment evidence, together with the use of Shah's deposition, denied her a fair trial. The Court of Appeals agreed and reversed the trial court's judgment. 268 Mich App 157, 163; 706 NW2d 869 (2005). First, the Court of Appeals held that the admission of the affidavits of merit that referenced Shah and listed Shah as a defendant was improper under *Brewer v Payless Stations, Inc*, 412

Mich 673; 316 NW2d 702 (1982), and *Clery v Sherwood*, 151 Mich App 55; 390 NW2d 682 (1986), because it allowed the jury to speculate about a possible settlement. Second, the Court held that the affidavits of merit constituted inadmissible hearsay that could not be used as substantive evidence. Third, the Court held that the affidavits of merit were inadmissible as impeachment evidence because they were not inconsistent with the experts' testimonies at trial, which were based on new facts developed throughout the course of discovery, and that even assuming that the use of the affidavits for impeachment purposes was proper, the trial court improperly permitted the affidavits to be given to the jury as exhibits. Finally, the Court of Appeals held that even though the use of Shah's deposition was proper for impeachment of Graham's testimony that there had been no review of the DIC screen results, its use as substantive evidence constituted error requiring reversal. We granted applications by Albaran and Hidalgo for leave to appeal. 477 Mich 851 (2006).[1]

II. STANDARD OF REVIEW

A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court's

[1] We directed the parties to 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."

decision to admit evidence is also reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion. *Id.*

III. ANALYSIS

A. AFFIDAVITS AS SUBSTANTIVE AND IMPEACHMENT EVIDENCE

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In pertinent part, MRE 801(d) provides that a statement is not hearsay in the following circumstances:

> (1) *Prior Statement of Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
>
> (2) *Admission by Party-Opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the

> party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .

Affidavits of merit are required to accompany a complaint alleging medical malpractice. MCL 600.2912d(1) provides:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a *statement* of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Emphasis added.]

We disagree with the Court of Appeals that Borson's affidavit of merit constitutes inadmissible hearsay. While an affidavit of merit is inadmissible under MRE 801(d)(1)(A) as a prior inconsistent statement because it is not given "at a trial, hearing, or other proceeding, or in a deposition," an affidavit of merit nonetheless is admissible as an admission by a party-opponent under MRE 801(d)(2)(B) and (C). An affidavit of merit in this context constitutes a sworn statement regarding the

applicable standard of practice or care, the health professional's opinion that the applicable standard of practice or care was breached by the defendant, the actions that should have been taken or omitted by the defendant in order to have complied with the applicable standard of practice or care, and the manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged. MCL 600.2912d(1).

In order for plaintiff to demonstrate that she has a valid malpractice claim and as a precondition to initiating her action, plaintiff was required to file an affidavit of merit in support of her complaint. As part of the pleadings,[2] an affidavit of merit is generally admissible as an adoptive admission;[3] by filing the affidavit of merit with the court, plaintiff manifests "an adoption or belief in its truth."[4] MRE 801(d)(2)(B); see also MRPC 3.3(a)(4). In the instant case, from among the universe of potential experts, plaintiff hired experts of her own choosing to prepare the affidavits of merit, she was fully cognizant of the experts' statements made in the affi-

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[2] See, e.g., *Kowalski v Fiutowski*, 247 Mich App 156, 164; 635 NW2d 502 (2001) (The Court of Appeals held that "when a defendant fails to file an affidavit of meritorious defense, that defendant has failed to plead.").

[3] See *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990) ("statements in pleadings may be treated as admissions").

[4] See, for example, *Pfizer Inc v Teva Pharmaceuticals USA, Inc*, 2006 US Dist LEXIS 77970 (D NJ, 2006) (expert affidavits submitted by the plaintiff in support of its European patent application represented adoptive admissions); *Kreppel v Guttman Breast Diagnostic Institute, Inc*, 1999 US Dist LEXIS 19602 (SD NY, 1999) (report prepared by medical expert witness who was also deposed and listed as a trial witness, which was produced by defendant to the other parties, constituted an admission); *Grundberg v Upjohn Co*, 137 FRD 365 (D Utah, 1991) (protocol report forms recording the results of research sponsored by the defendant, which were submitted to the Food and Drug Administration in connection with the defendant's application for approval to market a drug, were admissible as nonhearsay adoptive admissions).

davits, she voluntarily chose to submit those particular affidavits in support of her complaint, and she summoned the same experts as witnesses at trial. These steps each reflect an acceptance of the contents of the affidavits of merit sufficient, in our judgment, to constitute an adoption or belief in their truth.[5]

Moreover, an affidavit of merit satisfies the requirements of MRE 801(d)(2)(C). An independent expert who is not withdrawn before trial is essentially authorized by the plaintiff to make statements regarding the subjects listed by MCL 600.2912d(1)(a) through (d). Therefore, consistent with the actual language of MRE 801(d)(2)(C), an affidavit of merit is "a statement by a person authorized by the party to make a statement concerning the subject . . . ."[6] In the instant case, al-

[5] We note that MRE 801(d)(2) contains no express or implied requirement of personal knowledge or understanding on the part of the plaintiff-declarant of the facts or medical expertise underlying his or her statement. See, e.g., *Mahlandt v Wild Canid Survival & Research Ctr, Inc*, 588 F2d 626, 630-631 (CA 8, 1978), wherein the court held that FRE 801(d)(2)(D) does not contain an express or implied requirement that the declarant have personal knowledge of the facts underlying his or her statement.

[6] See, for example, *Reid Bros Logging Co v Ketchikan Pulp Co*, 699 F2d 1292, 1306-1307 (CA 9, 1983) (report prepared by an employee of a shareholder of the defendant's parent company at the request of the chairman of the board of the defendant's company on the basis of free access to all the company's books and records and that was circulated to the officers and managers was an authorized statement under FRE 801[d][2][C]); *Collins v Wayne Corp*, 621 F2d 777, 781-782 (CA 5, 1980) (deposition of expert hired by the defendant to investigate an accident and report his conclusions was admissible as an admission under FRE 801[d][2][C], which the defendant had the opportunity to explain, but the deposition was not a conclusive, judicial admission); *Glendale Fed Bank, FSB v United States*, 39 Fed Cl 422, 423-425 (1997) (deposition of expert who was not withdrawn before trial remains "authorized" by the party and amounts to a party-admission). But see contra *Kirk v Raymark Industries, Inc*, 61 F3d 147, 163-164 (CA 3, 1995). The court held that the testimony of an expert witness who is called to testify on behalf of a party

though plaintiff had no right to control the content of the independent experts' statements, she hired the experts and invested them with the authority to prepare affidavits of merit on her behalf. Subsequently, with full knowledge of the contents of these affidavits and with a belief that they demonstrated the validity of her claims, plaintiff submitted the affidavits of merit in support of her complaint. Plaintiff called the same experts as witnesses at trial and failed to amend the affidavits of merit to reflect any change in opinion. Plaintiff cannot now reasonably deny that she authorized the experts to make statements concerning the subject of the affidavits.[7]

While it is true that plaintiffs have a statutory obligation to submit affidavits of merit in support of their complaints *before* having the benefit of discovery, we cannot conclude that the nature of this obligation relieves them altogether of accountability for the substance of these statements. The purpose of the affida-

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in unrelated litigation is not admissible as an admission under FRE 801(d)(2)(C), unless the expert witness is an agent of the party and is authorized to speak on behalf of that party. We are not persuaded by the *Kirk* rationale. The actual language of the rule does not require that the person making the statement be an "agent" of the party; rather, it only requires that the party authorize the person to make a statement concerning the subject. "FRE 801(d)(2)(C) applies to a person who is not an agent but is 'authorized' to speak." *Glendale Fed Bank, FSB*, *supra* at 424.

[7] We agree with the Court of Appeals that an affidavit of merit is not admissible under MRE 801(d)(2)(D) as "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment" because there is no agency relationship between a plaintiff and an expert. The right to control the conduct of the agent with respect to the matters entrusted to him or her is fundamental to the existence of an agency relationship. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/MEA*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). Although an affidavit of merit is provided upon the plaintiff's request, the affidavit is prepared by an independent expert and the plaintiff has no right to control the content of the expert's statements.

vits of merit is to deter frivolous medical malpractice claims by verifying through the opinion of a qualified health professional that the claims are valid. *Scarsella v Pollak*, 461 Mich 547, 548, 551; 607 NW2d 711 (2000). The purpose of the statutory obligation to submit affidavits of merit would be defeated, or at least significantly undermined, if there were to be no accountability —including potentially adverse consequences—for statements made on the basis of information available at the time the affidavits of merit were submitted. When confronted with admissions made in their affidavits of merit, the plaintiffs may reasonably point out to the fact-finder that they had access to a more limited factual development before discovery and explain the basis for any changes in opinion.[8]

Furthermore, we disagree with the Court of Appeals that the affidavits of merit submitted by plaintiff are inadmissible as impeachment evidence. While evidence used exclusively for impeachment purposes is not substantively admissible without an independent basis, and therefore may not be introduced as an exhibit for the jury's consideration, *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972); *People v Wythcerly*, 172 Mich App 213, 220; 431 NW2d 463 (1988); *People v Alexander*, 112 Mich App 74, 77; 314 NW2d 801 (1981), here, the affidavits of merit are admissible into evidence because they are party-admissions. MRE 613, which sets forth a set of preconditions for impeachment, provides:

> (a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at

[8] See *Collins*, *supra* at 782.

> that time, but on request it shall be shown or disclosed to opposing counsel and the witness.
>
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Before attempting to impeach a witness by offering extrinsic evidence of a prior inconsistent statement, a litigant must lay a proper foundation in accordance with the court rule. *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998); *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995); *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992). To do so, the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. MRE 613(b); *People v Malone*, 445 Mich 369, 382-385; 518 NW2d 418 (1994); *Weatherford*, *supra* at 122. However, "extrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984).

The affidavits of merit provided by plaintiff's experts were inconsistent with their testimony at trial and were not offered on a collateral matter. Graham, Borson, and Wassermann clearly shifted the focus of their testimony against Albaran, and to a lesser extent against Hidalgo,

after plaintiff and Shah settled. In their affidavits of merit, none of the experts stated that Albaran or Hidalgo violated the standard of care because they failed to diagnose or recognize TTP or failed to follow up on the DIC screen results. In her affidavit of merit, Borson claimed that Shah had a duty to diagnose TTP and follow up on the blood tests. However, at trial, Borson testified that *all* of Barnett's treating doctors had been at fault for failing to review and follow up on Barnett's blood test results. Graham, who made no mention of any error in diagnosis regarding the blood disorder in his affidavit of merit, testified at trial that Albaran had violated the standard of care by failing to review the DIC screen results and recognize that Barnett was suffering from TTP. Furthermore, although Wassermann made no reference to this fact in his affidavit, Wassermann testified that Hidalgo violated the standard of care by failing to order a hematology consultation when he first saw Barnett, rather than waiting until the next day.

We do not believe that the changes in the experts' testimony at trial were simply the result of additional information they gained through the course of discovery, but if they were, that was for plaintiff to argue. The experts' affidavits of merit and trial testimony were based on the medical and autopsy records, information that had not changed during the course of discovery. Graham claimed that Albaran's statement in his deposition that Albaran had not reviewed the DIC screen results was new information that had not been available at the time of Graham's affidavit of merit. However, this information was already known to Graham; he testified that the medical records—records that were available to him before providing his affidavit—did not show that Albaran received the test results and therefore that Albaran had not reviewed the test re-

sults. Similarly, virtually all the information relied on by Borson and Wassermann for their trial testimony had been available at the time they submitted their affidavits of merit.

Therefore, the affidavits of merit were admissible as admissions by a party opponent under MRE 801(d)(2)(B) and (C) because they are statements concerning which plaintiff has manifested an adoption or belief in their truth or, alternatively, statements by a person authorized by plaintiff to make a statement concerning the subjects listed in MCL 600.2912d(1). Moreover, the affidavits of merit were admissible as impeachment evidence because they constitute prior inconsistent statements of plaintiff's expert witnesses.

B. AFFIDAVITS REFERENCING SETTLING DEFENDANT

MCL 600.2957 and MCL 600.6304, two sections enacted or amended as part of the 1995 tort reform legislation, generally provide that the trier of fact in a tort action shall determine the comparative negligence of each person who contributed to the plaintiff's injury, regardless of whether that person is, or could have been, named as a party. MCL 600.2957 provides:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.
>
> (2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A

cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(3) Sections 2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

In relevant part, MCL 600.6304 provides:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

* * *

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay

damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

* * *

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).

(b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties . . . .

The fact-finder's obligation to apportion fault among all liable persons is not altered by the creation of joint and several liability in medical malpractice actions. See *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 549, 551; 685 NW2d 275 (2004);[9] *Salter v Patton*, 261 Mich App 559, 565; 682 NW2d 537 (2004).[10] Because

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[9] This Court has held that

> [s]ubsection 6304(1)(b) is unambiguous and calls for the trier of fact to assess by percentage "the total fault of *all* persons that contributed to the death or injury, *including each plaintiff*," (emphasis added), as long as that fault constituted a proximate cause of the plaintiff's injury and subsequent damage. [*Estate of Shinholster, supra* at 551.]

[10] MCL 600.2957 and MCL 600.6304

> provide that the fact-finder shall allocate liability among nonparties even in medical malpractice cases where the plaintiff is

under these provisions the jury is required to allocate fault of all persons, parties as well as nonparties, we believe that a jury may hear evidence regarding every alleged tortfeasor who has been involved, even parties who have been dismissed, and by the same token, that a party must be permitted to refer to the involvement of nonparties.

The Court of Appeals decision that the admission of the unredacted affidavits of merit referencing Shah constituted error requiring reversal fails to consider the language of the above statutes and restricts the parties from revealing the existence of a potentially liable nonparty. In deciding that the admission of the affidavits of merit referencing Shah was error, the Court of Appeals relied on *Brewer* and *Clery*.

In *Brewer*, in an attempt to strengthen its policy of encouraging settlements, this Court held that

> [w]hen there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, *the jury shall not be informed of the existence of a settlement or the amount paid*, unless the parties stipulate otherwise. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced. [*Brewer, supra* at 679 (emphasis added).]

We determined in *Brewer* that because the uncertainty of juror reaction to evidence of settlements could be prejudicial to both parties, the potential admission of such evidence constitutes a foreseeable deterrent to settlements between plaintiffs and codefendants. *Id.*

> not at fault before joint and several liability is imposed on each defendant. Further, once joint and several liability is determined to apply, joint and several liability prohibits the limitation of damages to one's percentage of fault. [*Salter, supra* at 565.]

Because MCL 600.2957 and 600.6304 allow the parties to refer to the involvement of nonparties and because *Brewer* does not prohibit *any* reference to a nonparty, but merely prohibits mentioning the existence of a settlement or its amount, we conclude that *Brewer* can be reconciled with the above statutes. Thus, the Court of Appeals erred by completely restricting the parties from revealing the existence of a potentially liable nonparty. Moreover, the Court of Appeals reliance on *Brewer* was misplaced because, although the unredacted affidavits listed Shah as a defendant, the jury was never informed that plaintiff and Shah had reached a settlement.

In *Clery*, the trial court instructed the jury that certain parties had been dismissed before trial, without informing it that the parties were dismissed after a settlement had been reached. Relying on *Brewer*, the Court of Appeals found error requiring reversal in the trial court's instruction and held that, unlike in *Brewer*, where the concern had been the "misinterpretation of true facts," in *Clery* there had been an "added danger that the jury was in a position to misinterpret based only upon partial and misleading facts."[11] *Clery, supra* at 62. The Court of Appeals held that the danger of prejudice and confusion was greater because the jury was left to speculate regarding the missing parties' whereabouts, the amount of a possible settlement, and the potential fault of the missing parties. *Id.* at 62-63.

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[11] The Court of Appeals noted:

> At least in *Brewer* the facts imparted to the jury were a complete and accurate recital of the settlement in that case. In the present case, disclosure was but that of a half-truth; the jury was told that the case against the bar and the road commission was dismissed, but they were not told that this was pursuant to settlement of $128,000 and $5,000 respectively. [*Clery, supra* at 62.]

The Court of Appeals conclusion that *Clery* entirely prohibits the parties from referring to a nonparty potentially at fault is simply too broad. *Clery* merely stands for the proposition that the parties may not inform the jury that a nonparty was *dismissed* from the lawsuit. Under the provisions of MCL 600.2957 and 600.6304, a defendant may pursue a legitimate defense by arguing that fault rests with a nonparty, regardless of whether the nonparty is, or could have been, named as a party. However, the nonparty fault statutes do not require that the jury be informed about the reason behind a nonparty's absence from the lawsuit. The fact that the nonparty agreed to settle or was dismissed is irrelevant to the determination and allocation of that person's fault. Therefore, to the extent that it prohibits informing the jury that a nonparty has been *dismissed* from the lawsuit, *Clery* is not in conflict with the statutory mandate because it does not entirely prohibit any reference to a nonparty.

Because the jury in the instant case was not actually informed that Shah had been dismissed, the instant facts do not fit within the *Clery* holding. Arguably, however, because the unredacted affidavits of merit listed Shah as a defendant, the jury could have reasonably inferred that Shah had been dismissed from the lawsuit. Even if such an inference would equate with actually informing the jury that Shah was dismissed from the lawsuit, reversal here is not required. Plaintiff failed to show that it was more probable than not that the alleged error was outcome determinative. See *Lukity*, *supra* at 495-496. There was ample evidence showing that Albaran and Hidalgo, as a general surgeon and neurologist, respectively, did not breach the standard of care applicable to their profession by failing to recognize or diagnose TTP, a rare blood disorder usually diagnosed by a hematologist. Furthermore, had this

alleged error resulted in prejudicial jury speculation, the jury verdict may conceivably have been unfavorable to *defendants*. After informing the jury that Shah had been dismissed, the jury arguably could have believed that Shah's dismissal was indicative of his lack of fault, and, therefore, Albaran and Hidalgo must have been responsible for Barnett's death.

While the parties are not allowed to inform the jury about the existence of a settlement with a nonparty or its amount, or that the nonparty was dismissed, under MCL 600.2957 and 600.6304, the parties are permitted to introduce evidence referring to a nonparty. We therefore conclude that plaintiff's affidavits of merit referencing a settling defendant are admissible.

C. DEPOSITION OF SETTLING DEFENDANT

The final issue is whether the admission of Shah's deposition constitutes error requiring reversal. In pertinent part, MRE 804 provides:

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under

> subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (5) *Deposition Testimony*. Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Thus, when a witness is available at trial, his or her deposition testimony is inadmissible, as hearsay, for substantive purposes.

The Court of Appeals held that the admission of Shah's deposition to show that he reviewed the DIC screen results amounted to error requiring reversal because "[t]his critical information could not have gone before the jury by any other means." *Barnett*, *supra* at 168-169. We respectfully disagree and instead conclude that such error, if any, was harmless. MCR 2.613(A); *Lukity*, *supra* at 495-496. Two other witnesses, Albaran and Bowman, each properly testified that Shah had reviewed the DIC screen results. Thus, this information was available to the jury through alternative and permissible means.

IV. CONCLUSION

We conclude on the basis of MRE 801(d)(2)(B) and (C) and MRE 613 that the affidavits of merit were admissible as substantive evidence because they constitute admissions by a party opponent, and admissible as impeachment evidence because they constitute prior inconsistent statements of plaintiff's expert witnesses. Further, on the basis of MCL 600.2957 and 600.6304, we conclude that plaintiff was permitted to refer to the involvement of nonparties and that the jury therefore could have considered the affidavits of merit that referred to a settling defendant. Finally, we conclude that even if the deposition in this case was improperly used as substantive evidence, the error was harmless because the information was alternatively introduced through other permissible means. Accordingly, we reverse the Court of Appeals judgment.

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

CAVANAGH, J. I concur in the result only.

KELLY, J. (*dissenting*). I dissent from the majority's decision to reverse the Court of Appeals judgment. It was not harmless error to allow the unredacted affidavits of merit into evidence.

In *Clery v Sherwood*,[1] the plaintiff brought a wrongful death action against Timothy Sherwood, Jeffrey Pratt, Cass Leonard, the Stage Coach Stop Bar, and the Clinton County Road Commission. *Clery v Sherwood*, 151 Mich App 55, 59; 390 NW2d 682 (1986). Before trial, a settlement was reached with the bar and road

[1] 151 Mich App 55; 390 NW2d 682 (1986).

commission, and those parties were dismissed from the case. *Id.* The action proceeded against Sherwood, Leonard, and Pratt. At trial, the court instructed the jury that plaintiff's complaint originally listed the bar and road commission as defendants, but that those parties had been dismissed before trial began. *Id*. at 60.

The Court of Appeals held that the instruction was erroneous and required reversal. *Id.* at 62-63. Specifically, the panel applied the rationale in *Brewer*[2] and opined that a danger existed that the jury could misinterpret the court's instruction. *Id.* at 62. The Court of Appeals explicitly rejected the claim that the error was harmless, concluding that "the potential prejudice of this instruction is so great that any guess at its impact on the jury's verdict is speculative at best." *Id.* at 63.

I believe that the Court of Appeals in *Clery* properly concluded that it is not harmless error to instruct a jury that a nonparty has been dismissed from a lawsuit. I believe the rationale in *Clery* applies with equal force to the instant case. The unredacted affidavits of merit listed Dr. Shah as a party to the suit. However, the judge instructed the jury that Dr. Shah was not a party to the action. The clear inference was that Dr. Shah had been dismissed from the lawsuit.

The majority recognizes that the jury reasonably could have inferred from the unredacted affidavits of merit that Dr. Shah had been dismissed from the

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[2] *In Brewer v Payless Stations, Inc*, 412 Mich 673, 679; 316 NW2d 702 (1982), this Court determined that, as a matter of public policy, "[w]hen there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise." Specifically, this Court noted that keeping evidence of a settlement from the jury creates less confusion, promotes more predictability, and enhances this Court's policy of encouraging settlements. *Id.* at 678-679.

lawsuit. However, it concludes that the error, if any, is harmless. The majority opines that the jury arguably could have believed that Dr. Shah's dismissal indicated his lack of fault and, therefore, that defendants must have been responsible for Mr. Barnett's death.

However, it is equally possible that the jury believed that (1) Dr. Shah's dismissal was the result of a settlement, (2) that the settlement was indicative of Dr. Shah's fault, and (3) that, because Dr. Shah was at fault, defendants were not responsible. The list of possibilities for prejudice is lengthy. As a result, because the potential prejudice is so great, the inference that Dr. Shah was dismissed from the lawsuit cannot be harmless.

Accordingly, just as the Court of Appeals in *Clery* determined that the erroneous instruction warranted reversal, I conclude that the unredacted affidavits of merit in the instant case warrant reversal.

MUCI v STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

Docket No. 129388. Decided June 6, 2007.

Alina Muci brought an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company, seeking personal protection insurance benefits under the no-fault automobile insurance act, MCL 500.3101 *et seq*. The defendant eventually filed a motion to compel the plaintiff to submit to an independent medical examination as provided in MCL 500.3151 and as required by the insurance policy. The court, Robert L. Ziolkowski, J., granted the motion and ordered the plaintiff to submit to the examination; however, in agreement with the plaintiff's contention that MCR 2.311 allowed the court to impose conditions on the examination that the statute or the policy did not, the court imposed certain conditions on the examination. The defendant appealed from that order by leave granted, and the Court of Appeals, FITZGERALD and SMOLENSKI, JJ. (SAAD, P.J., dissenting), affirmed the trial court's order. 267 Mich App 431 (2005). The defendant sought leave to appeal in the Supreme Court. The Supreme Court ordered oral argument on whether to grant the application or take other peremptory action. 475 Mich 877 (2006). Following oral argument, the Supreme Court issued an opinion that reversed the judgment of the Court of Appeals and the order of the trial court, and remanded the matter to the trial court for further proceedings.

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

The no-fault act and the insurance policy establish the parameters of what conditions may be placed on the medical examination of a claimant. The role of the trial court is confined to adjudicating disputes that arise thereunder.

1. Although the court rules control matters on which the no-fault act is silent, they do not control matters specifically addressed by the act. In this case, the court rule and the no-fault act conflict and, because the act covers independent medical examinations, its provisions control. The statutory provisions concerning medical examinations are substantive, not procedural,

because they do not concern court administration, and are supreme over the court rule. MCR 2.311 is not applicable to the medical examination involved in this case because the no-fault act comprehensively addresses the matter of such an examination.

2. A trial court's ability to adjudicate disputes arising under the no-fault act and the insurance policy regarding examinations is limited by the no-fault act itself, primarily the provisions of MCL 500.3142, 500.3148, 500.3151, 500.3153, and 500.3159, and such other sections that may apply.

3. MCL 500.3159 protects an insured from discovery practices that cause annoyance, embarrassment, or oppression. In this case, the plaintiff has produced demonstrable evidence that, on a previous occasion, the defendant's medical examiner asked inappropriate questions of another examinee during an independent medical examination. However, the trial court relied on MCR 2.311(A), rather than MCL 500.3159, in imposing conditions on the medical examination the defendant is entitled to conduct under MCL 500.3151. On remand, the trial court must reconsider which conditions may properly be imposed under MCL 500.3159 to protect the plaintiff against annoyance, embarrassment, or oppression.

Reversed and remanded to the trial court for further proceedings.

Justice KELLY, joined by Justices CAVANAGH and WEAVER, dissenting, disagreed that MCL 500.3151 and MCR 2.311 conflict. The statute does not provide a limitless right to require medical examinations without conditions. The statute and the court rule can and should be read in harmony. Furthermore, MCL 500.3159 and MCR 2.311(A) are parallel with one another. Thus, the trial court properly relied on MCR 2.311(A) when it imposed conditions on the plaintiff's examination. Because MCR 2.311(A) applies, it is clear that the defendant agreed to allow the plaintiff's attorney to attend the examination and to allow it to be recorded. The trial court did not abuse its discretion in imposing the remaining conditions challenged, and other means exist for the defendant to obtain information the defendant seeks. The judgment of the Court of Appeals should be affirmed.

1. INSURANCE — NO-FAULT INSURANCE — PERSONAL PROTECTION INSURANCE BENEFITS — MEDICAL EXAMINATIONS.

The no-fault automobile insurance act's provisions concerning independent medical examinations of a claimant seeking personal protection insurance benefits and the parties' insurance policy control the conditions that may be placed on the independent

medical examination of a claimant; the no-fault act comprehensively addresses such examinations and its provisions control over the court rule governing discovery with respect to physical and mental examinations (MCL 500.3142, 500.3148, 500.3151, 500.3153, and 500.3159; MCR 2.311).

2. INSURANCE — NO-FAULT INSURANCE — PERSONAL PROTECTION INSURANCE BENEFITS — MEDICAL EXAMINATIONS.

A trial court may not impose conditions on an independent medical examination of a claimant of no-fault personal protection insurance benefits in the absence of a showing that submission to such an examination will cause the claimant to suffer annoyance, embarrassment, or oppression (MCL 500.3151 and 500.3159).

Buckfire & Buckfire, P.C. (by *Daniel L. Buckfire* and *Thomas N. Economy*), for the plaintiff.

Hewson & Van Hellemont, P.C. (by *James F. Hewson*) (*Gross, Nemeth & Silverman, P.L.C.,* by *James G. Gross,* of counsel), for the defendant.

Amici Curiae:

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman, P.C. (by *Ramond W. Morganti*), for Michigan Defense Trial Counsel.

Cox, Hodgman & Giarmarco (by *Larry W. Bennett*), for Michigan Trial Lawyers Association.

TAYLOR, C.J. At issue in this no-fault automobile insurance case is whether provisions of the no-fault act and the parties' contract of insurance establish the extent of allowable conditions on a medical examination of the claimant, or whether the allowable conditions are within a circuit court's discretion pursuant to MCR 2.311 (the general rule governing discovery with respect to physical and mental examinations). We conclude that the act and the contract establish the parameters of what is allowed and that the court's role is confined to

adjudicating disputes that arise under them. Accordingly, we reverse the judgment of the Court of Appeals and the order of the trial court that held to the contrary, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Alina Muci, an insured of State Farm Mutual Automobile Insurance Company (State Farm), was injured in an automobile accident in May 2002. She sought medical and psychiatric treatment for those injuries and, although the record is sketchy, it appears that she filed a claim with State Farm for personal protection insurance (PIP) benefits pursuant to the established process under the no-fault act, MCL 500.3142(2).[1] In such a situation State Farm, also operating under the procedures of the no-fault act, would have usually demanded, pursuant to MCL 500.3151 and the relevant section of the State Farm insurance policy,[2] that Muci submit to an independent medical examination. How-

[1] MCL 500.3142(2) provides:

> Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

[2] A person making a claim shall "be examined by physicians chosen and paid by us as often as we reasonably may require."

ever, in this case, it appears that, for reasons not indicated in the record before us, State Farm did not demand an independent medical examination. These unknown circumstances, which are irrelevant to the issue before us, culminated in State Farm's not paying Muci's claim, and she filed this action for a declaratory judgment, asserting that State Farm was unreasonably refusing to pay PIP benefits to which she was entitled.

As the lawsuit developed, State Farm demanded an unconditional medical examination (customarily referred to as a defense medical examination or DME) pursuant to § 3151 of the no-fault act. Muci refused, asserting that § 3151 and the policy were not exclusively controlling and that, rather, the conduct of any independent medical examination was also governed by MCR 2.311(A), the rule covering independent medical examinations in litigation of any kind. State Farm disputed Muci's assertion, contending that MCR 2.311(A) conflicts with § 3151, because the rule limits the unqualified right to an independent medical examination provided in § 3151 by requiring that litigation be pending and good cause for the examination be shown, and by allowing court-created conditions on the examination.

State Farm, in a motion to compel Muci to submit to a medical examination pursuant to § 3151, asserted that, as the insurer, it had the unconditional right to an independent medical examination conducted by its own physician without regard to whether litigation was pending or good cause for the examination had been shown. The trial court, evidently believing that MCR 2.311(A) could be read as a rule that merely supplemented § 3151, issued an order allowing the medical

examination but subject to many of the conditions proposed by plaintiff. The order included the following conditions:

> 1. That included with Plaintiff's notice of the medical examiner's deposition, Plaintiff's counsel shall be entitled to subpoena copies of all IRS form 1099's for the years 2000, 2001, and 2002, inclusive, for payments issued to said examiner, individually, and to any entity which received compensation for Independent and/or Insurance and/or defense medical examinations and related forensic services performed by said examiner, including but not limited to:
>
> a. Independent and/or Insurance and/or Defense medical examination;
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> b. Independent and/or Insurance and/or Defense medical examination reports;
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> c. Depositions;
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> d. Medical records reviews; and
>
> e. Forensic activity for which payments were made.
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> In the event said examiner refuses to provide the subpoenaed documents at his deposition, Defendant will be barred from introducing said examiner's testimony at trial.
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> 2. That the Plaintiff may be accompanied by her attorney or other representative as allowed by MCR 2.311(A) to observe the examination and/or be permitted to record the examination by means of simultaneous audio and visual recording.
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> 3. No other persons other than Plaintiff, her representative, the videographer, and designated medical examiner and his or her staff are allowed to be present during the examination.
>
> 4. That the examination must be limited to Plaintiff's conditions, which are in controversy in this action, as provided by the Michigan Court Rules of 1985.
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> 5. Any persons assisting the defense medical examiner must be fully identified by full name and title to Plaintiff, Plaintiff's representative, and on the video.

6. Defendant shall provide transportation or pay transportation to the Plaintiff for the evaluation/examination. If the Plaintiff chooses to drive or be driven by someone else she knows, the Defendant will reimburse the Plaintiff for reasonable transportation costs to and from each examination, at the rate of .35 cents [sic] a mile.

7. That the total time for examination and testing, if applicable, shall not be limited by Plaintiff or Plaintiff's counsel.

8. That a copy of this order shall be provided to the physician by the defense attorney prior to the exam.

9. That the Plaintiff's counsel will be provided a current copy of the curriculum vitae of the defense medical examiner no more than thirty (30) days after the scheduled appointment. [sic] As well as:

a. Within 21 days of the entry of this order Defendant will provide a statement of the reasonable charge for the Plaintiff's counsel taking of 1 hour deposition of the defense medical examiner at the medical examiner's office.

b. The full and correct name of the defense medical examiner (or separate billing entity, i.e. payee), with the tax identification number so that Plaintiff can comply with tax code and regulation requirements for any payment made in taking the examiner's deposition.

10. That no diagnostic test or procedure that is painful, protracted, or intrusive will be allowed as set forth in the Michigan Court Rules of 1985. X-rays will be allowed.

11. That the Plaintiff may be held responsible for cancellation fees charged the Defendant, unless the Plaintiff gives notification to the office of the Defense counsel 48 hours before canceling the appointment.

12. That the Plaintiff's attorney will be permitted to intercept communications between the Plaintiff and the defense medical examiner, in the same manner as if the Plaintiff's deposition were being taken and if the communications are in violation of this order. Otherwise the attorney will not involve himself in the examination proceedings.

13. Defendant's attorney shall provide all pertinent information to the defense medical examiner.

14. That Plaintiff will not be required to give any oral history of the accident.

15. That Plaintiff will not be required to give any oral medical history not related to the areas of injuries claimed in this lawsuit.

16. That information that may be required by the Defense medical examiner may be obtained through the normal course of discovery.

17. That Plaintiff will not be required to sign any paperwork or fill out any paperwork at the defense medical examiner's office, including "patient information forms" or "consent forms" or the like, since the Plaintiff is not a patient of the defense medical examiner's office and is submitting to this examination only pursuant to Court Order and the requirements of the Michigan Court Rules of 1985.

18. That Plaintiff's counsel will be provided a copy of any and all reports and writings generated by the defense medical examiners in this matter pursuant to the Michigan Court Rules of 1985, including, but not limited to, a copy of a detailed written report, setting out any history obtained, examination, findings, (including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner, all record review reports, a copy of all reports of earlier examinations of the same condition of the examinee made by that of [sic] any other examiner).

19. Throughout the litigation, the evaluation and examiner will be called and referred to as a defense medical evaluation and defense medical examiner respectively; and the term "independent medical evaluation" and/or "independent medical examiner" will not be used in the report, orally in a deposition, or at trial.

This order, with its conditions, prompted State Farm to file an application for an interlocutory appeal in the Court of Appeals. The Court of Appeals granted the

application and, in a published opinion, the divided panel affirmed the trial court's order. *Muci v State Farm Mut Automobile Ins Co,* 267 Mich App 431; 705 NW2d 151 (2005).

Judge FITZGERALD, writing for the majority, stated that while § 3151 gave the parties the right to include reasonable provisions in the policy regarding medical examinations, it did not give the parties a right to contractually determine how to proceed with discovery, and also stated that the trial court properly treated State Farm's motion to compel a medical examination in the present litigation as a discovery device controlled by MCR 2.311. *Muci, supra* at 440-442.

Presiding Judge SAAD dissented, stating that the "no-fault law should govern a no-fault insurer's statutory right to have a claimant submit to a medical examination" and that this right "does not depend on whether an insured has filed a lawsuit for failure to pay" or if there is a showing of "good cause." *Id.* at 445, 446 (SAAD, P.J., dissenting). Further, the dissent concluded that the Legislature had made no provisions for the conditions placed on the examination of the kind the trial court imposed in this case. The dissent stated that "MCR 2.311 should not be used preemptively to circumvent our Legislature's extensive statutory scheme for dealing with medical examinations under the no-fault act" and that "it is clear that our Legislature dealt comprehensively with both the question of medical examinations for PIP claimants and the appropriate penalties for an insurer's unreasonable refusal to pay benefits." *Id.* at 446, 448. Therefore, the dissent concluded, "[I]f a no-fault carrier abuses its right under § 3151, a trial court should use no-fault law and apply the remedies available in [MCL 500.3142, 500.3153, and 500.3148] rather than use MCR 2.311 to impose condi-

tions for the taking of such examinations—conditions our Legislature chose not to impose." *Id.* at 448.

State Farm sought leave to appeal in this Court, arguing that this effort of plaintiff's counsel placed at risk State Farm's "ability to conduct fair and meaningful discovery." This Court ordered oral argument on whether the application for leave to appeal should be granted. 475 Mich 877 (2006).

II. STANDARD OF REVIEW

The interpretation of court rules and statutes presents an issue of law that is reviewed de novo. *Lapeer Co Clerk v Lapeer Circuit Judges,* 465 Mich 559, 566; 640 NW2d 567 (2002).

III. ANALYSIS

The Legislature enacted the no-fault act in 1972. The act eliminated the old automobile tort reparations system for injured parties and replaced it with a mandatory coverage, no-fault automobile insurance system. Under this scheme, an injured insured was guaranteed what the Legislature considered to be a sufficient and expeditious recovery from his or her own insurer for all expenses for reasonably necessary medical care, recovery, and rehabilitation, as well as some incidental expenses. *Kreiner v Fischer*, 471 Mich 109, 114; 683 NW2d 611 (2004).

From our first handling of this statute in an advisory opinion issued in 1973, *Advisory Opinion re Constitutionality of 1972 PA 294,* 389 Mich 441; 208 NW2d 469 (1973), we have, without exception, emphasized the act's comprehensive nature.[3] What is unmistakable

[3] *Shavers v Attorney General,* 402 Mich 554, 579; 267 NW2d 72 (1978); *Davey v Detroit Automobile Inter-Ins Exch,* 414 Mich 1, 10; 322 NW2d 541

about this first-party payment scheme is that it was designed to cover contingencies that could arise, including, as relevant here, the process for making a claim, the procedures for investigation by the insurer, and the range of available enforcement tools. All of which are found within the four corners of the act. Thus, the legislative enactment in great detail dictated how injured parties are to make claims with "reasonable proof," mandated rapid payment within 30 days by insurers if the proofs were reasonable, and established fraud prevention investigation and examination rights for insurers that worked in accord with those important goals. Thus, upon receiving a claim, insurers have great latitude in evaluating the claim, including scheduling a medical examination. In this regard, MCL 500.3151 provides:

> When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits.

Because economy in the handling of claims to reduce transaction costs was also an important goal of the no-fault scheme, *Kreiner, supra* at 117, it is noteworthy that most claims are made, investigated, and either paid or rejected without a lawsuit being filed or indeed any court intervention or even lawyer involvement.[4] To

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(1982); *Thompson v Detroit Automobile Inter-Ins Exch,* 418 Mich 610, 624; 344 NW2d 764 (1984); *Priesman v Meridian Mut Ins Co,* 441 Mich 60, 65; 490 NW2d 314 (1992); *Michigan Ed Employees Mut Ins Co v Morris,* 460 Mich 180, 194; 596 NW2d 142 (1999); *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 150; 644 NW2d 715 (2002).

[4] This is very different from the situation contemplated by MCR 2.311, which, by its own terms, is only applicable when litigation is pending. The

allow for enforcement, should it be needed, the Legislature, in § 3153, authorized sanctions against an insured who refuses to submit to an examination, including dismissal of the insured's claim and an award of reasonable attorneys fees against the insured.[5] It also made provisions to protect an insured from discovery practices that cause annoyance, embarrassment, or oppression in MCL 500.3159,[6] which provides:

> In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

The argument of the insured in this matter, which was adopted by the trial court and the Court of Appeals majority, has been that in spite of the Legislature's obvious intent shown throughout the no-fault act to treat automobile accident cases falling within the scope

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failure to appreciate this distinction between § 3151 and MCR 2.311 has led the dissent to stray in its analysis.

[5] Other such provisions are also found in § 3142 and § 3148.

[6] We reject State Farm's argument that judicial authority to impose conditions on discovery under § 3159 is specifically limited to discovery sought under MCL 500.3158. Unlike, for example, § 3153, which specifically states it applies to §§ 3151 and 3152, there is nothing in the plain language of § 3159 that limits its application to pretrial discovery from medical entities and employers under § 3158. Rather, § 3159 clearly pertains to disputes about discovery regarding an injured person's "history, condition, treatment and dates and costs of treatment" without limiting the source of the discovery to medical entities and employers.

of the act differently, these cases, and in particular this claim and investigation situation, should be seen as just another species of civil litigation subject to all the generally applicable court rules. While the court rules control matters on which the no-fault act is silent, they do not control matters specifically addressed by the act. Here, where the act covers independent medical examinations,[7] it is entirely antithetical to the Legislature's desired approach to argue that § 3151 does not give the insurer the right to include a policy provision allowing it to choose the examiner or even insist on the examination itself. It is simply incorrect to argue that what can be done under § 3151 of the no-fault act is no different from what is required under MCR 2.311; after all, the court rule requires pending litigation and the insurer to show good cause, and allows court-imposed conditions as a predicate to the examination while § 3151 does not have these requirements. Indeed, under § 3151 an insured must submit to a medical examination. In contrast, under MCR 2.311, whether an insured

[7] When a claim has been made under § 3142(2), § 3151 requires the no-fault claimant to "submit" to physical or mental examination under rules in the policy. The parties focus on definitions and purported ambiguities that the use of the word "submit" introduces. We need not sort through this because, even if there is doubt about its meaning, it is dispelled when one examines the enforcement provisions in § 3153 regarding the refusal to comply with § 3151. There, after indicating that the court cannot cause the arrest of the insured for disobeying a request to submit to a physical or medical examination required in § 3151, it provides for an order that directs the disobedient person (inescapably the insured) to submit to an examination and gives enforcement powers that include the disallowance of evidence and defenses of the insured. The section further allows the entry of a default and the assessment of reasonable attorney fees against the insured. Given all this, it is unmistakably clear that under § 3151, the insurer has the right to include a policy provision allowing it to pick the examiner. Further, MCL 500.3152 requires that the report generated be made available to the insured and that any refusals to cooperate under these rules can be sanctioned by the court.

must submit to a medical examination is left to the trial court to decide. Therefore, the court rule and the statute conflict because that which is required under § 3151 is merely discretionary under MCR 2.311.[8]

Arguing in the alternative, however, Muci asserts that if it is conceded that the statute and the court rule are in conflict, the court rule should control because, as Muci sees it, claims and investigations are procedural, not substantive, and under *McDougall v Schanz,* 461 Mich 15; 597 NW2d 148 (1999), that means that the court rule controls. *Muci* misunderstands the rule of *McDougall*, which holds that a statute is substantive when, as in this case, it concerns a matter that has " 'as its basis something other than court administration . . . .' " *Id.* at 31 (citation omitted). Accordingly, the provisions concerning medical examinations, because they do not concern court administration, are substantive, not procedural, and are supreme over the court rule, just as the general court rule concerning experts' qualifications must, pursuant to *McDougall, supra* at 30-31, yield to statutory requirements concerning expert witnesses' qualifications.

Thus, we conclude that the no-fault act comprehensively addresses the matter of claimant examinations. Accordingly, MCR 2.311 is not applicable to such examinations.

Muci argues she has demonstrated good cause under § 3159 and can thus get an order imposing conditions on the examination as § 3159 allows because, as a general matter, physicians hired by an insurer are

[8] We further note that the court rule conflicts with § 3159. While MCR 2.311 requires the party seeking the medical examination to demonstrate good cause, § 3159 requires the party seeking to impose conditions on a discovery order such as an order for a medical examination to show good cause.

adversarial agents of the insurer and write their reports accordingly. Contrary to Muci's assertions, good cause may only be established by " 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.' " *Hertenstein v Kimberly Home Health Care, Inc,* 189 FRD 620, 624 (D Kan, 1999), quoting *Gulf Oil Co v Bernard,* 452 US 89, 102 n 16; 101 S Ct 2193; 68 L Ed 2d 693 (1981). Physicians are presumed to be bound by the methodologies of their profession and by principles of professional integrity. Only with demonstrable evidence that the discovery order or medical examination will cause the claimant annoyance, embarrassment, or oppression can a claimant rebut this presumption. Until this presumption is rebutted, a court may not impose conditions on an examination under § 3159.

Muci claims that she provided a specific demonstration of good cause through evidence that one of State Farm's physicians had previously delved into matters protected by the attorney-client privilege by asking an examinee about the status of settlement negotiations in her lawsuit. Specifically, plaintiff introduced a written medical report prepared by the same physician who was to examine Muci. In the medical report, defendant's examiner made the following notation as part of a previously conducted independent medical examination:

> When I asked her how her lawsuit was progressing she said she really did not know. When I inquired if there had been an offer she said she believed that one had been made. When I asked her what her attorney's advice to her had been she said "It's up to me;" she said that she would not, however, settle for the amount that was offered. She does not really know what amount she would like.

Here, plaintiff has produced demonstrable evidence that, on a previous occasion, defendant's medical exam-

iner asked inappropriate questions of another examinee during an independent medical examination, including questions regarding settlement issues and inquiring into areas unquestionably protected by the attorney-client privilege. We can fathom no explanation, and defendant has provided none, explaining what appropriate purpose this line of questioning would serve in the context of a medical examination. In this case, where plaintiff has proffered evidence that the doctor previously engaged in inappropriate questioning, plaintiff has established a basis in fact for requesting that the trial court impose conditions requiring that the doctor refrain from engaging in similar questioning in Muci's examination. Such questioning surely provides "good cause" for judicial intervention to protect against "annoyance, embarrassment or oppression," the statutory bases for imposing conditions on discovery under MCL 500.3159.

The remaining question concerns whether the various conditions imposed by the trial court on the independent medical examination were appropriate to protect against annoyance, embarrassment, or oppression. The trial court's discretion to specify conditions of discovery in no-fault cases is specifically limited to protecting "against annoyance, embarrassment or oppression, as justice requires." Therefore, any conditions of discovery imposed by the trial court must be fashioned to avert the annoying, embarrassing, or oppressive action or event that the insured establishes by her good-cause showing.

In this case, the trial court relied on MCR 2.311(A), rather than MCL 500.3159, in imposing 19 conditions on the independent medical examination defendant is entitled to conduct under § 3151. Many of those conditions bore no apparent relationship to the "annoyance" the plaintiff established–improper questioning by the medical examiner concerning the status of the litigation

and attorney advice to the insured. On remand, in the event that the defendant insists on using the medical examiner who asked the improper questions, the trial court shall reconsider plaintiff's proposed examination conditions, and determine which conditions, if any, ought be imposed in light of the evidence proffered by plaintiff.

IV. CONCLUSION

In a no-fault automobile insurance case, the act and the provisions of the parties' insurance policy control whether any conditions may be placed on independent medical examinations. A trial court's ability to adjudicate disputes arising under the statute and the insurance policy regarding examinations is limited to the authority granted by the no-fault act itself, primarily the provisions of §§ 3142, 3148, 3151, 3153, and 3159, and such other sections as may apply. When an insured fails to demonstrate good cause that submission to a particular examination will cause annoyance, embarrassment, or oppression, the trial court may not impose conditions on the examination. We reverse the order of the trial court and the Court of Appeals judgment[9] that affirmed the trial court's order, and remand to the trial court for further proceedings.

Reversed and remanded to the trial court.

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

KELLY, J. (*dissenting*). MCL 500.3151 and MCR 2.311 do not conflict. Rather, they can and should be

[9] We note that the Court of Appeals concluded that State Farm waived any challenge to two of the imposed conditions because its attorney agreed to the conditions if the court rule applied, *Muci, supra* at 442; however, because the court rule does not apply in the instant case, we conclude that the challenge to the relevant imposed conditions was not waived.

read together. Accordingly, during plaintiff's declaratory judgment action, when defendant sought a court order that instructed plaintiff to submit to a physical examination under MCL 500.3151, the court properly issued such an order. The court did not abuse its discretion in imposing various conditions in the order pursuant to MCR 2.311. Accordingly, I dissent from the majority opinion, which holds to the contrary, and would affirm the judgment of the Court of Appeals. *Muci v State Farm Mut Automobile Ins Co*, 267 Mich App 431; 705 NW2d 151 (2005).

APPLICABLE STANDARD OF REVIEW

The interpretation of court rules and statutes presents an issue of law that is reviewed de novo. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). Additionally, the no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995).

MCL 500.3151 AND MCR 2.311 DO NOT CONFLICT

This Court granted leave to appeal to determine, among other things, whether MCL 500.3151 and MCR 2.311 conflict. 475 Mich 877 (2006). As this Court noted in *McDougall v Schanz*: "When there is no inherent conflict, '[w]e are not required to decide whether [the] statute is a legislative attempt to supplant the Court's authority.' 'We do not lightly presume that the Legislature intended a conflict, calling into question this Court's authority to control practice and procedure in the courts.' "[1]

[1] 461 Mich 15, 24; 587 NW2d 148 (1999) (citation omitted). In *McDougall*, the issue before this Court was whether MCL 600.2169 and MRE 702 could be construed so as to avoid a conflict.

MCL 500.3151 provides:

> When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits.

The statute mandates that a person who seeks personal protection benefits "shall submit to mental or physical examination by physicians." *Id.* The use of the term "shall" indicates a mandatory and imperative directive that the claimant submit to examinations.[2] However, the statute does not indicate that the examination must be unrestricted or that the court cannot impose reasonable conditions on it. Moreover, the statute does not mandate that an independent medical or physical examination be performed by a physician chosen by the defendant.[3]

MCL 500.3151 provides that an insurer may include in a personal protection insurance policy reasonable provisions for mental and physical examinations of persons claiming personal protection insurance benefits. This enables the insurer to gather information in

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[2] This Court has noted that the Legislature's use of the word "shall" in a statute generally indicates a mandatory and imperative directive. *Costa v Community Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006), citing *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005).

[3] Moreover, as noted by the Court of Appeals, there is no language in MCL 500.3151 that indicates that the statute applies only to prelitigation medical examinations. *Muci,* 267 Mich App 436 n 5. It is foreseeable that a claimant may undergo an examination pursuant to MCL 500.3151 before the commencement of litigation. It is equally conceivable that the claimant will not undergo an examination pursuant to MCL 500.3151 until after litigation has commenced.

order to establish the claimant's entitlement to benefits and detect fraud. See *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 608; 648 NW2d 591 (2002) (KELLY, J., concurring in part and dissenting in part).[4]

During litigation, if an insurer wishes to seek a court order requiring the claimant to submit to a mental or physical examination, the insurer may bring a motion under MCR 2.311(A), which provides:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

In order to obtain a court order under MCR 2.311(A), the insurer will have to demonstrate good cause[5] and provide notice to the claimant and to all parties. Any court order requiring the plaintiff to submit to a physical or mental examination will specify, among other things, the time, place, manner, conditions, and scope of the examination. *Id.* The order may also provide that

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[4] Justice CAVANAGH concurred in my opinion.

[5] As noted by plaintiff at oral argument, it is likely that in most, if not all, situations, the good-cause requirement will be easily established by reliance on MCL 500.3151. That provision mandates that the claimant submit to a mental or physical examination if the claimant's mental or physical condition is material to the claim for personal protection insurance benefits.

the attorney for the person to be examined may be present at the examination. *Id.*

Therefore, under this analysis, MCL 500.3151 and MCR 2.311(A) can be read in harmony. Because on their face they do not conflict, there is no need to decide whether the statute is a legislative attempt to supplant the Court's authority. Accordingly, the trial court properly relied on MCR 2.311(A) when deciding whether to impose various conditions on plaintiff's examination.[6]

The majority concludes that the statute and the court rule conflict because the court rule allows court-imposed conditions while the statute is silent on the subject. I find this argument unpersuasive. Although MCL 500.3151 requires a claimant to undergo a medical examination to receive personal protection benefits, it does not state that the examination must be without limits. Nothing in the statute prohibits a court from imposing conditions on the examination once litigation has commenced. Their imposition, if reasonable, would not interfere with the insurer's substantive right to force a claimant to submit to an examination.

Moreover, the application of MCR 2.311(A) to disputes concerning an insurer's ability to enforce MCL 500.3151 is consistent with MCL 500.3159, the discovery provision of the no-fault act, MCL 500.3101 *et seq*. MCL 500.3159 provides:

> In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his

[6] The majority contends that my dissent fails to appreciate that MCR 2.311 applies only when litigation is pending. In doing so, it makes a distinction where there is none to be made. Plaintiff filed a declaratory action for personal protection insurance benefits. Therefore, for purposes of MCR 2.311(A), there was an "action . . . pending" when defendant moved to compel the independent medical examination pursuant to MCL 500.3151.

> history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

MCL 500.3159 provides that, if a dispute exists regarding an insurer's right to discovery of facts about matters such as the injured person's *condition*, the court may enter a discovery order. *Id.* Similarly, MCR 2.311(A) provides that, if the mental or physical *condition* of a party is in controversy, the court may enter an order for a medical examination. Both MCL 500.3159 and MCR 2.311(A) provide that the order may be made only "on motion for good cause." Moreover, MCL 500.3159 provides that the order "shall specify the time, place manner, conditions and scope of the discovery," while MCR 2.311(A) similarly provides that the order "must specify the time, place, manner, conditions, and scope of the examination . . . ."

Accordingly, both MCL 500.3159 and MCR 2.311(A): (1) apply to disputes involving a person's *condition*, (2) provide that a court may order a party to abide by the relevant form of discovery, (3) provide that the order will be made only on motion for good cause, and (4) provide that the order must specify the time, place, manner, conditions, and scope of the relevant discovery. Rather than conflicting in any respect, the statute and the court rule are parallel with one another.[7]

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[7] Defendant contended at oral argument that MCL 500.3159 is the enforcement mechanism for MCL 500.3158. However, the language of

Therefore, because MCL 500.3151 and MCR 2.311 do not conflict, there is no need to decide whether the statute is a legislative attempt to supplant the Court's authority. *McDougall v Schanz*, 461 Mich 15, 24; 587 NW2d 148 (1999). Accordingly, I would affirm the judgment of the Court of Appeals. It correctly affirmed the trial court's decision that defendant's motion to compel a medical examination pursuant to MCL 500.3151 was a request for a discovery device that is subject also to MCR 2.311.

APPROPRIATENESS OF THE PARTICULAR CONDITIONS AT ISSUE

Because I find that the trial court was empowered to impose conditions on the examination, the next issue is whether the particular conditions it imposed were warranted.

This Court reviews a trial court's decision regarding discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). In this case, defendant challenges the following court-imposed conditions:

> 2. That the Plaintiff may be accompanied by her attorney or other representative as allowed by MCR 2.311(A) to observe the examination and/or be permitted to record the examination by means of simultaneous audio and visual recording.

* * *

MCL 500.3159 does not indicate that the provision is the enforcement mechanism for MCL 500.3158. This is in sharp contrast to MCL 500.3153, the enforcement mechanism for MCL 500.3151 and MCL 500.3152, which specifically provides that "[a] court may make such orders in regard to the refusal to comply with sections 3151 and 3152 as are just . . . ." MCL 500.3153. Accordingly, the Legislature clearly knows how to specify that a particular provision is an enforcement mechanism for a preceding provision. The absence of such a specification in MCL 500.3159 suggests that the Legislature did not intend that statute to be an enforcement provision for MCL 500.3158.

14. That Plaintiff will not be required to give any oral history of the accident.

15. That Plaintiff will not be required to give any oral medical history not related to the areas of injuries claimed in this lawsuit.

Defendant agreed to the condition that plaintiff be accompanied by her attorney "and/or" be permitted to record the examination if the court ruled that MCR 2.311(A) applied. *Muci*, 267 Mich App 442-443. Accordingly, because I conclude that MCR 2.311(A) applies, defendant has agreed to allow plaintiff's attorney to attend the examination and to allow the examination to be recorded. In any event, MCR 2.311(A) explicitly provides that an attorney may be present during the examination.

With regard to the condition forbidding the physician from taking an oral history of the accident, defendant has other means to accomplish this objective. It can request that plaintiff answer interrogatories outlining the history of the accident. See MCR 2.309. Defendant can also request that plaintiff answer interrogatories outlining plaintiff's unrelated medical history. *Id*.

It is important to note that the conditions do not preclude a *written* history of unrelated medical injuries. They do not preclude the physician from inquiring into plaintiff's mental or physical condition at the time of the accident or asking how the injuries occurred or other similar questions. Accordingly, I believe that the remaining conditions challenged were reasonable, and the trial court did not abuse its discretion in imposing them.

CONCLUSION

MCL 500.3151 and MCR 2.311 do not conflict. Rather, they can be read in harmony. Specifically, MCL 500.3151 mandates that a claimant submit to a mental

or physical examination. However, it does not state that this is a limitless statutory right. MCR 2.311 is the court rule addressing orders for physical or mental examinations when, as in this case, an action is pending. And it provides that the court can impose conditions on the order.

I conclude that the trial court properly relied on MCR 2.311 in imposing various conditions on the order mandating that plaintiff submit to a mental or physical examination. The conditions imposed were not an abuse of discretion. Accordingly, the Court of Appeals judgment should be affirmed.

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

LISS v LEWISTON-RICHARDS, INC

Docket No. 130064. Argued December 12, 2006 (Calendar No. 2). Decided June 6, 2007.

Arthur Y. and Beverly Liss brought an action in the Oakland Circuit Court against Lewiston-Richards, Inc., and Jason P. Lewiston, alleging breach of contract, breach of warranty, and other causes of action related to a contract between the parties for the sale and the completion of construction of a residential home. The plaintiffs alleged, in part, that the defendants violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The defendants alleged that the transaction to build a residential home was exempt from the coverage of the MCPA under the section of the act that exempts any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). The defendants claimed that residential home building, including contracting to perform such transaction, is specifically authorized by the Michigan Occupational Code (MOC), MCL 339.101 *et seq*. The trial court, Fred M. Mester, J., denied the defendants' motion for summary disposition of the MCPA claim, ruling that it was bound to follow *Hartman & Eichhorn Bldg Co, Inc v Dailey,* 266 Mich App 545 (2005), and hold that the defendants were subject to the MCPA. *Hartman* held that residential home builders were subject to the MCPA on the basis that the Court was bound by the holding in *Forton v Laszar,* 239 Mich App 711 (2000), that residential home builders were subject to the MCPA. The defendants sought leave to appeal in the Court of Appeals and leave to appeal in the Supreme Court before any decision by the Court of Appeals. The Supreme Court granted the defendants' application, 474 Mich 1133 (2006), and the Court of Appeals, which had held the application in abeyance, dismissed the application in that Court.

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

The relevant inquiry under § 4(1)(a) of the MCPA is whether the general transaction is specifically authorized by law, regardless

of whether the specific misconduct alleged is prohibited. Forming an agreement to build a home is the essence of a residential home builder's activity that is specifically authorized by law under the MOC. Because the building of a residential home by a residential home builder is specifically authorized under the MOC and the relevant regulations pertaining thereto, the transaction is exempt from the MCPA. The order of the circuit court denying the defendants' motion for summary disposition of their MCPA claim must be reversed and the matter must be remanded to the trial court for further proceedings consistent with the opinion of the Supreme Court. Any holding in *Forton* and *Hartman* that residential builders are not exempt from the MCPA is overruled.

Reversed and remanded.

Justice CAVANAGH, dissenting, concurred with the result reached by Justice KELLY in her dissent, but did not agree with all the stated rationale in her dissent. The application of *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), should not be limited to the insurance industry. *Smith* should be overruled on the basis of the factors set forth in *Robinson v Detroit*, 462 Mich 439 (2000), for determining whether to overrule Supreme Court precedent. Further, residential home builders are specifically authorized to engage in the general conduct of residential home building. But the proper inquiry under MCL 445.904(1)(a) first examines whether the specific transaction or conduct at issue, as opposed to the general transaction, is specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state. The specific conduct at issue in this case is not specifically authorized. The trial court's denial of the defendants' motion for summary disposition should be affirmed.

Justice KELLY, dissenting, stated that the conduct at issue is not exempt from the provisions of the MCPA. The majority errs in extending to residential home builders the holding of *Smith v Globe Life Ins Co,* which classifies the transaction in question in broad terms and may exempt all the transactions of an entire industry by examining whether the general transaction at issue is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. The holding of *Smith* should be limited strictly to matters involving the insurance industry. The holding of *Attorney General v Diamond Mortgage Co*, 414 Mich 603 (1982), that only a transaction or conduct that is specifically authorized by a statute can be exempt from the MCPA, offers a more accurate interpretation of MCL 445.904(1)(a) and should be applied in this case. The focus of the inquiry under § 4(1)(a) is whether the discrete transaction alleged to be a violation of the

MCPA is specifically authorized by some other law. If the test set forth in *Diamond Mortgage* were applied to the facts of this case, the exemption in § 4(1)(a) would not apply because the defendants were not specifically authorized by statute to perform the discrete transactions at issue. Even under the test in *Smith*, the exemption would not apply here because there is no law specifically authorizing the general transactions or conduct at issue. The judgment of the trial court should be affirmed.

CONSUMER PROTECTION — MICHIGAN CONSUMER PROTECTION ACT — RESIDENTIAL BUILDERS.

Contracting to build, and the building of, a residential home by a residential home builder is specifically authorized by the Michigan Occupational Code and is exempt from the purview of the Michigan Consumer Protection Act under the act's exemption of any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the Untied States" (MCL 339.2401[a], 445.904[1][a]).

Liblang & Associates, P.C. (by *Dani K. Liblang*), and *Liss & Associates, P.C.* (by *Jay B. Schreier*), for the plaintiffs.

Jaffe, Raitt, Heuer & Weiss, P.C. (by *Brian G. Shannon* and *Michael F. Jacobson*), and *Bodman LLP* (by *Gary D. Reeves* and *Matthew T. Jane*), for the defendants.

Amicus Curiae:

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), for Michigan Defense Trial Counsel.

YOUNG, J. The issue presented in this case is the proper scope of the exemption for regulated conduct and transactions under the Michigan Consumer Protection Act (MCPA).[1] The MCPA exempts any "transaction or conduct specifically authorized under laws adminis-

[1] MCL 445.901 *et seq*.

tered by a regulatory board or officer acting under statutory authority of this state or the United States."[2] In *Smith v Globe Life Ins Co*, [3] this Court held that the relevant inquiry "is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." In *Hartman & Eichhorn Bldg Co, Inc v Dailey*,[4] the Court of Appeals opined that under the *Smith* test, licensed residential home builders were exempt from the MCPA; however, the Court ruled against the residential home builders because it believed that it was bound by *Forton v Laszar*[5] to hold that the residential home builders were subject to the MCPA. We hold that under MCL 445.904(1)(a), residential home builders are exempt from the MCPA because the general transaction of residential home building, including contracting to perform such transaction, is "specifically authorized" by the Michigan Occupational Code (MOC), MCL 339.101 *et seq*. Therefore, we overrule any holding to the contrary in *Forton* and *Hartman*.

FACTS AND PROCEDURAL HISTORY

In December 2000, plaintiffs, Arthur and Beverly Liss (Lisses) and defendant Lewiston-Richards, Inc. (Lewiston-Richards), entered into a contract for the sale and completion of construction of a residential home. Defendant Jason Lewiston (Lewiston), President of Lewiston-Richards, executed the contract on Lewiston-Richards's behalf. The Lisses allege that Lewiston-Richards did not complete construction on time and that the construction that was completed was

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[2] MCL 445.904(1)(a).

[3] 460 Mich 446, 465; 597 NW2d 28 (1999).

[4] 266 Mich App 545; 701 NW2d 749 (2005).

[5] 239 Mich App 711; 609 NW2d 850 (2000).

not done in a workman-like manner. In 2003, the Lisses filed this action alleging breach of contract, breach of warranty, and other causes of action.[6] Pertinent to this appeal, the Lisses allege that defendants violated the MCPA. Through their counterclaim and answer, defendants asserted that the transaction at issue, residential home building, was exempt from the MCPA. The parties filed cross-motions for summary disposition. The trial court denied defendants' motion for summary disposition of the MCPA claim. The court held that it was bound to follow *Hartman* and hold that defendants were subject to the MCPA. Defendants filed an application in the Court of Appeals for leave to appeal from the order denying their motion and an application in this Court for leave to appeal before a decision by the Court of Appeals. This Court granted defendants' bypass application.[7]

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo.[8] When interpreting a statute, this Court attempts to give effect to the Legislature's intent by looking at the statutory text, giving meaning to every word, phrase, and clause in the statute and considering both their plain meaning and their context.[9] This Court

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[6] The Lisses also filed a complaint with the Department of Labor and Economic Growth, Bureau of Commercial Services Enforcement Division. This entity within the Department of Labor and Economic Growth investigates and resolves consumer complaints against residential home builders.

[7] 474 Mich 1133 (2006).

[8] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

[9] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

also reviews a trial court's decision granting or denying a motion for summary disposition de novo.[10]

ANALYSIS

Under the MCPA, "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . . ."[11] However, the Legislature included an exemption in MCPA § 4(1)(a) that, relevant to this case, exempts any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."[12] The party claiming the exemption bears the burden of proving its applicability.[13]

This Court first construed the scope of this particular exemption in *Attorney General v Diamond Mortgage Co*.[14] In *Diamond Mortgage*, the defendant was a licensed real estate broker who advertised and offered loans to homeowners. The Attorney General brought suit alleging violations of the MCPA. The defendant answered, contending that because it was a licensed real estate broker, its activities were exempt under § 4(1)(a) of the MCPA. This Court disagreed, holding that the defendant's "real estate broker's license does not exempt it from the Michigan Consumer Protection

[10] *City of Taylor*, *supra* at 115.

[11] MCL 445.903(1).

[12] MCL 445.904(1)(a).

[13] MCL 445.904(4). Thus, § 4(1)(a) provides an affirmative defense, which is waived, unless the party raised it in the party's first responsive pleading, as originally filed or as amended under MCR 2.118, or motion for summary disposition. MCR 2.111(F)(3); see *Rasheed v Chrysler Corp*, 445 Mich 109, 131-132; 517 NW2d 19 (1994). Defendants properly raised the exemption in their answer and counterclaim, as well as in their motion for summary disposition.

[14] 414 Mich 603; 327 NW2d 805 (1982).

Act."[15] The broker's license authorized the defendant "to engage in the activities of a real estate broker," but it did not "specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct."[16] Ultimately, this Court held that while, "no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to '[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.' "[17] Because "a real estate broker's license is not specific authority for all the conduct and transactions of the [defendant's mortgage writing] business," the defendant's conduct and transactions were not exempt.[18]

This Court again considered the application of the MCPA exemption provision in *Smith v Globe Life Ins Co*.[19] In *Smith*, the plaintiff sued the defendant insurance company for breach of contract and violation of the MCPA. With regard to the MCPA exemption, this Court ruled that *Diamond Mortgage* controlled the disposition of the case and held that "*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, *not the alleged misconduct*, is 'specifically authorized.' "[20]

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[15] *Diamond Mortgage, supra* at 617.

[16] *Id*.

[17] *Id*. Plaintiff and the dissents contend that an illegal act can never be "specifically authorized" and thus exempt. In focusing on the alleged illegality rather than whether the transaction is authorized, plaintiff and the dissents conspicuously overlook this critical explanation from *Diamond Mortgage*.

[18] *Id*.

[19] 460 Mich 446; 597 NW2d 28 (1999).

[20] *Id.* at 464 (emphasis added).

Therefore, "the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not 'specifically authorized' under the defendant's real estate broker's license."[21] Analyzing the insurer's activities in *Smith*, this Court concluded that "§ 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such 'transaction or conduct' is 'specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.' "[22] What emerges from *Diamond Mortgage* and *Smith* is that the relevant inquiry "is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited."[23]

The Court of Appeals has applied this test in other regulated industries. For example, in *Kraft v Detroit Entertainment, LLC*,[24] the Court held that "the general conduct involved in th[at] case–the operation of slot machines–is regulated and was specifically authorized by the [Michigan Gaming Control Board]." Thus, the plaintiff's MCPA claim regarding slot machines failed because of the § 4(1)(a) exemption. Similarly, in *Newton v Bank West*,[25] the Court held that the defendant federal

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[21] *Id*.

[22] *Smith, supra* at 465.

[23] *Id*. Justice KELLY argues that there is a distinction between the tests articulated in *Diamond Mortgage* and *Smith*. The only difference in the cases is the result. In *Diamond Mortgage*, the defendants were specifically authorized to engage in real estate transactions, but they had no statutory authorization to engage in mortgage writing. Because the plaintiff's claims concerned mortgage writing, an unauthorized activity, the MCPA exception did not apply. In *Smith*, the defendant was licensed to sell insurance, and the case concerned insurance. Thus, the exception applied.

[24] 261 Mich App 534, 541; 683 NW2d 200 (2004).

[25] 262 Mich App 434; 686 NW2d 491 (2004).

savings bank's banking activities were exempt from the MCPA because those activities were authorized by the Michigan Savings Bank Act,[26] as well as by numerous federal statutes and regulations.

In the area of residential home building, the Court of Appeals held in *Forton v Laszar*,[27] that the definition of "trade or commerce" in the MCPA could be applied to residential home builders.[28] However, as noted by then-Chief Justice CORRIGAN in a statement concurring with this Court's order denying the builder's application for leave to appeal, the builder failed to preserve the issue whether § 4(1)(a) exempts residential home building because that conduct or transaction is subject to licensure and regulation under the MOC.[29] Therefore, *Forton* never squarely addressed the exemption. However, in *Hartman & Eichhorn Bldg Co, Inc v Dailey*,[30] the Court mistakenly opined that the *Forton* panel held that the exemption did not apply to building residential homes.[31]

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[26] MCL 487.3101 *et seq*.

[27] 239 Mich App 711, 714-715; 609 NW2d 850 (2000).

[28] The MCPA defines "trade or commerce" as

> the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. "Trade or commerce" does not include the purchase or sale of a franchise, but does include pyramid and chain promotions, as "franchise", "pyramid", and "chain promotions" are defined in the franchise investment law, 1974 PA 269, MCL 445.1501 to 445.1546. [MCL 445.902(g).]

[29] 463 Mich 969 (CORRIGAN, C.J., concurring), citing MCL 339.101 *et seq*.

[30] 266 Mich App 545; 701 NW2d 749 (2005).

[31] Between *Forton* and *Hartman*, in a number of unpublished opinions, the Court of Appeals held that under *Smith*, residential home building is exempt from the MCPA because of the fact that the conduct was regulated under the MOC. See *Winans v Paul and Marlene, Inc*, unpub-

The *Hartman* panel disagreed with the "holding" of *Forton* and declared a conflict, but the full Court of Appeals declined to convene a conflict panel,[32] and the *Hartman* panel denied Hartman's motion for reconsideration.

The *Hartman* panel's treatment of *Forton* was erroneous because *Forton* never addressed the exemption. As noted, *Forton* merely found that residential home building fell within the MCPA's definition of "trade or commerce." Because the builder did not timely raise the MCPA defense, the *Forton* panel did not have the opportunity to address the exemption. However, we agree with the *Hartman* panel's independent application of the exemption to residential home building.

Applying the *Smith* test, the relevant inquiry "is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited."[33] This Court has not construed the meaning of "specifically authorized" under the MCPA. "Specific" means "having a special application, bearing, or reference; explicit or definite."[34] "Au-

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lished opinion per curiam of the Court of Appeals, issued July 8, 2002 (Docket No. 230944), and *Shinney v Cambridge Homes, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2005 (Docket No. 250123). However, these cases were not binding on the *Hartman* panel. MCR 7.215(C).

[32] 266 Mich App 801 (2005).

[33] *Smith*, *supra* at 465.

[34] *Random House Webster's College Dictionary* (1997). Justice KELLY defines "authorize" as " 'to give authority or official power *to*; empower.' " *Post* at 228, quoting *Random House Webster's College Dictionary* (2001) (emphasis added). "Empower" is defined as "1. to give official or legal power or authority to. 2. to endow with an ability; enable." *Random House Webster's College Dictionary* (1997). Given the definition of "empower" and the use of the preposition "to," the clear import of this definition is that it applies to the "authorization" of the actor. The definition we choose focuses on the "authorization" of the action, which

thorize" means "to give authority or formal permission for; sanction."[35] Thus, the exception requires a general transaction that is "explicitly sanctioned."

In this case, the general conduct at issue is residential home building. Residential home builders are licensed under the MOC[36] and are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board, which oversees licensing and handles complaints filed against residential builders. Moreover, there is a set of administrative rules promulgated to regulate the licensing procedure.[37] Furthermore, the general transaction at issue in this case, contracting to build a residential home, is "specifically authorized" by law. First, the MOC comprehensively defines a "residential builder" as

> a person engaged in the construction of a residential structure or a combination residential and commercial structure who, *for a fixed sum, price, fee, percentage, valuable consideration, or other compensation*, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combi-

is also the focus of MCPA § 4(1)(a), which applies to "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Contrary to Justice KELLY's assertion, we do not focus on the actor. Defendants' status as residential home builders is relevant only to the extent that such status specifically authorizes them to engage in a particular *transaction*, i.e., residential home building.

[35] *Random House Webster's College Dictionary* (1997).

[36] MCL 339.101 *et seq*.

[37] 1999 AC R 338.1511 through R 338.1555.

> nation residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property.[38]

A residential home builder, by statutory definition, is one who engages in construction activities "for a fixed sum, price, fee, percentage, valuable consideration, or other compensation . . . ." Therefore, a residential home builder is "specifically authorized" to contract to build homes.[39]

Additionally, there are only a limited number of instances where a non-licensed builder may "engage in the business of or act in the capacity of a residential builder."[40]

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[38] MCL 339.2401(a) (emphasis added).

[39] Justice KELLY argues that "[n]othing in [the MOC] explicitly gives residential home builders the power to engage in residential home building." *Post* at 229. However, the statute clearly requires most people to obtain a license before acting as a residential home builder. A "license" is "formal permission from a governmental or other constituted authority to do something, as to carry on some business or profession." *Random House Webster's College Dictionary* (1997). Through the licensure requirement, the statute explicitly sanctions, or "specifically authorizes," qualified individuals to engage in residential home building.

Justice KELLY also states that "[a] transaction or conduct that is actually *prohibited* by law cannot be deemed to be specifically *authorized*." *Post* at 222 (emphasis in original). In this case, however, the general transaction of residential home building has been specifically authorized. The prohibitions cited by the dissent address specific misconduct in the course of fulfilling that transaction: MCL 339.2411(2)(d) prohibits "[a] willful departure from or disregard of plans," and MCL 339.2411(2)(m) prohibits "[p]oor workmanship." Contrary to the dissent, these provisions do not prohibit the transaction of residential home building. To the contrary, they assume the propriety of such transaction. Hence, the dissent errs in concluding that the transaction in this case has been "prohibited by law." *Post* at 222 (emphasis omitted).

[40] MCL 339.2403, listing nine exceptions to the licensure requirement.

The clear import of the statutory scheme is that there are only a *few instances* where one can engage in the business of a residential home builder *without having a license*. Therefore, with limited exceptions, contracting to build a residential home is a transaction "specifically authorized" under the MOC, subject to the administration of the Residential Builders' and Maintenance and Alteration Contractors' Board.[41]

Thus, the MCPA exemption applies to residential home builders who engage in the type of activities that define a residential home builder, which activities are permitted by the MOC to be performed only by licensed residential home builders. This case is unlike *Diamond Mortgage*, where the defendants engaged in activity, mortgage writing, that their real estate broker license simply did not permit them to do. Forming an agreement to build a home is the essence of a residential home builder's activity that is specifically authorized by law.

CONCLUSION

Applying the *Smith* test, defendants' "general transaction," building a residential home, is "specifically authorized" under the MOC and the relevant regulations. Therefore, that transaction is exempt from the MCPA. We reverse the Oakland Circuit Court order to the contrary, as well as overrule any contrary holding in *Forton* and *Hartman*, and remand for further proceedings consistent with this opinion.

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[41] The dissents' focus on the plaintiffs' characterization of the conduct is misplaced. While plaintiffs allege that defendants failed to timely complete construction and made multiple misrepresentations, the fact remains that all of the alleged misconduct occurred during the course of the *authorized* conduct of residential home building.

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

CAVANAGH, J. (*dissenting*). I concur with the result reached by Justice KELLY in her dissent. While I agree with much of Justice KELLY's analysis regarding *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), and *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), I do not agree with all the stated rationale in her dissent. I do not believe that the application of *Smith* should be limited to the insurance industry. Instead, I believe that *Smith* should be overruled on the basis of the factors set forth in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). As explained in my opinion concurring in part and dissenting in part in *Smith*, *supra* at 479-480, the test adopted in *Smith* is so broad that it precludes many permissible claims under the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Moreover, not only was *Smith* wrongly decided, the *Smith* decision defies practical workability because it disallows numerous claims that are actually *allowed* under the relevant statutory language.

Further, I do not agree that residential home builders are not specifically authorized to engage in the general conduct of residential home building. As stated in my opinion in *Smith*, a proper inquiry first examines "whether the *specific* transaction or conduct at issue, as opposed to the *general* transaction, is 'specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state . . . .' " *Smith*, *supra* at 476, quoting MCL 445.904(1)(a) (emphasis added). The specific conduct at issue in this case—essentially, not completing work by the agreed-upon time, doing work that did not meet the agreed-upon specifications, and making various

misrepresentations—is not conduct that is specifically authorized. Thus, I would affirm the trial court's denial of defendants' motion for summary disposition.

KELLY, J. (*dissenting*). Plaintiffs Arthur and Beverly Liss sued defendants Lewiston-Richards, Inc., and Jason Lewiston, asserting a cause of action under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. As the basis of their claim, plaintiffs accused defendants of behavior that is arguably prohibited by the Michigan Occupational Code. MCL 339.101 *et seq*.

A majority of this Court finds that the behavior at issue is exempt from the MCPA because it is specifically authorized by the code. In reaching this result, the majority extends the holding of *Smith v Globe Life Ins Co*[1] to the residential home building industry. Because I believe that the behavior at issue is not exempt from the MCPA and that the holding of *Smith* should be limited strictly to cases involving the insurance industry, I dissent.

FACTS

Plaintiffs, Arthur and Beverly Liss, purchased a house that was being built by defendant Lewiston-Richards, Inc. Construction was in progress when plaintiffs signed the agreement of sale. It contained provisions regarding the construction of a residential dwelling, Lewiston-Richards's experience and qualifications, and Lewiston-Richards's financing agreements. Lewiston-Richards's principal, defendant Jason Lewiston, signed a personal guaranty in connection with the agreement. Lewiston guaranteed that

[1] 460 Mich 446; 597 NW2d 28 (1999).

Lewiston-Richards would perform its obligations under the agreement, including those in the limited warranty. He further agreed that he would assume personal liability if a default occurred that Lewiston-Richards failed to cure.

The home was not completed by the agreed-upon date, and the work was not to plaintiffs' satisfaction. Plaintiffs filed suit claiming that the defendants engaged in unfair trade practices in violation of the MCPA. They alleged that defendants (1) misrepresented the characteristics, uses, and benefits of the residence; (2) misrepresented the standard, quality, and grade of the residence; (3) failed to complete the construction of the residence; and (4) made material misrepresentations or failed to advise of material information with respect to the transaction reflected in the agreement.

Defendants moved for summary disposition of the MCPA claim, asserting that the transaction, the building of a residential home, was exempt from the scope of the MCPA. The trial court denied the motion. Defendants then filed an application for leave to appeal in the Court of Appeals and an application for leave to appeal in this Court before a decision by the Court of Appeals. This Court granted defendants' application. 474 Mich 1133 (2006).

THE HOLDINGS IN *SMITH* AND *DIAMOND MORTGAGE* ARE IN CONFLICT

The majority's decision that MCL 445.904(1)(a) exempts licensed residential builders from liability under the MCPA when they are engaged in residential home building is erroneous for two reasons. First, it extends *Smith* to residential home builders. *Smith* should be strictly limited to the insurance industry. Second, even

under *Smith*, the conduct at issue is not exempt from the MCPA because the law does not specifically authorize residential home builders to engage in residential home building.

The key part of the MCPA involved here is the exemption provision, MCL 445.904(1)(a). It provides:

> (1) This act does not apply to either of the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

The burden of proving the exemption is on the person claiming it. MCL 445.904(4).

This Court first interpreted the exemption provision in *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982). *Diamond Mortgage* decided that real estate brokers are not exempt from liability under the MCPA even though their conduct is subject to regulation by the Michigan Department of Licensing and Regulation. *Id.* at 615-617. In holding that real estate brokers are subject to the MCPA, this Court reasoned:

> We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act. While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of § 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory

board or officer acting under statutory authority of this state or the United States." [*Id.* at 617.]

Diamond Mortgage's interpretation of § 4(1)(a) was very narrow and followed the plain meaning of the words of the statute: "[a] transaction or conduct specifically authorized." Under *Diamond Mortgage*, only a transaction or conduct that is specifically authorized by a statute can be exempt from the MCPA.

This Court considered the exemption again in *Smith*. Without explanation, the majority in *Smith* concluded that, in drafting § 4(1)(a), the Legislature intended to exempt "conduct the legality of which is in dispute." *Smith*, 460 Mich at 465. The *Smith* majority went on to create a new test for determining exemptions under § 4(1)(a). It is whether the "general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith*, 460 Mich at 465. Under this new test, the Court concluded that the entire insurance industry is exempt from the MCPA under § 4(1)(a).

It is apparent to me that the decisions in *Diamond Mortgage* and *Smith* cannot be squared. *Diamond Mortgage* asked whether the transaction or conduct alleged to be in violation of the MCPA is "specifically authorized" by another statute, and it created a narrow exception. *Diamond Mortgage*, 414 Mich at 617. *Smith* asked whether the general transactions of the industry are "specifically authorized," and it created a broad exemption exempting the entire insurance industry. *Smith*, 460 Mich at 465. Because the two interpretations are inconsistent, this Court should determine which was intended by the Legislature.[2]

[2] The majority claims that *Smith* and *Diamond Mortgage* are consistent because in *Diamond Mortgage* the defendants had "no statutory authorization to engage in mortgage writing." *Ante* at 210 n 23. This is

SMITH SHOULD BE LIMITED TO THE INSURANCE INDUSTRY

When interpreting any statutory provision, a court should begin with an examination of the statutory language. MCL 445.904(1)(a) provides that the exemption applies to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." By the statute's terms, the exemption applies to "[a] transaction." This statutory language is in the singular. It follows that the proper inquiry is whether the singular transaction or conduct at issue is specifically authorized by law.

However, instead of exempting a singular transaction or conduct, the *Smith* test classifies the transaction in question in broad terms and exempts all the transactions of the entire industry. *Smith*, 460 Mich at 465. On the other hand, *Diamond Mortgage* considers the discrete transaction or conduct at issue and concludes that the exemption applies only if that transaction or conduct is specifically authorized by law. *Diamond Mortgage*, 414 Mich at 617. Accordingly, solely on the basis of the common meaning of the language of the exemption, *Diamond Mortgage* offers the more accurate interpretation.

Smith is inconsistent with the language of the statute in another regard. It permits illegal behavior to be exempt from the MCPA. In this case, plaintiffs accuse defendants of behavior that is illegal under the Michi-

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irrelevant because *Diamond Mortgage* did not turn on whether the broker's license of the defendants allowed them to engage in mortgage writing. The decision turned on whether a statute specifically authorized the conduct at issue. The result in *Diamond Mortgage* would have been the same regardless of whether the broker's license allowed the defendants to engage in mortgage writing. The reason is that no statute specifically authorized the conduct that the plaintiffs alleged was in violation of the MCPA.

gan Occupational Code.[3] Yet under *Smith*, even if plaintiffs' allegations are true, defendants would be exempt from liability under the MCPA. This is an illogical result. The statute provides that there is an exemption for "[a] transaction or conduct specifically authorized under laws . . . ." MCL 445.904(1)(a). A transaction or conduct that is actually *prohibited* by law cannot be deemed to be specifically *authorized*.[4]

By contrast, *Diamond Mortgage*'s narrow reading of the exemption is harmonious with the language of the

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[3] MCL 339.2411(2) provides, in part:

> A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:
>
> * * *
>
> (d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications.
>
> * * *
>
> (m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

Because plaintiffs allege that defendants (1) misrepresented the characteristics, uses, and benefits of the residence; (2) misrepresented the standard, quality, and grade of the residence; (3) failed to complete the construction of the residence; and (4) made material misrepresentations or failed to advise of material information with respect to the transaction reflected in the agreement, defendants' behavior arguably violates these provisions.

[4] Accepting plaintiffs' allegations as true, the majority has decided that defendants are exempt from the MCPA even though they broke the law. I cannot accept that the Legislature intended to exempt illegal conduct from an act that protects consumers from illegal conduct.

exemption and also furthers the purpose of the MCPA. In the 1970s, the MCPA was the crown jewel of an aggressive legislative effort to expand consumers' rights and remedies.[5] It "was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices . . . ." *Dix v American Bankers Life Assurance Co*, 429 Mich 410, 417; 415 NW2d 206 (1987). The Legislature created this enlarged remedy by making the MCPA applicable to "trade or commerce"[6] and by defining "trade or commerce" to include virtually all consumer transactions.[7]

In order to accomplish the goal of "provid[ing] an enlarged remedy for consumers,"[8] courts should construe the act's exemption narrowly. *Smith v Employment Security Comm*, 410 Mich 231, 278; 301 NW2d 285 (1981) (MOODY, J., dissenting). Though no Michigan court has previously explored the purpose of the exemption in § 4(a)(1), courts in numerous other jurisdictions have considered the purpose of similar provisions.

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[5] In addition to the MCPA, the Legislature enacted the landlord-tenants relationships act, MCL 554.601 *et seq*.; the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq*.; the Truth in Renting Act, MCL 554.631 *et seq*.; and the pricing and advertising act, MCL 445.351 *et seq*. In fact, during this period, similar "laws of broad applicability [were] enacted in every state and the District of Columbia prohibiting unfair or deceptive acts and practices and unfair competition in the marketplace." Anno, *Right to private action under state consumer protection act—Equitable relief available*, 115 ALR5th 709, § 2, pp 725-726.

[6] See MCL 445.903(1).

[7] MCL 445.902(1)(g) provides, in part:

> "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

[8] *Dix*, 429 Mich at 417.

These decisions are helpful in understanding the purpose and scope of our exemption.

In *Skinner v Steele*,[9] the Tennessee Court of Appeals was called upon to determine the scope of a similarly worded exemption to the Tennessee consumer protection act (TCPA). *Id.* at 337. The exemption provided:

> The provisions of this chapter shall not apply to: (a) Acts or transactions required or specifically authorized under the laws administered by or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States. [TCA § 47-18-111.]

The defendant argued that this provision exempted the entire insurance industry from the TCPA. *Skinner*, 730 SW2d at 337. In deciding that the insurance industry was not exempt, the court noted:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree. [*Id.* at 337.][10]

Similarly, in considering whether regulated industries were exempt from the Ohio consumer sales practices act (CSPA), the Ohio Court of Appeals has stated that, in order to overcome the presumption that the CSPA applies,

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[9] 730 SW2d 335 (Tenn App, 1987).

[10] In interpreting similar provisions, the supreme courts of both South Carolina and Colorado have quoted *Skinner* in discussing the purpose of their respective exemptions. *Ward v Dick Dyer & Assoc, Inc*, 304 SC 152, 156; 403 SE2d 310 (1991); *Showpiece Homes Corp v Assurance Co of America*, 38 P3d 47, 56 (Colo, 2001).

> a court must be convinced that "a direct and unavoidable conflict exists between the application of the [CSPA] and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes." [*Elder v Fischer*, 129 Ohio App 3d 209, 219; 717 NE2d 730 (1998), quoting *Lemelledo v Beneficial Mgt Corp of America,* 150 NJ 255, 270; 696 A2d 546 (1997) (interpreting the New Jersey consumer fraud act).][11]

Another source that sheds light on the purpose of the exemption is the recent article written by Assistant Attorney General Edwin Bladen. The MCPA was authored in large part by Mr. Bladen and, in the article *How and why the Consumer Protection Act came to be,* he discusses at length the history and intent of the act.[12] Mr. Bladen states that the MCPA exemptions were intended to be given a limited interpretation. *Id.* at 12. Specifically, he says that the intent was to "look to see, not whether the entity is subject to the act, but whether the method, act or practice alleged to violate the act is indeed one addressed and prohibited by the act. To the extent *Smith v. Globe Life Insurance* . . . arrived at a different view, it is clearly erroneous . . . ." *Id.*

From these sources, it emerges that the Legislature included the exemption out of concern that the MCPA,

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[11] The decisions I have discussed are illustrative of how other courts have interpreted similar exemptions but are by no means an exhaustive review of the laws of sister states. There are many other similar decisions that I have not discussed. See, e.g., *Vogt v Seattle-First Nat'l Bank*, 117 Wash 2d 541; 817 P2d 1364 (1991); *Bober v Glaxo Wellcome PLC*, 246 F3d 934 (CA 7, 2001).

[12] Bladen, *How and why the Consumer Protection Act came to be,* <http://www.michbar.org/consumer/pdfs/HowWhy.pdf> (accessed May 16, 2007).

because of its breadth, might prohibit a transaction or conduct that another act authorizes. A merchant could be put on the horns of a dilemma if the same transaction were specifically authorized by one statute and prohibited by the MCPA. Section 4(1)(a) was designed to avoid that conflict. The *Diamond Mortgage* holding is in harmony with the purpose of § 4(1) because it applies the exemption only when there is a direct and unavoidable conflict between the MCPA and another law.[13]

Given the language and purpose of the MCPA, I believe that this Court interpreted the exemption correctly in *Diamond Mortgage* and incorrectly in *Smith*. Even so, because I do not think the compelling interests necessary to overrule a prior decision of this Court are present, I do not advocate overruling *Smith*. Instead, I would limit the holding of *Smith* to the insurance industry.

The *Smith* Court itself indicated that its opinion has limited application by explicitly stating that it did not address other consumer transactions not before the Court and warning that "insurance companies are not '[l]ike most businesses.' " *Smith*, 460 Mich at 465-466 n

[13] One example of a direct and unavoidable conflict can be found in the Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq*. The MVSRA establishes an extensive regulatory scheme for motor vehicle repair facilities. The written estimate section of the MVSRA specifically authorizes motor vehicle repair facilities to charge "10 % or $10.00, whichever is lesser" over a written estimate without obtaining "the written or oral consent of the customer . . . ." MCL 257.1332(1). Charging any amount above a written estimate without obtaining the consent of the consumer arguably could violate several subsections of the MCPA. See, e.g., MCL 445.903(1)(n), (s), (bb), and (cc). Because charging this amount in excess of a written estimate is "specifically authorized" under the MVSRA, however, motor vehicle repair facilities that impose the charge are exempt from suit under the MCPA.

12 (citation omitted).[14] Aside from matters involving the insurance industry, I would apply the standard articulated in *Diamond Mortgage*. I would hold that the focus of the § 4(1)(a) inquiry is whether the discrete transaction alleged to be in violation of the MCPA is specifically authorized by some other law.

If the test set forth in *Diamond Mortgage* were applied to the facts of this case, the exemption would not apply. Here, plaintiffs allege that defendants misrepresented their experience and qualifications and misrepresented the financing of the construction mortgage. Defendants have failed to point to any authority for the proposition that either of these transactions is "specifically authorized" by law.

Plaintiffs also allege that defendants (1) misrepresented the characteristics, uses, and benefits of the residence; (2) misrepresented the standard, quality, and grade of the residence; (3) failed to complete the construction of the residence; and (4) made material mis-

[14] There is extraordinary oversight of each credit insurance transaction. The Insurance Code "manifests an intent to regulate the entire insurance and surety business field, and not to leave any portion of it unregulated." 19 Michigan Law & Practice, Insurance, § 1, p 13. Credit insurance transactions are regulated by the Credit Insurance Act, MCL 550.602 through 550.624, and 21 rules in the Administrative Code, containing more than 130 subsections. 1999 AC, R 550.201 through R 550.221. Virtually every document used to arrange and sell credit insurance must be submitted for review by the Commissioner of Insurance before being used to sell insurance to consumers. 1999 AC, R 550.209(2). The commissioner also has authority over all rates and premiums charged in credit insurance transactions. Rates are set by rule; credit life insurance rates must conform to 1999 AC, R 550.211, credit accident and health insurance rates must conform to 1999 AC, R 550.212. This comprehensive regulation of each insurance transaction highlights that, indeed, insurance companies are not like most businesses. And, because insurance transactions require a degree and type of statutory authorization equaled by few, if any, other consumer industries, it is logical to limit *Smith*'s holding to this industry.

representations or failed to advise of material information with respect to the transaction reflected in the agreement. These transactions, rather than being authorized, are arguably specifically prohibited by law. See MCL 339.2411(2)(d),(m). Accordingly, because defendants were not specifically authorized to perform the discrete transactions at issue, the exemption does not apply.

EVEN UNDER *SMITH,* THE EXEMPTION DOES NOT APPLY HERE BECAUSE THE TRANSACTION OR CONDUCT AT ISSUE IS NOT SPECIFICALLY AUTHORIZED BY LAW

In *Smith*, this Court interpreted the § 4(1)(a) exemption to apply if the "general transaction is specifically authorized by law . . . ." *Smith*, 460 Mich at 465. As I explained earlier, *Smith* should not be extended beyond the facts of that case. However, even under the test in *Smith*, the exemption should not apply here because there is no law specifically authorizing the general transaction or conduct at issue.

The determinative issue under the *Smith* test is whether the general conduct or transaction is specifically authorized by law. Accordingly, in order to apply this test, it is first necessary to give meaning to the phrase "specifically authorized." In so doing, it is appropriate to consider dictionary definitions. *Koontz v Ameritech Services*, *Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002). "Specific" is defined as "having a special application, bearing, or reference; explicit or definite." *Random House Webster's College Dictionary* (2001). "Authorize" means "to give authority or official power to; empower."[15] *Id*. Hence, for the general transaction or

[15] Notably, I use *Random House Webster's College Dictionary*'s first definition of the word "authorize" while the majority opinion uses the second definition of the word. The majority claims that it uses the second

conduct to be "specifically authorized," there must be a law that explicitly gives the power to perform the general transaction or conduct at issue.

The provisions of the Michigan Occupational Code that apply to residential home builders[16] are devoid of any specific authorizations of transactions or conduct. There are broad definitions of "residential builder" and other positions.[17] MCL 339.2401. There are exemptions from licensure. MCL 339.2403. Minimum licensing qualifications are set forth. MCL 339.2404. Contributions to the Homeowner Construction Lien Recovery Fund[18] are made mandatory. MCL 339.2409.

Perhaps the most significant provision is MCL 339.2411, which lays out in detail the conduct of a licensee that will result in discipline and the procedures applicable to certain complaints. The most that can be said of this provision, however, is that it defines prohibited conduct. Nothing in any of these provisions explicitly gives residential home builders the power to engage in residential home building. Because there is no law that specifically authorizes residential home builders to

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definition because it focuses on the action and not the actor. This is not true. The majority focuses exclusively on the actor because, under the majority's interpretation, simply being a residential home builder makes defendants exempt from the MCPA.

[16] MCL 339.2401 through 339.2412.

[17] The majority relies on the code's definition of "residential builder" to find specific authorization for the conduct at issue. I take strong exception to this approach. This definition implicitly allows residential home builders to construct homes, but it does not specifically authorize them to do so. The majority also makes much of the fact that there are only a few instances where one can engage in residential home building without a license. Again, the fact that the law may prohibit nonlicensees from building a home does not amount to specific authorization for residential builders to engage in residential home building.

[18] MCL 570.1201.

engage in any activity, let alone residential home building, defendants cannot claim the protection of the exemption.

By erroneously finding that residential home builders are exempt from the MCPA, the majority essentially reads the phrase "specifically authorized" out of the statute. Rather than requiring specific authorization, the majority concludes that the exemption applies as long as the transaction or conduct is not prohibited. Yet, the majority is aware that every word in a statute should be given meaning, and the Court should avoid a construction that would render any part surplusage or nugatory. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). By ruling as it does, the majority has essentially decided that merely being a licensee in a regulated industry qualifies one for the exemption. Nothing indicates that the Legislature intended such a result.

CONCLUSION

This case addresses the scope of the exemption in MCL 445.904(1)(a). The majority finds that the exemption extends to builders when engaged in residential home building. Essentially, it decides that the exemption applies to any business that has a licensing scheme similar to that used by residential home builders. The result may well be that a large number of Michigan businesses will be able to engage in unfair or deceptive practices without running afoul of the MCPA. For this reason, and for the other reasons set forth in this opinion, I must dissent.

PEOPLE v FRAZIER

Docket No. 131041. Argued January 11, 2007 (Calendar No. 3). Decided June 6, 2007. Rehearing denied 478 Mich 1201.

Corey R. Frazier was convicted by a jury in the Genesee Circuit Court of various felonies, including two counts of felony murder. After pursuing unsuccessful appeals in the state appellate courts, the defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which conditionally granted the writ after determining that the defendant's Sixth Amendment right to counsel was violated when his attorney abandoned him during police interrogation following arraignment. In pretrial proceedings for the defendant's new trial, the court, Robert M. Ransom, J., granted the defendant's motions to exclude from trial for any purpose evidence of postarraignment statements made by the defendant to the police while his attorney was not present and to exclude the testimony of prosecution witnesses (the street sweepers) who were identified from information in the defendant's inadmissible statements, unless the prosecution can establish that the discovery of those witnesses came from an independent source. The prosecution appealed by leave granted. The Court of Appeals, COOPER, P.J., and FORT HOOD, J. (TALBOT, J., concurring in part and dissenting in part), affirmed in part, reversed in part, and remanded for further proceedings. 270 Mich App 172 (2006). The Court of Appeals agreed with the federal district court that the prosecution could not use the defendant's custodial statements in its case-in-chief, because the defendant was denied the effective assistance of counsel during the police interrogation, a critical stage of the proceedings. The Court of Appeals reversed the trial court's order prohibiting the use of the defendant's custodial statements for impeachment purposes. The Court also held that the exclusionary rule and the inevitable discovery doctrine applied to the testimony of the street sweepers and remanded the matter to the trial court for application of the inevitable discovery doctrine. The Supreme Court granted the prosecution's application for leave to appeal and denied the defendant's application for leave to cross-appeal. 477 Mich 851 (2006).

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

The portion of the Court of Appeals judgment that holds that the exclusionary rule applies to the street sweepers' testimony must be reversed and the portions of the Court of Appeals opinion that approve or adopt the federal district court's Sixth Amendment analysis must be vacated. The matter must be remanded to the trial court for retrial at which the street sweepers' testimony may be admitted.

1. The Supreme Court is bound by the federal district court's ruling that the defendant's confession must be excluded on retrial. However, because the Court of Appeals approved of the federal district court's legal analysis, the correctness of that analysis must be discussed. The federal district court incorrectly applied the presumed prejudice test of *United States v Cronic*, 466 US 648 (1984), in deciding that the defendant's Sixth Amendment rights were violated. The *Cronic* test properly applies where there has been a complete denial of counsel. The correct analysis for the defendant's Sixth Amendment claim, which did not involve a complete denial of counsel, is under the ineffective assistance of counsel test of *Strickland v Washington*, 466 US 668 (1984). Under the *Strickland* test, the federal district court erred in ruling that the defendant was entitled to relief without determining whether the defendant was prejudiced by counsel's performance.

2. The Court of Appeals erred in holding that the exclusionary rule applies to the testimony of the street sweepers who were identified from information in the defendant's custodial statements. Law enforcement did not engage in any misconduct in obtaining the defendant's confession or discovering the identities of the street sweepers; therefore, the goal of the exclusionary rule would not be served by excluding the testimony of the street sweepers. Further, the degree of attenuation between the street sweepers' testimony and any violation of the defendant's Sixth Amendment rights is sufficient to dissipate any taint.

Reversed in part, vacated in part, and remanded for retrial.

Justice CAVANAGH, joined by Justice Kelly, dissenting, stated that the Supreme Court is bound by the federal district court's holding that the defendant's incarceration violated the United States Constitution because the interrogation of the defendant violated his Sixth Amendment rights. The Supreme Court is equally bound by the district court's holding that the proper remedy for the violation was to apply the exclusionary rule to the defendant's statements. The majority therefore needlessly criti-

cizes the district court's legal analysis. The proper focus in this case is to determine whether exclusion of the evidence derived from the defendant's statements will neutralize the taint caused by the unconstitutional interrogation and provide the defendant the effective assistance of counsel and a fair trial. Derivative evidence may be admissible if the connection between the primary illegality and the evidence is so attenuated as to dissipate the taint. Special consideration is needed when the derivative evidence is live-witness testimony rather that inanimate evidence. Unique factors presented by a live witness include the fact that the greater the willingness of the witness to freely testify, the greater the likelihood that the witness would have been discovered by legal means. Also, the cost of excluding live-witness testimony is often greater that the cost of excluding inanimate evidence and, therefore, a more direct link between the illegality and the testimony of a live witness is required. The Court of Appeals correctly remanded the matter to the trial court to consider these factors concerning live witnesses and that decision should be affirmed.

1. CRIMINAL LAW — RIGHT TO COUNSEL — INEFFECTIVE ASSISTANCE OF COUNSEL.

Absent a complete denial of counsel, a claim of ineffective assistance of counsel is analyzed under a test where counsel is presumed effective and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error; a complete denial of counsel does not occur when counsel consults with the defendant, advises the defendant, and does nothing contrary to the defendant's wishes.

2. CRIMINAL LAW — EVIDENCE — EXCLUSIONARY RULE.

The exclusionary rule is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of a constitutional right; the primary purpose of the rule is to deter future unlawful police misconduct; a court must evaluate the circumstances of the case in light of the policy served by the rule in determining whether exclusion is proper; application of the rule is inappropriate in the absence of governmental misconduct or where the illegality and the discovery of the challenged evidence has become so attenuated as to dissipate the taint; the attenuation exception to the exclusionary rule applies when the causal connection is remote or when the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.

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.

Daniel D. Bremer for the defendant.

Amici Curiae:

Jill L. Price, President, *James R. Neuhard*, Director, State Appellate Defender Office, and *Marla R. McCowan*, Assistant Defender, for Criminal Defense Attorneys of Michigan.

Ronald Frantz, President, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for Prosecuting Attorneys Association of Michigan.

CORRIGAN, J. This 1995 murder case has a long history in the Michigan and federal courts. Following the affirmance of defendant's convictions in our state courts, the United States District Court for the Eastern District of Michigan, on habeas corpus review, ordered defendant's release unless he was given a new trial in which his confession would be excluded from evidence. The district court ordered this result because of retained counsel's deficient performance, not because of any police misconduct.

During pretrial hearings, the trial court also suppressed the testimony of two witnesses—street sweepers whose identities were "fruits" of defendant's confession—unless the prosecution could show that it discovered the street sweepers' identities from an independent source. Following the prosecution's interlocutory appeal, the Court of Appeals agreed that the trial court should conduct an "inevitable discovery" hearing.

We granted the prosecution's application for leave to file an interlocutory appeal to consider the proper scope of the exclusionary rule as it applies to the testimony of the street sweepers. We reverse the Court of Appeals expansive holding that the exclusionary rule applies to the testimony of the street sweepers. Because defendant's confession did not result from police misconduct, the purpose of the exclusionary rule is in no way served by excluding the street sweepers' testimony. Further, the degree of attenuation between the violation of defendant's Sixth Amendment rights and the street sweepers' testimony dissipated any taint.

We also vacate the Court of Appeals endorsement of the federal district court's errant legal analysis in holding that defendant's confession must be excluded. The district court mistakenly applied the test from *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), rather than the test from *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), in holding that defendant's Sixth Amendment rights had been violated. Nonetheless, despite the federal district court's faulty analysis, we acknowledge the binding force of the district court's ruling excluding defendant's confession. We remand this case for retrial at which the street sweepers' testimony may be admitted.[1]

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Two victims were robbed and fatally shot in one of the victim's homes in Grand Blanc, Michigan. Kenneth Haywood told the police that he drove defendant and defendant's accomplice, Idell Cleveland, to the home on

[1] We do not disturb the Court of Appeals holding that defendant's statements are admissible for impeachment purposes, which is not at issue in this appeal.

the night of the murders and waited in the car while defendant and Cleveland entered the home. Haywood heard Cleveland say, "Get on the floor" and then heard two gunshots. Haywood fled, leaving defendant and Cleveland in the house without transportation from the scene.

After interrogating Haywood, the police searched defendant's home and obtained an arrest warrant. Defendant's mother retained an attorney for him. Defendant told that attorney that, although he had been present when Cleveland robbed and murdered the victims, he did not know that Cleveland intended to rob the victims and he had not been involved in the murders. Defendant told counsel that he wanted to talk to the police about his noninvolvement in the crimes. Relying on defendant's assertions of innocence, defense counsel advised defendant that one option would be to talk to the police and tell the truth. Counsel then arranged defendant's surrender and accompanied him to the station, where defendant was arrested and later arraigned. Although the prosecutor told defendant and his counsel that he would not plea bargain or make any "deals," defendant nonetheless insisted on talking to the police. Defense counsel also advised defendant that talking to the police might assist in efforts to negotiate a plea bargain. Defense counsel was present when the police furnished *Miranda*[2] warnings and when defendant waived those protections. Defense counsel then left the police station before defendant was interrogated because he assumed that he could not be present during questioning.

During the police interrogation, defendant, contrary to what he told defense counsel, admitted that he knew Cleveland had been armed and had intended to rob the

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

victims. He also admitted that Cleveland paid him with two $50 bills after the murders. He told the police that two street sweepers gave him a ride home after the murders and that he asked them to change a $50 bill. The police later located the street sweepers, who testified that defendant approached them for a ride at a gas station and asked if they had change for a $50 bill.

Following his 1996 jury trial, defendant was convicted of two counts of felony-murder, MCL 750.316; one count of armed robbery, MCL 750.529; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The Court of Appeals initially affirmed defendant's murder and felony-firearm convictions, but vacated his armed robbery conviction on double jeopardy grounds. *People v Frazier*, unpublished opinion of the Court of Appeals, issued February 27, 1998 (Docket No. 193891). The Court of Appeals then granted rehearing and again vacated defendant's armed robbery conviction on double jeopardy grounds, but remanded "for a *Ginther*[3] hearing on the issue whether defendant was denied the effective assistance of counsel by trial counsel's advice that he make statements to the police about his role in the crime." *People v Frazier (On Rehearing)*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 1998 (Docket No. 193891), slip op at 2. On remand, the trial court concluded after a *Ginther* hearing that counsel had not been ineffective. The Court of Appeals affirmed, *People v Frazier (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2000 (Docket No. 193891), and this Court denied leave to appeal, 464 Mich 851 (2001).

The United States District Court for the Eastern District of Michigan conditionally granted defendant's

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

petition for a writ of habeas corpus on the ground that counsel abandoned defendant during the police interrogation in violation of defendant's Sixth Amendment right to counsel under *Cronic, supra*. *Frazier v Berghuis*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 6, 2003 (Docket No. 02-CV-71741DT). The federal district court ruled that counsel's absence during a critical stage (the interrogation) "tainted the whole trial process, as evidenced by the use of Petitioner's statements at trial." *Id.*, slip op at 7. The court held that "the only appropriate remedy is to not allow use of the tainted statements, should the State decide to initiate a new trial in this matter." *Id.* Thus, the district court ruled that defendant's confession would be inadmissible on retrial. The prosecution did not further appeal this decision.

The case was then set for retrial in the Genesee Circuit Court. Before trial, the trial court excluded defendant's custodial statements for all purposes. The court, citing *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), also held that the exclusionary rule applied to any derivative evidence from those statements, including the testimony of the street sweepers. The court stated that "knowledge gained by the government's own wrong cannot be used by it in the way proposed." The court also held, however, that the prosecution could call the street sweepers to testify at trial if the prosecution could establish that it in fact discovered the identity of these witnesses from a source independent of defendant's inadmissible statements. The prosecution appealed.[4]

[4] Because the prosecution appealed the trial court's decision, the trial court never held a hearing regarding whether the police would have inevitably discovered the street sweepers' identities.

A split Court of Appeals panel affirmed in part and reversed in part. *People v Frazier*, 270 Mich App 172; 715 NW2d 341 (2006). The majority first agreed with the federal district court that the prosecution could not use defendant's custodial statements in its case-in-chief because counsel had abandoned defendant at a critical stage of the proceedings (the police interrogation).[5] But the panel, citing *Michigan v Harvey*, 494 US 344; 110 S Ct 1176; 108 L Ed 2d 293 (1990), unanimously[6] reversed the trial court's order prohibiting the use of defendant's custodial statements for impeachment purposes.

The majority next held that the exclusionary rule and the "inevitable discovery" doctrine applied to the street sweepers' testimony. The majority explained that the United States Supreme Court has applied the exclusionary rule to Sixth Amendment violations, and that the street sweepers' testimony is "fruit of the poisonous tree" that must be excluded unless the prosecution can make an affirmative showing that the street sweepers' identities would have inevitably been discovered through alternative means.[7] The majority remanded to the trial court for application of the inevitable discovery doctrine.

Judge TALBOT dissented from the majority's holding that the exclusionary rule and the inevitable discovery doctrine apply to the street sweepers' testimony. He opined that the exclusionary rule does not apply in the absence of police misconduct, and that the majority

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[5] In his partial dissent, Judge TALBOT stated that whether defendant's Sixth Amendment rights were violated was not an issue before the Court. Judge TALBOT stated that he was not sure of the correctness of the federal district court's decision that defendant was denied his right to counsel, but that the Court of Appeals was bound by the unchallenged federal court determination.

[6] Judge TALBOT joined the majority on this point.

[7] But the panel disagreed with the trial court that the prosecution was required to show that it *actually* discovered the street sweepers' identities through independent legal means.

extended the doctrine by applying it to the testimony of witnesses named in defendant's statement to police. Further, Judge TALBOT opined that the police almost certainly would have discovered the identities of the street sweepers if defense counsel had been present at the interrogation or even if defendant had not made any statement to the police.

This Court granted the prosecution's application for leave to appeal and denied defendant's application for leave to cross-appeal. *People v Frazier*, 477 Mich 851; 720 NW2d 747 (2006). We directed the parties to address the following issues:

> (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. [477 Mich 851.]

II. STANDARD OF REVIEW

A lower court's application of constitutional standards is not entitled to the same degree of deference as are factual findings. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo. *Id.*

III. THE *CRONIC*/*STRICKLAND* STANDARDS

The prosecution initially urges us to ignore the federal district court's decision and hold that the exclu-

sionary rule does not apply to bar defendant's confession from evidence. We decline this invitation because the prosecution has forfeited this argument. The prosecution never challenged the adverse district court decision by appealing to the United States Court of Appeals for the Sixth Circuit. Nor did the prosecution argue in the trial court or in our Court of Appeals that the federal district court decision should be disregarded. "This Court disfavors consideration of unpreserved claims of error." *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Moreover, the prosecution conceded in its application for leave to appeal in this Court that it is "bound by the unchallenged federal court determination." (Prosecution's Application for Leave to Appeal, p v.) We decline to consider the prosecution's argument urging us to disregard the federal district court decision. Thus, the present issue is not the admissibility of defendant's confession, but the admissibility of the street sweepers' testimony.

In any case,

> [h]abeas corpus decisions within their scope generally are binding on the parties, on other courts, and are conclusive. . . . A judgment in habeas corpus discharging the prisoner, after a final determination of the ultimate facts and of the law, is conclusive of the right to remain at liberty. Therefore, the release by federal courts of one charged in state courts is binding on the latter, and there can be no further prosecution. [4 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 147:117, p 793.]

See also *Collins v Loisel*, 262 US 426, 430; 43 S Ct 618; 67 L Ed 1062 (1923) (holding that a habeas corpus decision operates as res judicata on the issues of law and fact necessarily involved in the habeas corpus proceedings); *Kurtz v State*, 22 Fla 36, 45 (1886) ("[I]n those States where a judgment of a court in a *habeas corpus* proceeding discharging or remanding to custody a pris-

oner is final, and a writ of error is allowed thereon, . . . the principle of *res adjudicata* [seems to be] applicable . . . .").[8] In cases where the federal court conditionally grants a writ of habeas corpus, the federal court retains jurisdiction to ensure that the state court complies with the terms of the conditional writ. *Gentry v Deuth*, 456 F3d 687, 692 (CA 6, 2006). A state's failure to cure the error identified in the conditional habeas court order justifies the release of the petitioner. *Id.* Moreover, we decline to contradict the federal court decision because doing so would create unnecessary confusion and uncertainty. Therefore, we accept as binding the district court's ruling that defendant's confession must be excluded on retrial.

Nonetheless, because our Court of Appeals approved of the federal district court's legal analysis in a published opinion, we must discuss the correctness of this analysis.[9] We agree with the prosecution that the cor-

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[8] Although the federal district court's habeas decision is binding on the parties in this particular case, it is not binding precedent for other cases. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." [Citations omitted.]).

[9] The dissent would have us leave unquestioned the federal district court's analysis. But the Court of Appeals opinion approving the district court's analysis is published and is binding precedent for the Court of Appeals and lower courts. MCR 7.215(J)(1). Even if the Court of Appeals approval of the district court's opinion is dicta, we will not allow that dicta to stand when it appears in a precedentially binding opinion and is erroneous. We decline to follow the dissent's suggestion to vacate the Court of Appeals dicta without any explanation of why we are doing so. Rather, the parties and the bench and bar benefit when we explain the reasoning underlying our rulings. Further, although the district court's decision is binding on the admissibility of defendant's confession, the district court did not decide whether the street sweepers' testimony is admissible. If defendant is convicted on retrial, this issue will likely be raised on appeal in the Michigan courts and on habeas review in federal

rect Sixth Amendment analysis is the ineffective assistance of counsel test of *Strickland, supra*, rather than the presumed prejudice test of *Cronic, supra*.

Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland, supra.* Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. *Strickland, supra* at 687, 690, 694. But in *Cronic, supra* at 659-662, the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a "critical stage" of the proceedings.[10] *Id.* at 659. "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, [the] difference is not of degree but of kind." *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

This case falls within the ambit of *Strickland* because none of the three *Cronic* situations is present. In their

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court. Our review of this issue at this juncture will aid those courts that might be required to review this issue in the future. It will also contribute to the broader debate regarding the proper application of the *Cronic* and *Strickland* standards.

We also reject the dissent's suggestion that we have not genuinely attempted to execute the federal order. We have complied with that order, contrary to the prosecution's request that we violate the order by admitting defendant's confession. See n 16 of this opinion.

[10] The other two situations in which prejudice is presumed are as follows: (1) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (2) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *Cronic, supra* at 659-660.

first meeting, defendant misled counsel. He said that he was present at the crime scene, but did not know that Cleveland intended to rob the victims. Defendant *insisted* on waiving his right to counsel and maintaining his innocence in a statement to the police in order to obtain a favorable plea bargain.[11] Counsel advised defendant of the risks of talking to the police and even advised him not to talk to the police despite his claims of innocence. Counsel, however, relied on defendant's assertions of innocence in advising defendant that he could talk to the police. Counsel's advice was predicated on defendant's false claim of innocence, and counsel cannot be faulted for advising defendant on the facts defendant had communicated to him.[12] What defendant ultimately told the police and what he told defense counsel were two different things. If defendant had given counsel the same version of events that he furnished the police, counsel would most likely have advised defendant differently.

The *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding. *Bell, supra* at 697. Because counsel consulted with defendant, gave

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[11] In this postarraignment interrogation case, defendant had a Sixth Amendment right to counsel at the police interrogation, a critical stage of the proceedings. *Michigan v Jackson*, 475 US 625, 629-630; 106 S Ct 1404; 89 L Ed 2d 631 (1986). But an accused may waive his Sixth Amendment right to counsel if the waiver is knowing, intelligent, and voluntary. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). Defendant may, of course, even waive counsel at a critical stage of the proceedings. See, e.g., *United States v Wade*, 388 US 218, 237; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) (holding that the defense counsel was required to be present at the lineup—a "critical stage"—absent an "intelligent waiver" by the defendant).

[12] Additionally, counsel, relying on previous experience, believed that the prosecution might change its position and make a plea offer after defendant talked to the police.

him advice, and did nothing contrary to defendant's wishes, counsel's alleged failure was not complete. Defendant alleges only that counsel erred at a specific point of the proceeding by advising him that he could waive his right to counsel at the interrogation. Therefore, prejudice may not be presumed, and counsel's performance should have been reviewed under the *Strickland* standard.[13]

Our determination that *Strickland* rather than *Cronic* applies is supported by *Roe v Flores-Ortega*, 528 US 470; 120 S Ct 1029; 145 L Ed 2d 985 (2000). In *Roe, supra,* the United States Supreme Court analyzed counsel's failure to file an appeal under the two-pronged test set forth in *Strickland* rather than the presumption of prejudice test set forth in *Cronic.* In doing so, it stated that the decision to waive the right to appeal, much like the decision to plead guilty and waive the right to a jury trial, belonged to the defendant. *Id.* at 485. The Court stated that when an attorney consults with his client about the consequences of his client's decision, the attorney's performance can be considered deficient under the first prong of *Strickland* only if the attorney fails to follow his client's express instructions. *Id.* at 478.

The applicability of *Strickland* is even more apparent in the instant case than in *Roe, supra*. In this case, defendant's attorney consulted with defendant and discussed the risks of talking to the police. As in *Roe*, the decision to talk to the police and, thus, to waive the right against compelled self-incrimination and the right to counsel's presence during interrogation, belonged to

[13] Although we hold that the federal district court should have applied the *Strickland* standard, we do not apply the *Strickland* test to the facts of this case or offer any opinion regarding the effectiveness of counsel.

defendant.[14] Defendant insisted on talking with the police in order to obtain a favorable plea bargain. Thus, the 2000 Court of Appeals panel correctly applied the *Strickland* standard rather than the *Cronic* standard in affirming the trial court's finding after a *Ginther* hearing that defense counsel had not been ineffective.[15] The federal district court erred in holding that defendant was entitled to relief without determining whether defendant was prejudiced by counsel's performance. Accordingly, we vacate the March 2006 published Court of Appeals opinion to the extent that it adopts or approves of the federal district court's decision endorsing the *Cronic* standard. Because we are bound by the federal district court's ruling on habeas review, we cannot disturb the erroneous ruling of the district court.[16]

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[14] We reject defendant's argument that his waiver of counsel was not knowing and intelligent because it was made on the advice of defense counsel. The 1998 Court of Appeals panel decided that defendant's waiver of counsel was valid. The federal district court's failure to analyze whether defendant's waiver of counsel was valid further illustrates its faulty reasoning in concluding that *Cronic* rather than *Strickland* applies.

[15] This Court denied leave to appeal that decision. 464 Mich 851 (2001).

[16] We reject the dissent's argument that we have foreclosed any possibility of holding that the derivative evidence (the street sweepers' testimony) should be excluded by "flatly refus[ing] to accept the validity of the district court's order." *Post* at 261. As we have clearly stated, we recognize that the district court's ruling is binding, and we accept for purposes of this case that defendant's Sixth Amendment rights were violated and that his confession must be excluded. We have scrupulously honored the district court's order, which provides, in pertinent part:

> [T]he only appropriate remedy is to not allow use of [defendant's] tainted statements, should the State decide to initiate a new trial in this matter.
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> * * *
>
> The Court ORDERS that the warden release Petitioner from custody, unless the State of Michigan initiates a new trial in this

IV. APPLICABILITY OF THE EXCLUSIONARY RULE TO THE STREET SWEEPERS' TESTIMONY

We next consider the Court of Appeals ruling that the exclusionary rule applies to the "fruit" of defendant's confession—the testimony of the street sweepers.[17] We conclude that the Court of Appeals erred in holding that the exclusionary rule applies.

The suppression of evidence should be used only as a last resort. *Hudson v Michigan*, ___ US ___; 126 S Ct 2159, 2163; 165 L Ed 2d 56, 64 (2006). "[T]he exclusionary rule is 'a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights . . . .' " *People v Anstey*, 476 Mich 436, 447-448; 719 NW2d 579 (2006), quoting *People v Hawkins*, 468 Mich 488, 512-513; 668 NW2d 602 (2003) (emphasis deleted); see also *Michigan v Tucker*, 417 US 433, 446; 94 S Ct 2357; 41 L Ed 2d 182 (1974), quoting *United States v Calandra*, 414 US 338, 347; 94 S Ct 613; 38 L Ed 2d 561 (1974) ("[T]he exclusionary rule's 'prime purpose is to deter future unlawful police conduct . . . .' "). " 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitu-

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case, consistent with this Court's Opinion, within one hundred and twenty (120) days from the entry of this Order. [*Frazier v Berghuis, supra*, slip op at *7-8.]

The district court did not rule on the admissibility of the street sweepers' testimony. In compliance with the district court's order, we are remanding for a new trial in which defendant's confession must be excluded from evidence. Our disagreement with the district court's ruling regarding the admissibility of defendant's statements in no way affects our ruling regarding the admissibility of the street sweepers' testimony.

[17] "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' " *Segura v United States*, 468 US 796, 804; 104 S Ct 3380; 82 L Ed 2d 599 (1984) (internal citations omitted).

tional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Id.*, quoting *Elkins v United States*, 364 US 206, 217; 80 S Ct 1437; 4 L Ed 2d 1669 (1960).[18] The judicially created rule is not designed to act as a personal constitutional right of the aggrieved party. *Calandra, supra* at 348.[19] "[T]he proper focus is on the deterrent effect on law enforcement officers, if any." *People v Goldston*, 470 Mich 523, 539; 682 NW2d 479 (2004).

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Calandra, supra* at 348.

> "The exclusionary rule has its limitations . . . as a tool of judicial control. . . . [In] some contexts the rule is ineffective as a deterrent. . . . Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. . . . [A] rigid and unthinking application of the . . . rule . . . may exact a high toll in human injury and frustration of efforts to prevent crime."

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[18] While courts must be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for applying the exclusionary rule. *Stone v Powell*, 428 US 465, 485; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

[19] In *Stone, supra* at 488 n 24, the United States Supreme Court quoted Professor Anthony Amsterdam:

> "The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers.' As it serves this function, the rule is a needed, but grud[g]ingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest...." Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 388-389 (1964) (footnotes omitted).

Terry v Ohio [392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968)]. [*People v Stevens (After Remand)*, 460 Mich 626, 636; 597 NW2d 53 (1999).]

"[A]pplication of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," *Calandra, supra* at 348, "that is, 'where its deterrence benefits outweigh its "substantial social costs," ' " *Hudson, supra* at 2163, quoting *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 363; 118 S Ct 2014; 141 L Ed 2d 344 (1998), quoting *United States v Leon*, 468 US 897, 907; 104 S Ct 3405; 82 L Ed 2d 677 (1984). "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Scott, supra* at 364. The United States Supreme Court has "repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Id.* at 364-365. Because of the costs associated with applying the exclusionary rule, the Court has been cautious against expanding it. *Hudson, supra* at 2163. In determining whether exclusion is proper, a court must " 'evaluate the circumstances of [the] case in the light of the policy served by the exclusionary rule . . . .' " *Stevens, supra* at 635, quoting *Brown v Illinois*, 422 US 590, 604; 95 S Ct 2254; 45 L Ed 2d 416 (1975).[20]

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[20] The dissent cites *United States v Wade*, 388 US 218, 240-241; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), and *Massiah v United States*, 377 US 201, 207; 84 S Ct 1199; 12 L Ed 2d 246 (1964), for the proposition that the exclusionary rule is an appropriate remedy for a Sixth Amendment violation. But those cases do not hold that derivative evidence discovered without any police misconduct whatsoever must be excluded from evidence. In both *Wade* and *Massiah*, the defendant's Sixth Amendment

It cannot be gainsaid that this case presents *no* police misconduct whatsoever. Excluding defendant's confession because of attorney error does not fulfill the goal of the exclusionary rule by deterring the police from future misconduct. *Goldston, supra* at 538.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. [*Tucker, supra* at 447.]

This Court has previously opined that application of the exclusionary rule is inappropriate in the absence of governmental misconduct. See, e.g., *Goldston, supra* at 538 ("[T]he goal of the exclusionary rule would not be furthered where police officers act in objectively reasonable good-faith reliance on a search warrant."); *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000) ("Because defendant failed to allege or establish a specific discovery violation, or any other sort of prosecutorial misconduct, the trial court lacked a basis upon which to punish the prosecutor by suppressing otherwise admissible evidence."). Moreover, application of the exclusionary rule in these circumstances further encroaches " 'upon the public interest in prosecuting those accused of crime and having them acquitted or

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rights were violated because of police misconduct. See *Wade, supra* at 220 (an FBI agent conducted a pretrial lineup [a critical stage of the proceedings] without notice to and in the absence of the defendant's attorney); *Massiah, supra* at 201 (federal agents, without notice to the defendant's attorney, arranged a meeting between the defendant and an accomplice turned informant and eavesdropped on the conversation). No such police misconduct occurred here.

convicted on the basis of all the evidence which exposes the truth.' " *Calandra, supra* at 351, quoting *Alderman v United States*, 394 US 165, 175; 89 S Ct 961; 22 L Ed 2d 176 (1969). Because the street sweepers' identities were not obtained as a result of any police misconduct, the Court of Appeals erred in applying the exclusionary rule to their testimony.

We agree with Judge TALBOT that *Tucker* supports this conclusion. In *Tucker,* the defendant was interrogated before the United States Supreme Court had decided *Miranda, supra*, but the *Miranda* decision nonetheless applied because it had been decided before the defendant's trial. During the interrogation, the police did not inform the defendant, as they were required to do after *Miranda,* that counsel would be appointed if the defendant could not afford one. *Tucker*, *supra* at 436. During questioning, the defendant named an alibi witness. *Id*. The witness, rather than confirming the defendant's alibi, discredited his story. *Id.* at 436-437.

The *Tucker* Court held that the exclusionary rule did not apply to the witness's testimony. *Id.* at 452. The Court explained that the police conduct was a departure from later-enacted "prophylactic standards" rather than actual misconduct, so the exclusion of the illegally obtained derivative evidence would not deter future misconduct. *Id.* at 446.[21] The Court also emphasized that the evidence at issue was not a statement by the defendant, but was rather the testimony of a witness

[21] We reject the dissent's contention that *Tucker* is inapplicable because the *Tucker* defendant's Sixth Amendment rights were not violated. The dissent ignores that the *Tucker* Court based its holding that the exclusionary rule did not apply to the derivative evidence on the narrow ground that the deterrence rationale of the exclusionary rule would not be fulfilled by excluding the evidence, because the police did not engage in misconduct. *Tucker, supra* at 447-448. We base our holding on the same ground.

whom the police discovered as a result of the defendant's statements, so that "the reliability of [the] testimony was subject to the normal testing process of an adversary trial." *Id.* at 449.

The instant case offers even stronger grounds than *Tucker* against excluding the testimony of the witnesses. Both Tucker and defendant gave statements without counsel present and identified witnesses in their statements. But while Tucker was advised of only some of his rights before waiving his right to counsel, defendant was advised of *all* of his *Miranda* rights before waiving his right to counsel. Tucker did not have counsel present when he waived his right to counsel, while defendant did. There was no police misconduct in either case. In both cases, the confession was suppressed, but in *Tucker*, the witness identified during the confessions was permitted to testify. The same outcome should pertain here. Here, as in *Tucker*, no deterrent purpose would be served by barring the witnesses' testimony. Moreover, the propriety of this outcome is reinforced here, as in *Tucker*, because witnesses were not subjected to custodial pressures, and would be subject to cross-examination.

Our holding is also supported by *People v Kusowski*, 403 Mich 653; 272 NW2d 503 (1978). In *Kusowski, supra* at 662, this Court, citing *Ceccolini* and *Tucker*, held that the exclusionary rule does not apply to third-party testimony discovered as a result of a *Miranda* violation. This Court explained that "the interest in preventing future police conduct which violates *Miranda* does not justify depriving the government of use of the evidence." *Kusowski, supra* at 662.

Further, even if defendant's confession had been obtained as a result of police misconduct, we hold that the exclusionary rule would not apply to the street

sweepers' testimony. Under the attenuation exception to the exclusionary rule, exclusion is improper when the connection between the illegality and the discovery of the challenged evidence has " 'become so attenuated as to dissipate the taint,' " *Wong Sun, supra* at 487, quoting *Nardone v United States*, 308 US 338, 341; 60 S Ct 266; 84 L Ed 307 (1939). Attenuation can occur when the causal connection is remote or when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson, supra* at 2164.

In *Ceccolini, supra* at 276-278, the United States Supreme Court held that the connection between police misconduct and the discovery of witnesses who will testify at trial is often too attenuated to justify application of the exclusionary rule:

> The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.
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> . . . Rules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor

> McCormick, "serious obstructions to the ascertainment of truth"; accordingly, "[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions." C. McCormick, Law of Evidence § 71 (1954). [*Ceccolini, supra* at 276-278.]

The *Ceccolini* Court concluded that "since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required." *Id.* at 278.

> [T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. [*Id.* at 280.]

Applying these principles, we conclude that the degree of attenuation was sufficient to dissipate the connection between any Sixth Amendment violation and the testimony. *Ceccolini, supra* at 279. The street sweepers testified of their own free will during the first trial, and any violation of defendant's right to counsel during the interrogation played no meaningful part in the street sweepers' willingness to testify. Moreover, we have no indication that their testimony was, or would be in the next trial, coerced.[22] We conclude, as did the *Ceccolini* Court, that, "[t]he cost of permanently silencing [the third-party testimony] is too great for an

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[22] The dissent argues that the street sweepers' failure to approach the police within one week of the crimes shows that they were not aware of the murders or did not connect the murders with defendant. But this fact actually supports our conclusion that the street sweepers testified of their own free will. In *Ceccolini, supra* at 279, the Court held that the substantial time that elapsed between the illegal search, the police contact with the witness, and the testimony at trial demonstrated that the witness testified of her own free will. We fail to see how the street sweepers' initial ignorance of the murders demonstrates their unwillingness to testify.

evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect." *Ceccolini, supra* at 280. Because of the remote causal connection between any Sixth Amendment violation and the discovery of the street sweepers' identities, there is no justification for suppression of the street sweepers' testimony.[23]

In sum, the Court of Appeals erred in holding that the exclusionary rule applies to the street sweepers' testimony. Law enforcement did not engage in any misconduct in obtaining defendant's confession or discovering the identity of the street sweepers, so the goal of the exclusionary rule would not be served by exclud-

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[23] The dissent argues,

> In contrast to the situation in *Ceccolini*, the identities of the street sweepers were not known to investigators, nor were they likely to be uncovered in the course of the police investigation. . . . [I]t appears that the relationship between discovering the identities of the street sweepers and defendant's illegal interrogation is not attenuated because the identities were revealed as a direct result of defendant's interrogation. [*Post* at 267.]

But *Ceccolini, supra* at 277, holds: " 'The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.' " (Citation omitted.) The attenuation exception to the exclusionary rule, unlike the inevitable discovery exception, does not focus primarily on the likelihood of discovering a live witness. Rather, *Ceccolini* holds that the attenuation exception applies when the connection between police misconduct and the discovery of witnesses who will testify at trial is too attenuated to justify application of the exclusionary rule. Attenuation can occur when the causal connection is remote or when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson, supra* at 2164. Here, the attenuation exception applies because the illegality played no meaningful role in the street sweepers' decision to testify, and the costs of excluding the street sweepers' testimony would outweigh the interests served by its suppression.

ing the street sweepers' testimony. In any case, the degree of attenuation between the street sweepers' testimony and any violation of defendant's Sixth Amendment rights is sufficient to dissipate any taint.[24]

V. CONCLUSION

We reverse the Court of Appeals holding that the exclusionary rule applies to the street sweepers' testimony. We further vacate the Court of Appeals endorsement of the federal district court's *Cronic* analysis. We remand for further proceedings consistent with this opinion.

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

CAVANAGH, J. (*dissenting*). I respectfully dissent from today's decision. In this case, we are called to implement a federal district court's order stemming from defendant's petition for a writ of habeas corpus. Rather than genuinely attempting to execute the federal court's order in our courts, the majority disputes the basis of the order itself and, as a result, frustrates its intended effect.

From the outset, the majority needlessly criticizes the federal district court's legal analysis. We are bound by the district court's holding that defendant's incarceration violated the United States Constitution be-

[24] The dissent argues that it is questionable whether the identities of the street sweepers would inevitably have been discovered during the course of the police investigation. We agree. But the inevitable discovery doctrine is an *exception* to application of the exclusionary rule. *Stevens, supra* at 636. Because the exclusionary rule does not apply to the street sweepers' testimony, the inevitable discovery exception is also inapplicable.

cause the interrogation of defendant violated his Sixth Amendment rights. We are equally bound to enforce the remedy the district court ordered—the exclusion of defendant's confession from any retrial. A judgment in a habeas corpus proceeding is res judicata with regard to the issues of law and fact necessary to reach the conclusion that the prisoner was illegally in custody. *Collins v Loisel*, 262 US 426, 430; 43 S Ct 618; 67 L Ed 1062 (1923). A state supreme court "may not . . . re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties." *City of Tacoma v Taxpayers of Tacoma,* 357 US 320, 334; 78 S Ct 1209; 2 L Ed 2d 1345 (1958).

Aside from the constraints of res judicata, the federal district court's enforcement power prevents us from deviating from its conditional grant of defendant's petition for a writ of habeas corpus. When conditionally granting a writ of habeas corpus, a federal district court retains jurisdiction to determine whether a party has complied with the terms of its order. *Gentry v Deuth*, 456 F3d 687, 692 (CA 6, 2006). A state's failure to timely cure the error identified by a federal district court in its order justifies the release of the prisoner. *Id*. Accordingly, unless defendant's trial comports with the federal district court's order, he should be released from custody.

Because we are bound to follow the federal district court's order, any statements adopting or disavowing the basis of the order are inconsequential; they cannot influence any decision before us.[1] The majority's dis-

[1] The majority suggests that these issues may be raised on appeal if defendant is convicted. But the federal district court order will always bind this particular case because the prosecution failed to appeal the ruling.

avowal and criticism of the district court's application of *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), are mere dicta. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985) (citation omitted). Similarly, the Court of Appeals endorsement of the district court's ruling was also dicta and could have simply been vacated as such.[2] But unlike the Court of Appeals dicta, the majority's dicta is an obstacle to our task—implementing the district court's order in state court proceedings. By questioning the validity of the district court's order excluding defendant's confession from the outset, the majority effectively eliminates the possibility of excluding evidence derived from the confession—the very matter we are called upon to decide.

I. THE EXCLUSIONARY RULE IN SIXTH AMENDMENT CASES

We are presented with the question whether, when a confession has been obtained in violation of a defendant's Sixth Amendment rights but without police misconduct, the exclusionary rule applies to live-witness testimony that is derived from the tainted confession. The exclusionary rule has long been employed as a remedy for violations of the Sixth Amend-

[2] The majority characterizes its discussion of *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *Cronic* as an explanation of its reasoning. But the majority could have explained why the Court of Appeals statements are dicta without passing judgment on the underlying analysis. "It is not our duty to pass on moot questions or abstract propositions." *Sullivan v State Bd of Dentistry*, 268 Mich 427, 429; 256 NW 471 (1934). I would exercise judicial restraint and reserve such in-depth analysis for a case that properly presents the issue for our review.

ment right to counsel. *United States v Wade*, 388 US 218, 240-241; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Massiah v United States*, 377 US 201, 207; 84 S Ct 1199; 12 L Ed 2d 246 (1964). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v Morrison*, 449 US 361, 364; 101 S Ct 665; 66 L Ed 2d 564 (1981).

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. [*Id.* at 365.]

The nature of a Sixth Amendment violation supports the use of the exclusionary rule even when the violation occurs because of defense counsel's ineffectiveness or absence rather than government misconduct. "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, *supra* at 658.

The rule distilled from federal authority is that the remedy for Sixth Amendment violations should be tailored to the circumstances to assure the defendant a fair trial. *Morrison*, *supra* at 364. In fashioning an appropriate remedy, the federal approach has been "to identify and then neutralize the taint by tailoring relief

appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. In this case, the federal district court ruled that "the only appropriate remedy is to not allow use of [defendant's] tainted statements, should the State decide to initiate a new trial in this matter." *Frazier v Berghuis*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 6, 2003 (Docket No. 02-CV-71741DT), slip op at 7. The district court recognized that the only proper remedy that would afford defendant a fair trial, while not entirely foreclosing the state's ability to prosecute defendant, was to apply the exclusionary rule to defendant's statements.

The majority contends that an application of the exclusionary rule is inappropriate in the absence of governmental misconduct. *Ante* at 250. But as I noted in *People v Goldston*, 470 Mich 523, 562; 682 NW2d 479 (2004) (CAVANAGH, J., dissenting), deterrence of governmental misconduct is not the *sole* purpose of the exclusionary rule. The exclusionary rule also ensures the integrity of judicial proceedings, *Terry v Ohio*, 392 US 1, 12-13; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and closes the courthouse doors "to any use of evidence unconstitutionally obtained . . . ." *Wong Sun v United States*, 371 US 471, 486; 83 S Ct 407; 9 L Ed 2d 441 (1963). The district court never indicated that its ruling was calculated to remedy improper conduct by law enforcement officials; rather, it was a response tailored to the fact of the Sixth Amendment violation itself. It would impair the integrity of our judicial system if defendant's statements could be introduced against him, despite a binding federal ruling that they had been obtained in violation of his Sixth Amendment rights.

The exclusionary rule was applied here to afford defendant a fair trial, not to deter governmental misconduct, but the majority still reasons that the exclusionary rule should not apply to the evidence derived from defendant's confession because no governmental misconduct occurred.[3] *Ante* at 251. But this fails to address the pertinent issue in applying the district court's order—whether excluding the derivative evidence will "neutralize the taint" caused by the interrogation and provide defendant "the effective assistance of counsel and a fair trial." *Morrison*, *supra* at 365. Further, it follows that the majority holds that the derivative evidence should not be excluded, when the majority flatly refuses to accept the validity of the district court's order. If the majority does not agree, and cannot accept for the purposes of this case, that defendant's interrogation constituted a Sixth Amendment violation that can be remedied by applying the exclusionary rule, it is not surprising that the majority finds no basis for excluding the evidence derived from that interrogation.[4] The exclusion of derivative evidence is

[3] I do not dispute that there was no evidence of police misconduct in this case. But as I have stated here and on other occasions, I disagree that the exclusionary rule is an appropriate remedy only when government misconduct has occurred.

[4] While the underlying Sixth Amendment violation is not a question that is properly before us, because of the majority's extensive review of the matter, I find it appropriate to briefly rebut its account. Ample evidence supports the federal district court's ruling. The defect in defense counsel's performance was not merely advising his client to speak to the police despite being told that no plea agreements were being offered; counsel's advice also prompted defendant to waive his right to have counsel present at the interrogation. Notably, at the hearing conducted pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), defense counsel was asked why he was not present during any of defendant's interrogations. He responded, "I don't know that they, one, they would have allowed me to be in there." The validity of defendant's waiver of counsel is seriously questionable when he was receiving advice

premised entirely on the existence of illegally obtained *primary evidence*. By rejecting the premise that the primary evidence should be excluded, the majority forecloses any possibility of holding that the derivative evidence should also be excluded.

II. DERIVATIVE EVIDENCE

Given that defendant's statement must be excluded from evidence, this Court is presented with the question whether evidence derived from defendant's interrogations, namely, the testimony of two street sweepers whom defendant identified during his conversations with the police, should also be excluded. In deciding whether derivative evidence is admissible, the relevant inquiry is " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun*, *supra* at 488, quoting Maguire, Evidence of Guilt, p 221 (1959). Derivative evidence may be admissible if the connection between the illegality and the evidence was " 'so attenuated as to dissipate the taint.' " *Wong Sun, supra* at 491, quoting *Nardone v United States*, 308 US 338, 341; 60 S Ct 266; 84 L Ed 307 (1939). For example, *Wong Sun* presented a situation where the defendant was illegally arrested, but lawfully arraigned and released on his own recognizance, and voluntarily returned to the authorities several days later to make a statement, and the statement was deemed sufficiently attenuated from the illegal arrest that it was deemed admissible. *Id.* In this case, defendant disclosed the identities of the street sweepers, Anthony Wright and

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from an attorney who believed that his presence at his client's postindictment interrogation was subject to approval by the police.

Wilbert Mack, during a postarraignment interrogation outside the presence of counsel. Defendant told officers that Wright and Mack gave him a ride home after the robbery. The prosecution located these witnesses, and they testified against defendant at his trial, stating that he had asked them for a ride home and sought change for a $50 bill. Defendant had also admitted to officers that codefendant Idell Cleveland gave him two $50 bills following the robbery.

Under the attenuation test of *Wong Sun*, the testimony of Wright and Mack should be excluded from evidence. Their identities were discovered as a direct result of the tainted interrogation. There was no intervening act of free will that dissipated the taint of the Sixth Amendment violation. The majority argues that *Michigan v Tucker*, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974), supports the opposite conclusion, but that case is inapplicable. In *Tucker*, the Court held that derivative witnesses could testify although the defendant's own statement had been suppressed because it had been obtained after deficient *Miranda*[5] warnings. *Id*. at 436-437, 450. Notably, from the outset, the *Tucker* opinion distinguished Sixth Amendment violations from the case before it:

> [Defendant] did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. Nor was the right to counsel, as such, considered to be persuasive by either federal court below. We do not have a situation such as that presented in *Escobedo v. Illinois*, 378 U.S. 478 [84 S Ct 1758; 12 L Ed 2d 977 (1964)], where the policemen interrogating the suspect had refused his repeated requests to see his lawyer who was then present at the police station. [*Tucker*, *supra* at 438.]

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[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Similarly, *Tucker* also distinguished *Wong Sun*:

> But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. [*Id.* at 445-446.]

In sum, *Tucker* made very clear that its holding was based on the condition that there was no constitutional violation, but merely a violation of what it perceived as a procedural safeguard designed to protect the constitutional right against self-incrimination. Because the present case involves a constitutional violation, defendant's case is more analogous to *Wong Sun* than to *Tucker*.

But analysis under the rule of *Wong Sun* does not resolve the inquiry because in this case the derivative evidence is live-witness testimony, which requires special consideration. "[T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *United States v Ceccolini*, 435 US 268, 280; 98 S Ct 1054; 55 L Ed 2d 268 (1978). Accordingly, in making its suppression decision, a court should take into account the unique factors presented by a live witness. For example, "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she [would have been] discovered by legal means . . . ." *Id*. at 276. Also, "the cost of excluding live-witness testimony" is often greater than the cost of excluding inanimate evidence, so a "more direct link between the illegality and that kind of testimony is required." *Id*. at 278.

Of course, *Ceccolini* does not stand for the proposition that live-witness testimony should never be excluded. It simply requires the court, when deciding whether discovery of the evidence is attenuated from the illegality, to scrutinize different factors than those in cases involving the exclusion of physical evidence. The court's attenuation analysis should be "appropriately concerned with the differences between live-witness testimony and inanimate evidence . . . ." *Id.* at 278-279.

The first factor in live-witness cases considers the free will of a live witness. In part, it is related to the inevitable discovery doctrine, an exception to the exclusionary rule that allows the admission of illegally obtained evidence if the evidence would inevitably have been obtained through legal means.[6] *Nix v Williams*,

[6] While *Ceccolini* does not hold that the discovery of a live witness may *only* be attenuated if that witness would have been inevitably discovered, the likelihood of discovering a live witness remains a significant factor. *Ceccolini* itself evokes the inevitable discovery doctrine when it notes that "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be *discovered by legal means*," *Ceccolini*, *supra* at 276 (emphasis added), and that "a determination that the *discovery* of certain evidence is sufficiently . . . independent of the constitutional violation to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence," *id.* at 278 (emphasis added). In applying the live-witness factors to Ceccolini's case, the Court observed that "both the identity of [the witness] and her relationship with the respondent were well known to those investigating the case," *id.* at 279, suggesting that the witness's identity would have been discovered regardless of the illegality. Further, Justice Marshall recognized in his dissent that the *Ceccolini* factors bore resemblance to the inevitable discovery doctrine when he stated:

> [T]he Court's approach involves a form of judicial "double counting." The Court would apparently first determine whether the evidence stemmed from an independent source or would inevitably have been discovered; if neither of these rules was found to apply, as here, the Court would still somehow take into account

467 US 431, 443; 104 S Ct 2501; 81 L Ed 2d 377 (1984). The nature of live witnesses is that, unlike inanimate objects, they can approach the police voluntarily. But between the time of the murders and defendant's confessions, approximately one week, Wright and Mack did not approach the police with information about defendant. This indicates that they did not connect defendant with the crime or were not aware of the murders. Also relevant to the degree of free will exercised by a witness is whether the illegality played any meaningful part in the witness's willingness to testify. There is no indication that defendant's illegal interrogation influenced Wright and Mack's decision to testify. In sum, the application of the first *Ceccolini* factor gives mixed results that require balancing by the trial court.

The remaining live-witness factors balance the costs of excluding a live witness with the illegality. Live-witness testimony requires a closer connection to the illegality because "such exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." *Ceccolini, supra* at 277. But this factor is most relevant when the discovery of the live witness is incidental to the illegality. For example, in *Ceccolini*, a police officer discovered in an envelope evidence of a gambling operation while casually visiting with a store clerk. When the officer asked the clerk whom the envelope belonged to, the clerk identified Ceccolini, the defendant. At Ceccolini's trial, both the contents of the envelope and the clerk's testimony were suppressed on the basis that an illegal

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the fact that, as a general proposition (but not in the particular case), witnesses sometimes do come forward of their own volition. [*Id.* at 287-288 (Marshall, J., dissenting).]

search had occurred. The United States Supreme Court reversed, stating that "[w]hile the particular knowledge to which [the clerk] testified at trial can be logically traced back to [the officer's] discovery of the policy slips, both the identity of [the clerk] and her relationship with the [defendant] were well known to those investigating the case." *Id.* at 279.

In contrast to the situation in *Ceccolini*, the identities of the street sweepers were not known to investigators, nor were they likely to be uncovered in the course of the police investigation. Wright and Mack were strangers to defendant, so the police would have had no reason to interview them as his associates. While it is possible that the prosecution may be able to demonstrate to the contrary, it appears that the relationship between discovering the identities of the street sweepers and defendant's illegal interrogation is not attenuated because the identities were revealed as a direct result of defendant's interrogation.

The Court of Appeals was correct to remand this case to the trial court to consider the *Ceccolini* factors and determine whether the testimony of Wright and Mack would otherwise be admissible under the inevitable discovery doctrine. Because of the trial court's initial ruling, the question whether the identities of the street sweepers would have been inevitably discovered was never addressed. Consequently, the prosecution should be given the opportunity to show that Wright and Mack would have been discovered regardless of defendant's interrogation without counsel. Accordingly, I would affirm the decision of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

BUKOWSKI v CITY OF DETROIT

Docket No. 129409. Decided June 6, 2007.

Diane Bukowski and Michigan Citizen brought an action in the Wayne Circuit Court against the city of Detroit, seeking disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., of a report relating to an investigation of a perceived problem of police misconduct. The defendant asserted that the report was exempt from FOIA as either a frank communication under MCL 15.243(1)(m) or as a law enforcement personnel record under MCL 15.243(s)(*ix*). Both parties moved for summary disposition. The trial court, Wendy M. Baxter, J., ordered the deliberative portions of the report redacted, ordered disclosure of the factual material to the plaintiffs, and denied the plaintiffs' request for an in camera inspection of the report. Both parties appealed. The Court of Appeals, WHITBECK, C.J., and ZAHRA and OWENS, JJ., reversed the trial court and remanded for further proceedings, ruling that the frank communications exemption was inapplicable because there was no evidence that the report was currently preliminary to any agency determination of policy or action. Unpublished opinion per curiam, issued May 26, 2005 (Docket No. 256893). The Supreme Court ordered and heard oral argument on whether to grant the defendant's application for leave to appeal or take other peremptory action. 477 Mich 960 (2006).

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

The Court of Appeals erred in holding that the frank communications exemption does not protect from disclosure communications and notes that are no longer preliminary to a final agency determination of policy or action at the time of the FOIA request. The phrase "preliminary to a final agency determination of policy or action" forms part of the statutory definition of a "frank communication"; thus, it is only pertinent whether those communications and notes were preliminary to a final agency determination at the time they were created, not whether they were preliminary at the time the FOIA request was made.

Justice CAVANAGH, concurring in the result only, agreed with the result reached by the majority and much of its reasoning, but would not rely solely on the textualist approach to statutory interpretation to reach the result. The maxim particularly applicable in this case provides that if the meaning of a statute is unclear, a court must consider the object of the statute and apply a reasonable construction that best accomplishes the Legislature's purpose. While the Freedom of Information Act is intended to be a pro-disclosure statute, the frank communications exemption recognizes a valid public interest in encouraging frank communications. Allowing disclosure of all preliminary communications once a final determination has been made would undermine the interest in encouraging frank communications. The exemption is not without bounds and a balancing test ensures that the exemption does not engulf the general rule favoring disclosure.

Reversed and remanded to the trial court.

Justice WEAVER, concurring in Justice KELLY'S dissent, noted that the majority's decision further reduces the public's ability to use the Freedom of Information Act to learn how the people's business is conducted.

Justice KELLY, dissenting, stated that the language of the exemption, which is written in the present tense, and the legislative history of FOIA indicate that the Legislature intended the frank communications exemption to apply only when communications are preliminary to final action at the time a FOIA request is made.

RECORDS — FREEDOM OF INFORMATION ACT — EXEMPTIONS — FRANK COMMUNICATIONS.

Under the frank communications exemption of the Freedom of Information Act (FOIA), the requirement that communications or notes "are preliminary to a final agency determination of policy or action" has nothing to do with the timing of the FOIA request; rather, it provides one part of the definition of a frank communication, which is determined at the time the communications or notes are created (MCL 15.243[1][m]).

Jerome D. Goldberg, PLLC (by *Jerome D. Goldberg*), for the plaintiffs.

John E. Johnson, Jr., Corporation Counsel, and *Jeffrey S. Jones*, Assistant Corporation Counsel, for the defendant.

Amicus Curiae:

Butzel Long (by *Dawn P. Hertz)* for the Michigan Press Association.

MEMORANDUM OPINION. The single issue we consider in this case is whether the "frank communication" exemption, MCL 15.243(1)(m), of the Freedom of Information Act (FOIA), exempts communications and notes that are no longer preliminary to a final agency determination of policy or action, even if those communications and notes were preliminary at the time that they were made. The Court of Appeals held that the frank communication exemption does not protect from disclosure communications and notes that are no longer preliminary to a final agency determination of policy or action. We reject that holding. The phrase "preliminary to a final agency determination of policy or action" forms part of the statutory definition of a "frank communication." The statutory definition, however, contains no reference to the timing of the FOIA request. Thus, it is only pertinent whether those communications and notes were preliminary to a final agency determination at the time they were created, not whether they were preliminary at the time the FOIA request was made. Accordingly, we reverse the Court of Appeals judgment and remand this case to the trial court for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL HISTORY

In May 2000, Detroit Police Chief Benny Napoleon directed Deputy Chief Walter Shoulders to head a three-person Executive Board of Review to investigate a perceived problem of police officer misconduct, particu-

larly by Officer Eugene Brown,[1] and the department's subsequent mishandling of investigations of that misconduct. In October 2000, the board completed and compiled its findings and recommendations in a written document known as the Shoulders Report. The Shoulders Report included information about the shootings, facts about Officer Brown's background, training, and disciplinary history, and interviews from eyewitnesses, coworkers, and other persons.

In June 2002, plaintiff Diane Bukowski, a reporter with coplaintiff Michigan Citizen, sought a copy of the Shoulders Report through a FOIA request. Defendant denied the request, invoking exemptions under MCL 15.243(1)(b)(*i*) and (*ii*),[2] and the frank communication exemption, MCL 15.243(1)(m). Plaintiffs subsequently filed suit against defendant, seeking the report pursuant to the FOIA. Both sides moved for summary disposition. Defendant conceded in the trial court that it was no longer relying on the exemption in MCL 15.243(1)(b) because the Wayne County Prosecutor had declined to file charges against Officer Brown. Defendant, however,

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[1] Officer Brown had been involved in the fatal shootings of three civilians and the wounding of a fourth in four separate incidents from 1995 to 1999.

[2] MCL 15.243(1)(b)(*i*) and (*ii*) state, in pertinent part:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (*i*) Interfere with law enforcement proceedings.
>
> (*ii*) Deprive a person of the right to a fair trial or impartial administrative adjudication.

continued to assert the frank communication exemption and also claimed that the report was exempt under the law enforcement personnel records exemption, MCL 15.243(s)(ix).[3]

The trial court granted in part and denied in part the parties' motions for summary disposition. It ruled that "the government has met its burden of proving that much of the Shoulders report is exempt and those portions of the report that are not specifically exempted and are pure and factual are discoverable." It ordered the redaction of the deliberative portions of the Shoulders Report and ordered disclosure of the factual material to plaintiffs. The trial court denied plaintiffs' request for an in camera inspection of the report.

Both sides appealed the trial court's decision. The Court of Appeals, in an unpublished opinion per curiam, reversed the trial court and remanded for further proceedings.[4] With respect to the frank communication exemption, the panel opined:

> Plaintiff argues that, although the Shoulders Report may have been prepared as "preliminary to a final agency determination of policy or action," the frank communications exemption does not apply because there is no evidence that the Shoulders Report is *currently* preliminary to any agency determination of policy or action. We direct the trial court to address this issue on remand. On remand, the court should take into account that MCL 15.243(1)(m) provides that the frank communications exemption applies only if the communications "*are* preliminary to a final agency determination of policy or action" (emphasis added), not "*were* preliminary to a final agency determina-

[3] Defendant also maintained that the Employee Right to Know Act, MCL 423.509(2), protected from disclosure certain information taken from Brown's personnel file.

[4] *Bukowski v Detroit,* unpublished opinion per curiam of the Court of Appeals, issued May 26, 2005 (Docket No. 256893).

> tion of policy or action." Thus, if the Shoulders Report contains communications that are no longer preliminary to an agency determination of policy or action, the frank communications exemption does not apply to these communications. [Slip op at 5-6.]

The panel remanded so the trial court could apply the frank communication exemption consistent with its ruling and could separate the purely factual material in the process.[5]

Defendant filed an application for leave to appeal in this Court. We ordered oral argument on the application, specifically requesting the parties to 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. [477 Mich 960 (2006).]

II. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo.[6] The goal of statutory interpretation is to give effect to the Legislature's intent as determined from the language of the statute.[7] In order to accom-

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[5] The Court of Appeals also held that the trial court misapplied the burdens in the balancing test found in the personnel records exemption. It remanded the case to the trial court for proper application of the exemption.

Finally, the Court rejected plaintiffs' argument on cross-appeal that the trial court erred in rejecting their requests for an in camera inspection of the Shoulders Report.

[6] *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006).

[7] *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005).

plish this goal, this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage.[8] We give the words of a statute their plain, ordinary meaning unless the Legislature employs a term of art.[9]

III. ANALYSIS

The frank communication exemption, MCL 15.243(1)(m), states in pertinent part:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
>
> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and *are preliminary to a final agency determination of policy or action*. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure . . . . [Emphasis added.]

In *Herald Co,* this Court examined the frank communication exemption. Drawing from the text of this provision and other portions of the FOIA, we set forth a framework for courts to apply the frank communication exemption. First, the public body seeking to withhold the document bears the burden of establishing the exemption. Second, the public record sought to be withheld from disclosure must meet the three-part statutory definition of a "frank communication": (1) it is a communication or note of an advisory nature made

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[8] *Herald Co*, *supra,* 475 Mich at 470.

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

within a public body or between public bodies, (2) it covers other than purely factual material, and (3) it is preliminary to a final agency determination of policy or action. Third, if the public record qualifies as a "frank communication," the trial court must engage in the balancing test and determine if the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. Finally, if the trial court determines that the frank communication should not be disclosed, the FOIA still requires the trial court to redact the exempt material and disclose the purely factual material within the document.[10]

The Court of Appeals instructed the trial court that

> the frank communications exemption applies only if the communications "*are* preliminary to a final agency determination of policy or action" (emphasis added), not "*were* preliminary to a final agency determination of policy or action." Thus, if the Shoulders Report contains communications that are no longer preliminary to an agency determination of policy or action, the frank communications exemption does not apply to these communications. [Slip op at 6.]

The Court of Appeals misconstrued the frank communication exemption because the requirement that communications or notes "are preliminary to a final agency determination of policy or action" has nothing to do with the timing of the FOIA request. Rather, this phrase speaks to the *purpose* of the communications or notes *at the time of their creation*. The first sentence of MCL 15.243(1)(m) provides the *definition* of a "frank communication." It qualifies what types of communications and notes are eligible for exemption under this provision. The phrase "are preliminary to a final agency determination of policy or action" modifies "communi-

[10] *Herald Co, supra,* 475 Mich at 475.

cations and notes."[11] The inclusion of this limiting phrase signifies the Legislature's intent to exclude from the ambit of the frank communication exemption those communications and notes that were not preliminary to a final agency determination of policy or action when they were created. Therefore, plaintiffs' and Justice KELLY's reliance on the Legislature's use of the present tense "are" in that phrase is misplaced. Our reading of the statute gives effect to the present tense of the verb because the communications or notes "*are* preliminary to a final agency determination" at the time they are created.[12]

Moreover, we find additional textual support in other FOIA exemptions where the Legislature drafted explicit time limits when an exemption ceases to protect a public record. For instance, MCL 15.243(1)(i) exempts "[a] bid or proposal by a person to enter into a contract or agreement, *until* the time for the public opening of bids of proposals, or . . . *until* the deadline for submission of bids or proposals has expired." (Emphasis added.) Similarly, MCL 15.243(1)(j) exempts "[a]ppraisals of real property to be acquired by the public body *until*" either "an agreement is entered into" or "three years have elapsed since the making of the appraisal,

[11] The communications or notes, in addition to being "preliminary to a final agency determination of policy or action" must also be (1) of an advisory nature made within a public body or between public bodies that (2) covers other than purely factual material.

[12] Justice KELLY argues that there was no longer a need for frank communications at the time of the FOIA request. However, before that determination is made by balancing the competing interests, a court must first consider whether "frank communications" are at issue. One part of the definition of a frank communication is that the communications and notes "are preliminary to a final agency determination" at the time they are created. Unless the communications and notes satisfy this part of the definition, the public body cannot successfully invoke this exemption.

unless litigation relative to the acquisition has not yet terminated." MCL 15.243(1)(p) exempts particular types of testing data developed by a public body except that the exemption ceases to apply "after 1 year has elapsed from the time the public body completes the testing." The absence of similar explicit time limits in the frank communication exemption supplies further evidence that the Legislature intended this exemption to apply to communications and notes after the final agency determination of policy or action has been made.[13]

For these reasons, we reject the Court of Appeals reading of the frank communication exemption. We reverse the judgment of the Court of Appeals on this

[13] Both sides present arguments unrelated to the statutory language at issue. Defendant argues that it would be poor public policy if the frank communication exemption ceased to apply to a public record once the agency makes its final determination. Plaintiffs argue that the legislative history behind the frank communication exemption supports their interpretation of the provision, and they draw parallels between this statute and similar provisions in the federal FOIA. Justice KELLY also relies heavily on legislative history, the federal FOIA, the "general purpose" of the FOIA to disclose public records, and the notion that FOIA exemptions are to be narrowly construed. As the plain language in the statute is sufficient to discern the Legislature's intent and to resolve this case, we decline to consider these nontextual arguments.

Justice KELLY makes the astonishing argument that adherence to the statutory language makes a court "deliberately uninformed" and *more* prone to impose its policy preferences. Whether or not statutory construction is difficult, we are certain that, far and away, the most "reliable source" of legislative intent is the plain language of a statute. Judicial power is most menacing when a court feels free to roam in search of interpretive cues that are unmoored to the statutory language. Therefore, we are not inclined to inform ourselves of extratextual sources where the language of the statute is plain. When grammar is the constructive tool of choice, all can readily ascertain what a statute commands. But when extratextual tools are brought to bear on otherwise unambiguous language, only judges can say what the statute "means"—and then only after the fact. We prefer interpretive methods available to all.

issue, and we remand this case to the trial court for further proceedings consistent with this opinion.

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

CAVANAGH, J. (*concurring in the result only*). The majority holds that the plain language of the "frank communications" exemption, MCL 15.243(l)(m), of the Freedom of Information Act (FOIA) exempts communications and notes that were preliminary to an agency determination of policy or action at the time they were created. Although I agree with the result reached by the majority and much of its reasoning, I write separately because I would not rely solely on a textualist approach to statutory interpretation in this case.

Certainly, statutory interpretation must begin with an examination of the language of the statute. But it is often helpful to use other methods of statutory interpretation, such as legislative history, when a statute is susceptible to different interpretations. Particularly applicable in this case is the maxim that "[i]f the meaning of a statute is unclear, a court must consider the object of the statute and apply a reasonable construction that best accomplishes the Legislature's purpose." *Rowell v Security Steel Processing Co*, 445 Mich 347, 354; 518 NW2d 409 (1994). While FOIA is intended to be a pro-disclosure statute, the frank communications exemption recognizes a valid public interest in encouraging frank communications within public bodies during deliberations. Allowing disclosure of all preliminary communications once a final determination has been made would undermine the valid interest in encouraging frank communications. But this exemption is not without bounds: the balancing test associated with the frank communications exemption is vital to ensuring

that the exemption does not engulf the general rule, which favors disclosure. Accordingly, I concur in the result reached by the majority.

WEAVER, J. (*dissenting*). I concur with Justice KELLY's well-reasoned dissent and note that the majority's decision further reduces the public's ability to use the Freedom Of Information Act (FOIA) to learn how the people's business is conducted.

KELLY, J. (*dissenting*). The issue presented is whether the "frank communications" exemption[1] of the Michigan Freedom of Information Act[2] (FOIA) applies to communications and notes that were preliminary to final agency action when made but were no longer preliminary when requested. A majority of this Court has decided that the exemption applies as long as the communications were preliminary to final agency action at the time of their creation. Because I find this result to be inconsistent with the statutory language, the legislative history, and the purpose of the exemption, I must respectfully dissent.

FACTS

Plaintiffs Diane Bukowski, a news reporter, and the *Michigan Citizen*, a newspaper, sought release of the Shoulders Report from defendant City of Detroit. An Executive Board of Review (EBR) of the Detroit Police Department wrote the report.[3] Its preparation was occasioned by the involvement of Detroit police officer

[1] MCL 15.243(1)(m).

[2] MCL 15.231 *et seq*.

[3] The report gets its name from Deputy Chief Walter Shoulders. Deputy Chief Shoulders was appointed as chairman of the EBR.

Eugene Brown in numerous shooting incidents that left three people dead and six injured. The Detroit Police Department undertook internal investigations into Officer Brown's conduct. After public concern was expressed at the response of the department to Officer Brown's actions, the chief of police directed the EBR to review the internal investigations. The EBR's mission was to review Brown's actions and the department's response to those actions.

On June 6, 2002, plaintiffs filed a FOIA request for a complete copy of the Shoulders Report. Defendant denied the request, stating:

> Your request is denied pursuant to MCL 15.243(1)(b)(i) and (ii) for the reason that the report you requested is an investigating record compiled for law enforcement purpose[s] and disclosing the report would interfere with law enforcement proceedings and deprive Officer Brown and others [of] the right to a fair trial or impartial administrative adjudication. Moreover, contained in the Shoulder[s] report are communications and notes with[in] a public body of an advisory nature to the extent they cover other than purely factual material and are preliminary to a final agency determination of policy or action. Accordingly, your request is also denied pursuant to MCL 15.243(1)(m).

On December 6, 2002, plaintiffs filed a complaint seeking release of the report. Both sides filed motions for summary disposition. Defendant continued to assert that the report was exempted by the frank communications exemption and also claimed that it was exempt under the "law enforcement personnel records" exemption, MCL 15.243(s)(*ix*).[4] After oral argument on the

[4] Defendant withdrew its claim of exemption under MCL 15.243(1)(b) because "at the present time, we do not have any knowledge that there is any law enforcement proceedings that may be interfered with or that would jeopardize any rights to a fair trial or impartial adjudication of the matter if the Shoulders report were to be released."

motions, the trial court indicated that it would partially grant both motions. The court denied plaintiffs access to the deliberative portions of the report, determining the material to be exempt. However, it rejected defendant's contention that the material was exempt under the personnel records exemption. Both sides appealed from the trial court's decision.

In a unanimous unpublished opinion, the Court of Appeals reversed and remanded. Unpublished opinion per curiam, issued May 26, 2005 (Docket No. 256893). It decided that the trial court had correctly articulated the personnel records exemption but incorrectly applied the exemption to determine whether the public interest in disclosure outweighed the interest in nondisclosure. With respect to the frank communications exemption, the Court decided that the trial court had incorrectly applied the balancing test. It also held that the frank communications exemption "applies only if the communications '*are* preliminary to a final agency determination of policy or action' (emphasis added), not '*were* preliminary to a final agency determination of policy or action.' " *Id.,* slip op at 6. The Court of Appeals directed the trial court to consider this issue on remand.

Defendant filed a motion for reconsideration challenging the Court of Appeals decision on the frank communications exemption. The Court of Appeals denied the motion, and defendant applied for leave to appeal in this Court. This Court heard oral argument on the application, having directed the parties to "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 determina-

tion of policy or action, even if the communications were preliminary at the time that they were made." 477 Mich 960 (2006).

STANDARD OF REVIEW

This Court reviews issues of statutory interpretation de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). When interpreting a statute, the task is to ascertain and give effect to "the purpose and intent of the Legislature by examining the provisions in question. The statutory words must be considered in light of the general purpose sought to be accomplished." *People v Smith*, 423 Mich 427, 441; 378 NW2d 384 (1985).

ANALYSIS

The frank communications exemption to FOIA, MCL 15.243(1)(m), states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
>
> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

In *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*,[5] this Court held that documents are frank communications if (1) they are communications and

[5] 475 Mich 463; 719 NW2d 19 (2006).

notes within a public body or between public bodies of an advisory nature that (2) cover other than purely factual materials and (3) are preliminary to a final agency determination of policy or action. *Id.* at 475. If the documents fail any one of these threshold qualifications, then the frank communications exemption does not apply. This case concerns the third element. The issue is whether the requirement that the communications be preliminary to a final agency determination is measured from when the documents are created or when disclosure is requested.

The frank communications exemption exempts from disclosure "[c]ommunications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and *are preliminary to a final agency determination of policy or action*." This exemption is written in the present tense.[6] By using the present tense, the Legislature has indicated that, at the moment the exemption is invoked, the communications and notes must be preliminary to a final agency determination or action.[7]

Accordingly, the Court of Appeals correctly held that the frank communications exemption applies only if the communications "are preliminary" to a final agency determination of policy or action at the time the request is made. If the Legislature wanted the determinative time to be when the communications were created, it would have used the word "were."[8] It chose not to do so,

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[6] The word "are" is defined as the present indicative plural and second person singular of "be." *Random House Webster's College Dictionary* (2001).

[7] "Present" is defined as "being, existing, or occurring at this time or now; current." *Random House Webster's College Dictionary* (2001).

[8] By finding that the frank communications exemption applies to communications that "were" preliminary to final agency action, the majority ignores MCL 8.3a. This section governs statutory construction

and the statutory language should be understood accordingly. It is not the function of the courts to rewrite statutes. *Hesse v Ashland Oil, Inc*, 466 Mich 21, 30-31; 642 NW2d 330 (2002).

MCL 15.243(1) is the provision that gives public bodies the authority to exempt from disclosure material that falls within the terms of one of the specific exemptions. It, too, supports a finding that the frank communications exemption applies only if the communications are preliminary to a final agency action at the time of the request. MCL 15.243(1) provides that "[a] public body may exempt from disclosure as a public record under this act any of the following . . . ." This provision is also written to be applied in the present. This is because the public body cannot decide whether the requested material falls within one of the exemptions until a member of the public makes a request for disclosure.

For this reason, it is illogical to look back in time, as the majority interpretation requires, in deciding whether the requested material is exempt. The more natural interpretation is to look at the material at the time of the request in order to decide whether an exemption applies.[9] Only if the terms of the exemption specifically use language indicating that another point

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and provides that "words and phrases shall be construed and understood according to the common and approved usage of the language." The word "are" does not commonly have the same definition as the word "were."

[9] Another example of a provision in which the measuring time is determinative is MCL 15.243(g). It provides an exemption for "[i]nformation or records subject to the attorney-client privilege." Information that at one time was subject to the attorney-client privilege can become unprotected. Thus, the measuring time is determinative. If the determinative time is when the communication was created, material that was once exempt will always be exempt. If the determinative time is when the request is made, material that was once exempt could be subject to disclosure.

in time is determinative should a point in time other than the present be considered. For example, the majority claims that MCL 15.243(1)(i)[10] and (j)[11] support their interpretation by using the word "until." Actually, these provisions undermine their position, because they specifically provide that some time in the past, or the future, is determinative. Unlike them, the frank communications exemption speaks in the present tense.

Holding that the frank communications exemption applies only if the communications are preliminary to a final agency determination of policy or action at the time of the request is (1) consistent with general purpose of FOIA and (2) consistent with the rule that FOIA exemptions are to be narrowly construed. See

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[10] MCL 15.243(1)(i) provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
>
> (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.

[11] MCL 15.243(1)(j) provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
>
> (j) Appraisals of real property to be acquired by the public body until either of the following occurs:
>
> (*i*) An agreement is entered into.
>
> (*ii*) Three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.

Herald Co v Bay City, 463 Mich 111, 119; 614 NW2d 873 (2000). The purpose clause of FOIA, MCL 15.231(2), provides:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Reading the frank communications exemption to apply only if the communications are preliminary to final action at the time of the request is consistent with this purpose. It ensures that citizens will get full and complete information regarding the affairs of government and the official acts of those who represent them. The majority's reading of the statute is inconsistent with this purpose and allows the exemption to swallow the rule.

It is also helpful to review the legislative history surrounding the particular exemption at issue. It supports the conclusion that the Legislature meant to extend the exemption only to those communications that are preliminary to a government decision at the time of the FOIA request.[12] The frank communications

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[12] This case presents a perfect example of what is wrong with a method of statutory interpretation that fails to consider all relevant sources in ascertaining legislative intent. As I have demonstrated, the majority's interpretation is not the most natural reading of the statutory language. Rather than test its interpretation to ensure that it reaches the correct result, the majority ignores numerous other relevant sources that illustrate that its reading was not intended by the Legislature. "[T]he 'minimalist' judge 'who holds that the purpose of the statute may be learned only from its language' retains greater discretion than the judge who 'will seek guidance from every reliable source.' A method of

exemption is a revision of the "deliberative process" privilege that existed in Michigan law before the adoption of FOIA. That privilege, contained at MCL 24.222, was part of the Administrative Procedures Act[13] and exempted from disclosure "[i]nteragency or intra-agency letters, memoranda, or statements which would not be available by law to a party other than an agency in litigation with the agency and which, if disclosed, would impede the agency in the discharge of its functions."

FOIA revised the deliberative process privilege to permit more access by the public to the government's workings. In fact, the original proposal for FOIA, House Bill 6085, specifically included preliminary inter- and intra-agency communications in the category of writings made available to the public under the act.[14] There was considerable debate over this section, however, with several agencies objecting to the bill's failure to grant a deliberative process exemption. House Legisla-

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statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process." *BedRoc Ltd, LLC v United States*, 541 US 176, 192; 124 S Ct 1587; 158 L Ed 2d 338 (2004) (Stevens, J., dissenting), quoting Barak, *Judicial Discretion* trans. Yadin Kaufmann (New Haven: Yale University Press, 1989) p 62.

The majority alleges that it is "astonishing" for me to claim that, by ignoring all sources aside from the statutory language, it could reach an uninformed decision. *Ante* at 277 n 13. The majority is too easily astonished. A decision that considers more pertinent information is generally more informed than one that considers less. Of course, I agree with the majority that the statutory language is a vital indicator of legislative intent. But what is "astonishing" is that anyone, no matter what the task, would ignore other helpful sources when trying to reach the correct answer to a difficult question. Ignoring helpful and relevant sources is not a good way to deal with most difficult decisions in life, and that includes statutory interpretation.

[13] MCL 24.201 *et seq*.

[14] The initial version of House Bill 6085 stated:

tive Analysis, HB 6085, September 21, 1976. In response, an amendment was offered to the bill. It read:

> 13. A public body may exempt from disclosure as a public record under this act:
>
> * * *
>
> (m) Communications between and within public bodies, including letters, memoranda, or statements which reflect deliberative or policy-making processes and are not purely factual, or investigative matter. [1976 Journal of the House 2842-2843.]

Under this amendment, the frank communications exemption would have applied in this case because there was no requirement that the communications be preliminary to a final agency determination of policy or action. But the proposed amendment was defeated.[15] *Id.* at 2843. Two months later, the original sponsor of the bill, Representative Bullard, proposed an amendment adding what is currently the frank communications exemption. 1976 Journal of the House 3210-3211.

> Section 12. The following categories of writings are specifically made available to the public under this act if those writings exist and are not exempt under section 13:
>
> * * *
>
> (g) Communications between public bodies and within public bodies including preliminary intra[-]agency, interagency, and intergovernmental drafts, notes, recommendations, and memoranda in which opinions are expressed or policies discussed or recommended. [1976 Journal of the House 4152-4153.]

[15] The defeat of this amendment indicates that the Legislature rejected exempting all nonfactual communications that occur during the deliberative process. However, this is exactly the result reached by the majority.

The legislative history surrounding the adoption of the exemption indicates that the language used was carefully thought out. The final amendment, the first one to include the language "are preliminary to a final agency determination of policy or action," was a compromise. It reconciled one bill that would have explicitly allowed disclosure of all inter- and intra-agency communications, with another that would have explicitly exempted all deliberative communications. By using the word "are," the Legislature intended to strike a balance between exempting all frank communications and no frank communications. The majority ignores this balance by exempting all nonfactual communications made during the deliberative process.

The fact that the frank communications exemption of FOIA replaced MCL 24.222 of the Administrative Procedures Act is also relevant. The FOIA legislation was introduced because it was thought that the access provided by the Administrative Procedures Act was "insufficient, unclear, and extremely unspecific." House Legislative Analysis, HB 6085, September 10, 1976. FOIA was intended to give the public greater access than it had before. *Id.* It follows that the Legislature intended less material to be exempt under the frank communications exemption than had been exempt under the Administrative Procedures Act.

MCL 24.222 mirrors the Federal Freedom of Information Act[16] exemption found at 5 USC 552(b)(5).[17] For

[16] 5 USC 552.

[17] MCL 24.222 exempted:

> Interagency or intra-agency letters, memoranda or statements which would not be available by law to a party other than an agency in litigation with the agency and which, if disclosed, would impede the agency in the discharge of its functions.

5 USC 552(b)(5) exempts

this reason, caselaw interpreting the federal exemption is instructive in determining what material was exempt under the Administrative Procedures Act. *Int'l Business Machines Corp v Dep't of Treasury*, 71 Mich App 526, 535; 248 NW2d 605 (1976). The United States Supreme Court has found that the federal exemption applies to predecisional communications leading up to final policy or action but not to postdecisional communications. *Nat'l Labor Relations Bd v Sears, Roebuck & Co*, 421 US 132, 151-152; 95 S Ct 1504; 44 L Ed 2d 29 (1975). Hence, the United States Supreme Court has decided that the federal exemption applies to communications that were preliminary to final action at the time they were created.

By deciding as it does, the majority interprets our exemption consistently with the federal exemption. This is erroneous because the Legislature rejected this interpretation when it eliminated the Administrative Procedures Act. In place of the act, the Legislature enacted FOIA, which was intended to exempt less information than its predecessor. The majority opinion fails to take cognizance of this point.

Whether one considers the language of the statute or its legislative history, the conclusion is inescapable: the Legislature intended the frank communications exemption to apply only when communications are preliminary to final action at the time a FOIA request is made. In the present case, advisory communications and notes that are the subject of the Shoulders Report may have been preliminary to a final agency determination of policy or action at some point in the past. However, once the documents were no longer preliminary to agency

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> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]

action, they should have been immediately released when properly sought under FOIA. The Court of Appeals was correct in remanding the case to the trial court for a determination on this issue.

CONCLUSION

"When government begins closing doors, it selectively controls information rightfully belonging to the people." *Detroit Free Press v Ashcroft*, 303 F3d 681, 683 (CA 6, 2002) (opinion by Keith, J.). This Court closes a door by giving the frank communications exemption an overly broad reading that the Legislature never intended. The result of this decision will be that materials that our Legislature intended to allow the public to access will forever be kept from the public eye. This decision undermines the very purpose of FOIA, which is to provide for an informed public so that the people can fully participate in the democratic process. I respectfully dissent from this erroneous decision.

PEOPLE v BOBBY SMITH

Docket No. 130353. Argued December 12, 2006 (Calendar No. 3). Decided June 20, 2007.

Bobby L. Smith was convicted by a jury in the Oakland Circuit Court, Nanci J. Grant, J., of two counts of first-degree felony murder with larceny as the predicate felony, two counts of armed robbery, and four counts of possession of a firearm during the commission of a felony. The defendant appealed, and the Court of Appeals, WHITBECK, C.J., and TALBOT and MURRAY, JJ., affirmed the felony-murder convictions and two of the felony-firearm convictions but vacated the convictions and sentences for armed robbery and two of the felony-firearm convictions. Unpublished opinion per curiam, issued December 27, 2005 (Docket No. 257353). The Court of Appeals concluded that there was no evidence that the defendant had committed the separate offenses of robbery and larceny and therefore held that the armed-robbery convictions violated double jeopardy. The Supreme Court granted the prosecution's application for leave to appeal, 475 Mich 864 (2006), and denied the defendant's application for leave to appeal, 475 Mich 871 (2006).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices WEAVER (except for part IV), CORRIGAN, and YOUNG, the Supreme Court *held*:

The Court of Appeals erred in its double jeopardy analysis by comparing the felony-murder convictions to the non-predicate felonies of armed robbery. Because armed robbery was not the predicate felony involved in the felony-murder convictions, reversal is not required pursuant to *People v Wilder*, 411 Mich 328 (1981), which held that the state constitutional prohibition against double jeopardy prohibits a conviction both of a murder in the perpetration of a felony and the underlying felony. The language "same offense" in the Michigan Double Jeopardy Clause, Const 1963, art 1, § 15, means the same thing in the context of the "multiple punishments" strand of the Double Jeopardy Clause as it does in the context of the "successive prosecutions" strand addressed by the Court in *People v Nutt*, 469 Mich 565 (2004). The test set forth in *People v Robideau*, 419 Mich 458 (1984), is

inconsistent with the understanding of the ratifiers of our constitution that Michigan's Double Jeopardy Clause be construed consistently with then-existing Michigan caselaw and with the interpretation given to US Const, Am V by federal courts at the time of ratification, and, therefore, *Robideau* must be overruled.

The same-elements test of *Blockburger v United States*, 284 US 299 (1932), as the reigning test in the Michigan Supreme Court in the context of the "successive prosecutions" strand and in the federal courts in the context of "multiple punishments" strand in 1963, best effectuates the intent of the ratifiers. Under the *Blockburger* test, first-degree felony murder and armed robbery each have an element that the other does not, and, therefore, they are not the "same offense" under either Const 1963, art 1, § 15 or US Const, Am V. The part of the judgment of the Court of Appeals that vacated the armed robbery convictions and sentences and two of the felony-firearm convictions and sentences must be reversed, and the matter must be remanded to the trial court for reinstatement of the convictions and sentences vacated by the Court of Appeals.

1. Two offenses do not constitute the "same offense" for purposes of the "successive prosecutions" strand of double jeopardy if each offense requires proof of a fact that the other does not.

2. There is no Michigan authority for the proposition that double jeopardy forbids the imposition of multiple punishments for felony murder and a non-predicate felony.

3. The defendant's convictions for the first-degree felony murders and the non-predicate armed robberies withstand constitutional scrutiny under the same-elements test. These offenses are not the same offense under either US Const, Am V or Const 1963, art 1, § 15, and the defendant may be punished separately.

Affirmed in part, reversed in part, and remanded to the trial court.

Justice CAVANAGH, dissenting, stated that the majority's use of the *Blockburger* test, which does not always recognize the relationship between a compound offense and its predicate offenses, as the sole determinant of what comprises multiple punishments does not adequately enforce the constitutional protections against double jeopardy. Because the defendant's prosecution for felony murder necessarily put him in jeopardy of a conviction of larceny as a lesser included offense, vacating the defendant's armed robbery convictions and related felony-firearm convictions is necessary to enforce the prohibition against double jeopardy. Additionally, there was no factual basis for finding that the defendant

separately committed larceny and armed robbery, because after the defendant was found guilty of larceny, no property remained that could have been separately taken as part of an armed robbery.

Justice KELLY, dissenting, would hold that the Court of Appeals correctly determined that there was no evidence that the defendant committed the separate offenses of robbery and larceny. Accordingly, the judgment of the Court of Appeals, which vacated the defendant's convictions and sentences for armed robbery and the two corresponding felony-firearm convictions, should be affirmed. Additionally, *Robideau* provides the appropriate protection against multiple punishments in Michigan and should not be overruled. The *Blockburger* test simply represents one of the many methods by which a court can discern the Legislature's intent regarding multiple punishments. It is not a definitive test that should, or could, be used in every case. The people of Michigan did not intend to adopt the federal interpretation of the Double Jeopardy Clause when they ratified the 1963 Michigan Constitution. Application of the factors announced in *Robinson v Detroit*, 462 Mich 439, 464 (2000), support the conclusion that *Robideau* should not be overruled.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — WORDS AND PHRASES — SAME OFFENSE.

The language "same offense" in the Michigan Double Jeopardy Clause means the same thing in the context of the multiple punishments strand of the Double Jeopardy Clause as it does in the context of the successive prosecutions strand of the clause (Const 1963, art 1, § 15).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY.

Two offenses do not constitute the "same offense" for purposes of the successive prosecutions strand of the Double Jeopardy Clause where each offense requires proof of a fact that the other does not (Const 1963, art 1, § 15).

3. CONSTITUTIONAL LAW — DOUBLE JEOPARDY.

The Michigan Double Jeopardy Clause does not forbid the imposition of multiple punishments for felony murder and a nonpredicate felony (Const 1963, art 1, § 15).

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

Michael J. McCarthy, *P.C.* (by *Michael J. McCarthy*), for the defendant.

MARKMAN, J. We granted leave to appeal to consider whether *Blockburger v United States,* 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), or *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984), sets forth the proper test in Michigan for determining when multiple punishments are barred on double jeopardy grounds.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), with larceny as the predicate felony. Defendant was also convicted of two counts of armed robbery, MCL 750.529, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appealed, asserting that his convictions for both first-degree felony murder and armed robbery violate the Double Jeopardy Clause of the Michigan Constitution, Const 1963, art 1, § 15. The Court of Appeals concluded that there was no evidence that defendant had committed the separate offenses of robbery and larceny and therefore held that defendant's armed robbery convictions violated double jeopardy. As a result, the Court of Appeals vacated defendant's two convictions and sentences for armed robbery and the accompanying convictions for felony-firearm. Unpublished opinion per curiam, issued December 27, 2005 (Docket No. 257353). We conclude that the Court of Appeals erred in its double jeopardy analysis by comparing the felony-murder convictions to the nonpredicate felonies of armed robbery. Because armed robbery was not the predicate felony involved in the instant felony-murder convictions, reversal is not required pursuant to *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981). We further conclude that the language "same offense" in Const 1963, art 1, § 15 means

the same thing in the context of the "multiple punishments" strand of the Double Jeopardy Clause as it does in the context of the "successive prosecutions" strand addressed by the Court in *People v Nutt,* 469 Mich 565; 677 NW2d 1 (2004). We therefore hold that *Blockburger* sets forth the proper test to determine when multiple punishments are barred on double jeopardy grounds. Because each of the crimes for which defendant here was convicted, first-degree felony murder and armed robbery, has an element that the other does not, they are not the "same offense" and, therefore, defendant may be punished for each. Accordingly, we reverse the part of the judgment of the Court of Appeals that vacated the armed robbery convictions and sentences and two of the felony-firearm convictions and sentences, and remand this case to the trial court to reinstate defendant's convictions and sentences for armed robbery and the accompanying felony-firearm convictions and sentences.

I. FACTS AND PROCEDURAL HISTORY

At approximately 10:30 a.m. on January 7, 2003, a customer entering the City Tire store in Pontiac discovered the bodies of store employee Stephen Putman and store owner Richard Cummings. Putman had died of a gunshot wound to the neck and Cummings had died from two gunshot wounds to the head. The police determined that $2,000 in cash that Cummings brought to the store from home to use in the store's cash register was missing, as were the store's proceeds from that morning. In addition, Pontiac police officers interviewed the victims' families and determined that both Putman's and Cummings's wallets were missing and that the money Cummings carried in his front pocket was also missing.

On January 8, 2004, the police received a call from Tywanda Smith, defendant's wife, who informed them that defendant confessed to her that he had committed the murders.[1] Smith testified that defendant told her that he first asked "the young guy [Putman]" for the money but that "the young guy acted like he didn't know what [defendant] was talking about and [defendant] shot him." Defendant then asked the "old guy [Cummings]" where the money was, and Cummings responded, "What do you think you are going to do? You going to rob me?" Cummings then hit defendant on the hand with an unknown object and defendant responded by shooting Cummings twice in the head. Defendant then admitted that, after the shootings, he took money and a set of keys from the store, but did not take any vehicle. Defendant also told Smith that the police had no evidence implicating him in the murders because he threw the gun into the river.

Defendant was prosecuted for two counts of first-degree felony murder, with larceny as the predicate felony, two counts of armed robbery, and four counts of felony-firearm. Following a jury trial, defendant was convicted on all charges. He appealed, contending that his convictions for two counts of felony murder and two counts of armed robbery committed during the course of the murders constituted a violation of the Double Jeopardy Clause of the Michigan Constitution. The Court of Appeals undertook its analysis by noting that larceny is a lesser included offense of robbery and that

[1] While defendant told Smith about the murders "some days" after they occurred, she did not contact the police until she saw newspaper and television coverage commemorating the one-year anniversary of the murders. The television coverage included a plea for information to assist in the investigation of the murders. Smith admitted on cross-examination that she told no one about her knowledge of the murders until contacting the police.

there was no evidence that defendant committed the separate offenses of robbery and larceny. Slip op at 2. On that basis, the Court of Appeals concluded that armed robbery, not larceny, was the predicate felony for the instant felony-murder convictions and, therefore, that it was bound by *Wilder* to reverse the armed robbery convictions as well as the accompanying felony-firearm convictions.[2] *Id.* We granted the prosecutor's application for leave to appeal.[3] 475 Mich 864 (2006).

II. STANDARD OF REVIEW

A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo. *Nutt, supra* at 573.

III. ANALYSIS

Const 1963, art 1, § 15 states that "[n]o person shall be subject for the same offense to be twice put in jeopardy."[4] The primary goal in interpreting a constitutional provision is to determine the text's meaning to the ratifiers, the people, at the time of ratification. *Wayne Co v Hathcock,* 471 Mich 445, 468; 684 NW2d 765 (2004). Justice COOLEY described this principle of constitutional interpretation as follows:

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[2] The Court of Appeals noted its agreement with Justice CORRIGAN's dissent in *People v Curvan*, 473 Mich 896, 903 (2005), in which she called into question the decision in *Wilder* that multiple punishments for felony murder and the predicate felony were barred on double jeopardy grounds, and stated that, absent *Wilder*, it would have held that "felony-murder is a distinct category of murder and not an enhanced form of armed robbery . . . ." Slip op at 2 n 1.

[3] We denied defendant's application for leave to appeal. 475 Mich 871 (2006).

[4] The analogous provision in the federal constitution, US Const, Am V, states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." [Cooley, A Treatise on the Constitutional Limitations (Little, Brown, & Co, 1886), p 81 (citation omitted).]

The Double Jeopardy Clause affords individuals "three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Nutt*, *supra* at 574. The first two protections are generally understood as the "successive prosecutions" strand of double jeopardy, while the third protection is commonly understood as the "multiple punishments" strand.

A. "SAME OFFENSE" FOR SUCCESSIVE PROSECUTIONS

Before 1973, the Court consistently construed Michigan's Double Jeopardy Clause in a manner consistent with the federal courts' interpretation of the Fifth Amendment of the United States Constitution. See, e.g., *In re Ascher,* 130 Mich 540, 545; 90 NW 418 (1902) (stating that "the law of jeopardy is doubtless the same under both [the federal and Michigan constitutions]");[5]

[5] *Ascher* interpreted the Double Jeopardy Clause of Const 1850, art 6, § 29, which stated, "No person after acquittal upon the merits shall be tried for the same offense."

People v Schepps, 231 Mich 260, 267; 203 NW 882 (1925) (quoting *Ascher* for the proposition that the Court is "committed" to the view of double jeopardy protections set forth by federal courts); *People v Bigge,* 297 Mich 58, 64; 297 NW 70 (1941) (holding that "[t]his State is committed to the view upon the subject of former jeopardy adopted by the Federal courts under the Federal Constitution").[6]

In *People v Townsend*, 214 Mich 267; 183 NW 177 (1921), the Court addressed the issue whether a defendant's conviction in municipal court of driving an automobile while intoxicated served as a bar to a subsequent prosecution for manslaughter arising out of the same drunken driving incident. We began our analysis by noting that under the federal interpretation of the Fifth Amendment, a defendant who commits two or more separate offenses during a single criminal transaction may be prosecuted for each, as long as the offenses are different. *Id.* at 275, citing *Gavieres v United States*, 220 US 338; 31 S Ct 421; 55 L Ed 489 (1911). To determine whether two offenses are the "same offense" for double jeopardy purposes, the Court cited the "same elements" test articulated by the Supreme Court of Massachusetts in *Morey v Commonwealth*, 108 Mass 433, 434 (1871). The *Morey* rule, which would later be adopted by the United States Supreme Court in *Blockburger*, held that offenses are not the "same offense" if each statute requires proof of an element that the other does not. The Court concluded that the misdemeanor offense of driving an automobile while intoxicated was not the "same offense" as involuntary manslaughter and therefore affirmed the subsequent conviction. *Townsend, supra* at 281.

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[6] *Schepps* and *Bigge* each interpreted the Double Jeopardy Clause of Const 1908, art 2, § 14, which stated, "No person, after acquittal upon the merits, shall be tried for the same offense."

Thus, before 1973, the Court had construed Michigan's Double Jeopardy Clause in a manner consistent with the interpretation of the Fifth Amendment by federal courts, *Ascher*, *supra* and held that the test for determining whether offenses are the "same offense" for double jeopardy purposes was whether each offense requires proof of a fact that the other does not. *Townsend, supra*. However, in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), the Court abandoned this traditional understanding, and instead adopted the "same transaction" test for the "successive prosecutions" strand of double jeopardy. Shortly thereafter, in *People v Cooper*, 398 Mich 450, 461; 247 NW2d 866 (1976), the Court also abandoned the federal approach to successive prosecutions by different sovereigns in favor of a rule under which successive prosecutions could only proceed if "it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different." Finally, in *Robideau,* the Court declined to adhere to the *Blockburger* test in the context of the "multiple punishments" strand of double jeopardy in favor of a rule intended to ascertain whether the Legislature intended to impose multiple punishments.

In *Nutt*, the Court granted leave to appeal to determine whether *White*'s interpretation of the language "same offense" in Const 1963, art 1, § 15 was consistent with the people's understanding when they ratified the constitution. We undertook our analysis by noting that *White*'s creation of the "same transaction" test was inconsistent with the ordinary meaning of the phrase "offense" as a "crime" or "transgression." *Nutt, supra* at 588. Moreover, and most critically, we concluded that *White*'s test was inconsistent with the understanding of the term "same offense" on the part of the ratifiers of our constitution. First, we noted that the framers of the

constitution recognized that the Court had interpreted the double jeopardy provision of the 1908 Constitution in a manner consistent with the federal constitution. Second, we quoted the Address to the People, 2 Official Record, Constitutional Convention 1961, p 3364, which stated:

> "[Const 1963, art 1, § 15] is a revision of Sec. 14, Article II, of the present constitution. The new language of the first sentence involves the substitution of the double jeopardy provision from the U.S. Constitution in place of the present provision which merely prohibits 'acquittal on the merits.' This is more consistent with the actual practice of the courts in Michigan." [*Nutt, supra* at 590.]

In other words, when the people ratified Const 1963, art 1, § 15, they were advised that "(1) the double jeopardy protection conferred by our 1963 Constitution would parallel that of the federal constitution, and (2) that the proposal was meant to bring our double jeopardy provision into conformity with what this Court had already determined it to mean."[7] *Nutt, supra* at 590. In 1963, the federal Double Jeopardy Clause permitted successive prosecutions for all crimes committed during a single "transaction," as long as each crime required proof of a fact that the other did not. *Blockburger, supra* at 304. The *Nutt* Court noted that the *Blockburger* test " 'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, not-

[7] By stating that the Michigan and federal double jeopardy clauses should be construed in a parallel fashion, "we do not mean that we are bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution." *Harvey v Michigan*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003). We mean only that we have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15 as well.

withstanding a substantial overlap in the proof offered to establish the crimes.' " *Nutt, supra* at 576 (citation omitted). Because the "same transaction" test set forth in *White* is inconsistent with the federal approach, it is also inconsistent with the understanding of the ratifiers and, as a result, was overruled. *Nutt, supra* at 591-592.

In *People v Davis,* 472 Mich 156; 695 NW2d 45 (2005), the Court granted leave to appeal to determine whether the rule announced by *Cooper* for determining whether successive prosecutions by different sovereigns were barred on double jeopardy grounds was consistent with the meaning of "same offense" set forth in the constitution. We undertook our analysis by noting *Nutt*'s conclusion that the ratifiers of our constitution intended that Michigan's Double Jeopardy Clause be construed consistently with Michigan precedent and the Fifth Amendment. At the time of ratification, the federal courts held that prosecution by one sovereign does not preclude a subsequent prosecution by a different sovereign based on the same act, where " 'by one act [the defendant] has committed two offences, for each of which he is justly punishable.' " *Bartkus v Illinois*, 359 US 121, 132; 79 S Ct 676; 3 L Ed 2d 684 (1959) (citation omitted); see also *Heath v Alabama*, 474 US 82, 88; 106 S Ct 433; 88 L Ed 2d 387 (1985). The rule set forth in *Cooper* was based on the Court's detection of a trend in federal cases that brought *Bartkus* into disrepute. However, we recognized in *Davis* that this "trend" never came to fruition and, in fact, the United States Supreme Court validated the *Bartkus* reasoning in *Heath*. Therefore, in accord with the understanding that Michigan's double jeopardy provision should "be construed consistently with the federal double jeopardy jurisprudence that then existed," we overruled *Cooper* in *Davis, supra* at 168, and held that a defendant who commits one

criminal act that violates the laws of two different sovereigns has committed two criminal acts for double jeopardy purposes.

In sum, offenses do not constitute the "same offense" for purposes of the "successive prosecutions" strand of double jeopardy if each offense requires proof of a fact that the other does not.

B. "SAME OFFENSE" FOR MULTIPLE PUNISHMENTS

1. PRE-1963 CASELAW

At issue in this case is whether "same offense" has the same meaning in the context of the "multiple punishments" strand of double jeopardy as it does in the context of the "successive prosecutions" strand. Pursuant to *Nutt*, we first examine Michigan caselaw addressing the "multiple punishments" strand of double jeopardy at the time of the ratification of the 1963 Constitution. While Michigan courts routinely applied the federal standard to the "successive prosecutions" strand, the Court did not address the "multiple punishments" strand until 1976. *Robideau, supra* at 481. Therefore, we must examine federal caselaw to determine how the Fifth Amendment was applied in the context of multiple punishments at the time our constitution was ratified. In *Blockburger,* the defendant was convicted of selling eight grains of morphine hydrochloride outside its original packaging[8] and of engaging in that sale without a written order of the purchaser as

[8] The defendant was convicted under the former Harrison Narcotic Act, 26 USC 692, which stated:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps

required by the statute.[9] The defendant claimed that because both convictions stemmed from a single narcotics sale, he could lawfully be punished only once for that single act. The United States Supreme Court undertook its analysis by noting that the language of the statutes created two distinct criminal offenses. In order to determine whether a defendant who, by a single act, commits two distinct criminal violations may be punished for both, the United States Supreme Court held that

> the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342 . . . . In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Compare *Albrecht v. United States*, 273 U.S. 1, 11-12[; 47 S Ct 250; 71 L Ed 505 (1927)][10] . . . . [*Blockburger, supra* at 304.]

> from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found . . . .

[9] The defendant was convicted under the former 26 USC 696, which stated:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

[10] In *Albrecht,* the United States Supreme Court held that "[t]here is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which

Because each of the violations of the Harrison Narcotic Act at issue contained an element that the other did not, the United States Supreme Court held that the defendant could be punished for each violation.

The United States Supreme Court reaffirmed the "same elements" approach to multiple punishments in *Gore v United States,* 357 US 386; 78 S Ct 1280; 2 L Ed 2d 1405 (1958). In *Gore*, the defendant was charged with two counts of selling heroin "not in pursuance to a written order" of the person receiving the drugs; two counts of dispensing drugs that were not "in the original stamped package or from the original stamped package"; and two counts of facilitating concealment and sale of drugs, with knowledge that the drugs had been unlawfully imported. The defendant argued that the purpose behind each statute was to outlaw the nonmedicinal sale of narcotics and, therefore, Congress desired to punish only for a single offense when these multiple infractions are committed through a single sale. The United States Supreme Court disagreed, noting that, as in *Blockburger*, Congress's decision to create three separate criminal violations, each with elements independent of the others, demonstrated that it intended that each violation be punishable separately. The Court went on to characterize the defendant's argument as a policy argument and opined that such policy matters are better left to Congress:

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy. [*Id.* at 393.]

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it has power to prohibit and punishing also the completed transaction."

To summarize, at the time the 1963 Constitution was ratified, the United States Supreme Court had interpreted the language "same offense" in the Fifth Amendment to mean multiple punishments were authorized if " 'each statute requires proof of an additional fact which the other does not . . . .' " *Blockburger, supra* at 304 (citation omitted). While there was no Michigan caselaw construing the language "same offense" as it applied to the "multiple punishments" strand of double jeopardy, our courts had defined the term "same offense" for purposes of successive prosecutions by applying the federal "same elements" test.

2. POST-1963 CASELAW

The Court first addressed the "multiple punishments" strand of double jeopardy in *People v Martin,* 398 Mich 303; 247 NW2d 303 (1976). In *Martin*, the defendant was convicted of both possession and delivery of the same heroin. The Court noted that while a defendant can be charged for each act that constitutes a separate crime, "when tried for an act which includes lesser offenses, if the jury finds guilt of the greater, the defendant may not also be convicted separately of the lesser included offense." *Id.* at 309. The Court found that possession of the heroin was a lesser included offense of its delivery because "[p]ossession of the heroin present in *this* case was that necessary to its delivery." *Id.* at 307 (emphasis in original). In other words, rather than focusing on the elements of the charged offenses, the Court focused on the facts of the particular case. While the Court cited a similar analysis by the United States Court of Appeals for the First Circuit in *O'Clair v United States*, 470 F2d 1199, 1203 (CA 1, 1972), it failed even to cite *Blockburger,* let alone explain why the "same elements" test did not apply.

Rather, the Court justified its approach by quoting with approval the Supreme Judicial Court of Maine in *State v Allen,* 292 A2d 167, 172 (Me, 1972), which held:

> The possession of narcotic drugs is an offense distinct from the sale thereof. But in the instant case the possession and sale clearly constituted one single and same act. The possession, as legally defined, is necessarily a constituent part of the sale, as legally defined. Where the only possession of the narcotic drug is that incident to and necessary for the sale thereof, and it does not appear that there was possession before or after and apart from such sale, the State cannot fragment the accused's involvement into separate and distinct acts or transactions to obtain multiple convictions, and separate convictions under such circumstances will not stand.

In *People v Stewart* (*On Rehearing*), 400 Mich 540; 256 NW2d 31 (1977), the Court addressed the similar issue whether a defendant could be punished for the possession and sale of the same narcotic. The Court began its analysis by acknowledging that a defendant may possess a narcotic without selling it and, likewise, may sell a narcotic without possessing it. However, the Court again failed to acknowledge *Blockburger* and instead applied the fact-based approach of *Martin*, concluding that "from the evidence adduced at this trial, the illegal possession of heroin was obviously a lesser included offense of the illegal sale of heroin. When the jury in the case at bar found the defendant guilty of the illegal sale of this heroin, they necessarily found him guilty of possession of the same heroin." *Id.* at 548 (emphasis deleted).

In *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979), the Court addressed the question whether double jeopardy forbade separate convictions and sentences for felony-firearm, MCL 750.227b, and the underlying felony. The Court

undertook this analysis by noting that the language of MCL 750.227b, defining the offense as a "felony" and requiring that the two-year sentence must be served "in addition to" the sentence for the underlying felony, demonstrated "that the Legislature intended to make the carrying of a weapon during a felony a separate crime and intended that cumulative penalties should be imposed." *Wayne Co Prosecutor, supra* at 391. In order to determine whether such an intention was consistent with the Double Jeopardy Clause, the Court then applied the "same elements" test from *Blockburger*. The Court observed that "[i]n applying the *Blockburger* rule, the United States Supreme Court has focused on the legal elements of the respective offenses, not on the particular factual occurrence which gives rise to the charges." *Id.* at 395. Applying *Blockburger,* the Court then determined that the felony at issue, second-degree murder, contained an element that felony-firearm did not, namely a killing committed with malice, and, likewise, that felony-firearm contained an element that second-degree murder did not, namely that the defendant carried or possessed a firearm during the commission of any felony. Therefore, the Court concluded that the imposition of multiple punishments was not barred on double jeopardy grounds.[11] *Id.* at 397.

However, in *People v Jankowski*, 408 Mich 79; 289 NW2d 674 (1980), the Court reverted to the fact-based approach of *Martin* and *Stewart*. In *Jankowski*, the defendant was convicted of armed robbery, larceny over $100, and larceny in a building as the result of one felonious taking. The Court began its analysis by noting

[11] The Court distinguished *Martin* and *Stewart* on the basis that "the Legislature has clearly expressed in the felony-firearm statute an intent to authorize multiple convictions and cumulative punishments." *Id.* at 402.

that, unlike in *Wayne Co Prosecutor,* there was no clear intention on the part of the Legislature that the crimes at issue be punished separately. The Court assessed the facts adduced at trial and determined that, because there was only one felonious taking, the larceny convictions constituted lesser offenses to the armed robbery conviction and therefore the larceny convictions were barred by double jeopardy.

The Court applied the same reasoning to first-degree felony murder and the predicate felony in *Wilder*. In *Wilder*, the defendant was convicted of both armed robbery and first-degree felony murder for a killing committed during the perpetration of that robbery. The Court began its analysis by noting that under the fact-based approach set forth in *Martin* and *Stewart*, if "the proof adduced at trial indicates that one offense is a necessarily or cognate lesser included offense of the other, then conviction of both the offenses will be precluded." *Wilder, supra* at 343-344. The Court held that because the evidence required to prove first-degree felony murder also requires proof of the armed robbery, armed robbery is a lesser offense of first-degree felony murder and therefore multiple punishments for each offense were barred by double jeopardy.[12] The Court went on to explain that its approach to the "multiple punishments" strand of double jeopardy differed from the federal approach set forth in *Blockburger*:

> [T]he test concerning multiple punishment under our constitution has developed into a broader protective rule than that employed in the Federal courts. Under Federal authority, the Supreme Court established the "required

[12] The Court acknowledged that "the elements of first-degree felony murder do not in every instance require or include the elements of armed robbery . . . ." *Id.* at 345.

evidence" test enunciated in *Blockburger*[, *supra*]. See also its original expression in *Morey v Commonwealth*, 108 Mass 433 (1871). In *Blockburger*, the Court outlined their test:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." [*Blockburger, supra* at] 304.

This approach isolates the elements of the offense as opposed to the actual proof of facts adduced at trial. See *Harris*[, *supra*]; *United States v Kramer*, 289 F2d 909, 913 (CA 2, 1961). Under this test, convictions of two criminal offenses arising from the same act are prohibited only when the greater offense necessarily includes all elements of the lesser offense. Accordingly, conviction of both offenses is precluded only where it is impossible to commit the greater offense without first having committed the lesser offense. From the perspective of lesser included offenses, the Supreme Court in cases concerning double jeopardy has thus adhered to the common-law definition of such offenses. See *People v Ora Jones* [395 Mich 379, 387; 236 NW2d 461 (1975)].

The Federal test in *Blockburger* can thus be distinguished from this Court's approach in two principal ways. First, we find the proper focus of double jeopardy inquiry in this area to be the proof of facts adduced at trial rather than the theoretical elements of the offense alone. Proof of facts includes the elements of the offense as an object of proof. Yet, the actual evidence presented may also determine the propriety of finding a double jeopardy violation in any particular case. See [*Martin, supra* at 309; *Stewart, supra* at 548; *Jankowski, supra* at 91].

Second, we have held that double jeopardy claims under our constitution may prohibit multiple convictions involving cognate as well as necessarily included offenses. [*Wilder, supra* at 348 n 10.]

Finally, in *Robideau,* the Court addressed the issue whether double jeopardy prohibits multiple punishments for convictions of both first-degree criminal sexual conduct, MCL 750.520b(1)(c) (penetration under circumstances involving any "other felony"), and the underlying "other felony" of either armed robbery or kidnapping used to prove the charge of first-degree criminal sexual conduct. The Court undertook its analysis by noting that double jeopardy protection against multiple punishments constitutes a restraint on the courts, not the Legislature. The Court acknowledged that, where the intention of Congress is not clear, federal courts rely on *Blockburger* to determine whether Congress intended to permit multiple punishments. However, the Court rejected the *Blockburger* test, noting:

> When applied in the abstract to the statutory elements of an offense, [the *Blockburger* test] merely serves to identify true lesser included offenses. While it may be true that the Legislature ordinarily does not intend multiple punishments when one crime is completely subsumed in another, *Blockburger* itself is of no aid in making the ultimate determination. Although its creation of a presumption may make a court's task easier, it may also induce a court to avoid difficult questions of legislative intent in favor of the wooden application of a simplistic test. [*Robideau, supra* at 486.]

In place of *Blockburger*, the Court set forth "general principles" to be used when assessing legislative intention. Those principles include, but are not limited to, the following:

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same

> social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. For example, the crimes of larceny over $ 100, MCL 750.356; MSA 28.588, and larceny in a building, MCL 750.360; MSA 28.592, although having separate elements, are aimed at conduct too similar to conclude that multiple punishment was intended.
>
> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions. [*Id.* at 487-488.]

The Court applied its new test by first looking to the maximum penalty available under each statute to determine whether the Legislature intended to permit multiple punishments. Where the Legislature designates a lower maximum penalty for the "lesser" crime than for the "greater" crime, the Court held that it can be inferred that the Legislature did not intend multiple punishments. However, the Court held that the fact that first-degree criminal sexual conduct and the predicate offenses of armed robbery and kidnapping all carry a maximum penalty of life imprisonment served as evidence that the Legislature did intend multiple punishments there. Moreover, the Court found that the "social norm" the Legislature intended to protect by enactment of the criminal sexual conduct statute, i.e., protecting citizens against nonconsensual sexual penetration, would be poorly served by classifying the predicate felony as the "same offense" for double jeopardy purposes.

> If we were to conclude that only one conviction could result from fact situations such as the cases at bar, the result would be that the defendants, having completed the predicate felonies of kidnapping and robbery, could then embark on one of the most heinous crimes possible, with no risk either of a second conviction or a statutorily increased maximum sentence. [*Id.* at 490.]

The Court concluded therefore that under its test, the Legislature intended that first-degree criminal sexual conduct and the predicate felonies of armed robbery and kidnapping be punished separately.

3. *ROBIDEAU* AND THE RATIFIERS' UNDERSTANDING

Robideau's creation of a new rule to determine whether two statutory offenses constitute the "same offense" for double jeopardy purposes was predicated on the Court's conclusions in previous cases that: (1) Michigan's Double Jeopardy Clause afforded greater protections than the Double Jeopardy Clause of the United States Constitution, *Wilder, supra* at 348 n 10; and (2) the *Blockburger* test did not account for Michigan's then-current recognition of "cognate" lesser included offenses as "lesser offenses" under a fact-driven analysis. This conclusion that the Michigan Constitution affords greater protection than the Fifth Amendment has no basis in the language of Const 1963, art 1, § 15, the common understanding of that language by the ratifiers, or under Michigan caselaw as it existed at the time of ratification. Further, the concern expressed by the Court that *Blockburger* does not account for cognate lesser included offenses is no longer pertinent in light of *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002).[13] Finally, nothing in the language of

[13] In *Cornell*, we held that an offense is an "offense inferior to that charged in the indictment" for purposes of MCL 768.32(1) when " 'the

the constitution indicates that the ratifiers intended to give the term "same offense" a different meaning in the context of the "multiple punishments" strand of double jeopardy than it has in the context of the "successive prosecutions" strand. In the absence of any evidence that the term "same offense" was intended by the ratifiers to include criminal offenses that do not share the same elements, we feel compelled to overrule *Robideau* and preceding decisions that are predicated on the same error of law, and to hold instead that *Blockburger* sets forth the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15.[14]

We conclude that in adopting Const 1963, art 1, § 15, the ratifiers of our constitution intended that our double jeopardy provision be construed consistently with then-existing Michigan caselaw and with the interpretation given to the Fifth Amendment by federal courts at the time of ratification. We further conclude

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lesser offense can be proved by the same facts that are used to establish the charged offense.' " *Cornell, supra* at 354 (citation omitted). In other words, an offense is the "same offense" for purposes of jury instructions if conviction of the greater offense necessarily requires conviction of the lesser offense.

[14] In deciding whether to overrule a precedent, we consider: (1) whether the earlier decision was wrongly decided; and (2) whether practical, real-world dislocations would arise from overruling the decision. *Robinson v Detroit*, 462 Mich 439, 464-466; 613 NW2d 307 (2000). As discussed earlier in this opinion, we believe that *Robideau* and preceding decisions that are predicated on the same error of law were wrongly decided because they are inconsistent with the common understanding of "same offense." Moreover, we can discern no practical, real-world dislocations or confusion that would arise from overruling *Robideau*. No reasonable person, in reliance on *Robideau*, would commit additional felonies during a criminal transaction in the hope that such additional criminal acts will not be punished separately. Finally, and not insignificantly in our judgment, failing to overrule *Robideau* would produce inconsistent rules regarding the meaning of the language "same offense" in Const 1963, art 1, § 15.

that the ratifiers intended that the term "same offense" be given the same meaning in the context of the "multiple punishments" strand of double jeopardy that it has been given with respect to the "successive prosecutions" strand. As we noted in *Nutt, supra* at 594 (citation omitted), " 'there is no authority, except *Grady* [*v Corbin*, 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990)], for the proposition that [the Double Jeopardy Clause] has different meanings [in different contexts],' " and *Grady* has been specifically overruled by *United States v Dixon*, 509 US 688, 704; 113 S Ct 2849; 125 L Ed 2d 556 (1993). At the time of ratification, we had defined the language "same offense" in the context of successive prosecutions by applying the federal "same elements" test. In interpreting "same offense" in the context of multiple punishments, federal courts first look to determine whether the legislature expressed a clear intention that multiple punishments be imposed. *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983); see also *Wayne Co Prosecutor, supra.* Where the Legislature does clearly intend to impose such multiple punishments, " 'imposition of such sentences does not violate the Constitution,' " regardless of whether the offenses share the "same elements." *Id.* (citation and emphasis deleted). Where the Legislature has not clearly expressed its intention to authorize multiple punishments, federal courts apply the "same elements" test of *Blockburger* to determine whether multiple punishments are permitted. Accordingly, we conclude that the "same elements" test set forth in *Blockburger* best gives effect to the intentions of the ratifiers of our constitution.

C. APPLICATION

We first conclude that the Court of Appeals erred in its double jeopardy analysis by comparing the first-

degree felony murder conviction with the non-predicate felony of armed robbery.[15] There is no Michigan author-

[15] The Court of Appeals held that armed robbery was the "true" predicate felony in this case because "larceny is a necessarily included lesser offense of robbery, and because, factually, there was no evidence that defendant committed separate offenses of robbery and larceny, defendant's armed robbery convictions violate double jeopardy protections." Slip op at 2. Similarly, Justice KELLY argues that the prosecutor's failure to distinguish between the property taken during the armed robbery and the property taken during the larceny establishes that there was not sufficient evidence to establish that defendant committed both crimes. *Post* at 333-334. However, as Justice KELLY acknowledges, the prosecutor's comments to the jury during closing argument do not constitute evidence. *People v Fields*, 450 Mich 94, 116 n 26; 538 NW2d 356 (1995). Rather, to determine whether there was sufficient evidence to sustain each of the instant convictions, this Court must review the evidence "in a light most favorable to the prosecution . . . and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt[.]" *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (citations omitted). Here, the evidence adduced at trial demonstrates that after the murder, both victims were missing their wallets, the store's keys were missing, and money was missing from the cash drawer of the store. A reasonable juror could well conclude beyond a reasonable doubt that defendant stole the money, the keys, and the wallets. Further, a reasonable juror could well conclude that there were two separate takings of property in this case—the keys and the money from the cash drawer (which belonged to the store) and the wallets and the cash from the victims. Thus, despite a lack of clarity by the prosecutor in his closing argument, when viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant committed the separate offenses of armed robbery and larceny.

Nor are we persuaded by Justice CAVANAGH that the Court's decision in *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983), supports the Court of Appeals conclusion that there was only one taking. In *Wakeford*, defendant robbed a market at gunpoint, forcing two separate cashiers to turn over the proceeds of their registers. Defendant claimed that his two convictions of armed robbery violated the Double Jeopardy Clause because each occurred during the same criminal transaction. This Court rejected that argument, noting that defendant assaulted and robbed two separate people and, therefore, could be held criminally liable for both. We also noted in dictum that, had this been a larceny charge, "the theft of several items at the same time and place constitutes a single larceny."

ity for the proposition that double jeopardy forbids the imposition of multiple punishments for felony murder and a non-predicate felony.[16] Therefore, the proper offenses to be analyzed under the *Blockburger* test are the felonies for which defendant was convicted—first-degree felony murder and armed robbery.

Defendant's convictions of first-degree felony murder and the non-predicate armed robbery withstand constitutional scrutiny under the "same elements" test. The elements of first-degree felony murder are: " '(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice],

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Id. at 112. Justice CAVANAGH seizes on this dictum to support his argument that, once the instant defendant was convicted of larceny, that conviction encompassed all the property stolen in this case and that "no property remained that could have been separately taken as part of an armed robbery." *Post* at 330. We disagree. In *Wakeford* there was a single victim from whom the defendant took multiple items. Thus, the dictum from *Wakeford* suggests that a defendant may not be convicted of multiple counts of larceny for different items taken from a single victim. However, in the instant case, there were *three different* victims—the proprietor of the store, Putman, and Cummings. It cannot be the case that once a defendant engages in a larceny, the defendant is free to take property from anyone else in the immediate vicinity without fear of any additional punishment.

[16] Because armed robbery is not the predicate felony for the instant first-degree felony murders, we need not address *Wilder*'s holding that the constitution bars multiple punishments for first-degree felony murder and the predicate felony, or Justice CAVANAGH's concern that *Blockburger* "has its limitations" in cases involving compound offenses. *Post* at 326. However, we note that the Court in *Wilder* based its holding on the fact that "double jeopardy claims under our constitution may prohibit multiple convictions involving cognate as well as necessarily included offenses." *Wilder, supra* at 349 n 10. *Wilder*'s focus on the "proof of facts adduced at trial," *id.,* seems questionable in light of the distinction between cognate lesser offenses and lesser included offenses dictated by the Court in *Cornell*.

(3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b), here larceny].' " *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999) (citation omitted). The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon. *Id.* at 757. First-degree felony murder contains elements not included in armed robbery—namely a homicide and a *mens rea* of malice. Likewise, armed robbery contains elements not necessarily included in first-degree felony murder—namely that the defendant took property from a victim's presence or person while armed with a weapon. Accordingly, we conclude that these offenses are not the "same offense" under either the Fifth Amendment or Const 1963, art 1, § 15 and therefore defendant may be punished separately for each offense.

IV. RESPONSE TO JUSTICE KELLY

Justice KELLY asserts that we have "systematically and drastically altered Michigan double jeopardy jurisprudence." *Post* at 340. In fact, our goal in interpreting provisions of our constitution is, and has always been, to give those provisions the meaning that the ratifiers intended. When the people ratified Const 1963, art 1, § 15, they understood that the term "same offense" would be construed as it always had been under Michigan caselaw on that point, i.e., in a manner consistent with the interpretation of the federal constitution. This was a critical understanding at the time, since the federal Double Jeopardy Clause had not yet been "incorporated" and applied against the states. See *Benton v Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969). Thus, the state Double Jeopardy Clause carried

far greater independent significance than it does today, and the people took care to state their intentions about what it meant. These intentions must serve as the touchstone in determining the meaning of Michigan's Double Jeopardy Clause. However, in *White* and its progeny, this Court disregarded the intentions of the ratifiers and substituted its own judgments regarding how double jeopardy principles should apply in this state.

The Court began this process of judicial amendment in *White* when it abandoned the "same elements" test that had been recognized in this state for at least 60 years, *Ascher, supra* at 545, in favor of the "same transaction" test advocated by Justice Brennan in his *concurring* statement in *Ashe v Swenson*, 397 US 436, 448; 90 S Ct 1189; 25 L Ed 2d 469 (1970). While *White* extolled the virtues of the "same transaction" test and noted that it had been adopted by "many" other state courts, it failed to mention that the test had been explicitly *rejected* in both *Ascher* and *Townsend*. Moreover, the Court dismissed out of hand a statement made just one year earlier by the authoring justice in *White* that the question whether the "same transaction" test should be adopted was "properly a decision for the Legislature and not for this Court." *People v Grimmett*, 388 Mich 590, 607; 202 NW2d 278 (1972). Thus, the Court dismissed the holdings of *Ascher, Townsend,* and *Grimmett,* each of which was consistent with the express intentions of the ratifiers, in order to pursue what *the Court* believed was the "only meaningful approach to the constitutional protection against being placed twice in jeopardy." *White, supra* at 257-258.

In *Cooper,* the Court continued to implement its own preferred policies in the realm of double jeopardy. The Court began its analysis by acknowledging that pre-

1963 federal caselaw, specifically *Bartkus,* had held that when a defendant by one act violates the laws of two different sovereigns, double jeopardy does not bar the defendant's prosecution by both. Despite acknowledging that *Bartkus* remained good law, the Court hesitated to apply its rule, identifying an alleged "trend" away from the logical underpinnings of that decision. However, it also hesitated to adopt the defendant's position that the dual-sovereignty doctrine should be overruled in its entirety. Rather, the Court articulated a new "middle" position derived from a post-1963 decision of the Pennsylvania Supreme Court. Under this new rule, successive prosecutions by separate sovereigns were permissible only when "the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different." *Cooper, supra* at 461. While the Court claimed that our constitution was the source of its authority for this new approach, it failed to cite *any* Michigan caselaw, and acknowledged that its holding was based, at least in part, on " 'some consideration [of] public policy.' " *Id.,* quoting *People v Beavers*, 393 Mich 554, 581; 227 NW2d 511 (1975) (COLEMAN, J., dissenting).

Thus, at the time *People v Nutt* was decided, this Court's double jeopardy jurisprudence had become largely unmoored from its constitutional foundation. In *White* and its progeny, the Court had disregarded the ratifiers' understanding of the phrase "same offense," and instead implemented a definition of the term that was consistent with its own ideas of "public policy." However, in *Nutt,* we recognized that it was the *ratifiers'* policy choices, and not those of the judiciary, which must govern our interpretation of the constitution. When *White* adopted the "same transaction" test, it acted contrary to the expressed intentions of the ratifiers that Michigan's Double Jeopardy Clause be inter-

preted in a manner consistent with the federal constitution, in accord with our then-existing caselaw. Therefore, in order to implement the policy determinations of the people, we overruled *White* and reinstated the meaning of the phrase "same offense" as it was understood by the ratifiers.

Likewise, in *People v Davis,* we recognized that the entire foundation for *Cooper*'s rejection of the dual-sovereignty doctrine had been its "detection of a trend" calling *Bartkus* into question. In fact, the opposite proved to be true, and the United States Supreme Court later affirmed the dual-sovereignty doctrine in *Heath*. Because *Cooper* had been wrong about the status of federal double jeopardy analysis at the time of ratification, its adoption of the Pennsylvania standard in dual-sovereignty cases became simply untenable. Rather, the correct standard—that intended by the ratifiers—is that a defendant who commits one criminal act that violates the laws of two different sovereigns has committed two different offenses for double jeopardy purposes. *Davis, supra* at 168.

Justice KELLY does not even purport to argue that *Robideau* can be maintained in light of *Nutt* and *Davis*.[17] Rather, Justice KELLY would apparently over-

[17] Justice KELLY "continue[s] to reject the majority's presumption that the voters of our state intended that Michigan's Double Jeopardy Clause be interpreted exactly as the federal provision is interpreted." *Post* at 343. While it is understandable that Justice KELLY would continue to adhere to her dissenting position in *Nutt*, the majority opinion in that case nonetheless remains binding law. Yet, Justice KELLY does not even *attempt* to argue that *Robideau*, which is being overruled here, can somehow be harmonized with *Nutt*. Given Justice KELLY's impassioned opposition to our double jeopardy jurisprudence, and her statement that she would restore the law "*as it existed* before the instant majority began mangling it," *post* at 339 n 13 (emphasis added), one is naturally tempted to re-inquire, see *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 223-228 (2007) (MARKMAN, J., concurring), whether the ongoing dispute

rule all of our *existing* double jeopardy jurisprudence and return this Court to the days when it could safely disregard the intentions of the ratifiers, at least when such intentions conflicted with judicial preferences and assessments of public policy. The approach championed by Justice KELLY is simply incompatible with the paramount duty of the judiciary to construe the people's constitution to mean what the ratifiers intended it to mean. Moreover, in order to maintain *Robideau,* this Court would be required to hold that the term "same offense" means different things depending on which double jeopardy protection is at issue, a proposition that has no historical or textual basis. *Nutt*, *supra* at 594. Therefore, in order to restore Const 1963, art 1, § 15 to the meaning the ratifiers intended, *Robideau* must be overruled.

In addition to restoring the law to what the ratifiers of the constitution manifestly intended, we believe that by its double jeopardy decisions, this Court has also restored a more responsible criminal justice system than that urged by Justice KELLY. In particular, this Court's approach to double jeopardy will better ensure that criminal perpetrators be punished for *all*, not merely *some*, of their offenses; at the same time, it will make it more likely that policy and prosecutorial judgments assigned by our constitution to the legislative and executive branches are undertaken by those branches, rather than by the courts.

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between the majority and Justice KELLY over overrulings of precedent truly concerns attitudes toward stare decisis or merely attitudes toward particular previous decisions of this Court. As the accompanying chart to my concurrence in *Rowland* demonstrates, the majority in many of its overrulings of precedent also restored the law "as it existed" before the overruled precedent. Apparently, precedents can be disregarded only when Justice KELLY believes that the law has been "mangled," not when other justices believe this.

V. CONCLUSION

We conclude that "same offense" in Const 1963, art 1, § 15 means the same thing in the context of the "multiple punishments" strand of double jeopardy as it does in the context of the "successive prosecutions" strand addressed by the Court in *Nutt*. The test set forth in *Robideau* for determining whether the Legislature intended to permit multiple punishments is inconsistent with the understanding of the ratifiers of our constitution that Michigan's Double Jeopardy Clause be construed consistently with the Fifth Amendment, and therefore *Robideau* must be overruled. We further conclude that the *Blockburger* same-elements test, as the reigning test in this Court in the context of the "successive prosecutions" strand and in the federal courts in the context of the "multiple punishments" strand in 1963, effectuates the intentions of the ratifiers. Because each of the felonies of which defendant was convicted, first-degree felony murder and armed robbery, has an element that the other does not, they are not the "same offense" under either Const 1963, art 1, § 15 or US Const, Am V. Accordingly, we reverse the part of the judgment of the Court of Appeals that vacated the armed robbery convictions and sentences and two of the felony-firearm convictions and sentences, and remand this case to the trial court to reinstate defendant's convictions and sentences for armed robbery and the accompanying felony-firearm convictions and sentences.

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

WEAVER, J. I concur in all except part IV.

CAVANAGH, J. (*dissenting*). Today the majority adopts the "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), to determine what comprises "multiple punishments" under Michigan's Double Jeopardy Clause, Const 1963, art 1, § 15. Because I believe that the *Blockburger* test is not always sufficient to enforce double jeopardy protections, I must respectfully dissent.

The Double Jeopardy Clause in both the Michigan Constitution and the United States Constitution protects against both successive prosecutions and multiple punishments for the "same offense."[1] In the multiple punishment context, the Double Jeopardy Clause ensures that a defendant's total punishment will not exceed the punishment authorized by the Legislature. *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991). The United States Supreme Court has characterized the *Blockburger* test as a "rule of statutory construction" that it has "relied on . . . to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Whalen v United States*, 445 US 684, 691; 100 S Ct 1432; 63 L Ed 2d 715 (1980).[2] But simply applying the *Blockburger* test does not end the inquiry. "The *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v United States*, 450 US 333, 340; 101 S Ct 1137; 67 L Ed 2d 275 (1981). Thus, the *Blockburger* test is not an end in itself; it merely assists

[1] Const 1963, art 1, § 15; US Const, Ams V and XIV.

[2] While the legislative body has the exclusive power to define offenses and fix punishments, there remain "constitutional limitations upon this power." *Whalen*, *supra* at 689 n 3.

in determining the Legislature's intent regarding the appropriate punishment for multiple offenses.

The use of *Blockburger* alone has its limitations, particularly in cases involving a compound offense, such as felony murder. The *Blockburger* test does not always recognize the relationship between a compound offense and its predicate offenses. For example, when comparing the abstract elements of felony murder and one of its predicate felonies, the offenses will be deemed separate offenses under the *Blockburger* test. But to convict a defendant of felony murder, the prosecution must establish that the defendant committed the underlying felony. Accordingly, the predicate offense to a felony-murder charge is a necessary element of felony murder, and conviction of both would violate double jeopardy.

When applying the *Blockburger* test to compound offenses, it is essential to account for the necessarily included predicate offense rather than limiting the inquiry to the abstract elements of the compound offense. We recognized this requirement when we held that double jeopardy analysis for compound offenses relies "not upon the theoretical elements of the offense but upon proof of facts actually adduced." *People v Wilder*, 411 Mich 328, 346; 308 NW2d 112 (1981). Similarly, when the United States Supreme Court applied *Blockburger* to the District of Columbia felony-murder statute, it held that multiple prosecutions for felony murder and the predicate offense of rape were barred even though the felony-murder statute does not *always* require proof of rape, but could also be based on robbery, arson, or kidnapping, among other offenses. *Whalen*, *supra* at 694. The Court noted that "[i]n the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are

unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." *Id.* Accordingly, the Court "concluded that, for purposes of imposing cumulative sentences under [the felony-murder statute], Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape." *Id.* at n 8. In sum, both Michigan and federal courts consider a predicate offense to be necessarily included within a compound offense, even if the abstract elements of the compound offense do not, in every case, encompass the elements of the predicate offense.

Applying the "same elements" test of *Blockburger*, the majority concludes that defendant's convictions for felony murder based on larceny and the non-predicate offense of armed robbery survive constitutional scrutiny. *Ante* at 318-319. But the majority errs in only comparing the abstract elements of felony murder and armed robbery. Under *Wilder* and federal law, felony murder and its predicate offense are the "same offense" for double jeopardy purposes because the felony-murder conviction necessarily includes all the elements of the predicate offense. The majority fails to account for the necessarily included elements of the predicate offense. Here, defendant's prosecution for felony murder necessarily put him "in jeopardy" of a conviction of larceny as a lesser included offense. Accordingly, the relevant comparison is between the offense of larceny and armed robbery. It is well established that larceny is a lesser included offense of armed robbery.[3] *People v Jankowski*,

[3] MCL 750.356(1) defines "larceny" in relevant part as follows: "A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section: (a) Money, goods, or chattels."

408 Mich 79, 92; 289 NW2d 674 (1980), disavowed on other grounds, *People v Wakeford*, 418 Mich 95, 111 (1983). As such, a defendant cannot be subjected to multiple prosecutions for both larceny and armed robbery. "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v Ohio*, 432 US 161, 169; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Defendant's convictions for armed robbery must be vacated in light of his convictions for felony murder with a predicate offense of larceny.

It is also important that we keep in mind the fundamental purpose of engaging in the *Blockburger* test—to discern legislative intent. If the Legislature did not intend to impose cumulative punishments for felony murder and its predicate offense, it would follow that it did not intend to impose multiple punishments for felony murder and offenses that entirely encompass the predicate offense. The legislative intent to impose only one punishment for committing felony murder would also apply to lesser and greater included offenses of the

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The armed robbery statute, MCL 750.529, provides in relevant part:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

And § 530(1) states:

> A person who, in the course of committing a *larceny* of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years. [MCL 750.530 (emphasis added).]

predicate offense. This is particularly true in the present case, which features a noteworthy relationship between the offense of felony murder and the nonpredicate offense of armed robbery. Here, defendant could have been prosecuted for felony murder with a predicate felony of armed robbery rather than larceny. Had that occurred, it would have been even more apparent that a simultaneous larceny conviction would violate double jeopardy principles because larceny is a lesser included offense of armed robbery and there was no evidence of separate takings. The government should not be permitted to evade the prohibition against double jeopardy by manipulating the charges it brings against a defendant. Such maneuvering demonstrates the very governmental overreaching that the double jeopardy provision is intended to prevent.

In sum, comparing abstract elements does not adequately enforce the constitutional protection against double jeopardy, particularly in cases involving compound offenses. Comparing the elements of two offenses may indicate whether the Legislature intended to impose cumulative punishments, but it does not serve as an exclusive method for determining whether the Double Jeopardy Clause has been violated. The majority's application of *Blockburger* threatens to undermine the protections against double jeopardy guaranteed by the Michigan Constitution and safeguarded by *Wilder*.

Additionally, the majority contends that the evidence adduced at trial could have supported a finding that two takings occurred—the store's keys and money in a larceny and the victims' wallets in an armed robbery. *Ante* at 317 n 15. But we have not permitted the offense of larceny to be divided this way. "[T]he theft of several items at the same time and place constitutes a single larceny. . . . The appropriate 'unit of prosecution' for

larceny is the taking at a single time and place without regard to the number of items taken . . . ." *Wakeford*, *supra* at 112.[4] By contrast, "the appropriate 'unit of prosecution' for armed robbery is the person assaulted and robbed." *Id.* When defendant was found guilty of all the elements of larceny, that offense involved *all* the property that was taken in this case.[5] Consequently, after defendant was found guilty of larceny, no property remained that could have been separately taken as part of an armed robbery. The Court of Appeals was correct to conclude that there was no factual basis supporting separate offenses of larceny and armed robbery.

Vacating defendant's armed robbery convictions and related convictions of possession of a firearm during the commission of a felony is necessary to enforce the prohibition against double jeopardy. I would affirm the result reached by of the Court of Appeals.

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[4] We recognized the "single larceny" doctrine in *People v Johnson*, 81 Mich 573, 576-577; 45 NW 1119 (1890). In *Johnson*, we held that the theft of property belonging to two different owners comprised a single larceny because the property was taken at the same time from one granary. *Id.* at 577. *Wakeford* discussed this doctrine in the process of discerning the Legislature's intent regarding multiple punishments for armed robbery. Our discussion was not merely dictum because the defendant argued that armed robbery of multiple victims at the same time should be treated the same as larceny; thus, we needed to explain why the armed robbery statute did not convey the same intent regarding multiple punishment as the larceny statute. *Wakeford*, *supra* at 111-112. Justice MARKMAN attempts to distinguish *Wakeford* by stating that "[i]n *Wakeford* there was a single victim from whom the defendant took multiple items," *ante* at 318 n 15, but there is no indication that we would have come to a different conclusion regarding larceny if the defendant had taken property belonging to multiple owners rather than just from multiple cashiers.

[5] Of course, having committed a larceny, a defendant is not free to take property from other owners without fear of additional punishment. Under the larceny statute, the value of the property taken is totaled to distinguish between misdemeanor and felony larceny and to determine the level of punishment. MCL 750.356.

KELLY, J. (*dissenting*). Regrettably, the majority has again unnecessarily chipped away at the Double Jeopardy Clause of the Michigan Constitution. Therefore, I must dissent.

The record in this case contains no evidence that defendant committed the separate offenses of robbery and larceny. For that reason, the Court of Appeals was correct in concluding that defendant's convictions and sentences for both armed robbery and felony murder, with the predicate offense being larceny, violated Michigan's Double Jeopardy Clause.

Additionally, the majority has unnecessarily overruled the test for the multiple-punishment strand of double jeopardy that this Court set forth in *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984). I believe that *Robideau* provides the appropriate protection against multiple punishments in Michigan. Therefore, I must also object to the majority's decision to overrule it and to the majority's continuing disregard for the rule of stare decisis.

THE FACTS

On January 7, 2003, store owner Richard Cummings and employee Stephen Putman died from gunshot wounds. During the criminal investigation, the police discovered that $2,000 in cash was missing from the store, in addition to the store's cash proceeds from that morning. Also missing were the wallets of both victims, the money Cummings carried in his front pocket, and a set of keys to the store. Ultimately, after a jury trial, defendant was convicted of two counts of first-degree felony murder,[1] with larceny as the predicate felony;

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

two counts of armed robbery;[2] and four counts of possession of a firearm during the commission of a felony.[3]

Defendant appealed, arguing that his convictions for both felony murder and armed robbery violated constitutional double jeopardy protections. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2005 (Docket No. 257353). The Court of Appeals agreed and vacated the armed robbery convictions and the corresponding felony-firearm convictions, as well as the sentences for those convictions. The Court specifically noted that "[b]ecause larceny is a necessarily included lesser offense of robbery, and because, factually, there was no evidence that defendant committed separate offenses of robbery and larceny, defendant's armed robbery convictions violate double jeopardy." *Id.,* slip op at 2. The prosecution sought leave to appeal in this Court, contending that the Court of Appeals erred in its double jeopardy analysis.

INSUFFICIENT EVIDENCE

A majority of this Court concludes that the Court of Appeals erred in its double jeopardy analysis by comparing the felony-murder conviction to the nonpredicate felony of armed robbery. According to the majority, because armed robbery was not the predicate felony involved in the felony-murder conviction, reversal is not required pursuant to *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981). I disagree with the majority's conclusion. Rather, I believe that the Court of Appeals correctly concluded that there was no evi-

[2] MCL 750.529.

[3] MCL 750.227b.

dence that defendant committed the separate offenses of robbery and larceny.

In his opening statement, the prosecutor argued to the jury that defendant took the following items: Putman's wallet, Cummings's cash, Cummings's wallet, the keys to the store, and the cash from the cash register. The prosecutor also explained that, in order to prove felony murder, all he had to show was (1) that defendant murdered Cummings and Putman, (2) that he did it with malice, and (3) that he was attempting a larceny at the time he committed the murders. With regard to the armed robbery, the prosecutor explained that he had to prove that defendant committed robbery with a gun.

In his closing statement, the prosecutor summarized for the jury what he believed the evidence showed. Specifically, with regard to the armed robbery, the prosecutor noted (1) that defendant took the keys and (2) that money was taken from several locations, including Cummings's front pocket, the men's wallets, and the cash drawer. With regard to felony murder, the prosecutor argued that defendant caused the deaths of Cummings and Putman. He said that, when defendant caused their deaths, defendant had the intent either to kill the victims or to do them great bodily harm. With regard to the predicate offense of larceny, the prosecutor explained that, if defendant "was either stealing or attempting to steal at the time he killed these two men, which we have shown, he is guilty as charged of both counts of Felony Murder."

Although a prosecutor's comments are not evidence, they are intended to summarize the evidence put before the jury. Clearly, the prosecutor in this case did not distinguish between the separate acts of armed robbery and larceny. Rather, he treated the two crimes as

interchangeable and failed to identify the items stolen with the individual crimes. In fact, when restating the items that defendant allegedly stole during the armed robbery, the prosecutor named all the stolen items.

However, if defendant stole all the items during the armed robbery, none remained to be stolen during the larceny. In order to satisfy the predicate offense of larceny, the prosecutor stated that he had already shown that defendant was either stealing or attempting to steal from the two men. However, when he made that assertion, the prosecutor was referring to the proofs he had just discussed with regard to the armed robbery. Accordingly, the Court of Appeals correctly concluded that there was no evidence that defendant committed both armed robbery and larceny.

The majority notes that a reasonable juror could have concluded that there were two separate takings: the money from the cash drawer and the wallets from the victims. However, the prosecutor did not make this distinction. Moreover, the facts of this case should not be read in a vacuum. In making the distinction it does, the majority is essentially acting as a super-prosecutor and a thirteenth juror.

The Court of Appeals correctly concluded that there was insufficient evidence of two takings, and that defendant was convicted of both felony murder and the predicate felony. As the Court noted, it is well established that convictions and sentences for both felony murder and the predicate felony for felony murder violate double jeopardy. *Wilder*, 411 Mich at 345-347. The proper remedy is to vacate the conviction and sentence for the underlying felony. Accordingly, I would affirm the Court of Appeals judgment and vacate defendant's two convictions for armed robbery and the cor-

responding two convictions for felony-firearm, as well as the sentences for those convictions.[4]

THE DOUBLE JEOPARDY ISSUE

It is unnecessary in this case for the Court to choose whether the proper test for determining if a double jeopardy violation has occurred is set forth in *Blockburger*[5] or *Robideau*. However, the majority takes this step, and I state my strong disagreement. *Robideau* should not be overruled.

The Double Jeopardy Clause of the Michigan Constitution[6] provides: "No person shall be subject for the same offense to be twice put in jeopardy." Similarly, the Double Jeopardy Clause of the United States Constitution[7] provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."[8]

The Double Jeopardy Clause primarily offers three protections: it protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Robideau*, 419 Mich at 468, citing *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

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[4] The majority notes that its approach to double jeopardy will better ensure that criminal perpetrators be punished for *all*, not merely *some*, of their offenses. A telling flaw that I find with the majority's approach is that, in its zeal, it will at times punish a defendant twice for the same offense.

[5] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

[6] Const 1963, art 1, § 15.

[7] US Const, Am V.

[8] In *Benton v Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969), the United States Supreme Court held that the federal Double Jeopardy Clause was applicable to actions by the states.

The first two protections are commonly referred to as the "successive prosecution" strand, and the third protection is commonly referred to as the "multiple punishment" strand. According to the majority, the instant case concerns the third protection. As noted in *Robideau*, "[t]he Double Jeopardy Clause prohibits a court from imposing more punishment than that intended by the Legislature." *Robideau*, 419 Mich at 469. Accordingly, " 'the question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent . . . .' " *Id.*, quoting *Ohio v Johnson*, 467 US 493, 499; 104 S Ct 2536; 81 L Ed 2d 425 (1984).

RECENT CHANGES IN MICHIGAN'S DOUBLE JEOPARDY JURISPRUDENCE

It should be noted that there are few areas of the law in which the current Michigan Supreme Court majority has altered state law more than double jeopardy jurisprudence. Ten years after the 1963 Michigan Constitution was ratified, this Court decided *People v White*, 390 Mich 245; 212 NW2d 222 (1973). There, the Court held that the "same transaction" test should be used to determine if serial prosecutions violate the state constitution's double jeopardy provision. *Id.*

Thirty years later, the majority of this Court[9] overruled *White* and instead adopted the "same elements" test, also referred to as the *Blockburger* test. *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004). Specifically, the majority in *Nutt* concluded that, in adopting the Michigan Double Jeopardy Clause, "the people of this state intended that our double jeopardy provision would be construed consistently with Michigan precedent and the Fifth Amendment." *Id.* at 591. Accordingly, because

[9] Justice YOUNG wrote the majority opinion, which was signed by then-Chief Justice CORRIGAN and Justices WEAVER, TAYLOR, and MARKMAN.

federal courts used the same-elements test in interpreting the term "same offence" under the federal constitution, this Court likewise adopted the same-elements test. *Id.* at 576, 592.

The dissent in *Nutt*[10] rejected the majority's application of the same-elements test and noted that it "is not as entrenched in federal jurisprudence as the majority claims." *Id.* at 597 (CAVANAGH, J., dissenting). The dissent noted that the United States Supreme Court has used other tests, because it recognized that the same-elements test is not an adequate safeguard to protect a citizen's double jeopardy rights. *Id.* at 598-599, citing *Ashe v Swenson*, 397 US 436, 443-444, 447; 90 S Ct 1189; 25 L Ed 2d 469 (1970), *Ball v United States*, 470 US 856, 105 S Ct 1668, 84 L Ed 2d 740 (1985), *In re Nielson*, 131 US 176; 9 S Ct 672, 33 L Ed 118 (1889), *Harris v Oklahoma*, 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), and *Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977).

Specifically, the dissent noted that a technical comparison of the elements is neither constitutionally sound nor easy to apply. *Nutt*, 469 Mich at 600. Essentially, the dissent opined that the same-elements test is nothing more than a method that can be used to interpret statutes. *Id.* at 598, citing *Albernaz v United States*, 450 US 333, 340; 101 S Ct 1137; 67 L Ed 2d 275 (1981).

In a similar vein, in 1976, this Court decided *People v Cooper*, 398 Mich 450; 247 NW2d 866 (1976). In *Cooper,* the defendant was acquitted in federal court, then tried in state court on charges for the same criminal act. *Id.* at 453. The issue was whether his right to be free from double jeopardy under either the Michigan or United

[10] Justice CAVANAGH wrote the dissent, and I signed it, as well.

States Constitution had been violated. *Id*. We held that "Const 1963, art 1, § 15 prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different." *Id.* at 461.

Again, nearly 30 years later, the same majority of the Michigan Supreme Court that overruled *White* in *Nutt* overruled *Cooper* in *People v Davis*, 472 Mich 156; 695 NW2d 45 (2005).[11] The majority in *Davis* relied on its analysis in *Nutt* for this proposition: The double jeopardy provision of the Michigan Constitution should be construed consistently with federal double jeopardy jurisprudence that existed at the time the 1963 Michigan Constitution was ratified. *Id.* at 168. Accordingly, applying federal double jeopardy jurisprudence, the majority in *Davis* concluded that the Michigan Double Jeopardy Clause did not bar the defendant's successive prosecutions in Michigan and Kentucky. *Id.* at 158. The reason was that the states are separate sovereigns deriving their authority to punish from distinct sources of power. *Id.*

I dissented in *Davis*.[12] My dissent reviewed this state's common-law history before we became a state, our constitutional history, and the language of the Address to the People before the constitution was ratified in 1963. It rejected the majority's claim that the voters of our state intended that Michigan's Double Jeopardy Clause be interpreted exactly as the federal provision is interpreted. *Id.* at 182 (KELLY, J., dissenting). I also noted that *Cooper* properly relied on the

[11] Justice WEAVER wrote the majority opinion, which was signed by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN.

[12] Justice CAVANAGH concurred with my dissent. *Id.* at 191 (CAVANAGH, J., dissenting).

Michigan Constitution, and that the *Cooper* rule was necessary to protect the individual's and the state's respective interests. *Id.* at 184.[13]

Finally, we come to the instant case. In 1984, this Court decided *Robideau* and specifically addressed the multiple-punishment strand of Michigan's Double Jeopardy Clause. The Court noted that, although the United States Supreme Court had adopted the *Blockburger* same-elements test, the United States Supreme Court's treatment of issues of multiple punishment suggested a struggle to set forth a single standard. *Robideau*, 419 Mich at 479.

Turning to Michigan caselaw, *Robideau* concluded that Michigan's double jeopardy analysis had been no more consistent than federal double jeopardy analysis. *Id.* at 484. In deciding the appropriate test to use in Michigan, this Court explicitly rejected the *Blockburger* test. *Id.* at 485-486. Specifically, it stated that, although *Blockburger*'s "creation of a presumption may make a court's task easier, it may also induce a court to avoid difficult questions of legislative intent in favor of the wooden application of a simplistic test." *Id.* at 486. Instead, this Court used the traditional means of determining legislative intent: the subject, language, and history of the statutes. *Id.*

Now, more than 20 years after *Robideau* was decided, the same majority that overturned *White* and *Cooper* overturns *Robideau*. Relying once again on its analysis in *Nutt*, the majority holds that *Blockburger* set forth

[13] The majority claims that I would overrule all of the existing double jeopardy jurisprudence. This is inaccurate. My concern is simply with the majority's contributions to our double jeopardy jurisprudence. In that regard, I have consistently dissented. As I noted in my dissents in *Davis*, *Nutt*, and in this case, I would have upheld Michigan's double jeopardy jurisprudence as it existed before the instant majority began mangling it.

the proper test to determine when multiple punishments are barred on double jeopardy grounds.

It is beyond argument that the majority of this Court has systematically and drastically altered Michigan double jeopardy jurisprudence. For nearly 30 years, this Court applied *White* to cases involving successive prosecutions and *Cooper* to cases involving two sovereigns. For more than 20 years, this Court applied *Robideau* to cases involving multiple punishments. However, in rapid succession, the majority of this Court has discarded each of these precedents and created its own double jeopardy jurisprudence.

I dissented in *Nutt* and *Davis* because I did not agree that *White* and *Cooper* should have been overturned. Today, I again dissent because I do not agree that *Robideau* should be overturned.

THE *ROBINSON*[14] FACTORS

A. WHETHER THE CASE WAS WRONGLY DECIDED

This Court laid out the factors to consider in departing from the rule of stare decisis in the *Robinson* case: (1) whether the earlier decision was wrongly decided, (2) whether the decision at issue defies "practical workability," (3) whether reliance interests would work an undue hardship if the authority is overturned, and (4) whether changes in the law make the decision no longer justified. *Robinson*, 462 Mich at 464.[15]

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

[15] It is worth noting that the same majority that overrules *Robideau* today set forth in *Robinson* the test for departing from the rule of stare decisis. Notwithstanding the fact that it created this test, the majority pays little attention to it and instead goes through the *Robinson* factors in a footnote.

First, I believe *Robideau* was correctly decided. In *Robideau*, this Court exhaustively reviewed federal caselaw concerning double jeopardy. *Robideau*, 419 Mich at 472-480. After concluding that federal jurisprudence offered no concrete guidance, this Court exhaustively reviewed Michigan caselaw concerning Michigan's Double Jeopardy Clause. *Id*. at 480-484. Similarly, this Court found that Michigan's double jeopardy analysis had not been consistent. *Id*. at 484.

This Court noted that it had concluded in *White* that the transactional approach was the correct standard to use with regard to successive prosecutions. *Id*. at 485. However, because different interests were involved, a different standard was needed for cases involving multiple punishments. *Id*. Accordingly, after conducting an extensive caselaw analysis, this Court explicitly rejected the *Blockburger* test, preferring instead traditional means of determining the intent of the Legislature: the subject, language, and history of the statutes. *Id*. at 486.[16]

Robideau was based on the Michigan Constitution and Michigan caselaw. The test in *Robideau* adequately safeguards a Michigan citizen's right to be free from multiple punishments for the same offense. As noted in

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[16] Specifically, this Court set forth a nonexhaustive list of considerations:

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. . . .
>
> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. [*Robideau*, 419 Mich at 487.]

Robideau, when multiple punishments are involved, the Double Jeopardy Clause is a restraint on the prosecution and the courts, not on the Legislature. *Id.* at 469. The test in *Robideau* ensures that the defendant does not receive more punishment than intended by the Legislature. Accordingly, it adequately protects the double jeopardy rights of Michigan citizens.

Moreover, the *Robideau* Court was free to use its own preferred methods of ascertaining judicial intent. As noted repeatedly throughout *Robideau*, the *Blockburger* test is simply a method for determining legislative intent. *Robideau*, 419 Mich at 473, 478, citing *Gore v United States*, 357 US 386; 78 S Ct 1280; 2 L Ed 2d 1405 (1958) (stressing that *Blockburger* was decided as a matter of legislative intent), and *Albernaz,* 450 US at 338 (noting that the *Blockburger* test was merely a means to determine legislative intent and that the presumption created by the *Blockburger* test could be rebutted by a clear indication of legislative intent to the contrary).

I believe this is the proper lens through which to view *Blockburger*: It is simply one of many methods by which a court can discern the Legislature's intent. It is not a definitive test that should, or could, be used in every case. Indeed, as noted by this Court in *Robideau*, "it would be quite contrary to established principles of federalism for the United States Supreme Court to impose on the states the method by which they must interpret the actions of their own legislatures." *Robideau*, 419 Mich at 486. Accordingly, the *Robideau* Court was within its authority to reject the *Blockburger* test and instead fashion a test that properly reflected the protections of the Michigan Constitution.

The majority believes that the constitution's ratifiers intended our double jeopardy provision to be construed

consistently with the interpretation given the Fifth Amendment by federal courts at the time of ratification. I disagree. As I noted in my dissent in *Davis*, the sole concern in revisiting the Double Jeopardy Clause in our state constitution was to clarify that jeopardy attaches when a jury is sworn, as our courts had interpreted. *Davis,* 472 Mich at 181 (KELLY, J., dissenting).

In *Davis*, I also rejected the majority's claim that the people of Michigan intended to adopt the federal interpretation of the Double Jeopardy Clause. *Id.* Specifically, I did not agree with the majority that the ratifiers knew how the United States Supreme Court had interpreted the federal Double Jeopardy Clause and that they accepted it. *Id.* I did not agree that the ratifiers were willing to allow the federal government to interpret our constitution for us. *Id.* I continue to believe that my analysis in *Davis* was correct. Therefore, I continue to reject the majority's presumption that the voters of our state intended that Michigan's Double Jeopardy Clause be interpreted exactly as the federal provision is interpreted.

The majority overturns *Robideau* also in the belief that the Michigan Constitution does not afford greater protections than does the Fifth Amendment of the United States Constitution. As an initial matter, I would note that the *Robideau* Court did not expressly base its decision on this assertion. Regardless, this Court has, for decades, determined that our constitutional prohibition against double jeopardy affords greater protection than does the Fifth Amendment. See, e.g., *Robideau*, 419 Mich at 507 n 5 (CAVANAGH, J., dissenting), citing *People v Wakeford*, 418 Mich 95, 105 n 9; 341 NW2d 68 (1983), *People v Carter*, 415 Mich 558, 582-584; 330 NW2d 314 (1982), *Wilder*, 411 Mich at 343-349, *People v Jankowski*, 408 Mich 79, 91-92, 96;

289 NW2d 674 (1980), and *White*. Accordingly, for the reasons I have stated, I continue to believe *Robideau* was correctly decided.

B. PRACTICAL WORKABILITY PROBLEMS

The next *Robinson* factor to consider is whether the decision at issue defies "practical workability." *Robinson*, 462 Mich at 464. I do not believe that it does. In interpreting statutes, courts are charged with the responsibility to determine the Legislature's intent in writing such statutes. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). *Robideau* set forth a nonexhaustive list of factors a court could consider in determining legislative intent. I believe that the test set forth in *Robideau* is workable. It is no more difficult to apply than any other method that this Court uses to discern the Legislature's intent.

The majority adopts the *Blockburger* test. However, as indicated by the *Robideau* Court, the *Blockburger* test is not an easy test to apply consistently. This Court noted that, among other difficulties that arise from the application of the *Blockburger* test, it "fails to recognize that the Legislature does not always create crimes in neat packages which are susceptible to a pure greater and lesser included offense analysis." *Robideau*, 419 Mich at 487 n 6. Moreover, the *Blockburger* test "may also induce a court to avoid difficult questions of legislative intent in favor of the wooden application of a simplistic test." *Id.* at 486. The difficulty in applying *Blockburger* is one of the reasons, if not the main reason, this Court specifically declined to adopt the *Blockburger* test.

In *Nutt*,[17] the dissent noted that the *Blockburger* test is an inadequate safeguard because it leaves the consti-

[17] 469 Mich at 565 (CAVANAGH, J., dissenting).

tutional guarantee at the mercy of the Legislature's decision to modify statutory definitions. *Nutt*, 469 Mich at 600, quoting *United States v Dixon,* 509 US 688, 735; 113 S Ct 2849; 125 L Ed 2d 556 (1993) (White, J., dissenting). Therefore, it is the *Blockburger* test, not the *Robideau* test, that defies practical workability.

C. HARDSHIP BECAUSE OF RELIANCE

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. "[T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id*. at 466. Overturning *Robideau* would work an undue hardship. As indicated above, Michigan courts have followed the test for more than 20 years. It has become a fundamental part of Michigan double jeopardy jurisprudence.

D. CHANGES IN THE LAW

The final *Robinson* factor is whether changes in the law make the decision no longer justified. *Id.* at 464. There has been no change in Michigan's Double Jeopardy Clause, and the test set forth in *Robideau* has been applied since its inception in 1984.

The majority notes that the concern expressed by this Court in *Robideau* that *Blockburger* does not account for cognate lesser-included offenses is no longer pertinent in light of *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002). As an initial matter, the *Robideau* Court's reasoning was much more diverse than the majority implies. The *Robideau* Court did not reject

the *Blockburger* test solely because it did not account for cognate lesser-included offenses. Rather, this Court noted that federal double jeopardy jurisprudence was inconsistent and that *Blockburger* was difficult to apply.

Regardless, in *Cornell*, the same majority that overturned *White, Cooper,* and now *Robideau* held that an offense is an "offense inferior to that charged in the indictment" for purposes of MCL 768.32(1) when " 'the lesser offense can be proved by the same facts that are used to establish the charged offense.' " *Id.* at 354-355 (citation omitted).

I dissented in *Cornell* and noted that, in coming to this conclusion, the majority strayed beyond the matter at hand, which was lesser-included misdemeanor offenses. *Cornell*, 466 Mich at 376 (KELLY, J., dissenting). I noted that, whereas the majority devoted pages of discussion to cognate lesser included offenses, its holding applied to necessarily included felony offenses. Therefore, I disagreed with the majority's analysis in *Cornell* and do not believe it affects the instant case.

Accordingly, after considering all the *Robinson* factors, I conclude that *Robideau* should not be overturned.

CONCLUSION

There was no need, other than one springing from the majority's desire to rewrite Michigan double jeopardy jurisprudence, to overturn *Robideau* or determine whether *Robideau* or *Blockburger* is the appropriate test to apply. Rather, the Court of Appeals was correct. There was no evidence in this case that defendant committed the separate offenses of robbery and larceny. His armed robbery convictions violate double jeopardy.

Additionally, because I believe that *Robideau* provides the appropriate protection against multiple punishments in Michigan, I must also dissent from the majority's decision to overturn that decision. Application of the *Robinson* factors supports my position.

I would affirm the Court of Appeals judgment and vacate defendant's two convictions for armed robbery and the two corresponding convictions for felony-firearm, as well as the sentences for those convictions.

CZYMBOR'S TIMBER, INC v CITY OF SAGINAW

Docket No. 130672. Argued December 13, 2006 (Calendar No. 9). Decided June 20, 2007.

Czymbor's Timber, Inc., and Michael Czymbor brought an action in the Saginaw Circuit Court against the city of Saginaw and its city council and city manager, seeking, in part, to have Saginaw Ordinances, title IX, §§ 130.02 and 130.03(D) declared invalid on the basis that the ordinances, which prohibit the discharge of firearms, arrows, and other listed projectiles within the city limits, are preempted by state law regulating hunting. The plaintiffs alleged that the ordinances, which do not contain an exception for the taking of game, unlawfully prevent them from hunting on their land within the city limits. The court, Lynda L. Heathscott, J., granted summary disposition in favor of the defendants, ruling that the ordinances were related to the city's general police power to regulate the discharge of weapons, and not to the regulation of hunting. The Court of Appeals, BANDSTRA, P.J., and FITZGERALD and WHITE, JJ., affirmed, holding that the relevant statute, MCL 324.41901, contained in part 419 of the Natural Resources and Environmental Protection Act, MCL 324.41901 *et seq.*, which is part of the act that concerns the hunting area control, does not preempt the city ordinances. 269 Mich App 551 (2006). The Supreme Court granted the plaintiffs' application for leave to appeal. 475 Mich 909 (2006).

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

There is no need to determine whether the defendants' ordinances are preempted by MCL 324.41901 because the clear language of § 41901 grants the Department of Natural Resources the authority to regulate and prohibit the discharge of firearms and bow and arrow, but that authority is limited to those areas established under part 419. The plaintiffs failed to show that their property is an area established under part 419. Because the plaintiffs have not made the requisite showing, there is no basis to conclude that the statute is applicable to the plaintiffs' property. Additionally, the current administrative rule promulgated by the department to administer part 419, Mich Admin Code, R 299.3048,

applies to townships but not to cities such as the defendant city. Therefore, even if the plaintiffs could show that their property is an area established under part 419, the administrative mechanism currently in place would not apply. The judgment of the Court of Appeals must be affirmed, although under an alternative rationale.

Affirmed.

Justice CAVANAGH, dissenting, stated that the city's ordinance is preempted because there is no exemption for the taking of game. The exclusive authority of the Department of Natural Resources to regulate the taking of game would be usurped by allowing the city to prohibit the discharge of firearms and other weapons within the city without an exception for the taking of game or approval from the department to close the city to the taking of game.

Justice WEAVER, joined by Justice KELLY, dissenting, stated that the plaintiffs' property is a hunting area as defined by the Department of Natural Resources and, as such, is subject to hunting regulations and restrictions prescribed by part 419. The plain language of part 419 provides the exclusive method by which the discharge of weapons may be prohibited in hunting areas, and explicitly authorizes the department to determine and define the boundaries of hunting areas to which part 419 applies. The plaintiffs' land is a hunting area that the department regulates; therefore, any change to the department's regulations in the area must follow the procedure outlined in part 419. The existing statutory scheme does not impliedly or explicitly restrict the application of part 419 to townships; rather, it applies to the governing body of any political subdivision. The department, not the hunter area control committee, is empowered to make all decisions regarding the regulation of hunting. Mich Admin Code, R 299.3048 is effective only to the extent that it does not exceed or restrict the statutory mandates in part 419. The rule does not limit the application of part 419 to townships. The judgment of the Court of Appeals should be reversed.

1. ADMINISTRATIVE LAW — DEPARTMENT OF NATURAL RESOURCES — DISCHARGE OF FIREARMS.

Section 41901 of the Natural Resources and Environmental Protection Act grants the Department of Natural Resources the authority to regulate and prohibit the discharge of firearms and bows and arrows; however, that authority is limited to those areas established under part 419 of the act (MCL 324.41901 *et seq*.).

2. ADMINISTRATIVE LAW — DEPARTMENT OF NATURAL RESOURCES — HUNTING AREA CONTROL.

The administrative rule promulgated by the Department of Natural Resources to administer part 419 (hunting area control) of the Natural Resources and Environmental Protection Act applies only to townships (MCL 324.41901 *et seq.*; Mich Admin Code, R 299.3048).

Warner Norcross & Judd LLP (by *John J. Bursch* and *Joseph M. Infante*) for the plaintiffs.

Braun Kendrick Finkbeiner P.L.C. (by *Scott C. Strattard* and *Bruce L. Dalrymple*) for the city of Saginaw.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Sara R. Gosman*, Special Assistant Attorney General, and *Robert P. Reichel*, Assistant Attorney General, for the Department of Natural Resources.

Foster Zack Little Pasteur & Manning, PC (by *J. Kevin Winters* and *Marc D. Matlock*), for the Michigan United Conservation Clubs.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Michael P. McGee* and *Jeffrey S. Aronoff*), for the Michigan Municipal League.

YOUNG, J. Plaintiffs, property owners in the city of Saginaw, brought suit to challenge the validity of two city ordinances that ban the discharge of firearms and the discharge of arrows by bows within city limits. Plaintiffs claim that, because neither ordinance contains a hunting exception, the ordinances conflict with and are preempted by MCL 324.41901, a statute that gives the Michigan Department of Natural Resources (DNR) the authority to regulate and prohibit the discharge of firearms and bows under certain circumstances.

However, because plaintiffs have not made the requisite showing that their property is a hunting area "established under" part 419 of the Natural Resources and Environmental Protection Act, MCL 324.41901 *et seq*., there is no need to determine whether defendants' ordinances are preempted by the statute. Moreover, the administrative rule promulgated by the DNR to administer part 419, Mich Admin Code, R 299.3048, pertains only to townships, not cities such as defendant city of Saginaw. We therefore affirm the judgment of the Court of Appeals, although for different reasons.[1]

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs own a 56-acre parcel of property located in the city of Saginaw. Plaintiffs claim that the property has been used for hunting for many years.

In 1999, defendant city of Saginaw enacted Saginaw Ordinances, title IX, § 130.03(D), which prohibits the discharge of firearms within the city.[2] The ordinance

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[1] In affirming the judgment of the Court of Appeals, we do not address and take no position on the Court of Appeals preemption analysis.

[2] The ordinance provides:

> (1) *Discharge Prohibited*. It shall be unlawful for any person to discharge a firearm in the City.
>
> (2) *Exceptions*. It shall not be a violation of this section to discharge a firearm under the following conditions:
>
> (a) In the protection of life;
>
> (b) Law enforcement officers in the performance of their duties;
>
> (c) An established and lawfully permitted educational program properly supervised;
>
> (d) Military functions, such as parades, funerals, firing blank charges.

contains four exceptions, but does not provide an exception for hunting. Subsequently, in 2002, defendant enacted Saginaw Ordinances, title IX, § 130.02, which prohibits the discharge of many types of projectiles, including arrows "by use of any bow . . . ."[3] This ordinance contains no exceptions.

In 2003, plaintiff Michael Czymbor sought a hunting permit from the DNR. However, according to plaintiffs' affidavit, the DNR denied plaintiff a hunting permit because the DNR "understood that hunting was not allowed" on plaintiffs' property as a result of defendants' ordinances. The DNR further indicated to plaintiff that it would issue hunting permits in the future if the city ordinances are repealed and "hunting is restored to the property."

Plaintiffs filed an action for a declaratory judgment and a motion for a temporary restraining order, challenging the validity of the two ordinances because neither contained an exception for hunting. Plaintiffs claimed that the ordinances were invalid to the extent that they interfered with lawful hunting activity. Because the DNR was granted the authority to regulate or prohibit the discharge of hunting weapons under MCL 324.41901, plaintiffs argued that the statute preempted the ordinances.

Subsequently, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), contending that the ordinances were enacted as a valid exercise of the city's police power under the Home Rule City Act, MCL 117.1 *et seq*. Moreover, defendants claimed that § 41901 did not preempt the city ordi-

[3] The ordinance provides that "[n]o person shall discharge or propel any arrow, metal ball, pellet or other projectile by use of any bow, long bow, cross bow, slingshot or similar device within the City limits."

nances because the regulation of the discharge of weapons was a subject area that was separate and distinct from the regulation of hunting. The trial court granted defendants' motion for summary disposition, concluding that the statute did not preempt the local ordinances because the ordinances did not regulate the same area as the statute.

In a published opinion, the Court of Appeals affirmed the judgment of the lower court, holding that the city ordinances were not preempted by MCL 324.41901.[4] The panel noted that state law preempts a municipal ordinance where either a direct conflict exists between the enactments, or where the statute completely occupies the field that the ordinance attempts to regulate. Because no direct conflict existed, the panel analyzed the "field preemption" issue, concluding that the statute did not preempt the ordinances because "firearm control is a subject distinct from the field of hunting control" and that defendant city had authority as a home rule city to enact measures to assure public peace and safety.[5]

Plaintiffs sought leave to appeal in this Court, arguing that the city's antidischarge ordinances were preempted by state law. This Court granted leave to appeal.[6] Subsequently, after oral argument, we directed the parties and amicus curiae DNR to file supplemental briefs.[7]

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[4] *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551; 711 NW2d 442 (2006).

[5] *Id*. at 559.

[6] 475 Mich 909 (2006).

[7] 477 Mich 1277 (2007). Specifically, we directed the parties and amicus curiae to address "(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

II. STANDARD OF REVIEW

Resolution of the issue presented in this case involves the interpretation of MCL 324.41901. Statutory interpretation is a question of law that we review de novo.[8] Moreover, this Court reviews the decision to grant or deny summary disposition de novo.[9]

III. ANALYSIS

A. THE STATUTE

Part 419 of the Natural Resources and Environmental Protection Act, entitled "Hunting Area Control," consists of five statutory provisions. The statute at issue, MCL 324.41901, provides, in relevant part:

> (1) In addition to all of the department powers, in the interest of public safety and the general welfare, *the department may regulate and prohibit hunting, and the discharge of firearms and bow and arrow, as provided in this part, on those areas established under this part where hunting or the discharge of firearms or bow and arrow may or is likely to kill*, injure, or disturb persons who can reasonably be expected to be present in the areas or to destroy or damage buildings or personal property situated or customarily situated in the areas or will impair the general safety and welfare. *In addition, the department may determine and define the boundaries of the areas.* Areas or parts of areas may be closed throughout the year. The department, in furtherance of safety, may designate areas where hunting is permitted only by prescribed methods and weapons that are not inconsistent with law. When-

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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."

[8] *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005).

[9] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 60; 718 NW2d 784 (2006).

> ever the governing body of any political subdivision determines that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows, by resolution it may request the department to recommend closure of the area as may be required to relieve the problem. [Emphasis added.]

The clear language of § 41901 grants the DNR the authority to "regulate and prohibit" the discharge of firearms and bows and arrows, but that authority is limited to "*those areas established under this part* . . . ." (Emphasis added.) In this case, plaintiffs have made no showing that their property is an area "established under" part 419. Because plaintiffs have not made the requisite showing, there is no basis to conclude that the statute is applicable to plaintiffs' property.

In their supplemental briefs, plaintiffs and the DNR maintain that plaintiffs' property need not be "established" under part 419 because the DNR has the "exclusive authority to regulate the taking of game" under MCL 324.40113a(2), and that hunting on private land is generally permitted everywhere, subject to the permission of the landowner.[10] However, the issue before us today is not where hunting is permitted. Rather, the issue before us is the applicability of MCL 324.41901.[11]

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[10] The other hunting limitation identified by the DNR can be found at MCL 324.40111(4), which prohibits hunting or discharging a weapon within 150 yards of an occupied building without first obtaining the written permission of the landowner. A violation of MCL 324.40111(4) is a misdemeanor. MCL 324.40118.

[11] Justice WEAVER's dissenting opinion claims that the plain language of MCL 324.41901 "explicitly authorizes the DNR to determine and define the boundaries of hunting areas in Michigan." *Post* at 362-363.

However, MCL 324.41901(1), which is substantively identical to its predecessor statute, MCL 317.332, merely states that "[i]n addition, the department may determine and define the boundaries of the areas." Read in context, the statute indicates that, in addition to regulating and prohibiting hunting and firearms "where hunting or the discharge of

The plain language of the statute requires that property be "established under" part 419 before the regulatory provisions of § 41901 apply. In other words, the DNR's authority to regulate the discharge of weapons on property under § 41901, and any potential reciprocal limitation on the city of Saginaw's ability to prohibit the discharge of weapons within its city limits, exists only to the extent that the subject property has been "established under" part 419. While the DNR enjoys "the exclusive authority to regulate the taking of game," MCL 324.40113a(1), there is no indication that the legislative grant of authority to regulate the taking of game is superior to or supersedes the specific legislative grant of authority at issue here—*the authority to regulate the discharge of weaponry*.[12] In any event, the DNR cannot exceed the authority granted by the Legislature to regulate the discharge of weaponry under MCL 324.41901.[13] Moreover, while the DNR's interpretation of the statute is given some measure of deference, its construction cannot conflict with the plain language of the statute,[14] which requires that property be "estab-

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firearms or bow and arrow may or is likely to kill . . . ," the department may also define the boundaries of the areas. Thus, the sentence at issue in § 41901 indicates that that DNR may "determine and define the boundaries of the areas" where hunting has been *restricted*, and does not address where hunting is permitted.

[12] In fact, the first phrase in MCL 324.41901(1), stating that the authority to regulate the discharge of weaponry is "[i]n *addition to* all of the department powers," (emphasis added) indicates that this authority is *coequal,* rather than inferior, to the DNR's authority to regulate the taking of game.

[13] *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000); *York v Detroit (After Remand)*, 438 Mich 744; 475 NW2d 346 (1991); *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951).

[14] *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004); *Ludington Service Corp v Acting Comm'r of Ins,* 444 Mich 481; 511 NW2d 661 (1994).

lished under" part 419 before the regulatory provisions of § 41901 are applicable.[15]

Because plaintiffs have not shown that their property is "established under" part 419 of the Natural Resources and Environmental Protection Act, there is no basis to conclude that the statute is applicable, thus eliminating the need to decide whether defendants' ordinances are preempted by MCL 324.41901.

B. THE ADMINISTRATIVE RULE

Additionally, while not discussed by the parties or the DNR, we also note that the current administrative rule promulgated by the DNR to administer part 419 applies to townships but not to cities such as defendant. Thus, even if plaintiffs could show that their property was "established under" part 419, which they cannot, the administrative mechanism currently in place would not apply.

Mich Admin Code, R 299.3048 provides:

> (1) The hunter area control committee was created by section 1 of Act No. 159 of the Public Acts of 1967. It is composed of a representative of the department of natural resources, a representative of the department of state police, *the township supervisor*, and a representative of the sheriff's department of the counties involved.
>
> (2) The committee selects a chairman from its members who serves for a year, then alternates with a member from another agency. The department of natural resources performs clerical, operational, and administrative duties of the

[15] In dissent, Justice WEAVER opines that plaintiffs' property is "established under" part 419 because "Saginaw County, in which plaintiffs' land is located, is mentioned multiple times" in the Wildlife Conservation Order (WCO). *Post* at 364. The WCO can be found at <http://www.michigan.gov/documents/Wcao_134367_7.html> (accessed May 2, 2007). However, nothing in the WCO references, much less purports to establish areas under MCL 324.41901 *et seq*.

committee. Expenses incurred are borne by the member's department. Costs of surveys and actions outside the committee and the sheriff's department are borne by the department of natural resources.

(3) In the interest of public safety and the general welfare, the committee may regulate and prohibit hunting and the discharge of firearms and bow and arrow on those areas where hunting or the discharge of firearms or bow and arrow may or is likely to kill, injure, or disturb persons who reasonably can be expected to be present in the areas or to destroy or damage buildings or personal property situated or customarily situated in such areas or will impair the general safety and welfare. The committee may determine and define the boundaries. Areas may be closed throughout the year or parts thereof. The committee, in furtherance of safety, may designate areas where hunting is permitted only by prescribed methods and weapons not inconsistent with law. [Emphasis added.]

While the administrative rule was originally promulgated to administer the predecessor statute to MCL 324.41901, there is no indication that the current rule does not remain in full effect.[16] Justice WEAVER's dissent claims that reading Rule 299.3048 according to its plain language is contrary to "a plain reading of part 419." *Post* at 369. However, nothing in part 419 describes or requires any particular mechanism of implementation. Rather, a "plain reading of part 419" indicates that the mechanism of implementation is left to the discretion of the DNR. Here, it is clear that the DNR has chosen to administer MCL 324.41901 by means of Rule 299.3048.[17]

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[16] See MCL 324.105; MCL 324.41902(3). Of course, if the DNR no longer believes that the administrative rule "adequately cover[s] the matter," then the DNR is encouraged to promulgate new rules in conformance with the Administrative Procedures Act, MCL 24.201 *et seq*.

[17] It should also be noted that *each and every* hunting restriction promulgated under part 419 involves only townships, and does not

IV. CONCLUSION

The actions of the DNR throughout these proceedings have been, to say the least, contradictory. Initially, the DNR refused to issue hunting permits to Michael Czymbor *solely* because of the existence of defendants' discharge ordinances. However, the DNR now claims that these same ordinances are invalid to the extent that they do not provide a hunting exception, because only the DNR may prohibit the discharge of weaponry in hunting areas under MCL 324.41901. Moreover, the department claims that areas need not be established under part 419, despite the clear language of MCL 324.41901, because its "exclusive authority to regulate the taking of game" under § 40113a(2) obviates the need to comply with the requirements of § 41901. Additionally, the DNR has failed to acknowledge the existence or effect of Rule 299.3048. Certainly, if the DNR no longer wishes to acquiesce to defendants' antidischarge ordinance, it is free to take the necessary steps to amend its administrative rules to conform to the view it urges in its briefs. It may not, however, simply ignore the language of MCL 324.41901 or the requirements of the Administrative Procedures Act.[18]

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involve a single city or village. See Local Hunting and Firearms Controls, Mich Admin Code, R 317.101.1 through 317.182.12. The last time a local hunting control was implemented was in Brownstown Township in 2004. See Department of Natural Resources, Hunter Safety Section, Local Hunting Area Controls, HC-82-04-001.

[18] The Administrative Procedures Act requires an agency to give notice of proposed rules or rule changes, to hold a public hearing, and to submit the proposed rules or rule changes to the Legislature's Joint Committee on Administrative Rules for review. MCL 24.241 through 24.246. If the committee objects to a proposed rule, both the Legislature and the Governor must approve legislation repealing or delaying the effective date of the rule. MCL 24.245a.

The judgment of the Court of Appeals granting summary disposition to defendants is affirmed, although for an alternative rationale.

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

CAVANAGH, J. (*dissenting*). I believe that the city of Saginaw's ordinance prohibiting the discharge of firearms and other weapons within city limits is preempted because there is no exception for the taking of game. Pursuant to MCL 324.40113a(2), the Department of Natural Resources (DNR) has exclusive authority to regulate the taking of game. Allowing the city of Saginaw to prohibit the discharge of firearms and other weapons without an exception for the taking of game and without seeking approval from the DNR to close the city of Saginaw to the taking of game usurps the exclusive authority of the DNR to regulate the taking of game throughout the state and makes it impossible for the DNR to fulfill its statutorily mandated duties.

WEAVER, J. (*dissenting*). I dissent from the majority's affirmance of the judgment of the Court of Appeals. I would hold that the plaintiffs' land is a hunting area as defined by the Michigan Department of Natural Resources and, as such, is subject to hunting regulations and restrictions prescribed by MCL 324.41901 *et seq*.

This case arises out of defendant city of Saginaw's enactment of two ordinances prohibiting the discharge of firearms or bows and arrows within the city limits. The ordinances as enacted do not contain an exception for hunting activities. The Michigan Legislature has mandated that the Michigan Department of Natural Resources (DNR) shall have the exclusive power to "regulate and prohibit hunting, and the discharge of

firearms and bow and arrow" within the state.[1] A governing body of any political subdivision may request that the DNR close an area to hunting for safety or other concerns.[2] However, it is ultimately the DNR, not the local government, that regulates hunting, including the imposition of an absolute hunting prohibition.[3] When the state reserves exclusive jurisdiction to regulate a field, a municipal corporation cannot regulate the same field if the regulation results in a conflict between state regulations and local regulations.[4]

Contrary to the majority's interpretation, the plain language of MCL 324.41901 *et seq.*, hereafter referred to as part 419, of the Natural Resources and Environmental Protection Act (NREPA), provides the exclusive method by which the discharge of weapons may be prohibited in hunting areas, and explicitly authorizes the DNR to determine and define the boundaries of hunting areas in Michigan, to which part 419 applies. The majority's holding that Mich Admin Code, R 299.3048 limits the application of part 419 exclusively to townships contravenes the plain language of part 419 and belies basic rules of interpretation governing administrative regulations. A local government must follow the procedure outlined in part 419 to obtain additional hunting restrictions.

A. MCL 234.41901 EXPLICITLY AUTHORIZES THE DNR TO DETERMINE AND DEFINE THE BOUNDARIES OF HUNTING AREAS IN MICHIGAN

Part 419, which concerns hunting-area control of the NREPA, provides a local governmental unit the only means of imposing additional hunting safety regula-

[1] MCL 324.41901(1); see MCL 324.40113a.

[2] MCL 324.41901(1).

[3] MCL 324.41901(1) and (2).

[4] *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

tions beyond those originally prescribed by the DNR. The local governing body must ask the DNR to enact additional safety measures in an area if the governing body thinks that the "safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows . . . ." MCL 324.41901(1). Part 419 vests the power to "regulate and prohibit hunting, and the discharge of firearms and bow and arrow" in the DNR. MCL 324.41901(1). In the event that a local governing body deems that the safety measures in place are inadequate to protect the general welfare, the local governing body can petition the DNR for a resolution closing additional lands to hunting.[5] The DNR must then hold a public hearing, conduct investigations, and submit its findings of facts and recommendations to the governing body of the local governmental unit.[6]

After receiving the DNR's recommendations, the governing body can either accept the measures recommended by the DNR, or it can do nothing. If the governing body accepts the measures recommended by the DNR, it can incorporate the recommendations into a local ordinance that is identical to the DNR's recommendations.[7] The DNR retains authority to unilaterally terminate closure of an area to hunting.[8] If the governing body chooses to reject the DNR's recommendations, part 419 mandates that no further action be taken on the matter.[9]

Contrary to the majority's interpretation, the plain language of part 419 explicitly authorizes the DNR to

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[5] MCL 324.41901.

[6] *Id*.

[7] MCL 324.41902(1).

[8] MCL 324.41903.

[9] MCL 324.41902(1).

determine and define the boundaries of hunting areas in Michigan. MCL 324.41901 provides:

> (1) In addition to all of the department powers, in the interest of public safety and the general welfare, the department may regulate and prohibit hunting, and the discharge of firearms and bow and arrow, as provided in this part, on those areas established under this part where hunting or the discharge of firearms or bow and arrow may or is likely to kill, injure, or disturb persons who can reasonably be expected to be present in the areas or to destroy or damage buildings or personal property situated or customarily situated in the areas or will impair the general safety and welfare. *In addition, the department may determine and define the boundaries of the areas*. Areas or parts of areas may be closed throughout the year. The department, in furtherance of safety, may designate areas where hunting is permitted only by prescribed methods and weapons that are not inconsistent with law. Whenever the *governing body of any political subdivision* determines that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows, by resolution it may request the department to recommend closure of the area as may be required to relieve the problem. Upon receipt of a certified resolution, the department shall establish a date for a public hearing in the political subdivision, and the requesting political authority shall arrange for suitable quarters for the hearing. The department shall receive testimony on the nature of the problems resulting from hunting activities and firearms use from all interested parties on the type, extent, and nature of the closure, regulations, or controls desired locally to remedy these problems.
>
> (2) Upon completion of the public hearing, the department shall cause such investigations and studies to be made of the area as it considers appropriate and shall then make a statement of the facts of the situation as found at the hearing and as a result of its investigations. The department shall then prescribe regulations as are necessary to alleviate or correct the problems found. [Emphasis added.]

The majority is correct that part 419 only governs hunting weapons regulation of "those areas established under this part." However, plaintiffs' land is subject to part 419 because plaintiffs' land is a hunting area that the DNR regulates.

The DNR extensively and pervasively regulates hunting in the state of Michigan. In 1996 the people of Michigan, through legislative referendum, vested the DNR with the "exclusive authority to regulate the taking of game" in the state of Michigan.[10] In exercising its exclusive authority to regulate hunting, the DNR may, among other things, issue orders to "[e]stablish lawful methods of taking game," "[e]stablish geographic areas within the state where certain regulations may apply to the taking of animals," and "[r]egulate the hours during which animals may be taken."[11]

The orders promulgated by the DNR to regulate hunting are collectively known as the Wildlife Conservation Order (WCO).[12] Chapter XII of the order, titled "Management Areas Defined," defines not only the areas in Michigan where hunting is allowed, but what type of animal can be hunted in which area. Saginaw County, in which plaintiffs' land is located, is mentioned multiple times in the order. WCO 12.73, 12.73a, and 12.73b define the parts of Saginaw County that are subject to DNR regulations with respect to deer hunting —the areas covered include the city of Saginaw. WCO 12.635 defines all of Saginaw County as a hunting area with respect to spring wild turkey management. WCO 12.641 defines all of Saginaw County as a hunting area

[10] MCL 324.40113a(2), found in part 401 of the NREPA, which concerns wildlife conservation.

[11] MCL 324.40107(1)(e), (h), and (k).

[12] The Wildlife Conservation Order can be found at <http://www.michigan.gov/documents/Wcao_134367_7.html> (accessed May 2, 2007).

with respect to turkey management. WCO 12.673 defines all of Saginaw County as a hunting area with respect to fall wild turkey management. WCO 12.700 and 12.701 define all of Saginaw County as a hunting area with respect to goose management. And the list continues.

Clearly, the DNR considers Saginaw County, and the city of Saginaw contained within the county, a hunting area to be managed, properly defined, and established by the DNR. Consequently, because plaintiffs' land is designated as a hunting area by the DNR, any changes to DNR hunting regulations in the area must follow the procedure outlined in part 419. The DNR has the authority to regulate the discharge of weapons for hunting on plaintiffs' property under part 419, and the city of Saginaw must follow the procedure outlined in part 419 to enact local ordinances that further restrict hunting.

B. LEGISLATIVE HISTORY AND ADMINISTRATIVE RULES APPLIED TO PART 419

Given that the DNR has the explicit statutory authority to establish and define hunting areas under part 419, including regulating hunting on plaintiffs' land, it is now necessary to consider the effect of administrative rules already enacted for the administration of the regulatory provisions of part 419. An administrative agency cannot go beyond the bounds of the statutory authority granted by the Legislature.[13]

MCL 317.332, enacted by 1967 PA 159, was the predecessor statute to MCL 324.41901 (part 419). MCL

[13] *York v Detroit (After Remand)*, 438 Mich 744; 475 NW2d 346 (1991); *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951).

317.332 was repealed in 1995 by 1995 PA 57, which enacted 324.41901. MCL 317.332 provided:

> (1) In the interest of public safety and the general welfare, the committee is empowered to regulate and prohibit hunting, and the discharge of firearms and bow and arrow, as herein provided, on those areas established under the provisions of this act where hunting or the discharge of firearms or bow and arrow may or is likely to kill, injure, or disturb persons who can reasonably be expected to be present in such areas or to destroy or damage buildings or personal property situated or customarily situated in the such areas or will impair the general safety and welfare; and the committee is empowered to determine and define the boundaries of such areas. Areas may be closed throughout the year or parts thereof. The committee, in furtherance of safety, may designate areas where hunting is permitted only by prescribed methods and weapons that are not inconsistent with law. Whenever the governing body of any political subdivision determines that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows, by resolution it may request the committee to recommend such area closure as may be required to relieve the problem. Upon receipt of a certified resolution, the committee shall establish a date for a public hearing in the political subdivision, and the requesting political authority shall arrange for suitable quarters for the hearing. The committee shall receive testimony on the nature of the problems resulting from hunting activities and firearms use from all interested parties on the type, extent, and nature of the closure, regulations, or controls desired locally to remedy these problems.
>
> (2) Upon completion of the public hearing, the committee shall cause such investigations and studies to be made of the area as it deems appropriate and shall then make a statement of the facts of the situation as found at the hearing and as a result of its investigations. The committee shall then prescribe such regulations as are necessary to alleviate or correct the problems found.

Although MCL 324.41901 and MCL 317.332 are almost identical, there are several substantive differences between the two. The first distinction is the addition of the phrase "[i]n addition to all of the department powers" to the beginning of subsection 1 of MCL 324.41901. The second distinction is the addition of the phrase "[i]n addition, the department may determine and define the boundaries of the areas" to the middle of subsection 1 of MCL 324.41901. The third distinction is changing "the committee" to "the department."

MCL 317.331, also repealed by 1995 PA 57, defined "the committee" for purposes of MCL 317.332. MCL 317.331 provided:

> (1) A hunting area control committee, composed of a representative of the department of conservation, a representative of the department of state police, *the township supervisor*, or if he declines to serve, a representative selected by *the township board*, and a representative of the sheriff's department of the respective counties involved is established and shall perform such duties as are authorized by this act.
>
> (2) The representatives of the state agencies shall be selected from the staff of each agency by its chief authority and designated as that agency's representative. The committee shall select 1 of its members as chairman and the chairmanship shall be alternated between the agencies each year. The department of conservation shall perform clerical, operational, and administrative duties of the committee in accordance with rules, regulations, procedures and policies promulgated and adopted by the committee and the department of conservation as the agency within which the committee operates. Expenses incurred by individual members in carrying out the intent and purpose of this act shall be borne by the member's department. Costs of surveys and actions requiring services outside the committee and the sheriff's department shall be borne by the department of conservation. [Emphasis added.]

Part 419 does not have a section corresponding to MCL 317.331, the only section in the previous statute that explicitly referenced townships. As a result, the existing statutory scheme does not impliedly or explicitly restrict the application of part 419 to townships. Rather, part 419 applies to "the governing body of any political subdivision," as explicitly stated in MCL 324.41901.

The majority argues that Rule 299.3048 restricts the application of part 419 exclusively to townships, not cities. Rule 299.3048 provides:

> Rule 299.3048 Hunter area control committee.
>
> Rule 48. (1) The hunter area control committee was created by section 1 of Act No. 159 of the Public Acts of 1967. It is composed of a representative of the department of natural resources, a representative of the department of state police, the township supervisor, and a representative of the sheriff's department of the counties involved.
>
> (2) The committee selects a chairman from its members who serves for a year, then alternates with a member from another agency. The department of natural resources performs clerical, operational, and administrative duties of the committee. Expenses incurred are borne by the member's department. Costs of surveys and actions outside the committee and the sheriff's department are borne by the department of natural resources.
>
> (3) In the interest of public safety and the general welfare, the committee may regulate and prohibit hunting and the discharge of firearms and bow and arrow on those areas where hunting or the discharge of firearms or bow and arrow may or is likely to kill, injure, or disturb persons who reasonably can be expected to be present in the areas or to destroy or damage buildings or personal property situated or customarily situated in such areas or will impair the general safety and welfare. The committee may determine and define the boundaries. Areas may be closed throughout the year or parts thereof. The committee, in furtherance of safety, may designate areas where hunting is

> permitted only by prescribed methods and weapons not inconsistent with law.

The majority argues that under the plain language of Rule 299.3048, the DNR has elected to administer part 419 through the "committee," including the duty to designate hunting areas.

There are several flaws with such an interpretation. First this interpretation of the effect of Rule 299.3048 does not consider the extensive and detailed regulations promulgated by the DNR covering the what, when, where, and how of hunting in Michigan.[14] Further, asserting that Rule 299.3048 allows a "committee" to restrict DNR hunting regulation to townships ignores the express mandate in MCL 324.41901 that "the *department* may determine and define the boundaries of the areas" to be hunted upon, not a committee. This phrase was added to the statute during the 1995 amendment, and it signifies the Legislature's intent to empower the DNR, as opposed to the committee, to make all decisions regarding the regulation of hunting. To interpret Rule 299.3048 to vest complete authority to designate hunting areas in a "committee" ignores the vast body of regulations that the DNR has promulgated to designate and define hunting areas, long after Rule 299.3048 was enacted. Such a reading would be contrary to the intent of the Legislature and a plain reading of part 419. Because the DNR has continued to define and designate hunting areas in Michigan, it is inconsistent to conclude that the DNR has elected to vest the power to designate and define hunting areas in a "committee."

The majority supports the applicability of Rule 299.3048 to the current statutory scheme by citing MCL 324.105 and MCL 324.41902(3). MCL 324.105 states:

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[14] See the Wildlife Conservation Order, *supra*.

> When the department or other agency is directed to promulgate rules by this act and rules exist on the date the requirement to promulgate rules takes effect, which rules the department or agency believes *adequately cover the matter*, the department or agency may determine that new rules are not required or may delay the promulgation of new rules until the department or agency considers it advisable. [Emphasis added.]

MCL 324.41902(3) provides that "all rules" promulgated before 1986 are still in effect "unless rescinded pursuant to the administrative procedures act." Although Rule 299.3048 has never been rescinded, the majority's interpretation that Rule 299.3048 restricts DNR hunting-area control to "townships" and that the "committee" controls hunting-area designations belies basic concepts governing the applicability of administrative rules.

While an administrative agency may make such rules and regulations as are *necessary for the efficient exercise* of its powers expressly granted by the Legislature, the administrative agency cannot *exceed* or *restrict* the statutory authority granted by the Legislature.[15] Rule 299.3048, therefore, is effective only to the extent that it does not exceed or restrict the statutory mandates in part 419. MCL 324.41902(3) keeps Rule 299.3048 effective today, and MCL 324.105 mandates that Rule 299.3048 be read to "adequately cover the matter" discussed in part 419. Neither MCL 324.105 nor MCL 324.41902(3) authorizes the DNR to restrict hunting regulations to townships. Furthermore, part 419 expressly states that DNR authority applies to the governing body of any political subdivision, not just to townships. If Rule 299.3048 is read to mean that the DNR is restricting its control over hunting regulations

[15] *York*, *supra*; *Coffman*, *supra*.

to townships, the rule would be narrowing the DNR's authority to designate, define, and control hunting areas, as granted by part 419. Such an interpretation allows an impermissible abridgment of the authority that the Legislature granted to the DNR.

Rule 299.3048 (adopted in 1975) is an administrative rule purportedly implementing part 419, and the Wildlife Conservation Order (adopted in 1995, and last revised on April 17, 2007) is a set of regulations promulgated by the DNR that also administers the provisions of part 419. To read Rule 299.3048 to apply only to townships contravenes principles of administrative law dealing with the interpretation of coexisting administrative regulations. There is a presumption in favor of finding harmony between two administrative regulations dealing with similar subjects.[16] Between two incompatible agency statements, the later one controls over the earlier one.[17] Rule 299.3048 must be read in conjunction with the Wildlife Conservation Order, and when there is a direct conflict between Rule 299.3048 and the Wildlife Conservation Order, the Wildlife Conservation Order should govern because it was adopted after Rule 299.3048. The "committee" created in Rule 299.3048 cannot control hunting-area designations because the Wildlife Conservation Order describes in minute detail hunting areas in Michigan, and the order governs if there is a direct conflict between two regulations. Likewise, Rule 299.3048 cannot limit the application of part 419 to townships because the Wildlife Conservation Order explicitly describes hunting in all of Michigan, and contains no limitation to townships only.

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[16] *Kearfott Guidance & Navigation Corp v Rumsfeld*, 320 F3d 1369, 1377 (CA Fed, 2003).

[17] *Timken Co v United States*, 166 F Supp 2d 608, 619 (Ct of Int'l Trade, 2001).

The majority's interpretation that Rule 299.3048 limits the application of part 419 to townships and vests the authority to designate and control hunting areas in a committee contravenes the plain language of part 419 and belies basic rules of interpretation governing administrative regulations. As a result, I remain convinced that the DNR has the exclusive authority to regulate hunting in Michigan, including the discharge of firearms and bows and arrows for hunting purposes.

CONCLUSION

The DNR has the exclusive authority to regulate hunting in Michigan, including the discharge of firearms and bows and arrows for hunting purposes. Contrary to the majority's interpretation, the plain language of part 419 explicitly authorizes the DNR to determine and define the boundaries of hunting areas in Michigan. As a result, local governments must follow the procedure outlined in part 419 to adopt additional hunting regulations. The majority's interpretation that Rule 299.3048 limits the application of part 419 to townships and vests the authority to designate and control hunting areas in a committee contravenes the plain language of part 419 and belies basic rules of interpretation governing administrative regulations.

KELLY, J., concurred with WEAVER, J.

GREATER BIBLE WAY TEMPLE OF JACKSON v CITY OF JACKSON

Docket Nos. 130194, 130196. Argued November 13, 2006 (Calendar No. 5). Decided June 27, 2007. Rehearing denied 480 Mich ___.

The Greater Bible Way Temple of Jackson brought an action in the Jackson Circuit Court against the city of Jackson, the Jackson Planning Commission, and the Jackson City Council, challenging the city's decision to deny a request by the plaintiff to rezone property it owns from single-family residential to multiple-family residential so that it could construct an apartment complex. The plaintiff alleged that the defendants' actions violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc *et seq*. The trial court, Alexander C. Perlos, J., granted the defendants' motion for summary disposition of the count challenging the defendants' zoning decision. The trial court, Chad C. Schmucker, J., then denied the defendants' motion for summary disposition of the count alleging a violation of RLUIPA and granted in part the plaintiff's motion for summary disposition of that count. The court ruled that RLUIPA applied because the city's zoning decision constituted an "individualized assessment" and the refusal to rezone the property imposed a "substantial burden" on the free exercise of religion. The court then conducted a bench trial to determine whether the city had a compelling governmental interest for its refusal to rezone and concluded that the city had failed to demonstrate such an interest, that the defendants had violated RLUIPA, and that the plaintiff was entitled to the requested rezoning. The court enjoined the defendants from interfering with the plaintiff's efforts to construct its apartment complex and awarded the plaintiff costs and attorney fees. The Court of Appeals, FORT HOOD, P.J., and METER and SCHUETTE, JJ., affirmed, holding that the defendants had violated RLUIPA and that the application of RLUIPA to compel the requested rezoning did not render the statute unconstitutional. 268 Mich App 673 (2005). The Supreme Court granted the defendants' application for leave to appeal. 474 Mich 1133 (2006).

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

A refusal to rezone does not constitute an "individualized assessment," and, therefore, RLUIPA is not applicable to this matter. Even if RLUIPA were applicable, the building of an apartment complex would not constitute a "religious exercise," and even if it did constitute a "religious exercise," the defendants' refusal to rezone the plaintiff's property would not substantially burden the plaintiff's religious exercise, and even if it did substantially burden the plaintiff's religious exercise, the imposition of that burden would be in furtherance of a compelling governmental interest and would constitute the least restrictive means of furthering that interest. Therefore, even if RLUIPA were applicable, it has not been violated. The judgment of the Court of Appeals must be reversed and the case remanded to the trial court for the entry of a judgment in favor of the defendants.

1. RLUIPA applies to any case in which a substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

2. An "individualized assessment" is an assessment based on one's particular circumstances. Here, the city's decision whether to grant rezoning was not predicated on the plaintiff's particular circumstances or the plaintiff's particular project and did not constitute an "individualized assessment." There is no evidence that the city has in place procedures or practices that would permit it to make "individualized assessments" in determining whether to grant requests for rezoning. Therefore, RLUIPA is not applicable to this case.

3. Something does not become a "religious exercise" just because it is performed by a religious institution. Because the plaintiff has not shown that the building of the apartment complex constitutes an exercise in religion, the defendants' decision not to rezone the property cannot be said to have burdened the plaintiff's "religious exercise," and, thus, RLUIPA has not been violated.

4. A "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. A mere inconvenience or irritation, or something that simply makes it more difficult in some respect to practice one's religion, does not constitute a "substantial burden." Here, the defendants are not forbidding the plaintiff from building an apartment complex; they are simply regulating where that

apartment complex can be built. The defendants have not done anything to coerce the plaintiff into acting contrary to its religious beliefs, and, thus, they have not substantially burdened the plaintiff's exercise of religion.

5. Local governments have a "compelling governmental interest" in protecting the health and safety of their communities through the enforcement of local zoning regulations. Here, the city has a compelling governmental interest in regulating where apartment complexes can be built within the city.

6. Any burden placed on the plaintiff's exercise of religion as a result of the denial of rezoning constitutes the least restrictive means of furthering the city's compelling governmental interest. There do not appear to be any means of maintaining the single-family residential zoning less restrictive than denying the request for rezoning.

Justice CAVANAGH, joined by Justice WEAVER, concurring, agreed with part IV(B) of the majority opinion, but wrote separately because it was unnecessary to determine whether the defendants made an individualized assessment in this case or whether the statutory test of strict scrutiny was met. The plaintiff failed to show that its petition for rezoning was related to the plaintiff's exercise of religion. The Court of Appeals judgment should be reversed on that basis, and the matter should be remanded to the trial court for dismissal of the plaintiff's claim.

Justice KELLY, concurring, wrote separately to state that because RLUIPA is inapplicable, it was unnecessary to discuss whether the building of an apartment complex was a religious exercise, whether the refusal to rezone the plaintiff's property substantially burdened the alleged religious exercise, and whether the alleged burden was in furtherance of a compelling governmental interest and constituted the least restrictive means of furthering that interest.

Reversed and remanded.

1. ZONING — REZONING — RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT — INDIVIDUALIZED ASSESSMENTS.

The Religious Land Use and Institutionalized Persons Act applies to any case in which a substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved; an "individualized assessment" is an assess-

ment based on one's particular circumstances; a refusal to rezone does not constitute an "individualized assessment" (42 USC 2000cc[a][2]).

2. ZONING — RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT — RELIGIOUS EXERCISE.

The Religious Land Use and Institutionalized Persons Act forbids a government from imposing or implementing a land use regulation that imposes a substantial burden on the religious exercise of a person; a religious exercise is not the equivalent of any exercise by a religious body; the burden is on the plaintiff to prove that an exercise is a religious exercise (42 USC 2000cc[a][1]; 42 USC 2000cc-5[7][A] and [B]).

3. ZONING — RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT — RELIGIOUS EXERCISE — SUBSTANTIAL BURDEN.

The Religious Land Use and Institutionalized Persons Act forbids a government from imposing or implementing a land use regulation that imposes a substantial burden on the religious exercise of a person; a substantial burden on one's religious exercise exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires; something that simply makes it more difficult in some respect to practice one's religion does not constitute a substantial burden (42 USC 2000cc[a][1]).

Hubbard, Fox, Thomas, White & Bengston, P.C. (by *Mark T. Koerner*), for the plaintiff.

Julius A. Giglio, City Attorney, *Susan G. Murphy*, Deputy City Attorney, and *Secrest Wardle* (by *Gerald A. Fisher, Thomas R. Schultz*, and *Shannon K. Ozga*) for the defendants.

Amici Curiae:

David S. Parkhurst for National League of Cities and International Municipal Lawyers Association.

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

MARKMAN, J. We granted leave to appeal to consider whether the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 USC 2000cc *et seq*., entitles plaintiff to the rezoning of its property from single-family residential to multiple-family residential to allow plaintiff to build an apartment complex. The lower courts held that RLUIPA does entitle plaintiff to the rezoning of its property. We conclude that a refusal to rezone does not constitute an "individualized assessment," and, thus, that RLUIPA is inapplicable. Further, even if RLUIPA is applicable, the building of an apartment complex does not constitute a "religious exercise," and even if it does constitute a "religious exercise," the city of Jackson's refusal to rezone plaintiff's property did not substantially burden plaintiff's religious exercise, and even if it did substantially burden plaintiff's religious exercise, the imposition of that burden is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that interest. Therefore, even assuming that RLUIPA is applicable, it has not been violated. For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the trial court for the entry of a judgment in favor of defendants.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff wants to build an apartment complex across the street from its church on property that it owns in the city of Jackson. The property consists of eight lots totaling 1.13 acres. The property is zoned single-family residential (R-1). One of the lots contains a single-family residence, and the remaining lots are vacant. There are single-family residences on each side of the property. Plaintiff petitioned the city to change the zoning of the property to multiple-family residential (R-3) so that it could construct an apartment complex.

The Region 2 Planning Commission recommended denying plaintiff's rezoning petition. After a public hearing, the city planning commission also voted to recommend that the city council deny plaintiff's rezoning petition. Pursuant to these recommendations, and following another public hearing, the city council voted to deny plaintiff's rezoning petition.

Plaintiff then filed a complaint against defendants, containing two counts: count one directly challenged the city's zoning decision and count two alleged a violation of RLUIPA. The trial court granted defendants' motion for summary disposition with regard to count one, which decision was not appealed. With regard to count two, the trial court denied defendants' motion for summary disposition and granted plaintiff's motion for summary disposition in part. Specifically, the trial court ruled that RLUIPA did apply because the city's zoning decision constituted an "individualized assessment," and the refusal to rezone plaintiff's property imposed a "substantial burden" on the exercise of religion. The trial court then ordered a trial on the issue whether the city had a compelling interest for its refusal to rezone. After a bench trial, the trial court ruled that defendants had failed to demonstrate such an interest. Therefore, it determined that defendants had violated RLUIPA and that plaintiff was entitled to the requested rezoning of its property. The trial court enjoined defendant from interfering in any manner with plaintiff's efforts to construct an apartment complex on its property. After the final order was issued, plaintiff filed a motion for attorney fees and costs, and the trial court awarded plaintiff over $30,000 in attorney fees and costs.

The Court of Appeals affirmed the trial court in all respects. 268 Mich App 673; 708 NW2d 756 (2005). The

Court of Appeals also held that the application of RLUIPA to compel the requested rezoning did not render the statute unconstitutional. We granted defendants' application for leave to appeal. 474 Mich 1133 (2006).

II. STANDARD OF REVIEW

A trial court's ruling on a summary disposition motion is a question of law that this Court reviews de novo. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). Questions of statutory interpretation are also questions of law that this Court reviews de novo. *Id.*

III. ORIGINS OF RLUIPA

The First Amendment of the United States Constitution provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." US Const, Am I. The second clause of this amendment is commonly known as the Free Exercise Clause. The protections provided by the First Amendment, including the Free Exercise Clause, have been "incorporated" and extended to the states and to their political subdivisions by the Fourteenth Amendment. *Cantwell v Connecticut*, 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940); *Santa Fe Independent School Dist v Doe*, 530 US 290, 301; 120 S Ct 2266; 147 L Ed 2d 295 (2000).

In *Sherbert v Verner,* 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), the plaintiff, a member of the Seventh-day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment because she would not work on

Saturdays. The South Carolina Unemployment Compensation Act, SC Code, Tit 68, § 68-1 *et seq*., provided that a claimant was ineligible for benefits if the claimant had failed "without good cause" to accept available suitable work. The Employment Security Commission determined that the plaintiff's religious belief against working on Saturdays did not constitute "good cause." The United States Supreme Court held that denying the plaintiff unemployment compensation benefits solely because of her refusal to accept employment in which she would have to work on Saturdays contrary to her religious belief imposed a substantial burden on her exercise of her religion that was not justified by a compelling state interest, and, thus, violated the Free Exercise Clause.

In *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990), the United States Supreme Court held that Oregon's prohibition of the use of peyote in religious ceremonies, and the denial of unemployment benefits to persons discharged for such use, does not violate the Free Exercise Clause of the First Amendment. The Court explained that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified, under the Free Exercise Clause, by a compelling governmental interest.[1]

In response to *Smith,* Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),[2] prohibiting

[1] *Smith, supra* at 884, held that *Sherbert* was distinguishable because *Sherbert* involved an "individualized governmental assessment"; that is, the "good cause" standard at issue in *Sherbert* allowed the government to consider the plaintiff's "particular circumstances." See pp 387-388 of this opinion. That is, *Smith* held that while the "compelling governmental interest" test may be applicable to laws allowing for an "individualized governmental assessment," it is not applicable to generally applicable laws that do not allow for an "individualized governmental assessment."

[2] RFRA provides, in pertinent part:

the government from substantially burdening a person's exercise of religion, even by means of a generally applicable, religion-neutral law, unless the government could demonstrate that the burden imposed furthers a compelling governmental interest and that it constitutes the least restrictive means of furthering such interest.

However, in *City of Boerne v Flores*, 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997), the United States Supreme Court held that Congress, in enacting RFRA, had exceeded its powers under § 5 of the Fourteenth Amendment to enact legislation enforcing the Free Exercise Clause of the First Amendment because RFRA proscribes state conduct that the First Amendment itself does not proscribe.[3] The Court explained:

> Congress' power under § 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial . . . ." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the

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> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest. [42 USC 2000bb-1.]

[3] Section 5, the Enforcement Clause of the Fourteenth Amendment, provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [US Const, Am XIV, § 5.]

> meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."
>
> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. [*Id.* at 519-520.]

The Supreme Court then concluded that the substantial costs that RFRA exacted through its "compelling governmental interest" test "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.* at 534. Thus, "the Court invalidated RFRA as applied to the states, finding it an unconstitutional exercise of Congress' Enforcement Clause powers because Congress had not shown a pattern of religious discrimination meriting such a far-reaching remedy . . . ." Galvan, *Beyond worship: The Religious Land Use and Institutionalized Persons Act of 2000 and religious institutions' auxiliary uses*, 24 Yale L & Policy R 207, 218 (2006).[4]

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[4] Although RFRA no longer applies to the states, it still applies to the federal government. See *Gonzales v O Centro Espirita Beneficente Uniao Do Vegetal,* 546 US 418; 126 S Ct 1211; 163 L Ed 2d 1017 (2006) (holding that, under RFRA, the Controlled Substances Act, 21 USC 801 *et seq.*, cannot prohibit a religious sect from receiving communion by drinking *hoasca,* a tea that contains a hallucinogen).

In response to *City of Boerne,* Congress enacted RLUIPA. Unlike RFRA, RLUIPA does not attempt to bar all laws that substantially burden religious exercise. Instead, it focuses on land use regulations[5] and provides, in pertinent part:

> (a) Substantial burdens.
>
> (1) General rule. No government[6] shall impose or implement a land use regulation[7] in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and

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[5] RLUIPA also focuses on regulations pertaining to institutionalized persons, but that portion of RLUIPA is not applicable here.

[6] "Government" is defined as:

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law; and
>
> (B) for the purposes of sections 4(b) and 5 [42 USC 2000cc-2(b) and 2000cc-3], includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law. [42 USC 2000cc-5(4).]

[7] "Land use regulation" is defined as a

> zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest. [42 USC 2000cc-5(5).]

That the city's denial of plaintiff's petition to rezone its property here constitutes a "land use regulation" is uncontested.

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which—

* * *

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. [42 USC 2000cc(a).][8]

"Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc-5(7)(A). RLUIPA specifically provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the

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[8] RLUIPA further provides:

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. [42 USC 2000cc(b).]

Plaintiff does not argue that 42 USC 2000cc(b) was violated.

person or entity that uses or intends to use the property for that purpose." 42 USC 2000cc-5(7)(B). A plaintiff asserting a RLUIPA violation has the burden of presenting prima facie evidence to support the assertion. 42 USC 2000cc-2(b).[9] That is, the plaintiff has the burden to prove that RLUIPA is applicable and that the government has implemented a land use regulation that imposes a substantial burden on the exercise of religion. *Id.* Once the plaintiff has proven this, the burden shifts to the government to prove that the imposition of such burden is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that interest. *Id.* As the United States Supreme Court has explained, "RLUIPA is [a] congressional effort[] to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents." *Cutter v Wilkinson,* 544 US 709, 714; 125 S Ct 2113; 161 L Ed 2d 1020 (2005). Therefore, it is clearly appropriate to examine the United States Supreme Court's precedents when analyzing RLUIPA.

IV. ANALYSIS

A. INDIVIDUALIZED ASSESSMENT

The threshold question is whether RLUIPA is applicable to this dispute. The burden is on plaintiff to prove

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[9] RLUIPA provides, in pertinent part:

> If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 USC 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion. [42 USC 2000cc-2(b).]

that RLUIPA is applicable. 42 USC 2000cc-2(b). RLUIPA "applies only if one of three jurisdictional tests is first met . . . ." *Midrash Sephardi, Inc v Town of Surfside,* 366 F3d 1214, 1225 (CA 11, 2004); see also *Prater v City of Burnside,* 289 F3d 417, 433 (CA 6, 2002) ("[T]he Church may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute"); *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp,* 259 Mich App 315, 326-327; 627 NW2d 271 (2003) ("In order to establish a claim under RLUIPA, a party must establish that at least one of these three jurisdictional elements exists [.]"). RLUIPA states that it "applies in any case in which"

> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved. [42 USC 2000cc(a)(2) (emphasis added).][10]

Therefore, the issue is whether a substantial burden has been imposed in the implementation of a land use regulation under which a government is permitted to

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[10] RLUIPA also "applies in any case in which"

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
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> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability . . . . [42 USC 2000cc(a)(2).]

However, it is uncontested that A and B are not applicable to the instant case.

make an individualized assessment of the proposed uses for the property involved.

This is not the first time that the phrase "individualized assessment" has been employed. The United States Supreme Court distinguished its decision in *Bowen v Roy,* 476 US 693; 106 S Ct 2147; 90 L Ed 2d 735 (1986), from its decisions in *Sherbert* and *Thomas v Review Bd of Indiana Employment Security Div*, 450 US 707; 101 S Ct 1425; 67 L Ed 2d 624 (1981), on the basis that the latter decisions, unlike *Bowen*, involved "individualized assessments."[11] "The statutory conditions at issue in [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen, supra* at 708. In *Sherbert* and *Thomas*, the Court held that when the government applies individualized exemptions, but refuses to extend an exemption to an instance of genuine "religious hardship," the government must demonstrate a compelling reason for denying the requested exemption. *Id.*

In *Smith, supra* at 884, the United States Supreme Court again emphasized the distinction between governmental action requiring and not requiring individualized assessments.

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[11] In *Sherbert,* as discussed above, the United States Supreme Court held that South Carolina's denial of unemployment compensation benefits to a member of the Seventh-day Adventist Church who could not find work because her religious convictions prevented her from working on Saturdays abridged her right to the free exercise of her religion. In *Thomas,* the United States Supreme Court held that Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his employment because his religious beliefs prevented him from participating in the production of weapons abridged his right to the free exercise of his religion.

> The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment. . . . [O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. [*Id.*, quoting *Bowen, supra* at 708.]

In *Church of the Lukumi Babalu Aye, Inc v City of Hialeah,* 508 US 520, 527; 113 S Ct 2217; 124 L Ed 2d 472 (1993), the United States Supreme Court, against the backdrop of a ritualistic practice of animal sacrifice by practitioners of the Santerian faith, held that a city ordinance that prohibits a person from "unnecessarily . . . kill[ing] . . . an animal" violates the Free Exercise Clause of the First Amendment. The Court explained:

> [B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct . . . ." As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." [*Id.* at 537 (citations omitted).]

"Individualize" is defined as "to . . . consider individually; specify; particularize." *Random House Webster's College Dictionary* (1991). Therefore, an "individualized assessment" is an assessment based on one's particular circumstances. Accordingly, RLUIPA applies when the government makes an assessment based on one's particular or specific circumstances or has in

place procedures or practices that would allow the government to make an assessment based on one's particular or specific circumstances. As the Ninth Circuit Court of Appeals recently held, "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak Sikh Society of Yuba City v Sutter Co,* 456 F3d 978, 986 (CA 9, 2006).

In the instant case, the city adopted a zoning ordinance that applied to the entire community, not just to plaintiff. See *West v City of Portage,* 392 Mich 458, 469; 221 NW2d 303 (1974) (" '[Z]oning ordinances . . . are classified as general policy decisions which apply to the entire community.' ") (citation omitted). Concomitantly, if the city had granted plaintiff's request to rezone the property, such rezoning would also have applied to the entire community, not just plaintiff.[12] A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects. See *Sherrill v Town of Wrightsville Beach*, 81 NC App 369, 373; 344 SE2d 357 (1986) ("[I]t is the duty of the zoning authority to consider the needs of the entire community when voting on a rezoning, and not just the needs of the individual petitioner."). Thus, if the city had granted plaintiff's request to rezone the property from single-family residential to multiple-family residential, plain-

[12] Although a request to rezone a particular piece of property " 'may be differentiated on the basis that such a determination is narrowly confined to a particular piece of property,' " *West, supra* at 469 (citation omitted), it still applies to the "entire community." That is, the "entire community" would be bound by the city's decision to rezone or not rezone the property.

tiff could then have sold the property to any third party and that third party could have sold the property to any other third party and any of these parties could have built an apartment complex or any other conforming building on that property. Therefore, the city's decision whether to rezone the property would not have been predicated on plaintiff's particular circumstances or plaintiff's particular project.[13] Even if the city had affirmatively wanted plaintiff to build an apartment complex on its property, it could not have granted the requested zoning change unless it was also prepared to accommodate all projects falling within the scope of the rezoning. Plaintiff's particular circumstances were simply not determinative of the city's decision whether to rezone, and, thus, the city's decision did not constitute an "individualized assessment" within the meaning of that term.[14] Plaintiff has cited no cases in support of its position that a refusal to rezone property constitutes an "individualized assessment," and we have found none.

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[13] Plaintiff's counsel told the trial court that "even at the planning commission level, they don't care what's being built"; "they don't consider a site plan"; "the site plan itself is irrelevant when it comes to requesting rezoning from R-1 to R-3." Appellant's appendix at 238a, 523a.

[14] Possibly, if plaintiff had requested a variance and the city had refused that request, this might constitute an "individualized assessment." See *Shepherd, supra* at 320 (holding that "[w]hen the Ann Arbor Charter Township Zoning Board of Appeals examined and subsequently denied plaintiff's petition for a variance, an individualized assessment pursuant to 42 USC 2000cc(a)(2)(C) occurred"). A request for a variance is significantly different from a request to rezone. When one requests a variance, one is requesting permission to use the property for a *specific use*. By contrast, when one requests a rezoning, one is asking the city for permission to use the property for *any use* that would be permitted under the new classification. Therefore, when the city considers a request for a variance, it does consider the specific site plan proposed by the landowner. But, when the city considers a request for rezoning, it considers the numerous different uses that would be permitted under the new classification, and it does not consider a specific site plan.

Moreover, plaintiff has presented no evidence to suggest that the city has in place procedures or practices that would permit the city to make "individualized assessments" when determining whether to rezone property.

Because the city's refusal to rezone the property did not constitute an "individualized assessment," and because there is no evidence that the city has in place procedures or practices that would permit it to make "individualized assessments" when determining whether to grant requests to rezone property, RLUIPA is not applicable here.

B. RELIGIOUS EXERCISE

Assuming that RLUIPA is applicable here, the next question is whether the building of an apartment complex constitutes a "religious exercise." The burden is on plaintiff to prove that the building of an apartment complex constitutes a "religious exercise." 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the *religious exercise* of a person, including a religious assembly or institution, unless . . . . [42 USC 2000cc(a)(1) (emphasis added).]

"Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc-5(7)(A). RLUIPA specifically provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 USC 2000cc-5(7)(B). A "religious exercise" consists of a specific type of exercise, an exercise of *religion*, and this is not the

equivalent of an exercise—any exercise—by a religious body. "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v Beason,* 133 US 333, 342; 10 S Ct 299; 33 L Ed 637 (1890), overruled on other grounds in *Romer v Evans*, 517 US 620, 634; 116 S Ct 1620; 134 L Ed 2d 855 (1996). The United States Supreme Court has explained that " '[t]he "exercise of religion" often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . .' " *Cutter, supra* at 720, quoting *Smith, supra* at 877.[15] The Supreme Court has further held that "[a]lthough RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion, see 42 U.S.C. § 2000cc-5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity. Cf. *Gillette v. United States*, 401 U.S. 437, 457, 91 S. Ct. 828, 28 L. Ed. 2d 168, (1971) (' "The 'truth' of a belief is not open to question"; rather, the question is whether the objector's beliefs are "truly held." ' (quoting *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965))." *Cutter, supra* at 725 n 13. Nor, obviously, does RLUIPA bar inquiry into whether a particular belief or practice constitutes an aspect, central or otherwise, of a person's religion.

The question that we must answer is whether plaintiff is seeking to use its property for the purpose of

[15] In *Cutter, supra* at 718, the United States Supreme Court held that "RLUIPA's institutionalized-persons provision, § 3 of the Act, is consistent with the Establishment Clause of the First Amendment." The Court also made clear that "Section 2 of RLUIPA [the land use regulation provision] is not at issue here. We therefore express no view on the validity of that part of the Act." *Id.* at 716 n 3.

religious exercise.[16] Obviously, not everything that a religious institution does constitutes a "religious exercise." Plaintiff bears the burden of establishing that its proposed use of the property constitutes a "religious exercise." 42 USC 2000cc-2(b). In the instant case, the only evidence that plaintiff has presented to establish that its proposed use of the property constitutes a "religious exercise" is an affidavit signed by the bishop of the Greater Bible Way Temple. The affidavit states that plaintiff's mission is set forth in its letterhead as follows:

> The Greater Bible Way Temple stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes housing, employment, consulting and supports as determined appropriate in fulfilling our Mission.

The affidavit further states that plaintiff "wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of Jackson."[17]

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[16] Notwithstanding the inquiry required by RLUIPA into what constitutes a "religious exercise," this Court is extremely cognizant of the difficulties inherent in a judicial body's evaluating the practices of particular religious faiths or assessing the "centrality" of particular religious precepts. In accord, *Smith*, *supra* at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each . . . judge[] weigh[s] the social importance of all laws against the centrality of all religious beliefs."); *Lemon v Kurtzman*, 403 US 602, 613; 91 S Ct 2105; 29 L Ed 2d 745 (1971) (expressing concern about fostering an " 'excessive government entanglement with religion' ") (citation omitted).

[17] The bishop's affidavit proceeds to state that "there is a substantial need in the City of Jackson for clean and affordable housing, especially for the elderly and disabled." However, because there is no evidence that the proposed complex would either be limited to housing elderly and

No evidence has been presented to establish that the proposed apartment complex would be used for religious worship or for any other religious activity. Instead, it appears that the only connection between the proposed apartment complex and "religious exercise" is the fact that the apartment complex would be owned by a religious institution. Generally, the building of an apartment complex would be considered a commercial exercise, not a religious exercise. The fact that the apartment complex would be owned by a religious institution does not transform the building of an apartment complex into a "religious exercise," unless the term is to be deprived of all practical meaning. Something does not become a "religious exercise" just because it is performed by a religious institution. Because plaintiff has not shown that the building of the apartment complex constitutes an exercise in religion, the city's decision not to rezone the property cannot be said to have burdened plaintiff's "religious exercise," and, thus, RLUIPA has not been violated.

C. SUBSTANTIAL BURDEN

Assuming, however, that the building of an apartment complex does constitute a "religious exercise," the next question is whether the city's refusal to rezone the property to allow the apartment complex constitutes a "substantial burden" on that "religious exercise." The burden is on plaintiff to prove that the city's refusal to rezone the property constitutes a "substantial burden" on plaintiff's exercise of religion. 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

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disabled persons or be designed to accommodate elderly and disabled persons to any particular extent, it is unnecessary to address whether the building of such a complex would constitute a "religious exercise."

> No government shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on the religious exercise of a person, including a religious assembly or institution, unless . . . . [42 USC 2000cc(a)(1) (emphasis added).]

RLUIPA does not define the phrase "substantial burden." However, this is not the first time that the phrase "substantial burden" has been used.

Before deciding *Smith,* the United States Supreme Court held that a "substantial burden" on one's religious exercise that was not justified by a compelling governmental interest violated the Free Exercise Clause. *Jimmy Swaggart Ministries v Bd of Equalization of California,* 493 US 378, 384-385; 110 S Ct 688; 107 L Ed 2d 796 (1990), quoting *Hernandez v Comm'r of Internal Revenue,* 490 US 680, 699; 109 S Ct 2136; 104 L Ed 2d 766 (1989) ("Our cases have established that 'the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.' "). The United States Supreme Court's definition of "substantial burden" in its free exercise cases is instructive in determining what Congress understood "substantial burden" to mean in RLUIPA.

In *Sherbert, supra* at 404, the United States Supreme Court held that a "substantial burden" exists when an individual is "force[d] . . . to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand."

In *Thomas, supra* at 717-718, the Supreme Court explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or

> where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

In *Lyng v Northwest Indian Cemetery Protective Ass'n,* 485 US 439, 450; 108 S Ct 1319; 99 L Ed 2d 534 (1988), the United States Supreme Court explained that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute "substantial burdens."[18]

Several federal circuit courts of appeal have also defined the term "substantial burden." Although we are not bound by these decisions, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), we find them persuasive.

In *Civil Liberties for Urban Believers v Chicago,* 342 F3d 752 (CA 7, 2003), the Seventh Circuit Court of Appeals held that a Chicago zoning ordinance that allows churches as a matter of right in residential zones, but requires them to obtain special use permits in other zones, does not violate RLUIPA. That court explained:

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the

[18] Relying on *Lyng,* our Court of Appeals held that "for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient." *Shepherd, supra* at 330.

> regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means. We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.[19]
>
> While [the ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, [it does] not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *See, e.g.*, *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them"). . . . Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise. [*Id.* at 761-762 (emphasis in the original).]

In *San Jose Christian College v City of Morgan Hill*, 360 F3d 1024 (CA 9, 2004), the Ninth Circuit Court of

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[19] In *Lighthouse Institute for Evangelism Inc v City of Long Branch*, 100 Fed Appx 70 (CA 3, 2004), the Third Circuit Court of Appeals adopted this same definition of "substantial burden."

Appeals held that there was no RLUIPA violation where the city denied the plaintiff's rezoning application.[20] That court explained:

> A "burden" is "something that is oppressive." BLACK'S LAW DICTIONARY 190 (7th ed.1999). "Substantial," in turn, is defined as "considerable in quantity" or "significantly great." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1170 (10th ed.2002). Thus, for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a significantly great restriction or onus upon such exercise.
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> * * *
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> [W]hile the PUD ordinance may have rendered College unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that College was precluded from using other sites within the city. Nor is there any evidence that the City would not impose the same requirements on any other entity seeking to build something other than a hospital[21] on the Property. [*Id.* at 1034, 1035.]

In *Midrash Sephardi,* the Eleventh Circuit Court of Appeals held that an ordinance that prohibits churches and synagogues in the town's business district does not impose a "substantial burden" on the exercise of religion. That court explained:

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accord-

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[20] We note that the court did not address the preliminary question whether RLUIPA was even applicable to the denial of the rezoning application.

[21] A city task force concluded that the city urgently needed a hospital and this particular piece of property was the only suitable location in the city for a hospital.

> ingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct. [*Midrash Sephardi, supra* at 1227.]

In *Adkins v Kaspar,* 393 F3d 559 (CA 5, 2004), the Fifth Circuit Court of Appeals held that requiring the presence of a qualified outside volunteer at prison congregations did not impose a "substantial burden" on the plaintiff's exercise of religion. That court explained:

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs. [T]he effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed. [*Id.* at 570.]

In *Spratt v Rhode Island Dep't of Corrections,* 482 F3d 33, 38 (CA 1, 2007), which involved a blanket ban against all preaching activities by prison inmates, the First Circuit Court of Appeals asserted:

> The district court decided that a "substantial burden" is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," citing *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); see also *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (applying the *Thomas* standard in a RLUIPA case). Assuming arguendo that *Thomas* applies, . . . Spratt

> has made a prima facie showing that his religious exercise has been substantially burdened.

In *Grace United Methodist Church v City of Cheyenne,* 451 F3d 643 (CA 10, 2006), the Tenth Circuit Court of Appeals held that the city's denial of the plaintiff church's request for a variance from an ordinance prohibiting any entity from operating a commercial day care center in a residential zone did not violate RLUIPA. That court explained:

> [T]he incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute substantial burdens on the exercise of religion. [*Id.* at 662 (citation omitted).][22]

After reviewing the above decisions, we believe that it is clear that a "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious

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[22] In *Murphy v Missouri Dep't of Corrections*, 372 F3d 979, 988 (CA 8, 2004), the Eighth Circuit Court of Appeals held that, to constitute a substantial burden, the government policy or actions

> must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." [Citation omitted.]

Although the Sixth Circuit Court of Appeals has applied the same test when applying RFRA, *Miller-Bey v Schultz*, 1996 US App LEXIS 6541 (CA 6, 1996), it has not yet addressed the meaning of "substantial burden" under RLUIPA. The *Murphy* definition of "substantial burden" seems inconsistent with RLUIPA because RLUIPA specifically defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc-5(7)(A).

beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. That is, a "substantial burden" exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a "*substantial* burden." Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "*substantial* burden." Rather, a "substantial burden" is something that "coerce[s] individuals into acting contrary to their religious beliefs . . . ." *Lyng, supra* at 450.[23]

In the instant case, plaintiff argues that the city's refusal to rezone its property to allow it to build an apartment complex constitutes a "substantial burden" on its "religious exercise." Even assuming that the building of an apartment complex constitutes a "religious exercise," the city's refusal to rezone the property so plaintiff can build an apartment complex does not constitute a "substantial burden" on that exercise. The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes. If plaintiff wants to use the property for housing, then it

[23] We recognize that some courts have held that a "substantial burden" exists where there is "delay, uncertainty, and expense." See, for example, *Sts Constantine & Helen Greek Orthodox Church v City of New Berlin*, 396 F3d 895, 901 (CA 7, 2005), and *Living Water Church of God v Meridian Charter Twp*, 384 F Supp 2d 1123, 1134 (WD Mich, 2005). However, we reject this definition of "substantial burden" both because it is inconsistent with the United States Supreme Court's definition of the phrase and because it is inconsistent with the common understanding of the phrase "*substantial* burden."

can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.[24]

"While [the zoning ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city," *Civil Liberties for Urban Believers, supra* at 761, it does not prohibit plaintiff from providing housing. " 'Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users].' " *Id.*, quoting *Love Church, supra* at 1086. The city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, and, thus, it has not substantially burdened plaintiff's exercise of religion. *Lyng, supra* at 450.[25]

D. COMPELLING GOVERNMENTAL INTEREST

Assuming that the city's refusal to rezone the property constitutes a "substantial burden" on plaintiff's "religious exercise," the next question is whether it is "in furtherance of a compelling governmental interest." The burden is on defendants to prove that the imposition of the burden on plaintiff is in furtherance of a compelling governmental interest. 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

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[24] Plaintiff was aware when it purchased the property that it was zoned single-family residential. Thus, plaintiff's claim that the city's refusal to rezone the property will cause it to lose the money that it invested in the property is meritless.

[25] We note that the lower courts' interpretation of the "substantial burden" provision of RLUIPA would seem to render the "discrimination and exclusion" provision of RLUIPA effectively meaningless because it will almost always be easier to prove a "substantial burden" on one's "religious exercise," as those terms are defined by the lower courts, than it will be to prove discrimination or exclusion. See n 8 of this opinion.

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a *compelling governmental interest* . . . . [42 USC 2000cc(a)(1) (emphasis added).]

After a bench trial on this issue, the trial court held that "this mere concern over zoning [does not] establish[] a compelling State interest." We respectfully disagree. It has long been recognized that "local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations." *Murphy v Zoning Comm of the Town of New Milford,* 148 F Supp 2d 173, 190 (D Conn, 2001). " 'All property is held subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare.' " *Austin v Older,* 283 Mich 667, 677; 278 NW 727 (1938), quoting *State v Hillman,* 110 Conn 92, 105; 147 A 294 (1929). Therefore, a municipal body "clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations." *First Baptist Church of Perrine v Miami-Dade Co,* 768 So 2d 1114, 1118 (Fla App, 2000). "A government's interest in zoning is indeed compelling." *Konikov v Orange Co,* 302 F Supp 2d 1328, 1343 (MD Fla, 2004); see also *Midrash Sephardi v Town of Surfside,* 2000 US Dist LEXIS 22629, *51 (SD Fla, 2000) (holding that "the zoning interests of Surfside may properly be characterized as compelling"). "The compelling state interest and, hence, the municipal concern served by zoning regulation of land use is promotion of health, safety, morals or general welfare."

Home Bldg Co v Kansas City, 609 SW2d 168, 171 (Mo App, 1980). "[T]he ordinance serves a compelling state interest; the City['s] . . . police power to regulate the private use of the land." *Lyons v Fort Lauderdale*, 1988 US Dist LEXIS 17646, *5-6 (SD Fla, 1988). "The city has a cognizable compelling interest to enforce its zoning laws. . . . Reserving areas for commercial activity both protects residential areas from commercial intrusion and fosters economic stability and growth." *Chicago Hts v Living Word Outreach Full Gospel Church and Ministries, Inc,* 302 Ill App 3d 564, 572; 707 NE2d 53 (1998); see also *Daytona Rescue Mission, Inc v City of Daytona Beach,* 885 F Supp 1554, 1560 (MD Fla, 1995) (holding that "the City's interest in regulating homeless shelters and food banks is a compelling interest").

In the instant case, the city has a compelling interest in regulating where apartment complexes can be built within the city. As the United States Supreme Court has explained:

> The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the

> entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances. [*Village of Euclid v Ambler Realty Co,* 272 US 365, 394-395; 47 S Ct 114; 71 L Ed 303 (1926).]

See also *Kropf v Sterling Hts,* 391 Mich 139, 159-160; 215 NW2d 179 (1974) (adopting the above analysis in addressing "why the local zoning board could reasonably restrict multiple dwellings in a residential area"). That a court will defer to zoning authorities and will only overturn a zoning ordinance excluding other uses from a single-family residential area if it is arbitrary or capricious is evidence of the magnitude of the municipalities' interest in such zoning ordinances. *Id*. at 161 (holding that "[i]t is not for this Court to second guess the local governing bodies in the absence of a showing that that body was arbitrary or capricious in its exclusion of other uses from a single-family residential district").

In this case, much testimony was presented regarding the city's interest in preserving single-family neighborhoods. Charles Reisdorf, the Executive Director of the Regional Planning Commission, testified:

> [I]n an area where you have a large number of single-family residences, people have made purchases with the expectation that there will be some stability in the neighborhood. For most of us, the purchase of a home is the major expense of our life . . . . And so when you—when you have something that's incompatible interjected into a neighborhood area, it creates problems and often results in a blighting situation . . . .

Dennis Diffenderfer, a planner who has been with the city's Department of Community Development for nearly 20 years, testified:

> [A]ny time you even add a duplex or a three- or four-unit or a number of buildings that convert to rental, it does have a negative effect on the adjoining neighbors. I can speak not only as a housing professional, but from experiences.

Charles Aymond, who has served as the chairman of the Jackson Planning Commission for over ten years, testified:

> [T]he City has experienced a great deal of blight and destabilization as the result of commercial enterprises . . . or different residential uses coming into what is generally referred to as a higher residential use.

Plaintiff's own architect, James Pappas, testified that if the property were rezoned multiple-family residential, as the plaintiff desires, a 45-foot apartment complex would be permitted and this would be "inappropriate with that neighborhood."

Given the city's general interest in zoning, and the city's specific interest in maintaining the character of this single-family residential neighborhood, we con-

clude that the city has a compelling interest in maintaining single-family residential zoning and in not rezoning this area of the city.

E. LEAST RESTRICTIVE MEANS

Given that the imposition of the burden on plaintiff is in furtherance of a compelling governmental interest, the final question is whether a particular governmental action constitutes the "least restrictive" means of furthering that interest. 42 USC 2000cc(a)(1)(B). The burden is on defendants to prove that an action constitutes the least restrictive means of furthering the compelling governmental interest. 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the *least restrictive means* of furthering that compelling governmental interest. [42 USC 2000cc(a)(1) (emphasis added).]

In the instant case, plaintiff asked the city to rezone the property from single-family residential to multiple-family residential. In response, the city could have done one of two things—it could have granted or it could have denied plaintiff's request to rezone the property. The city decided to deny plaintiff's request to rezone the property. That is, the city decided to maintain the single-family residential zoning. There do not appear to be any less restrictive means of maintaining the single-family residential zoning.

For these reasons, we conclude that any burden placed on plaintiff's exercise of religion is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that compelling governmental interest.[26] Therefore, even assuming that RLUIPA is applicable in the instant case, it has not been violated.[27]

V. CONCLUSION

RLUIPA applies to burdens imposed by governmental bodies on "religious exercises" in the course of

[26] 42 USC 1988(b) provides, "In any action or proceeding to enforce a provision of . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." For the reasons discussed herein, plaintiff is not a "prevailing party," and, therefore, is not entitled to attorney fees.

[27] As discussed above, in *City of Boerne*, the United States Supreme Court held that Congress, in enacting RFRA, had exceeded its power under § 5 of the Fourteenth Amendment to enact legislation enforcing the Free Exercise Clause because RFRA proscribes state conduct that the First Amendment itself does not. In *Smith*, the United States Supreme Court held that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified under the Free Exercise Clause by a compelling governmental interest. However, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, *supra* at 884. Proponents of RLUIPA argue that Congress has the authority to enact RLUIPA because it merely codifies *Smith*. However, the lower courts in the instant case held that, under RLUIPA, a religious institution need not abide by a generally applicable, religion-neutral zoning ordinance unless it is justified by a compelling governmental interest. This seems inconsistent with the Free Exercise Clause as interpreted in *Smith*, which held that a generally applicable, religion-neutral law does not have to be justified by such an interest. Whenever possible, courts should construe statutes in a manner that renders them constitutional. *People v Bricker*, 389 Mich 524, 528; 208 NW2d 172 (1973). Because the lower courts' interpretation of RLUIPA would render RLUIPA unconstitutional, we reject their interpretation and instead adopt the interpretation set forth in this opinion.

implementing land use regulations under which "individualized assessments" may be made of the proposed uses for the land. An "individualized assessment" is an assessment based on one's particular or specific circumstances. A decision concerning a request to rezone property does not involve an "individualized assessment." Therefore, RLUIPA is not applicable here.

A "religious exercise" constitutes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc-5(7)(A). However, something does not become a "religious exercise" just because it is carried out by a religious institution. Because the only connection between religion and the construction of the apartment complex in this case is the fact that the apartment complex would be owned by a religious institution, the building of the apartment complex does not constitute a "religious exercise."

A "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. A mere inconvenience or irritation does not constitute a "*substantial* burden"; similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "substantial burden." Because the city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, the city has not substantially burdened plaintiff's religious exercise.

Even if the city did substantially burden plaintiff's religious exercise, imposition of that burden here is in furtherance of a compelling governmental interest, namely, the enforcement of local zoning ordinances, and

constitutes the least restrictive means of furthering that compelling governmental interest. Therefore, even assuming that RLUIPA is applicable, RLUIPA was not violated. For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the trial court for the entry of a judgment in favor of defendants.

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

CAVANAGH, J. (*concurring*). I agree with part IV(B) of the majority opinion. I write separately because I believe it is unnecessary to determine whether defendants made an individualized assessment in this case or whether the statutory test of strict scrutiny was met, because plaintiff failed to show that its petition for rezoning was related to plaintiff's exercise of religion. Thus, I would reverse the Court of Appeals judgment on that basis and remand to the trial court for dismissal of plaintiff's claim.

WEAVER, J., concurred with CAVANAGH, J.

KELLY, J. (*concurring*). I agree with the order in which the majority opinion interprets the relevant provisions of the Religious Land Use and Institutionalized Persons Act, 42 USC 2000cc *et seq*. I concur in the majority's holding that there was no individualized assessment in this case and therefore that RLUIPA is not applicable.

I write separately because I believe it is unnecessary to discuss (1) whether the building of an apartment complex was a religious exercise, (2) whether the refusal to rezone plaintiff's property substantially burdened the alleged religious exercise, and (3) whether the alleged burden was in furtherance of a compelling

governmental interest and constituted the least restrictive means of furthering that interest. The majority's discussion of these issues is mere dicta.

I would reverse the Court of Appeals judgment because RLUIPA is inapplicable in the instant case.

WASHINGTON v SINAI HOSPITAL OF GREATER DETROIT

Docket No. 130641. Argued January 10, 2007 (Calendar No. 1). Decided June 27, 2007.

Eula Washington, as personal representative of the estate of Lisa B. Griffin, deceased, brought a wrongful death, medical malpractice action in the Wayne Circuit Court against Sinai Hospital of Greater Detroit and others, alleging that the decedent died as a result of the defendants' malpractice. An identical action filed by the original personal representative of the estate, the decedent's brother, had been involuntarily dismissed on the basis that the period of limitations applicable to the action had expired. After the plaintiff, the decedent's mother, was appointed successor personal representative of the decedent's estate, she filed the instant action. The court, Isidore B. Torres, J., granted the defendants' motion for summary disposition on the basis that the suit was barred by the doctrine of res judicata. The Court of Appeals, JANSEN, P.J., and CAVANAGH and FORT HOOD, JJ., reversed the trial court, holding in part that the doctrine of res judicata does not govern the present action because the dismissal of the original personal representative's action on statute of limitations grounds did not constitute an adjudication of the merits of the plaintiff's action. Unpublished opinion per curiam, issued December 1, 2005. (Docket No. 253777). The Supreme Court granted the defendants' application for leave to appeal. 475 Mich 909 (2006).

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

The plaintiff's claims were properly dismissed on the basis of the doctrine of res judicata because the involuntary dismissal of the initial personal representative's suit operated as an adjudication of the entire merits of that action under MCR 2.504(B)(3) and all three requirements for the application of the doctrine of res judicata were met in this case.

1. The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter asserted in the second action was, or could have been, resolved in

the first action. The doctrine bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.

2. MCR 2.504(B)(3) provides that, unless the court otherwise specifies in its order for involuntary dismissal, a dismissal under the subrule or a dismissal not provided for in that rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication of the entire merits of the plaintiff's claim. The order of involuntary dismissal in the first action did not specify that the order was without prejudice and was not a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205. Therefore, the prior action was decided on the merits.

3. The plaintiff's complaint was identical to that which was filed in the first action, and, therefore, the matter asserted in the second suit was raised and resolved in the first suit. The transactional test used to determine if a matter could have been resolved in the first action provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts gives rise to the assertion of relief.

4. The plaintiff is in privity with the initial personal representative. The plaintiff represents the same legal entity and right that was represented by the initial personal representative. Any familial relationship between the plaintiff and the initial personal representative is irrelevant with regard to privity.

Justices CAVANAGH and KELLY concurred in the result only.

Reversed; trial court order granting summary disposition reinstated.

Robin H. Kyle for the plaintiff.

Tanoury, Corbet, Shaw, Nauts & Essad (by *Linda M. Garbarino, Anita Comorski,* and *Kenneth M. Essad*) for the defendants.

Amici Curiae:

Donald M. Fulkerson for Michigan Trial Lawyers Association.

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

Plunkett & Cooney, P.C. (by *Robert G. Kamenec*), for American Physicians Assurance Corporation.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Anthony G. Arnone*) for Masoon Ahmad, M.D.; and Michigan Hospitalist, P.C.

Feikens, Stevens, Kennedy & Galbraith, P.C. (by *Lee A. Stevens* and *Jeffrey Feikens*), for Henry Ford Health System and Michael S. Eichenhorn, M.D.

Sullivan, Ward, Asher & Patton (by *Ronald S. Lederman* and *Nicole K. Nugent*) for Vencor Hospital.

CORRIGAN, J. This medical malpractice case presents the question whether a successor personal representative of a decedent's estate is barred from filing a subsequent complaint by the doctrine of res judicata when the initial personal representative filed a complaint that was involuntarily dismissed. The Court of Appeals held that the successor representative's complaint was not barred by res judicata because a grant of summary disposition on statute of limitations grounds in the first action was not an adjudication on the merits. The Court of Appeals, however, overlooked MCR 2.504(B)(3), which states that, unless the court otherwise specifies in its order for dismissal, an involuntary dismissal, "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." Under the plain language of MCR 2.504(B)(3), the dismissal of the initial personal representative's untimely complaint was an adjudication on the merits. Because all the elements of res judicata have been satisfied, plaintiff's claims are barred. Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting summary disposition for the defendants.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

The decedent, Lisa Griffin, arrived at defendant Sinai Hospital of Greater Detroit complaining of shortness of breath on February 28, 2000. On March 1, 2000, Lisa Griffin died of cardiac arrest, allegedly as a result of defendants' failure to administer intravenous antibiotics. Decedent's brother, David Griffin, was appointed personal representative of her estate on March 16, 2000, which meant that the two-year saving provision would expire March 16, 2002.[1] David Griffin served defendants with a notice of intent to file suit on February 7, 2002, which tolled the period of limitations until August 9, 2002, with 21 days remaining.[2] David Griffin, however, did not initiate a wrongful death, medical malpractice action against defendants until September 25, 2002. In that action, the trial court granted summary disposition to defendants under MCR 2.116(C)(7), ruling that Griffin filed his complaint after the period of limitations had expired and more than two years after the letters of authority were issued. Griffin did not appeal the trial court's decision.

Almost a year later, on August 26, 2003, plaintiff Eula Washington, decedent's mother, was appointed successor personal representative of decedent's estate. Relying on the wrongful death saving provision, MCL 600.5852, and this Court's decision in *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29; 658 NW2d 139 (2003), plaintiff initiated the instant wrongful death action against defendants, which was identical to the first action. Defendants moved for summary disposition on the ground that plaintiff's suit was barred by res judicata. The trial court granted

[1] MCL 600.5852.

[2] MCL 600.5856(c).

defendants' motion, concluding that *Eggleston, supra*, did not preclude the application of res judicata.

The Court of Appeals reversed in an unpublished opinion.[3] The Court stated that the wrongful death saving provision permitted a successor personal representative to bring a wrongful death action within two years of the issuance of letters of authority and within three years after the period of limitations has run. The Court further held that, under *Eggleston, supra*, the two-year saving period for the successor personal representative does not commence upon the issuance of letters of authority to the initial personal representative. Finally, although summary disposition usually operates to resolve a matter on the merits, the Court held that res judicata did not govern the case because a dismissal on the basis of the expiration of the period of limitations does not constitute an adjudication on the merits. The Court of Appeals cited several cases in support of this latter proposition.[4]

Defendants sought leave to appeal in this Court. We granted defendants' application, ordering the parties to brief the following questions: (1) whether a successor personal representative is entitled to his own two-year saving period in which to file a complaint under MCL 600.5852 if the first personal representative served a full two-year term, and (2) whether a subsequent complaint filed by a successor personal representative is barred by res judicata and MCR 2.116(C)(7) or MCR 2.504(B)(3) if the first personal representative filed a

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[3] *Washington v Sinai Hosp of Greater Detroit*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2005 (Docket No. 253777).

[4] *Rogers v Colonial Fed S&L Ass'n,* 405 Mich 607; 275 NW2d 499 (1979); *Nordman v Earle Equip Co*, 352 Mich 342; 89 NW2d 594 (1958); *Ozark v Kais*, 184 Mich App 302; 457 NW2d 145 (1990).

complaint.[5] We hold that, because the trial court's involuntary dismissal of the initial personal representative's wrongful death suit operates as an adjudication on the merits under MCR 2.504(B)(3), plaintiff's claims were properly dismissed on the basis of res judicata. In light of this holding, it is unnecessary to decide whether a successor personal representative is entitled to his own two-year saving period after the first personal representative served a full two-year term but failed to file a claim within that time.

II. STANDARD OF REVIEW

We review de novo a trial court's decision with regard to a motion for summary disposition under MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). We also review de novo questions of statutory interpretation. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). Additionally, the application of a legal doctrine, such as res judicata, presents a question of law that we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

III. LEGAL ANALYSIS

First, we emphasize that we do not here decide the threshold question whether a successor personal representative is entitled to her own two-year period to file suit if the original personal representative has served a full two-year period. We decline to address this question because res judicata nonetheless bars plaintiff from commencing this action. This Court has held:

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[5] 475 Mich 909 (2006).

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). [*Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).]

Therefore, we must consider these three elements of res judicata in turn.

In the present case, the Court of Appeals held that the prior action had not been decided on the merits because "a grant of summary disposition on grounds that the statute of limitation has expired does not constitute an adjudication on the merits of a cause of action." *Washington v Sinai Hosp of Greater Detroit*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2005 (Docket No. 253777), slip op at 2, citing *Rogers v Colonial Fed S&L Ass'n,* 405 Mich 607, 619 n 5; 275 NW2d 499 (1979), *Nordman v Earle Equip Co*, 352 Mich 342 346; 89 NW2d 594 (1958), and *Ozark v Kais*, 184 Mich App 302, 308; 457 NW2d 145 (1990). The reliance by the Court of Appeals on *Rogers*, however, is misplaced. This Court recently overruled *Rogers* in *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280; 731 NW2d 29 (2007), holding that *Rogers* not only has been superseded by the current court rules, but also that it was incorrectly decided under the then-existing GCR 1963, 504.2, which was substantially similar to the current MCR 2.504(B)(3).

The current version of MCR 2.504(B) provides, in pertinent part:

> (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.

In the first action, defendants were granted summary disposition under MCR 2.116(C)(7), because the initial personal representative failed to file suit within the period of limitations. Plaintiff argues that, under MCR 2.504(B)(3), the only "merits" decided in the first action are whether the initial personal representative timely filed his action. MCR 2.504(B)(3), however, does not distinguish between the grounds for a dismissal. Rather, subrule B(3) plainly states that "a dismissal under this subrule or a dismissal not provided for in this rule . . . operates as an adjudication on the merits." In the absence of any language in an order of dismissal limiting the scope of the merits decided, the court rule plainly provides that the order operates as an adjudication of the entire merits of a plaintiff's claim. The trial court's dismissal of the case was, therefore, an involuntary dismissal under MCR 2.504(B)(1). Moreover, the trial court did not specify that its order was without prejudice. Also, the trial court's order in the first action was not "a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205." Consequently, the decision in the first action was an adjudication on the merits of the initial personal representative's claims, not just on the issue whether he timely filed his claims.

The third requirement for the application of res judicata is that "the matter in the second case was, or could have been, resolved in the first." *Adair*, *supra* at 121. Plaintiff argues that the issue whether a successor personal representative has her own two-year saving period could not have been resolved in the first case because the successor personal representative had not been appointed at that time. As stated in *Adair*, however, this Court uses a transactional test to determine if the matter could have been resolved in the first case. *Id*. at 123. As this Court explained in *Adair*:

> "The 'transactional' test provides that 'the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.' " [*Id*. at 124 (citations omitted in original).]

" 'Whether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation . . . .' " *Id*. at 125 (citation omitted). See also *Reid v Thetford Twp,* 377 F Supp 2d 621, 627 (ED Mich, 2005); *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 230 (2006). Because plaintiff's complaint is identical to that which was filed in the first action, the identical operative facts now support her medical malpractice claim. Therefore, the third res judicata requirement is met because the matter asserted in the second suit was raised in the first.

The application of the wrongful death saving provision, MCL 600.5852, does not affect this analysis. Although § 5852 allows a personal representative to bring an action in her own name, the legal right she represents belongs to the estate, and her claim must be brought on behalf of the estate. Plaintiff does not have

her *own* legal right to bring a wrongful death claim against defendant. Hence, the only factual condition that cannot be mirrored in the original suit is the name representing the estate on the complaint. The name on the complaint in the second action, however, is not an "operative fact" because it represents the same interest as that represented in the first action. Rather, the "operative facts" here are those underlying the estate's claim for medical malpractice. Accordingly, plaintiff's claim is not fundamentally different from her predecessor's claim, which relied on the same operative facts.

Finally, with regard to the second res judicata requirement, plaintiff is in privity with the initial personal representative. We held in *Adair* that "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, *supra* at 122.

Plaintiff cites *Phinisee v Rogers*, 229 Mich App 547; 582 NW2d 852 (1998), for the proposition that the familial relationship between a mother and child does not put them in privity with one another. In *Phinisee*, the Court of Appeals concluded that the doctrine of res judicata did not bar the plaintiff child's paternity action against the defendant, despite the earlier dismissal of the plaintiff's mother's paternity action against the same defendant. *Id*. at 554. Plaintiff's reliance on *Phinisee*, however, is misplaced. In concluding that the mother and child in *Phinisee* were not in privity, the Court relied on its own conclusion that " '[a]t some point, the law must recognize the fact that a child's interests in paternity litigation are much greater than the mother's interest in continued support.' " *Id*. at 552, quoting *Spada v Pauley*, 149 Mich App 196, 205 n

6; 385 NW2d 746 (1986).[6] The Court declined to apply res judicata to the plaintiff's claims because she did not represent the same legal interest as her mother in the first action, and thus, was not in privity with her.

In this case, both plaintiff and the initial personal representative were representing the same legal entity —namely, the estate—and prosecuting the estate's cause of action against defendants for malpractice. The familial relationship between plaintiff and the initial personal representative is, therefore, irrelevant. Because plaintiff represents the same legal right that was represented by the initial personal representative, she is in privity with the initial personal representative.[7]

Thus, all three requirements for the application of res judicata have been met in this case. Moreover, while we expressly do not decide whether a successor personal representative is entitled to her own two-year saving period where the original personal representative served a full two-year period, we note that nothing in MCL 600.5852 precludes the application of res judicata in this case, even if we were to interpret this provision in plaintiff's favor. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition in favor of defendants.

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

CAVANAGH and KELLY, JJ. We concur in the result only.

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[6] While we make no pronouncement on the correctness of this statement, we note that *Phinisee* is further distinguishable from the present case because in *Phinisee* no final order was entered in the first action. *Phinisee*, *supra* at 550-551.

[7] See MCL 600.2922; *Shenkman v Bragman*, 261 Mich App 412, 415-416; 682 NW2d 516 (2004).

OMDAHL v WEST IRON COUNTY BOARD OF EDUCATION

Docket No. 131926. Decided June 27, 2007.

Attorney Torger G. Omdahl sought an award of attorney fees and costs in the Iron Circuit Court after prevailing against the West Iron County Board of Education in an action under the Open Meetings Act (OMA), MCL 15.261 *et seq*., in which he proceeded *in propria persona*. The trial court, Joseph C. Schwedler, J., denied the plaintiff's request, and the plaintiff appealed. The Court of Appeals, SAWYER, P.J., and DAVIS, J. (KELLY, J., concurring in part and dissenting in part), reversed, reasoning that the phrase "actual attorney fees," as used in the OMA, does not require an actual physical bill and can refer to the value of the plaintiff's professional time. 271 Mich App 552 (2006). The defendant sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 477 Mich 961 (2006).

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

The phrase "actual attorney fees" requires an agency relationship between an attorney and the client whom he or she represents. There must be separate identities between the attorney and the client, and a person who proceeds *in propria persona* cannot recover actual attorney fees even if the pro se individual, like the plaintiff, is a licensed attorney.

Reversed and remanded to the trial court.

Justice WEAVER, dissenting, would hold that the plain language of the OMA, which makes no reference to an agency relationship as a prerequisite to an award of attorney fees, allows for a pro se litigant who is an attorney to recover actual attorney fees.

Justice KELLY concurred in the result proposed by Justice WEAVER.

Justice CAVANAGH would deny leave to appeal.

ACTIONS — OPEN MEETINGS ACT — ATTORNEY FEES.

An attorney acting *in propria persona* who prevails in an action under the Open Meetings Act is not entitled to an award of actual attorney fees (MCL 15.271[4]).

Fisher & Omdahl (by *Torger G. Omdahl*) for the plaintiff.

Basso & Basso Legal Services LLC (by *Sara J. Basso*) for the defendant.

Amici Curiae:

Brad A. Banasik for the Michigan Association of School Boards, the Michigan Municipal League, and the Public Corporation Law Section of the State Bar of Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Thomas Quasarano*, Assistant Attorney General, for the Attorney General.

TAYLOR, C.J. At issue in this case is whether a pro se litigant, who is also an attorney, may recover "court costs and actual attorney fees," MCL 15.271(4), after he or she brings a successful action under the Open Meetings Act. We conclude that because an attorney is defined as an agent of another person, there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees. Accordingly, we reverse the judgment of the Court of Appeals that held to the contrary, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Torger Omdahl, an attorney proceeding *in propria persona*, sued his former client, the West Iron County Board of Education, for violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*. The trial court granted judgment for Omdahl, ruling that the board violated the OMA by failing to take minutes at two closed

sessions. However, the trial court denied Omdahl's request for attorney fees. Omdahl appealed.

The Court of Appeals, in a divided decision, reversed the denial of attorney fees and costs. *Omdahl v West Iron Co Bd of Ed,* 271 Mich App 552, 553; 722 NW2d 691 (2006). The majority noted the general rule that a party proceeding *in propria persona* is not entitled to an award of attorney fees. *Id.* However, MCL 15.271(4) of the OMA specifically mandates an award of actual attorney fees to a prevailing plaintiff. *Omdahl, supra* at 554. The Court recognized a split of authority in contexts other than the OMA regarding whether an attorney proceeding *in propria persona* could collect attorney fees. *Id.* It found unpersuasive the argument that allowing an attorney plaintiff proceeding *in propria persona* to collect attorney fees would create a cottage industry that would subsidize attorneys without clients. *Id.* at 555. The majority then stated:

> [A]s Abraham Lincoln is quoted as saying, "a Lawyer's time and advice are his stock in trade." We see no reason why plaintiff should be expected to give away his stock in trade merely because he is seeking to redress a wrong on his own behalf, and in which the public always has an interest, instead of on behalf of a third party. Whether representing himself or a client, he is investing the time. It is time he could have invested on behalf of another client who would have paid a fee. [*Id.* at 556-557.]

The majority declined to read "actual attorney fees" as requiring an actual physical bill or the actual payment of a fee. *Id.* at 557-558. Rather, it concluded that the actual attorney fees constituted the value of the professional time Omdahl invested in the case. *Id.* at 559.

Judge KELLY dissented, stating that the statute referred to "actual" attorney fees; "actual" was defined as " 'existing in act, fact, or reality; real' "; and Omdahl did not demonstrate that the fees he sought existed in act, fact, or reality. *Id.* at 561, quoting *People v Yamat*, 475 Mich 49, 54 n 15; 714 NW2d 335 (2006) (internal quotation omitted). She opined that it was inappropriate to rely on cases addressing other statutes or court rules because the statute at issue in the instant case unambiguously requires that the attorney fees actually be incurred. *Omdahl, supra* at 562 (KELLY, J., dissenting). With respect to the quotation from Abraham Lincoln, Judge KELLY stated: "And although Abraham Lincoln recognized the value of a lawyer's 'time and advice,' the OMA does not provide for a recovery of this time or effort."

Defendant board of education sought leave to appeal in this Court, arguing that (1) the plain language of MCL 15.271(4) requires "actual attorney fees," (2) an attorney representing himself or herself could not claim actual attorney fees because he or she was not obligated to reimburse himself or herself for services, (3) the Court of Appeals impermissibly engaged in judicial legislation by not applying the statute as clearly written, and (4) if the Court of Appeals published opinion was allowed to stand it would wreak havoc not only in this case but on future litigation involving statutory construction. This Court ordered oral argument on whether the application for leave to appeal should be granted. 477 Mich 961 (2006).

II. STANDARD OF REVIEW

The interpretation of a statute presents an issue of law that is reviewed de novo. *Lapeer Co Clerk v Lapeer Circuit Judges,* 465 Mich 559, 566; 640 NW2d 567

(2002). Our primary purpose when construing a statute is to effectuate legislative intent. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). Legislative intent is best determined by the language used in the statute itself. *Id.* When the language is unambiguous, we give the words their plain meaning and apply the statute as written. *Id.*

III. ANALYSIS

The OMA was enacted by the Legislature in 1968 to consolidate the hodgepodge of statutes requiring governmental accountability and disclosure. *Booth v Univ of Michigan Bd of Regents,* 444 Mich 211, 221; 507 NW2d 422 (1993); 1968 PA 261. The *Booth* Court explained that legislators perceived that, by promoting openness of governmental deliberations, the act would cause responsible decision making and minimize abuse of power. *Booth, supra* at 223. Because the act initially failed to provide for an enforcement mechanism or penalties for noncompliance, the act was repealed and reenacted by 1976 PA 267 to remedy the oversight and "promote a new era in governmental accountability." *Booth, supra* at 222. One of these newly enacted enforcement provisions was MCL 15.271(4), which provided that a successful party could recover court costs and actual attorney fees. It is this provision under which Omdahl claims he is entitled to attorney fees even though he was a pro se litigant in the OMA action.

In determining whether a party is entitled to statutory attorney fees, the first thing to consider is the statutory language itself. The relevant provision of the OMA, MCL 15.271(4), states:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further

> noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

Because Omdahl prevailed in his action against the board of education under the OMA, the only question was whether there were "actual attorney fees" for Omdahl to recover.

The meaning of these three words is central to the resolution of this case. The word "actual" means " 'existing in act, fact, or reality; real.' " *Yamat, supra* at 54 n 15, quoting *Random House Webster's College Dictionary* (1997). "Attorney" is defined as a "lawyer" or an "attorney-at-law." *Random House Webster's College Dictionary* (2001). The definition of "lawyer" is "a person whose profession is *to represent clients* in a court of law or *to advise or act for them* in other legal matters." *Id.* (emphasis added). And the definition of "attorney-at-law" is "an officer of the court authorized to appear before it as a *representative of a party* to a legal controversy." *Id.* (emphasis added). Clearly, the word "attorney" connotes an agency relationship between two people.[1] "Fee" is relevantly defined as "a sum charged or paid, as for professional services or for a privilege." *Id.*

The courts of this state as well as the federal courts have, in deciding cases of this sort, focused on the concept that an attorney who represents himself or

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[1] We have applied the plain and unambiguous meaning of the term "attorney" by discerning the reasonable meaning of the term through relevant dictionary definitions. The dissent claims that the definitions of "attorney" do not explicitly require an agency relationship; however, the most reasonable interpretation of the term does require such a relationship, and the dissent does not cite a single instance in which "attorney" is defined in any context other than an agency relationship. The dissent compounds its erroneous analysis by ignoring the fact that the word "fees," as used in the statute, is modified not only by the word "actual," but also by the word "attorney."

herself is not entitled to recover attorney fees because of the absence of an agency relationship.[2]

In *Laracey v Financial Institutions Bureau,* 163 Mich App 437, 441; 414 NW2d 909 (1987), the Court of Appeals considered whether an attorney acting *in propria persona* could collect attorney fees under MCL 15.240(4) of the Michigan Freedom of Information Act (FOIA). That act provided that the fees, to be awardable, had to be "reasonable attorney fees."[3]

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[2] We note in passing that these courts also relied on several public policy grounds in reaching their conclusions. In *Falcone v Internal Revenue Service,* 714 F2d 646, 647-648 (CA 6, 1983), the Sixth Circuit Court of Appeals reasoned that the attorney fee provision was intended to relieve plaintiffs of the burden of legal costs, not to provide pro se plaintiffs a windfall for fees never incurred; the provision was intended to encourage prospective plaintiffs to seek the advice of detached and objective legal professionals; and the provision was not intended to create a cottage industry for clientless attorneys. The Court of Appeals in *Laracey v Financial Institutions Bureau,* 163 Mich App 437, 444-446; 414 NW2d 909 (1987), relied on the first and third grounds stated in *Falcone, supra.* In *Kay v Ehrler,* 499 US 432, 437-438; 111 S Ct 1435; 113 L Ed 2d 486 (1991), the United States Supreme Court also noted that the purpose of the provision was to encourage prospective plaintiffs to seek the advice of detached and objective counsel. And the Court of Appeals in *Watkins v Manchester,* 220 Mich App 337, 343-345; 559 NW2d 81 (1996), in addition to relying on *Laracey, supra,* and *Kay, supra,* noted that pro se attorneys should not be able to recover for time that could have been spent representing other clients when pro se plaintiffs who were not attorneys also could suffer lost income or business opportunities as a result of time spent in litigation. While this public policy reasoning may be of interest, we decline to rely on it here because the statutory language can be applied plainly without resort to public policy analysis; thus, the dissent's claim that we have relied on public policy to reach our decision in the instant case is unfounded.

[3] MCL 15.240(4) provided:

> *If a person asserting the right to inspect* or to receive a copy of *a public record* or a portion thereof *prevails* in an action commenced pursuant to this section, *the court shall award reasonable attorneys' fees*, costs, and disbursements. If the person prevails in part, the court may in its discretion award reasonable attorneys'

The Court stated that an attorney proceeding *in propria persona* actually had no attorney for the purpose of the attorney fee provision and thus no fees were recoverable. *Laracey, supra* at 445. In doing so, it relied on the reasoning from the Eleventh Circuit in *Duncan v Poythress,* 777 F2d 1508, 1518 (CA 11, 1985) (Roney, J., dissenting):

> For there to be an attorney in litigation there must be two people. Plaintiff here appeared *pro se.* The term "*pro se*" is defined as an individual acting "in his own behalf, in person." By definition, the person appearing "in person" has no attorney, no agent appearing for him before the court. The fact that such plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself. In other words, when applied to one person in one proceeding, the terms "*pro se*" and "attorney" are mutually exclusive. [*Laracey, supra* at 445 n 10, quoting *Duncan, supra* (Roney, J., dissenting).]

The Court of Appeals thus determined that a plaintiff attorney proceeding *in propria persona* is not entitled to attorney fees under FOIA.[4]

> fees, costs, and disbursements or an appropriate portion thereof. The award shall be assessed against the public body liable for damages under subsection (5). [Emphasis added.]

[4] While the dissent criticizes the majority for relying on cases interpreting the statutory language "reasonable attorney fees," and claims that the difference between actual attorney fees and reasonable attorney fees is significant, we note that our focus in this case is on "attorney" not "actual." In this respect, the dissent's attempt to distinguish *Laracey* fails. *Laracey* is relevant because both *Laracey* and the instant case involve attempts by an attorney appearing *in propria persona* to recover attorney fees. We find *Laracey* persuasive for the relevant portion of its holding, which states that "both a client and an attorney are necessary ingredients for an attorney fee award." *Laracey, supra* at 446. Contrary to Justice WEAVER's assertion, the term "reasonable," as used in the statute in *Laracey,* does not affect this analysis.

Building on *Laracey,* the Court of Appeals in *Watkins v Manchester,* 220 Mich App 337, 341-344; 559 NW2d 81 (1996), in construing the attorney fee provisions in the case evaluation rules that gave "reasonable" attorney fees, held that a defendant attorney who represents himself or herself is not entitled to an award of attorney fees under MCR 2.403(O). While the statutory and court rule language interpreted in *Laracey* and *Watkins* differed somewhat from the language in the present statute in that the attorney fees were to be "reasonable" as opposed to "actual," the courts in both cases focused on the availability of any attorney fees when the agency relationship was missing, which is also the situation here.

In *Falcone v Internal Revenue Service,* 714 F2d 646 (CA 6, 1983), the Sixth Circuit similarly held that a pro se attorney may not recover attorney fees under 5 USC 552(a)(4)(E) of the federal Freedom of Information Act where attorney fees to be allowable had to be reasonable. In so concluding, the court stated, "The fortuitous fact that such a FOIA plaintiff is also an attorney makes no difference. Both a client and an attorney are necessary ingredients for an award of fees in a FOIA case." *Falcone, supra* at 648.

Similarly, the United States Supreme Court in *Kay v Ehrler,* 499 US 432, 435, 438; 111 S Ct 1435; 113 L Ed 2d 486 (1991), affirmed the Sixth Circuit in holding that a successful *in propria persona* attorney may not recover attorney fees under 42 USC 1988, where the fees were allowed if reasonable. It noted that the use of the word "attorney" assumed an agency relationship and found it likely that Congress intended to predicate an award under § 1988 on the existence of an attorney-client relationship. *Kay, supra* at 435-436. After noting that the circuit court interpreted the statute as assum-

ing there was a " 'paying relationship between an attorney and a client,' " the Court agreed "that the overriding statutory concern is the interest in obtaining *independent* counsel for victims of civil rights violations." *Id.* at 435, 437.

In the instant case, the Court of Appeals reliance on the case that predated *Laracey* and *Watkins, Wells v Whinery,* 34 Mich App 626; 192 NW2d 81 (1971), was misplaced. While the issue in *Wells* was whether an attorney plaintiff who represented himself could recover attorney fees under MCL 600.2522, that Court neglected to directly consider whether an agency relationship existed, *Wells, supra* at 630, and is unpersuasive, as *Watkins* concluded, *Watkins, supra* at 342.

Thus, with these definitions and the caselaw we have discussed in mind, it being clear that there was no agency relationship between two different people, there was no lawyer-client relationship as understood in the law. Therefore, there were no "actual attorney fees" for Omdahl to recover under MCL 15.271(4).

IV. CONCLUSION

In sum, by its plain terms, the phrase "actual attorney fees" requires an agency relationship between an attorney and the client whom he or she represents. Therefore, there must be separate identities between the attorney and the client, and a person who represents himself or herself cannot recover actual attorney fees even if the pro se individual is a licensed attorney. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for proceedings consistent with this opinion.

Reversed and remanded to the trial court.

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

WEAVER, J. *(dissenting).* I respectfully dissent from the majority's holding that a pro se litigant who is an attorney is barred from recovering "actual attorney fees" under MCL 15.271(4) of the Open Meetings Act (OMA) because there must be separate identities between the attorney and the client, within the confines of an attorney-client agency relationship, before the attorney may recover actual attorney fees. Instead, I would hold that the plain language of the OMA, which makes no reference to an agency relationship as a prerequisite to an award of attorney fees, allows for a pro se litigant who is an attorney to recover "actual" attorney fees under MCL 15.271(4).

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Torger Omdahl, an attorney who represented himself in this litigation, sued defendant West Iron County Board of Education and others for violations of the Open Meetings Act (OMA). The complaint alleged that defendants violated the OMA by engaging in an illegal closed session. After the session, defendants voted to remove plaintiff from representation of the board in a particular lawsuit and to fire plaintiff as the board's attorney. Plaintiff claimed that this closed session violated the OMA because it was held for the purpose of firing him, not for the stated purpose of discussing a letter from plaintiff regarding the case in which plaintiff was providing representation. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim.

The circuit court granted defendants' motion, ruling that the challenged meeting was legal on its face.

However, the court allowed plaintiff 21 days to amend his complaint. Plaintiff then added count III, "false reference to purpose for closed session," and defendants renewed their motion for summary disposition. Plaintiff filed an amended complaint, adding a count alleging that defendants also violated the OMA by failing to take minutes in the executive sessions in question. In all three of plaintiff's complaints, he requested an award of "actual attorney fees, together with costs and disbursements." The circuit court dismissed plaintiff's first three counts, retaining only the count relating to the failure to take minutes. Defendants then filed an amended summary disposition motion under MCR 2.116(C)(10).

At a hearing on the C(10) motion, the circuit court stated that defendants should not be required to pay actual attorney fees because there was no attorney in this case since plaintiff was appearing pro se. However, the judge stated that defendants did violate the OMA by failing to keep minutes and ruled that they must keep minutes at any future closed sessions. The judge explained that he would not order any costs because the facts in the original complaint were the subject of depositions, litigation, and motions and were heard and already dismissed for having no basis.

Plaintiff appealed, and in a published opinion the Court of Appeals reversed the denial of fees and costs and remanded with instructions to enter an award of attorney fees and costs. *Omdahl v West Iron Co Bd of Ed,* 271 Mich App 552, 553; 722 NW2d 691 (2006). Judge KELLY, dissenting in part, would have affirmed the award of costs but would have denied the award of attorney fees because they were not "actually incurred." *Id*. at 561 (KELLY, J. concurring in part and dissenting in part). Defendants now seek review of that

decision in this Court, and plaintiff has responded. This Court ordered oral argument on whether the application for leave to appeal should be granted. 477 Mich 961 (2006).

II. STANDARD OF REVIEW

For the purposes of this dissent, I agree with the standard of review presented by the majority opinion, *ante* at 426-427:

> The interpretation of a statute presents an issue of law that is reviewed de novo. *Lapeer Co Clerk v Lapeer Circuit Judges,* 465 Mich 559, 566; 640 NW2d 567 (2002). Our primary purpose when construing a statute is to effectuate legislative intent. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). Legislative intent is best determined by the language used in the statute itself. *Id.* When the language is unambiguous, we give the words their plain meaning and apply the statute as written. *Id.*

III. ANALYSIS

Contrary to the majority's conclusion, the plain language and unambiguous meaning of the OMA allow a litigant to recover "actual attorney fees," regardless of whether the attorney is a pro se litigant. Central to the disposition of this case is the meaning and interpretation of the phrase "actual attorney fees" contained within MCL 15.271(4), the part of the OMA dealing with awards of court costs and attorney fees. MCL 15.271(4) states:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, *the person shall recover court costs and actual attorney fees for the action.* [Emphasis added.]

This Court, in determining the meaning of a statutory term, looks to the common and ordinary meaning of the term. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002). The term "actual attorney fees" requires the word "actual" to be interpreted. The simple definition of the word "actual" is "existing in fact; real." Black's Law Dictionary (8th ed). *Merriam-Webster Online* defines "actual" as "existing in act and not merely potentially"; "existing in fact or reality"; "not false or apparent <actual costs>"; "existing or occurring at the time." <http://www.m-w.com/dictionary/actual> (accessed June 12, 2007).

Actual attorney fees are costs that are real, not merely speculative. The word "actual" should not be construed so far as to require an exchange of a fee from one entity to another, but rather to require that the attorney fees are calculable or recorded and, more importantly, can be relied on. The attorney fees must be more than speculative, they must be existing in fact.

In the present case, plaintiff was entitled to an award of both costs and attorney fees under MCL 15.271(4) because defendants had violated the OMA, and plaintiff was a person who had commenced the action to enforce the OMA and had prevailed. Plaintiff requested attorney fees in all three of his complaints. Plaintiff sought attorney fees from the outset of his claim, not as an afterthought. He reasonably relied on the terms in the statute when requesting relief. The attorney fees sought are not speculative, but exist in fact as legal services rendered. Plaintiff is not setting up shop to recover attorney fees, but is seeking to vindicate his rights under the plain language of the OMA, which contains a mandatory fee scheme created by the statutory use of the term "actual attorney fees."

The majority argues that the plain language and unambiguous interpretation of MCL 15.271(4) requires an agency relationship between an attorney and a client in order to recover actual attorney fees. In support of this theory, the majority cites various definitions of "attorney" and "fee," surmising that an attorney-client relationship is essential to the existence of "actual attorney fees." However, none of the definitions that the majority cites supports an interpretation that an agency relationship is necessary to the existence of actual attorney fees that are recoverable under the OMA.[1] The majority states:

> "Attorney" is defined as a "lawyer" or an "attorney-at-law." *Random House Webster's College Dictionary* (2001). The definition of "lawyer" is "a person whose profession is *to represent clients* in a court of law or *to advise or act for them* in other legal matters." *Id.* (citation omitted). And the definition of "attorney-at-law" is "an officer of the court authorized to appear before it as a *representative of a party* to a legal controversy." *Id.* (citation omitted). Clearly, the word "attorney" connotes an agency relationship between two people. [*Ante* at 428.]

While it is true that an attorney most commonly represents others, there is nothing in the definitions cited by the majority that prevents an attorney from

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[1] Although the definition of the term "actual" in *People v Yamat*, 475 Mich 49, 54 n 15; 714 NW2d 335 (2006), which the majority uses, is accurate, it is not taken in the context of the case at hand. In *Yamat*, a felonious driving case, "actual" is used in the pertinent Michigan Vehicle Code provision defining "operate" as "being in actual physical control . . . ." *Id.* at 56. In *Yamat* the term "actual" was contrasted to the term "exclusive." *Id.* at 56-57. In this case, the term "actual" is in reference to attorney fees and contrasted to the term "reasonable." Although the simple definition is the same, the implicit meaning of the word in context allows the word "actual" to be read to mean "not merely speculative." In a mandatory fee scheme, because discretion is not permitted when determining recovery, the fee must be verifiable.

representing himself.[2] While the definitions of "attorney" may imply a possible agency relationship, the definitions do not explicitly require one. As a result, a plain and unambiguous interpretation of the OMA does not include a mandatory agency relationship as a prerequisite to recovering attorney fees. Under the statutory scheme, all that is required is that there exist "actual attorney fees." Plaintiff has shown that he has "actual" attorney fees as opposed to speculative fees, and should be allowed to recover those fees under the plain and unambiguous language of the OMA.

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[2] The majority reasons that an attorney representing himself or herself does not have a client, thus precluding the existence of an agency relationship. This reasoning creates an inconsistent hypothetical situation with no client and no lawyer. However, an attorney is not precluded from applying his or her specialized skills in a case where the attorney himself or herself is the client. The old adage "an attorney who represents himself has a fool for a client," illustrates that an individual is not precluded—but discouraged—from playing both roles. Attorney fee awards do encourage those who otherwise would not be able to afford counsel to bring claims, knowing they will recover fees and costs. However, encouraging the retention of counsel does not necessarily preclude self-representation by a qualified attorney who has the requisite specialized skills to adequately represent himself or herself.

Moreover, the caselaw cited by the majority to not award attorney fees to attorneys who are pro se litigants applies only to statute-specific holdings and does not apply to the award of "actual attorney fees" as mandated by the OMA. See *Laracey v Financial Institutions Bureau,* 163 Mich App 437, 441; 414 NW2d 909 (1987) (nonbinding Michigan Court of Appeals case analyzing the award of attorney fees with regard to state Freedom Of Information Act claims); *Falcone v Internal Revenue Service,* 714 F2d 646, 647-648 (CA 6, 1983) (federal Sixth Circuit Court of Appeals case analyzing attorney fee awards with respect to the federal FOIA); *Watkins v Manchester,* 220 Mich App 337, 341-344; 559 NW2d 81 (1996) (Michigan Court of Appeals case analyzing the award of discretionary "reasonable" attorney fees with respect to MCR 2.403[O]); *Kay v Ehrler,* 499 US 432, 435, 438; 111 S Ct 1435; 113 L Ed 2d 486 (1991) (United States Supreme Court case holding that an attorney proceeding *in propria persona* may not recover discretionary "reasonable" attorney fees under 42 USC 1988). The present case is the only Michigan case that contemplates an award of "actual attorney fees" under the OMA.

The majority cites *Laracey v Financial Institutions Bureau,* 163 Mich App 437, 441; 414 NW2d 909 (1987), to assert that an agency relationship is necessary for recovering attorney fees under the OMA. The majority's reliance on *Laracey* is misplaced. In *Laracey* the Court of Appeals considered whether an attorney acting pro se could collect attorney fees under MCL 15.240(4) of the Michigan Freedom of Information Act (FOIA). Use of the word "actual," as opposed to "reasonable," is significant in the context of attorney fees recoverable under the OMA versus FOIA. Under MCL 15.240 of FOIA, the term "reasonable attorneys' fees" is utilized. MCL 15.240(6) states:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award *reasonable attorneys' fees, costs, and disbursements*. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.

The term "actual attorney fees" in MCL 15.271(4) of the OMA creates a mandatory fee scheme under the OMA, while the term "reasonable attorneys' fees" in MCL 15.240 of FOIA creates a discretionary fee scheme under FOIA.[3] Despite the fact that the OMA and FOIA are often read in harmony to further the purpose of both acts, the statutory fee schemes are different and should be interpreted distinctly.

In interpreting the term "actual" under the OMA, the Court of Appeals reasoned:

> As used in the statute, the term "actual" is in contrast to the term "reasonable" (the term used under FOIA). It reflects, we believe, not the Legislature's concern with

[3] See also *Manning v City of East Tawas*, 234 Mich App 244, 253; 593 NW2d 649 (1999).

> whether a bill has been generated, but with its intent that the full value of the attorney's time be recompensed and not abridged by what a trial judge might deem reasonable. That is, while a plaintiff in a FOIA case may not get his or her full attorney fee reimbursed by the defendant because the attorney charged a fee subject to downward adjustment by a judge, the plain meaning of the OMA provision is that the full attorney fee incurred is to be paid subject only to a demonstration of time spent and customary billing practice. [*Omdahl, supra* at 558-559.]

The Court of Appeals interpretation of "actual attorney fees" relies on the plain and unambiguous meaning of the statutory language of MCL 15.271(4) to conclude that attorney fees are actual if they are not speculative.

On the other hand, the majority's reliance on *Laracey* depends on everything except the plain language of the OMA to assert that the existence of an agency relationship is necessary to recover attorney fees. First, because of the difference in the fee schemes outlined in the OMA versus FOIA, any analogy between the interpretations of one scheme and the other is misplaced. The majority cannot use *Laracey* and its progeny to interpret the OMA because the fee schemes are fundamentally different. The OMA fee scheme should only be interpreted on the basis of the plain language found in the OMA.

Second, although the majority claims otherwise, its entire analysis that an agency relationship is required in order to recover actual attorney fees is based on a public policy analysis, instead of on a plain interpretation of the unambiguous statutory language of the OMA. The rationale for denying pro se lawyer litigants from recovering attorney fees under FOIA is inconsistent and should not be applied to the OMA. In *Laracey*, the Court determined that the award of attorney fees was intended to relieve a plaintiff's legitimate claim to

legal costs. *Laracey, supra* at 444. The *Laracey* Court reasoned that this would afford lawyer litigants a windfall for all the costs that were incurred. *Id*. at 445. Further, the Court reiterated the trial court's determination that a lawyer litigant's opportunity cost has no greater significance than the lost opportunity costs of laymen who proceed pro se. *Id.* at 441. This argument falls short in the present case and should have no applicability because it is an analysis that is based on public policy.

By insisting that an agency relationship exist for attorney fees to be paid under the OMA, the majority cites a multitude of considerations: the OMA fee provision was intended to relieve plaintiffs of the burden of legal costs, not to provide pro se plaintiffs a windfall for fees never incurred; the provision was intended to encourage prospective plaintiffs to seek the advice of detached and objective legal professionals; and the provision was not intended to create a cottage industry for clientless attorneys. All these considerations are *public policy* considerations that can be found nowhere within the text of MCL 15.271(4). While some of these considerations may be valid, they are issues that need to be flushed out, discussed, and legislated by the appropriate branch of government: the Legislature, not the Court. Nowhere in the plain language of the OMA is there a requirement that an agency relationship exist in order to recover attorney fees.

MCL 15.271(4) expressly provides the criteria that must be met in order to recover court costs and attorney fees in an OMA suit: (1) a public body is not complying with the OMA, (2) a person commences a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance, and (3) that person succeeds in obtaining relief in the action. In

this case, the board violated the OMA by failing to take and keep minutes. Plaintiff commenced a suit against the board. Plaintiff was successful in obtaining relief when the circuit court held that the board was acting in violation of the OMA and ordered the board to comply with the OMA in the future. Clearly, each requirement of the statute is met.

The Court of Appeals has previously held that costs and fees are mandatory under the OMA when the plaintiff obtains relief in an action brought under the act. *Kitchen v Ferndale City Council*, 253 Mich App 115; 654 NW2d 918 (2002). Although the statute uses the words "actual attorney fees," it contains no restriction indicating that certain plaintiffs do not have "actual," but have speculative, fees. Presumably, plaintiff has kept records of the fees he incurred in pursuing this litigation. Also, as previously stated, he has requested these fees from the commencement of this lawsuit. There is no statutory provision or caselaw dictating that plaintiff should be denied attorney fees simply because by profession he is an attorney and was able to represent himself.

IV. CONCLUSION

The Court of Appeals in this case was correct when it stated that the term "actual attorney fees" was not to be read narrowly, was meant to be read in contrast to the term "reasonable," and reflected the Legislature's concern not with whether a bill was generated for attorney fees, but with its intent that the full value of the attorney's time be recompensed. *Omdahl, supra* at 558. There is no question that plaintiff has incurred actual attorney fees under the OMA. The majority's holding that an agency relationship is a prerequisite to the existence of "actual attorney fees" under the OMA

goes beyond the clear and unambiguous language of the OMA. Therefore, I dissent from the majority opinion in this case and would instead hold that the plain language of the OMA, which makes no reference to an agency relationship as a prerequisite to an award of attorney fees, allows for a pro se litigant who is an attorney to recover "actual" attorney fees under MCL 15.271(4).

KELLY, J. I concur in the result reached by Justice WEAVER.

CAVANAGH, J. I would deny leave to appeal.

In re FORFEITURE OF $180,975

Docket No. 127983. Argued March 6, 2007. (Calendar No.1). Decided July 3, 2007.

The state of Michigan, by or on the relation of the Van Buren County prosecuting attorney, filed a complaint in the Van Buren Circuit Court seeking the forfeiture of $180,975 discovered in a backpack in the trunk of a vehicle rented by Todd F. Fletcher, driven by Tamika S. Smith, and stopped by a Michigan State Police trooper for a traffic infraction. The civil forfeiture action was brought pursuant to MCL 333.7521(1)(f), which provides for the forfeiture of anything of value intended to be furnished in exchange for a controlled substance. The trial court, William C. Buhl, J., granted a motion by Smith to suppress evidence of the backpack and its contents on the basis that the evidence was illegally seized. While the court suppressed that evidence, it allowed the prosecution to introduce other evidence to show that Smith was a drug courier and that the money had been intended to be used to purchase illegal drugs. The court ordered a forfeiture, determining that, even excluding the illegally seized evidence, the prosecution had established by a preponderance of the evidence that the money was intended to buy illegal drugs. The Court of Appeals, MARKEY, P.J., and FITZGERALD and OWENS, JJ., affirmed in an unpublished memorandum opinion, issued December 28, 2004 (Docket No. 249699). The Supreme Court granted Smith's application for leave to appeal, directing the parties to address the proper application of the exclusionary rule in a forfeiture proceeding in which the property subject to forfeiture has been illegally seized and whether *In re Forfeiture of United States Currency*, 166 Mich App 81 (1988), was correctly decided. 475 Mich 909 (2006).

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

Property subject to forfeiture that was illegally seized is not excluded from the proceeding entirely and may be offered into evidence for the limited purpose of establishing its existence and the court's in rem jurisdiction over it. The exclusionary rule was never meant to immunize illegally seized property from a subsequent civil forfeiture proceeding involving that property. In accord

with *In re Forfeiture of United States Currency* and MCL 333.7521, as long as the order of forfeiture is supported by a preponderance of the evidence untainted by the illegal search and seizure, the forfeiture is valid. The totality of the circumstances in this case, which included the claimant's possession of a large sum of cash despite a meager income and the seizure on an interstate highway known as a drug corridor, supports a conclusion that the circuit court did not clearly err in determining that although the money had been illegally seized, there was a preponderance of untainted evidence to support a civil forfeiture pursuant to MCL 333.7521(1)(f). *In re Forfeiture of United States Currency* reached the correct result.

Affirmed.

Justice MARKMAN, dissenting, stated that the propriety of the suppression of the evidence was not appealed by the prosecution and therefore is not at issue here. Justice MARKMAN dissented because the majority improperly relies on a variety of "surrounding circumstances" and "implications" concerning the suppressed evidence to support the judgment of forfeiture. But "suppressed" means "suppressed"; it does not mean that the Court can characterize evidence as "suppressed" while, in fact, using that evidence to support its forfeiture. Suppressed evidence is admissible only to "establish its own existence" and the fact of the court's jurisdiction, not to communicate the "surrounding circumstances" of the evidence or their "implications." The majority effectively redefines the law to avoid the necessary consequences of suppression. What is left in this case after the evidence has been suppressed is that the claimant, a person of low income, was a frequent traveler between Detroit and Chicago, a recognized drug corridor, in a rental car. Such evidence can describe entirely innocent behavior and is clearly insufficient to support the forfeiture. The majority seeks to make painless the suppression of evidence by rendering the suppression largely irrelevant. The judgment of the Court of Appeals should be reversed and the trial court's judgment of forfeiture should be vacated.

Justice CAVANAGH, dissenting, concurred with parts I, II, and IV of Justice MARKMAN's dissenting opinion.

Justice KELLY, dissenting, joined Justice MARKMAN's dissent, except for part III. She wrote separately to note that *One 1958 Plymouth Sedan v Pennsylvania,* 380 US 693 (1965), has not been overruled by the United States Supreme Court and remains as binding precedent despite the majority's argument that the underpinnings of that decision have been weakened.

1. FORFEITURE AND PENALTIES — SEARCHES AND SEIZURES — EVIDENCE.

Property subject to forfeiture that was illegally seized is not excluded entirely from a civil forfeiture proceeding and may be offered into evidence for the limited purpose of establishing its existence and the court's in rem jurisdiction over it.

2. FORFEITURE AND PENALTIES — EVIDENCE — EXCLUSIONARY RULE.

The exclusionary rule does not immunize illegally seized property from a subsequent civil forfeiture proceeding involving the property where the order of forfeiture is established by a preponderance of the evidence untainted by the illegal search and seizure.

3. FORFEITURE AND PENALTIES — CIVIL FORFEITURE PROCEEDINGS — EVIDENCE — EXCLUSIONARY RULE.

A civil forfeiture proceeding under MCL 333.7521 is a proceeding in rem; it is the property that is proceeded against, not the owner or claimant of the property; the exclusionary rule never acts as a complete bar to bringing a civil forfeiture proceeding against an object that has been illegally seized.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Juris Kaps*, Prosecuting Attorney, and *Michael J. Bedford* and *Lori Baughman Palmer*, Assistant Prosecuting Attorneys, for the people.

Karri Mitchell for Tamika S. Smith

Amicus Curiae:

David Gorcyca, President*, Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Lori Baughman Palmer,* Assistant Prosecuting Attorney, for Prosecuting Attorneys Association of Michigan.

WEAVER, J. In this case we consider the proper application of the exclusionary rule in a civil forfeiture proceeding in which the property subject to forfeiture has been illegally seized. We further consider whether *In re Forfeiture of United States Currency,* 166 Mich App 81; 420 NW2d 131 (1988), was correctly decided. In

deciding these questions, we first hold that under *Immigration & Naturalization Service v Lopez-Mendoza,* 468 US 1032; 104 S Ct 3479; 82 L Ed 2d 778 (1984), illegally seized property is not immune from forfeiture. We also agree with the holding in *United States v $639,558,* 293 US App DC 384, 387; 955 F2d 712 (1992), that property subject to forfeiture that was illegally seized "is not 'excluded' from the proceeding entirely." Instead, the illegally seized property "may be offered into evidence for the limited purpose of establishing its existence, and the court's *in rem* jurisdiction over it." *Id.*

Because we find that the exclusionary rule was never meant to preclude illegally seized property from a subsequent civil forfeiture proceeding involving that property, we hold that, in accord with *In re Forfeiture of United States Currency* and MCL 333.7521, as long as the order of forfeiture can be established by a preponderance of evidence untainted by the illegal search and seizure, the forfeiture is valid.

For the reasons summarized by the Court of Appeals in its decision affirming the circuit court's judgment and order, we agree with the Court of Appeals that the circuit court did not clearly err in finding that, although the money was illegally seized, there was a preponderance of untainted evidence to support a finding of civil forfeiture pursuant to MCL 333.7521(1)(f).

Accordingly, we affirm the Court of Appeals judgment, and we further conclude that the Court of Appeals in *In re Forfeiture of United States Currency* reached the correct result.

FACTS

Claimant Tamika S. Smith was driving west on I-94 when she was stopped for speeding by Michigan State

Trooper James Lass. Smith was traveling with her two small children in a rental car rented by her adult male passenger, claimant Todd F. Fletcher. Trooper Lass obtained photo identification in the form of a driver's license from both Smith and Fletcher and checked both licenses for outstanding warrants. Lass discovered that Smith's license had been suspended, and that Fletcher's license was valid, but that Fletcher had been identified as an individual to whom "officer safety caution" applied. After checking Fletcher's criminal history, Trooper Lass learned that Fletcher had been arrested previously for possession of cocaine and for weapons offenses. On the basis of this information, Trooper Lass returned to the rental car and apparently advised Smith that he was going to search the trunk of the rental car, in which Trooper Lass subsequently discovered a backpack containing $180,975 in cash.[1] Smith was cited for speeding and driving on a suspended license.[2]

The state filed a complaint for forfeiture of the currency discovered in the backpack, pursuant to MCL 333.7521(1)(f). Before the forfeiture proceeding, claimant Smith filed a motion to suppress evidence of the backpack and its contents on the basis that the evidence was illegally seized in violation of the Fourth Amendment because Smith did not consent to the search of the rental car. The circuit court agreed with Smith, determined that there was no probable cause to search the trunk of the car, and granted Smith's motion to suppress.

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[1] Because it was not clear that Smith consented to the search of the trunk, after an evidentiary hearing, the trial court granted Smith's motion to suppress evidence of the backpack and its contents on the ground that the seizure was illegal under the Fourth Amendment, US Const, Am IV, and Const 1963, art 1, § 11.

[2] No criminal charges arising out of this incident were ever filed against Smith.

While the circuit court ruled that the $180,975 in currency was suppressed, the court allowed the prosecutor to introduce other evidence during the forfeiture proceeding. Specifically, the prosecutor presented evidence to show that Smith was a drug courier and that the $180,975 seized by Trooper Lass had been intended for the purchase of illegal drugs. The prosecutor submitted evidence that in the three months before Smith was stopped for speeding, Smith had rented several different rental cars at least four times for three days each time; that she had driven for several hundred miles on each occasion, but could not recall where she had driven; and that Smith's tax records indicated that she generally earned between $4,000 and $5,000 a year and had no income in 2002, the year when she was stopped for speeding.

In addition, an expert in the area of illegal drug trafficking testified that I-94, the highway on which Smith was driving when she was stopped, is a recognized major drug corridor between Detroit and Chicago, with large amounts of cash found in rental cars traveling west, and large amounts of illegal drugs recovered in rental cars going east. The circuit court further found that Smith's explanation of how she came to be traveling with $180,975 in cash was neither consistent nor credible. Ultimately, the court ruled in favor of forfeiture, concluding that, even when the illegally seized evidence is excluded, the prosecutor established by a preponderance of the evidence that the money was intended to buy illicit drugs.

Claimant Smith appealed, and the Court of Appeals, finding no clear error, affirmed the forfeiture.[3] Smith

[3] *In re Forfeiture of $180,975,* unpublished memorandum opinion of the Court of Appeals, issued December 28, 2004 (Docket No. 249699).

sought leave to appeal the Court of Appeals decision, and we granted leave to appeal to consider "(1) the proper application of the exclusionary rule in a forfeiture proceeding in which the property subject to forfeiture has been illegally seized, and (2) whether *In re Forfeiture of United States Currency,* 166 Mich App 81 (1988), was correctly decided."[4]

STANDARD OF REVIEW

This Court reviews de novo questions of law. *Cowles v Bank West,* 476 Mich 1, 13; 719 NW2d 94 (2006). The proper application of the exclusionary rule in a civil forfeiture proceeding is a question of law subject to review de novo. *People v Stevens (After Remand),* 460 Mich 626, 631; 597 NW2d 53 (1999). A trial court's decision in a forfeiture proceeding will not be overturned unless it is clearly erroneous.[5] A finding is clearly erroneous where, although there is evidence to support it, the reviewing court is firmly convinced that a mistake has been made.[6]

ANALYSIS

APPLICATION OF THE EXCLUSIONARY RULE TO CIVIL FORFEITURE UNDER MCL 333.7521

A forfeiture proceeding pursuant to MCL 333.7521(1)(f) is a proceeding in rem. As such, the item that is the subject of the forfeiture proceeding is the "offender" and the "claimant" is the owner, or perhaps only a possessor, of the item in question. As the United

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[4] *In re Forfeiture of $180,975,* 475 Mich 909 (2006).

[5] *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983); *People v United States Currency*, 148 Mich App 326, 329; 383 NW2d 633 (1986).

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

States Supreme Court explained in *Various Items of Personal Property v United States*:[7]

> It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. *Origet v United States*, 125 U. S. 240, 245-247 [8 S Ct 846; 31 L Ed 743 (1888)].

In *One 1958 Plymouth Sedan v Pennsylvania,* 380 US 693; 85 S Ct 1246; 14 L Ed 2d 170 (1965), the United States Supreme Court held that the exclusionary rule applied to forfeiture proceedings because forfeiture proceedings are quasi-criminal in nature. In this case, the prosecutor has raised questions about the continuing viability of *One 1958 Plymouth Sedan*. However, the prosecutor has not appealed the suppression order, and, therefore, this issue is not before us. Nevertheless, while *One 1958 Plymouth Sedan* has not been overruled and, thus, is still applicable, several subsequently decided cases indicate that the underpinnings of *One 1958 Plymouth Sedan* have been weakened.

For example, when the United States Supreme Court was presented with the question whether to exclude evidence from a federal civil tax proceeding on the basis that the evidence was obtained by a state law-enforcement officer relying in good faith on a defective warrant, the Court declined to extend the exclusionary rule to the federal proceeding.[8] In so holding, the Court recognized that the primary purpose of the exclusionary rule, which is a judicially created remedy, is to deter

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[7] 282 US 577, 581; 51 S Ct 282; 75 L Ed 558 (1931).

[8] *United States v Janis*, 428 US 433, 454; 96 S Ct 3021; 49 L Ed 2d 1046 (1976).

future unlawful police conduct. As such, courts impose the exclusionary rule in criminal proceedings to deter police officers from making future illegal searches and seizures. Thus, the United States Supreme Court recognized that to further extend the exclusionary rule would not be prudent given that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation."[9]

In *Pennsylvania Bd of Probation & Parole v Scott,* 524 US 357, 363; 118 S Ct 2014; 141 L Ed 2d 344 (1998), the United States Supreme Court explained that it has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." Additionally, the Supreme Court has declined to apply the exclusionary rule when the proceedings fall outside the offending officer's primary focus.[10] The Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."[11] The deterrent function is strongest where the unlawful conduct would result in a criminal penalty.[12] Extending the rule beyond the officer's primary zone of interest would have, at most, only an incremental deterrent effect.[13]

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[9] *Id.* at 453-454. See also *Lopez-Mendoza, supra at* 1041-1042 (during civil deportation proceeding, court declined to apply exclusionary rule to bar admission of illegally seized evidence); *Pennsylvania Bd of Probation & Parole v Scott,* 524 US 357, 366-367; 118 S Ct 2014; 141 L Ed 2d 344 (1998) (exclusionary rule does not bar admission of evidence at parole revocation hearing even though evidence obtained in violation of Fourth Amendment).

[10] See *Janis, supra, Lopez-Mendoza, supra,* and *Scott, supra*.

[11] *Scott, supra* at 368.

[12] See *id.*

[13] *Id*.

As acknowledged by the Court of Appeals in *In re Forfeiture of United States Currency,* "the Michigan forfeiture statute [MCL 333.7521(1)(f)] closely parallels the analogous federal statute, 21 USC 881(a)(6)."[14] MCL 333.7521(1)(f)[15] is contained within the controlled

[14] 21 USC 881(a)(6) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> * * *
>
> (6) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all monies, negotiable instruments and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[15] MCL 333.7521(1)(f) states:

> The following property is subject to forfeiture:
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> * * *
>
> (f) Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article that is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article or that is used or intended to be used to facilitate any violation of this article including, but not limited to, money, negotiable instruments, or securities. To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent. Any money that is found in close proximity to any property that is subject to forfeiture under subdivision (a), (b), (c), (d), or (e) is presumed to be subject to forfeiture under this subdivision. This presumption may be rebutted by clear and convincing evidence.

substances article of the Public Health Code. In summary, § 7521(1)(f) provides for the forfeiture of "any thing of value that is furnished or intended to be furnished in exchange for a controlled substance . . . in violation of this article [or] that is traceable to an exchange for a controlled substance, . . . or that is used or intended to be used to facilitate any violation of this article . . . ."[16] Forfeiture proceedings under the administrative section of the Michigan Public Health Code are not within the offending police officer's primary zone of interest. The primary goal of a police officer is to collect evidence to be used to convict a defendant in a criminal proceeding. The police officer's main focus is not on obtaining evidence for a civil forfeiture action.

We further note, as amicus curiae, the Prosecuting Attorneys Association of Michigan, correctly observes, that there is a distinction between civil and criminal forfeiture proceedings. As mentioned in *Various Items of Personal Property, supra* at 580-581:

> At common law, in many cases, the right of forfeiture did not attach until the offending person had been convicted and the record of conviction produced. But that doctrine did not apply, as this court in an early case pointed out, where the right of forfeiture was "created by statute, *in rem*, cognisable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*." *The Palmyra*, [25 US (12 Wheat) 1, 14; 6 L Ed 531 (1827)].

There is an additional distinction between civil and criminal forfeitures, namely that the latter are punitive

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[16] *Id*. MCL 333.7104(2) provides, " 'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." Or, put more simply, a "controlled substance" is an illegal drug.

in nature, while the former are not. Section 7521(1)(f) is not a criminal statute. There are no penalties or fines associated with a violation of this section. Further, there are no provisions for inquiry into the guilt or innocence of the owner or possessor of the item subject to forfeiture. Instead, the intent of civil forfeiture statutes like § 7521(1)(f) is to remove from circulation all cash, property, and contraband used to further drug trafficking. Indeed, in *Bennis v Michigan,*[17] the United States Supreme Court affirmed this Court's decision that forfeiture under Michigan's nuisance abatement statute[18] was appropriate even when the joint owner of the forfeited vehicle was innocent. In so holding, the United States Supreme Court stated:

> [Petitioner] claims she was entitled to contest the abatement by showing she did not know her husband would use it to violate Michigan's indecency law. But a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put *even though the owner did not know that it was to be put to such use*. [*Id.* at 446 (emphasis added).]

Given the distinctions between a criminal proceeding against a defendant accused of a crime and a civil forfeiture against the offending object, we decline to rule that the exclusionary rule ever acts as a complete

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[17] 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996).

[18] MCL 600.3801 states:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

bar to bringing a forfeiture proceeding against an object that has been illegally seized. We instead examine the approach adopted by the Court of Appeals in *In re Forfeiture of United States Currency* and consider whether that decision was correct.

In re FORFEITURE OF UNITED STATES CURRENCY

The Court of Appeals affirmed the forfeiture of the $180,975 in currency on the basis of *In re Forfeiture of United States Currency.* Like claimant Smith herein, the petitioner there, Kenneth Williams, moved to suppress evidence of controlled substances and $30,632.41 in cash illegally seized from his home by the police. The trial court granted Williams's motion to suppress and all criminal charges were dismissed. Thereafter, the city of Lansing brought a forfeiture proceeding against the seized items, and the trial court ruled in the city's favor. Williams appealed, arguing that the trial court erred because illegally seized evidence could not be the subject of a subsequent forfeiture action. The Court of Appeals, when faced with the issue now before us, observed:

> Michigan courts have not decided the specific question whether property seized pursuant to a search warrant which is subsequently held invalid may still be subject to forfeiture under the Michigan forfeiture statute. However, this Court has stated that property and monies described in the analogous federal statute are subject to forfeiture even where the seizure of the property subject to the forfeiture is subsequently found to be unlawful. *Michigan State Police v 33d District Court*, 138 Mich App 390, 395; 360 NW2d 196 (1984). [*In re Forfeiture of United States Currency*, *supra* at 87-88.]

Williams contended, as does claimant Smith here, that *One 1958 Plymouth Sedan* bars a forfeiture pro-

ceeding when the subject of the forfeiture is illegally seized property. The Court of Appeals in *In re Forfeiture of United States Currency, supra* at 88-89, disagreed:

> *One 1958 Plymouth Sedan* holds that evidence and property illegally seized cannot be used in a forfeiture proceeding, and not that the illegally seized property cannot be forfeited.
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> The decision in *United States v "Monkey" a Fishing Vessel,* 725 F2d 1007, 1012 (CA 5, 1984), addressing forfeiture of illegally seized property under federal law, is instructive:
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> "This court recently decided that
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> " 'even . . . if the seizure were illegal, it would not bar the government's right to claim the vehicle through forfeiture proceedings. Improper seizure does not jeopardize the government's right to secure forfeiture if the probable cause to seize the vehicle can be supported with untainted evidence. *United States v Eighty-Eight Thousand, Five Hundred Dollars,* 671 F2d 293, 297-298 (CA 8, 1982); *United States v One 1975 Pontiac Lemans*, 621 F2d 444, 450-451 (CA 1, 1980); *United States v One Harley Davidson Motorcycle,* 508 F2d 351, 351-352 (CA 9, 1974). This position is not contrary to *One 1958 Plymouth Sedan v Pennsylvania,* 380 US 693; 85 S Ct 1246; 14 L Ed 2d 170 (1965). That case holds that an object illegally seized cannot in any way be used either as evidence or as the basis for jurisdiction. Therefore, evidence derived from a search in violation of the fourth amendment must be excluded at a forfeiture proceeding. In the case at bar, all evidence of probable cause was developed independent of the seizure of the vehicle. Thus, even if a warrant were required, the failure to secure it would not bar the forfeiture of the vehicle.' [*United States v One 1978 Mercedes Benz, 4-Door Sedan,* 711 F2d 1297 (CA 5, 1983).]"

We hold that illegally seized property is forfeitable under MCL 333.7521; MSA 14.15(7521), so long as the probable cause for its seizure can be supported with

> untainted evidence and any illegally seized property is excluded from the forfeiture proceeding. In this case, the illegally seized articles were never introduced into evidence. Thus, the circuit court complied with an interpretation of Michigan's forfeiture statute which parallels the federal statute and is consistent with this opinion, despite its erroneous assertion as to the holding of *One 1958 Plymouth Sedan*.

We first note that the Court of Appeals panel in the instant case erred in relying on the erroneous standard of proof cited in *In re Forfeiture of United States Currency* when the panel held that "probable cause supported by untainted evidence existed for the seizure." *In re Forfeiture of $180,975,* slip op at 2. The correct burden of proof is a *preponderance of the evidence,* not *probable cause.*[19]

We agree with the Court of Appeals conclusion that while *One 1958 Plymouth Sedan* holds that illegally seized evidence and property cannot be used in a subsequent forfeiture proceeding, *One 1958 Plymouth Sedan* does not state that illegally seized property cannot be forfeited. We disagree, however, with the Court of Appeals inclusion in its analysis of the questionable conclusion made by the Fifth Circuit Court of Appeals that *One 1958 Plymouth Sedan* holds that " 'an object illegally seized *cannot in any way* be used either as evidence or as the basis for jurisdiction.' "[20]

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[19] *People v United States Currency*, 158 Mich App 126, 130; 404 NW 2d 634 (1986) ("[T]he party asserting the claim has the burden of proving his case by a preponderance of the evidence. See *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 89; 367 NW 2d 1 (1985), reh den 422 Mich 1206 (1985), app dis 474 US [805]; 106 S Ct 40; 88 L Ed 2d 33 (1985).").

[20] *In re Forfeiture of United States Currency*, *supra* at 89, quoting *United States v One 1978 Mercedes Benz, 4-Door Sedan*, 711 F2d 1297, 1303 (CA 5, 1983) (emphasis added).

Although *One 1958 Plymouth Sedan* characterized the forfeiture proceeding in that case as being "quasi-criminal" and requires application of the exclusionary rule to forfeiture proceedings, neither *One 1958 Plymouth Sedan* nor the exclusionary rule prevents the mention of the illegally seized property that is the subject of the forfeiture proceeding. In fact, in *Lopez-Mendoza, supra* at 1039-1040, the United States Supreme Court stated that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. A similar rule applies in forfeiture proceedings . . . ." The United States Court of Appeals for the District of Columbia Circuit properly interpreted *One 1958 Plymouth Sedan* and *Lopez-Mendoza* in *United States v $639,558*:[21]

> When illegally seized property is itself the "defendant" in the forfeiture proceeding, it may not be "relied upon to sustain a forfeiture," *Plymouth Sedan,* 380 U.S. at 698, but it is not "excluded" from the proceeding entirely. Such property may be offered into evidence for the limited purpose of establishing its existence, and the court's *in rem* jurisdiction over it. This, we think, is the import of the Second Circuit's recent statement that with respect to unlawfully obtained property that is the subject of the forfeiture suit, "the property itself cannot be excluded from the forfeiture action," *United States v. $ 37,780 in U.S. Currency,* 920 F. 2d 159 at 163 (2d Cir. 1990). In other words, as the Supreme Court suggested in *INS v. Lopez-Mendoza,* 468 U.S. 1032 at 1041, 104 S. Ct. 3479, 82 L.Ed.2d 778 (1984), the fact that the defendant property had been seized after an illegal search does not "immunize" it from forfeiture, any more than a defendant illegally arrested is immunized from prosecution. *United States v. Crews,* 445 U.S. 463 at 474, 100 S. Ct. 1244, 63 L.Ed.2d 537

[21] *United States v $639,558*, *supra* at 387 n 5.

(1980). See, e.g., *United States v. One (1) 1987 Mercury Marquis,* 909 F.2d 167 at 169 (6th Cir. 1990); *United States v. U.S. Currency $31,828,* 760 F.2d 228 at 230-31 (8th Cir. 1985). Thus, other evidence, legally obtained, may be introduced to establish that the property should be forfeited to the government. *United States v. One (1) 1971 Harley-Davidson Motorcycle,* 508 F.2d 351 (9th Cir. 1974). In this case the government apparently had no such other evidence and, for that reason, the district court dismissed the action after ordering the cash (and the keys and ledgers) suppressed.

We agree with the conclusions in *United States v $639,558* that (1) the illegal seizure of property does not immunize it from forfeiture, and (2) illegally seized property that is the subject, or "res," of the forfeiture proceeding may be offered into evidence for the limited purpose of establishing its existence and the court's in rem jurisdiction over it. We therefore find that the Court of Appeals in *In re Forfeiture of United States Currency* reached the correct result. We further hold that illegally seized property is forfeitable under MCL 333.7521 as long as the forfeiture can be supported by a preponderance of untainted evidence.

While illegally seized evidence itself is physically excluded, it is not entirely excluded from the forfeiture proceeding. However, questions concerning this excluded evidence should be limited to the circumstances surrounding its existence. For example, in the case of illegally seized cash, the state should not be permitted to exploit the search by asking how the money was packaged, or whether evidence of drugs was detected on the money. In addition, any other legally obtained evidence may be introduced to support the forfeiture.[22]

[22] The dissent by Justice MARKMAN argues that "[b]ecause suppressed evidence is inadmissible for broader purposes," a court may not consider the surrounding circumstances or implications of any suppressed evi-

Justice MARKMAN, in dissent, questions the propriety of permitting the consideration of the "surrounding circumstances" of illegally seized property during a forfeiture proceeding.[23] Further, the dissent apparently

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dence. *Post* at 479-480. In support of this contention, the dissent cites *People v LoCicero (After Remand)*, 453 Mich 496, 508; 556 NW2d 498 (1996), a criminal proceeding in which this Court held that "[t]he exclusionary rule forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search." Yet the issue in *LoCicero* was whether a police officer had reasonable suspicion under *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), to stop defendant's vehicle. Because we concluded that the officer's observations did not amount to a reasonable suspicion and therefore the stop violated the Fourth Amendment, we applied the exclusionary rule to suppress the illegally obtained evidence. *LoCicero* is thus distinguishable in that it does not address the application of the exclusionary rule in a civil forfeiture proceeding in which the illegally seized property is the "defendant." Further, *LoCicero* does not hold that the identity of the defendant or the circumstances surrounding the existence of the defendant may not be considered when the defendant is illegally seized.

[23] The dissent implies that in determining that there was insufficient independent evidence to support a forfeiture, the District of Columbia Circuit Court of Appeals in *United States v $639,558* did not permit the consideration of the "surrounding circumstances" of the illegally seized money; however, the circuit court, in fact, did not even rule on this issue because the prosecutor had already conceded that he could not proceed without the suppressed evidence. *United States v $639,558*, *supra* at 387.

In addition, the dissent asserts that the Fifth Circuit Court of Appeals in *United States v "Monkey"* also did not rely on the "surrounding circumstances" concerning suppressed evidence, "but rather held that a forfeiture was supported *in spite of* the suppression," *post* at 482 (emphasis in original), because of independent evidence. Again, the dissent mischaracterizes the actual holding: the Fifth Circuit Court of Appeals did not rule on the question whether it could properly consider the "surrounding circumstances" of the suppressed evidence because it did not need to even reach that issue in order to decide the case.

Thus, contrary to the dissent's assertions, neither *United States v $639,558* nor *United States v "Monkey"* stands for the proposition that the circumstances surrounding the illegally seized evidence may not be considered to support a forfeiture. And, in fact, the dissent fails to cite *even one case* supporting its contention that a court may not consider the

would immunize the illegally seized property such that a court could not consider *anything* regarding that property, even the presence of a large sum of money, *post* at 485-486. Yet this reasoning has been rejected. In *United States v $493,850 in United States Currency,*[24] the government sought to forfeit illegally seized cash, but the claimant asserted that the cash could not even be mentioned during the forfeiture proceeding and that the illegally seized cash should be treated as if it were a "widget." The United States District Court for Arizona disagreed, holding:

> However, the Court does not believe that exclusion of the cash means the Court must consider the defendant cash as a "widget." The Court believes it can still take notice of the fact that the defendant is cash. This is obviously stated in the caption of the case. Perhaps the denominations making up the amount and the actual money itself cannot be put into evidence. However, there is no way for the Government to show that a "widget" is the product of a drug transaction and, therefore, the Court does not believe it has to disregard the fact that one of the defendants is cash.[25]

Because a basic purpose of a drug forfeiture proceeding is to establish that the item subject to forfeiture (here the $180,975 in cash) is connected to drug activity, a court cannot be forced to pretend that the cash does not exist. Nor must the court turn a blind eye to the conclusions one reaches when considering all of the circumstances surrounding its existence and its implications. Rather, we apply a commonsense approach to drug forfeiture hearings in which the item subject to

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implications and circumstances surrounding evidence that is the subject of forfeiture and that has been illegally seized.

[24] 2006 US Dist LEXIS 2370, *14 (D Ariz, January 23, 2006).

[25] *Id*. at *15-16.

forfeiture has been excluded from evidence:[26] while the court may not consider the specific physical characteristics of the item itself, the court can consider evidence presented in relation to the fact of the item's existence, such as the fact that claimant's testimony about the money itself is questionable. This approach in no way redefines the judicially created exclusionary rule. Here, the court can consider the reliability of the claimant's testimony concerning the money's origin, its existence in her rental car its intended purpose, the amount of the money in relation to her reported income, the fact that she was traveling along a known drug corridor in a rental car and that she had rented several cars in the preceding weeks, and any other circumstantial factors not specifically related to the physical characteristics of the money.

Our conclusion is supported by *United States v $22,287 in United States Currency*,[27] in which the United States District Court for the Eastern District of Michigan held that the circumstances surrounding illegally seized cash may be considered. The court held that although all the evidence seized during an illegal drug raid ($22,287 in currency, a bag of heroin, two scales, and some firearms) was excluded, the forfeiture was still supported on the basis of a conversation between a police officer and a purported drug seller, as well as certain circumstances concerning the money. Specifically, the court noted that $22,287 was "an unusually large amount of cash for any individual to have on

[26] The Eleventh Circuit Court of Appeals has taken a commonsense approach in determining whether there is probable cause to establish forfeiture: "Finally, and most importantly we do not take an academic or theoretical approach. Instead we eschew clinical detachment and use a common sense view to the realities of normal life." *United States v $242,484 in United States Currency*, 389 F3d 1149, 1167 (CA 11, 2004).

[27] 520 F Supp 675, 680 (ED Mich, 1981), aff'd 709 F2d 442 (CA 6, 1983).

hand" and, further, that the amount of cash was "very close to the price of 'nineteen five' ($19,500.00) noted by Johnny [purported drug seller] as the cost of an 'lb' (pound of heroin)."[28] These are precisely the type of factors regarding the existence of the cash that the dissent would preclude from consideration.[29]

EVIDENCE SUPPORTING FORFEITURE

Turning now to the circuit court's forfeiture hearing, we note that the circuit court correctly excluded evidence of the illegally seized backpack and its contents. Our next inquiry is whether there was a preponderance of *untainted* evidence to support the forfeiture. First, with respect to the $180,975 in cash found in the claimant's rental car, while the cash itself was excluded from evidence, the trial court could properly consider the implications of the presence of such a large amount of cash in the vehicle. The Sixth Circuit Court of Appeals has held that "carrying a large sum of cash is strong evidence of some relationship with illegal drugs."[30] Here, as noted in the circuit court's findings,

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[28] *Id*.

[29] The dissent, *post* at 481, claims that with the exception of our citation of *United States v $22,287, supra*, the forfeiture cases cited in our opinion are not in dispute and are "irrelevant." Yet we note that while the dissent may not dispute the propositions for which these cases are cited, the parties do. Specifically, while the prosecutor has asserted that illegally seized evidence may be introduced into evidence for *any purpose*, some of the "irrelevant" cases we cite reject this assertion and establish that illegally seized evidence may only be offered for the purpose of establishing its existence and court's jurisdiction over such evidence. See pp 458-460 of this opinion, discussing *One 1958 Plymouth, supra*; *Lopez-Mendoza, supra*; and *United States v $639,558, supra*.

[30] *United States v $67,220 in United States Currency*, 957 F2d 280, 285 (CA 6, 1992), citing *United States v $215,300*, 882 F2d 417, 419 (CA 9, 1989). See also *United States v $87,375 in United States Currency*, 727 F Supp 155, 161 (D NJ, 1989) ("The fact of an extremely large amount of

the ruling of drug forfeiture was based in part on the presence of the $180,975 in currency:

> Well, what do we have here? We have a very large amount of money. It is not illegal to have it. It is unheard [sic] of, but it is mighty unusual to have One Hundred Eighty Thousand Dollars ($180,000) in cash being transported in this vehicle.

The circuit court further noted:

> It is also a little unusual and I guess it would create in one's mind a suspicion, which isn't sufficient, but it is a suspicion when the person transporting it [cash] and driving the vehicle has no apparent means to produce that kind of income or have that kind of money. And Exhibit 3 tells us that her [claimant's] income peaked I think at one year at Fourteen Thousand (14,000) and usually it is Four to Five Thousand Dollars ($5,000) a year. So there is no good explanation why she would have it.

The circuit court's suspicion about the claimant's ability to produce such a large amount of income, given the evidence of claimant's negligible taxable earnings, is also a factor that federal courts have used in concluding that there is sufficient evidence to support a drug forfeiture. For example, in *United States v $174,206 in United States Currency,* 320 F3d 658, 662 (CA 6, 2003), the Sixth Circuit Court of Appeals held that evidence of the claimants' lack of legitimate income, by itself, was sufficient evidence to support the forfeiture of cash:

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money by itself constitutes strong evidence that the money was furnished in exchange for illegal drugs. *United States v $ 2,500*, 689 F. 2d 10, 16 (2d cir. 1982)[.]"); *United States v $84,615 in United States Currency*, 379 F3d 496, 501-502 (CA 8, 2004) ("[P]ossession of a large amount of cash (here, nearly $ 85,000) is strong evidence that the cash is connected with drug activity."); *United States v $433,980 in United States Currency*, 473 F Supp 2d 685, 691 (ED NC, 2007) ("[T]he additional circumstantial proof discussed above (particularly the large amount of the currency as well as its unusual packaging) persuades the Court that it is more likely than not that the $433,980 was substantially related to a drug offense . . . .").

> The United States has shown by a preponderance of the evidence that the property [$174,206 in cash] is traceable to the drug offenses and is thus subject to forfeiture under 21 U.S.C. § 881(a)(6). The evidence before the district court showed that the Claimants' legitimate income was insufficient to explain the large amount of currency found in their possession. State tax records showed that Richard had filed no income tax returns from 1994 through 1999, and that Love had filed no income tax returns from 1994 through 1997. Love's 1998 and 1999 returns showed income of $ 15,147.00 and $ 15,995.00, respectively. In sum, then, the United States showed that the Claimants had a total of $31,142 in legitimate income between 1994 and 1999. The Claimants' safe deposit boxes contained $174,206.00. This evidence of legitimate income that is insufficient to explain the large amount of property seized, unrebutted by any evidence pointing to any other source of legitimate income or any evidence indicating innocent ownership, satisfies the burden imposed by the statute.[31]

The circuit court's ruling of forfeiture was also based on the testimony of the expert on illegal drug trafficking:

> And what we have discovered from hearing the testimony of the expert is that when in patrolling the interstate, and I-94 particularly, that I-94 is a corridor for transporting drug monies westbound and drugs eastbound.
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> * * *
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> And on the number of stops with large amounts of money with very little exception, large amounts of money

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[31] See also *United States v Parcels of Land*, 903 F2d 36, 39-40 (CA 1, 1990) ("The sheer magnitude of Laliberte's expenditures supports an inference that his property acquisitions were funded with the proceeds of drug trafficking; Laliberte's millions of dollars in purchases far exceeded his reported average annual income of $27,690, and there was no other apparent legitimate source of money to account for this magnitude of expenditures. See, e.g., *United States v $ 250,000*, 808 F. 2d [895,] 899 [CA 1, 1987] (noting the absence of any apparent legitimate sources of income that could account for the property sought to be forfeited . . . .").

> without drugs headed westbound and large amounts of drugs without money is headed eastbound. So, what this tells us is that the probability that this is a westbound transportation of drug money.
>
> Further, that more often than not rental cars are used for this purpose, and that there are frequent rental of vehicles from Detroit by the petitioner [claimant] for us. And that makes it more likely that she was transporting drug money.

Federal courts have held that evidence seized in a known drug corridor is probative in drug forfeiture cases. For example, in *United States v $87,375 in United States Currency,* 727 F Supp 155, 161 (D NJ, 1989), the district court held:

> The fact that a large amount of money was being transported southward from New York through a well known drug corridor by a Colombian national who resides in Miami further supports the Government's showing of probable cause.[32] The reputation of an area for criminal activity may be relied on to support an inference of criminal conduct. See *United States v. Rickus*, 737 F.2d 360, 365 (3d Cir. 1984). The area where Mr. Camacho was stopped by Trooper Tomasello, along Route 40 in Salem County, New Jersey, carries such a volume of drug traffic that it is commonly known as "Cocaine Alley." See *United States v. $ 33,500,* Civil Action No. 86-3348(MHC) (D.N.J. Aug. 17, 1988); United States v. $ 32,310, Civil Action No. 85-4004(MHC) (D.N.J. June 23, 1988). Colombia is a known

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[32] The federal "probable cause" burden of proof has been replaced:

> Forfeiture proceedings commenced prior to the effective date of CAFRA [Civil Assist Forfeiture Reform Act] (August 23, 2000) applied a lesser standard of proof—probable cause. *See United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017, 1023 (7th Cir. 2000) (CAFRA "requires the government to prove the connection between the property to be forfeited and the drug activity by a preponderance of the evidence, rather than to prove merely probable cause to believe there is a connection."). [*United States v Funds in the Amount of $30,670*, 403 F3d 448, 454 n 4 (CA 7, 2005).]

> major source of drugs which eventually get trafficked throughout the United States, and Miami is a known center for drug trafficking and money laundering. *United States v. $ 364,960*, 661 F.2d at 323-24; *United States v $ 5,644,540*, 799 F.2d 1357, 1363 (9th Cir 1986). We are entitled to take such common experience considerations into account. *United States v. $ 319,820*, 620 F. Supp. [1470, 1477 (ND Ga, 1985)].

A claimant's explanation for the presence of large amounts of cash is also evaluated in drug forfeiture cases. Federal courts have held that a claimant's false statement is probative of drug activity. "[I]nconsistencies and contradictions are relevant in determining whether the government has met its burden in justifying forfeiture."[33] For example, in *United States v Funds in the Amount of $30,670,*[34] the claimant gave inconsistent testimony about the source of the $30,670 in cash contained in the his gym bag seized by drug enforcement agents. In finding under the "totality of circumstances" that there was a preponderance of evidence supporting forfeiture, the Seventh Circuit Court of Appeals considered the inconsistency and unreliability of the claimant's testimony:

> Calhoun's [claimant's] explanations regarding his travel to Phoenix are suspect. On the day his cash was seized, Calhoun was traveling to Phoenix, a recognized source city for illegal narcotics. See, e.g., [*United States v*] *$22,474* [*in United States Currency*], 246 F.3d [1212] at 1216 [(CA 9, 2001)] ("Phoenix[] [is] a known source city for drugs."); cf. *United States v. Currency, U.S. $ 42,500.00*, 283 F.3d 977, 981 (9th Cir. 2002) (giving weight to fact that claimant was "traveling from New York to San Diego, well known source cities for drugs"); *United States v. $ 141,770.00 in U.S. Currency*,

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[33] *United States v $159,880 in United States Currency*, 387 F Supp 2d 1000, 1015 (SD Iowa, 2005).

[34] 403 F3d 448 (CA 7, 2005).

> 157 F.3d 600, 604 (8th Cir. 1998) (giving weight to fact that claimant was traveling from California, "a drug source state"). He had made frequent trips to Phoenix—seven trips within two months, not three as he claimed. Calhoun alleged that he stayed at the same hotel each trip (at "55th and the expressway") but could not recall the hotel's name; subpoenaed travel records indicate that Calhoun did not stay at any hotel at "55th and the expressway." Yet he stayed in Phoenix at least 27 nights during the two months he had been traveling there (making his forgetfulness all the less credible). All of these inconsistencies are relevant in weighing whether the government has established its burden justifying forfeiture. See [*United States v*] *$ 242,484* [*in United States Currency*], 389 F.3d [1149,] 1164 [(CA 11, 2004)] (finding it proper to consider claimant's inconsistent statements and changing stories in considering whether the government's burden is met); $ *22,474*, 246 F.3d at 1217 ("[Claimant's] inconsistent statements about the money and his reasons for being in Phoenix tended to support an inference that the money was drug related."); *United States v. $ 67,220.00 in U.S. Currency*, 957 F.2d 280, 286 (6th Cir. 1992) ("Misstatements are probative of possible criminal activity.") [*United States v Funds*, *supra* at 467.]

As was the case in *United States v Funds,* claimant here gave unreliable and inconsistent testimony about why she had $180,975 in cash in the trunk of her rental car.[35] In addition, claimant's testimony that she in-

[35] While evidence of the money itself had been suppressed by the circuit court, the court allowed the prosecutor to question the claimant about the basis for its existence. When asked about where the $180,975 in cash came from, claimant said it was her money and she got a little bit of it from a friend, Todd Fletcher. She was not sure how much she got from Fletcher, nor did she know from where Fletcher obtained the money. She claimed that Fletcher gave it to her "throughout the years" and that she had been storing it in a "personal area." With respect to the money's appearance in the trunk of the rental car, she denied ever putting it in the trunk or having any knowledge of it being placed in the trunk. She claimed that the first time she observed the presence of the money was when she was stopped for speeding that day.

tended to use the money to buy a house in Indianapolis was not credible.[36] And while the dissent has suggested that if the cash subject to forfeiture is removed from consideration, claimant's behavior appears "ordinary and innocent," *post* at 486, we remind the dissent that the circuit court had the benefit of judging the credibility of the claimant's testimony on the stand juxtaposed with the testimony of the illegal drug trafficking expert. Given claimant's inability to provide a credible explanation for how she came to have such a large amount of cash in a rental car, while traveling along a known drug trafficking corridor, and given her unexplained and

[36] Claimant initially stated that she "had plans" to get a rental car sometime around September 28, 2002, to go to Indianapolis to "get a house" and that before September 28, 2002, she had "very frequently" gone to look for a house in Indianapolis. But when questioned about four instances before that date when she had rented cars, claimant could not remember on what date, if any, she would have used a rental car to go to Indianapolis. Further, claimant admitted that she took no luggage, clothing, or overnight bags with her on this trip to Indianapolis.

Claimant first testified that she was going to Indianapolis to see her sister-in-law, Betty Smith, to look for a house, but she later testified that she was actually there to see her brother, Richard Smith. When reminded of her earlier testimony about going to see Betty Smith to help her find a house, claimant stated, "Well, we had already got everything straight about the house." Still later, claimant indicated that when she went to Indianapolis on September 28, she had already had contact with a realtor. When asked the name of the agent, she said, "Sam." When asked whether she had entered into a purchase agreement, her response was "Entered into a purchase agreement?" After the prosecutor explained what the agreement was, claimant said that she had not signed a purchase agreement but had settled on a price with "Sam" for "like 180 something." Claimant could not say when she would have negotiated this price with the agent, and when asked the name of the agent's office, she stated that it was "Morgan something."

When questioned about her use of rental cars on July 5, July 20, July 27, and September 21, 2002, and October 18, 2002, she could not say what she had used the cars for, nor where she had driven, nor why the respective mileage amounts for each date were 787 miles, 558 miles, 647 miles, 125 miles, and 860 miles.

repeated history of using rental cars, as well as the absence of evidence supporting her explanation for the intended use of such a large amount of cash, the circuit court could properly find that her behavior was not "ordinary and innocent."

Under such circumstances, it is not surprising that ultimately the circuit court found claimant's testimony unpersuasive:

> Her [claimant's] testimony [is] that she was transporting the money to buy a house and in the Indianapolis area, that there is no buy/sell agreement. There is no documentation. There is no substantiation of that. Her testimony about the money and how it happened to get into the car was changing and ambiguous, and very honestly not very credible. So when all gets said and done, I don't give much credibility to her testimony given the contradictions involved.

In deciding whether there is sufficient evidence to support a ruling of drug forfeiture, the Eleventh Circuit Court of Appeals has held that "we look to the totality of circumstances and do not try to pick them off, one by one, by conjuring up some alternative hypothesis of innocence to explain each circumstance in isolation."[37]

CONCLUSION

We conclude that the exclusionary rule was not meant to immunize illegally seized property from a subsequent civil forfeiture proceeding in which the seized property is the subject of the proceeding. We hold that, in accord with *In re Forfeiture of United States Currency* and MCL 333.7521, as long as the forfeiture can be established by a preponderance of untainted evidence, the forfeiture is valid. Consequently, it was appropriate for the circuit court to proceed with the

[37] *United States v $242,484, supra* at 1167.

forfeiture hearing as long as the illegally seized currency was excluded from evidence. As summarized by the Court of Appeals in its opinion affirming the circuit court, a preponderance of independent evidence supported the forfeiture:

> At trial, expert testimony was presented that I-94 is a primary "pipeline" for narcotic sales. Couriers carry large sums of money west on I-94 to purchase drugs in Chicago. The drugs are then transported and delivered east to Detroit and other eastern cities. Cash is the customary method of payment; cars are the most common form of conveyance; couriers frequently use rental cars; and the trips are quick. The evidence indicated that claimant was driving a rental car. Further, in the three-months before the stop, claimant had rented at least four cars for three days each, placed several hundred miles on each car, and did not recall where she had driven. Additionally, her tax records reflected that from 1998 through 2001, claimant generally earned between $ 4,000 and $5,000 a year. An expert opined that the large amount of cash claimant was transporting west on I-94 was consistent with claimant's being a courier and intending to purchase drugs. [*In re Forfeiture of $180,975,* slip op at 2.]

Reviewing the circuit court's findings, under the "totality of circumstances," we agree with the Court of Appeals that the circuit court did not clearly err in determining that although the money had been illegally seized, there was a preponderance of untainted evidence to support a civil forfeiture pursuant to MCL 333.7521(1)(f).

Accordingly, we affirm the Court of Appeals judgment below and we further conclude that the Court of Appeals in *In re Forfeiture of United States Currency* reached the correct result.

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

MARKMAN, J. (*dissenting*). I respectfully dissent and would reverse the judgment of the Court of Appeals and vacate the forfeiture award. I agree with the majority that: (a) illegally seized property may not be relied on to sustain its own forfeiture; (b) illegally seized property may only be offered into evidence for the limited purpose of establishing its existence and the court's jurisdiction over it; (c) illegally seized property may only be forfeited if such forfeiture is supported by a preponderance of the untainted evidence; and (d) therefore, the principles of law set forth in *In re Forfeiture of United States Currency*, 166 Mich App 81; 420 NW2d 131 (1988), and *United States v $639,558 in United States Currency*, 293 US App DC 384; 955 F2d 712 (1992), are correct. Nonetheless, I disagree with the result reached by the majority because it fails to apply these rules.

In particular, the majority redefines the proposition that illegally seized property may only be offered into evidence for the purpose of establishing its existence and the court's jurisdiction over it. Although evidence of such property was suppressed here, the majority improperly relies on a variety of "surrounding circumstances" and "implications" concerning the illegally seized property (in this case, money) to support the forfeiture award. Absent consideration of these "circumstances" and "implications," the remaining untainted evidence would clearly be insufficient to support the forfeiture. By these means, the majority seeks to make painless the suppression of evidence by rendering it largely irrelevant; in the end, the suppression constitutes a mere inconvenience that has little effect on the government's ability to use the illegally seized property as evidence.

It is important to note at the outset that the applicability of the exclusionary rule to forfeiture proceed-

ings in general, and the propriety of the trial court's suppression of the $180,975 in particular, are *not* at issue here. The prosecutor has not chosen to appeal either of these decisions. Therefore, we must assume for purposes of this appeal that the suppression of evidence was constitutionally required. The *only* issues on appeal are whether the suppressed evidence may be used to support the forfeiture, and whether, absent this evidence, there is sufficient untainted evidence to support the forfeiture.

I. FACTS AND PROCEDURAL HISTORY

Claimant Tamika Smith was stopped for speeding while traveling west on I-94 in a rental car with her two children and an adult male named Todd F. Fletcher. A Law Enforcement Information Network (LEIN) search revealed that Smith's driver's license had been suspended. After the state trooper ticketed Smith for speeding and driving on a suspended license, the trooper searched the trunk of the car without Smith's consent and discovered a backpack filled with $180,975.

The prosecutor subsequently filed the instant complaint for forfeiture of the $180,975, pursuant to MCL 333.7521(1)(f).[1] The trial court granted Smith's motion

[1] MCL 333.7521(1)(f) provides:

> The following property is subject to forfeiture:
>
> * * *
>
> (f) Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article that is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article or that is used or intended to be used to facilitate any violation of this article including, but not limited to, money, negotiable instru-

to suppress evidence of the money on the basis that it had been seized pursuant to an illegal search, and the prosecutor did not appeal. Following a bench trial, the trial court entered a judgment of forfeiture, finding that, even without the illegally seized evidence, the prosecutor had established that the money was intended to purchase illicit drugs. The court based its decision on the fact that: (1) Smith had "a very large amount of money"; (2) Smith's income peaked at $14,000 a year and she was usually making $4,000 to $5,000 a year; (3) westbound I-94 is a known corridor for transporting drug monies from Detroit to Chicago; (4) rental cars are frequently used to transport drugs; and (5) Smith had frequently rented cars in Detroit. The Court of Appeals affirmed, further noting that "an expert [witness] opined that the large amount of cash claimant was transporting west on I-94 was consistent with claimant's being a courier and intending to purchase drugs." Unpublished opinion per curiam of the Court of Appeals, issued December 28, 2004 (Docket No. 249699), slip op at 2.

II. ANALYSIS

A. EXCLUSIONARY RULE IN FORFEITURE PROCEEDINGS

The exclusionary rule generally bars the introduction into evidence of materials seized and observations made during an unconstitutional search. *Weeks v United*

ments, or securities. To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent. Any money that is found in close proximity to any property that is subject to forfeiture under subdivision (a), (b), (c), (d), or (e) is presumed to be subject to forfeiture under this subdivision. This presumption may be rebutted by clear and convincing evidence.

States, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914); *Silverman v United States*, 365 US 505; 81 S Ct 679; 5 L Ed 2d 734 (1961); see also *People v LoCicero*, 453 Mich 496, 508; 556 NW2d 498 (1996) ("The exclusionary rule forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search.");[2] *Mapp v Ohio*, 367 US 643, 648; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (" '[T]he Fourth Amendment barred the use of evidence secured through an illegal search and seizure.' ") (citation omitted).

Black's Law Dictionary (6th ed), p 563, defines "exclusion" of evidence as "[t]he action by the trial judge in which he excludes from consideration by the trier of fact whatever he rules is not admissible as evidence." To "exclude" is defined by *Random House Webster's College Dictionary* (1997) as "1. to shut or keep out; prevent entrance of. 2. to shut out from consideration, privilege, etc. 3. to expel and keep out; thrust out; eject." "Suppression of evidence" is defined as "[t]he ruling of a trial judge to the effect that evidence sought to be admitted should be excluded because it was illegally acquired," and to "suppress evidence" as "to keep it from being used in a trial by showing that it was either gathered illegally or that it is irrelevant." Black's Law Dictionary (6th ed), p 1440. To "suppress" is defined as "to do away with by or as if by authority; abolish; stop (a practice, custom, etc.); to withhold from

[2] The majority argues that *LoCicero* is not applicable to this case, because *LoCicero* addressed the exclusionary rule in the context of a criminal proceeding, rather than a civil forfeiture proceeding. I fail to see the slightest relevance in this observation. The fact remains that the evidence in this case *was* suppressed and that the prosecutor did not challenge this suppression. The only question before this Court concerns the *impact* of that suppression, an impact that our decision in *LoCicero* accurately described.

disclosure or publication (evidence, a book, etc.); to keep (a thought, memory, etc.) out of conscious awareness." *Random House Webster's College Dictionary* (1997). Thus, once suppressed or excluded, evidence should generally be treated as nonexistent and withheld from disclosure and consideration in legal proceedings, except under very specifically delineated exceptions. See, e.g., *United States v Havens*, 446 US 620; 100 S Ct 1912; 64 L Ed 2d 559 (1980) (although illegally seized evidence is inadmissible as substantive evidence, it is admissible for impeachment purposes); *United States v Calandra*, 414 US 338; 94 S Ct 613; 38 L Ed 2d 561 (1974) (illegally seized evidence is admissible in grand jury proceedings).

As the majority correctly notes, in a civil forfeiture proceeding where the illegally seized property is itself the "defendant," such property is not entirely excluded from the forfeiture proceedings, but rather, "may be offered into evidence for the limited purpose of establishing its existence, and the court's *in rem* jurisdiction over it." *$639,558*, *supra* at 715 n 5. In other words, the excluded property may be identified as the defendant in a forfeiture proceeding, *Immigration & Naturalization Service v Lopez-Mendoza*, 468 US 1032, 1039-1040; 104 S Ct 3479; 82 L Ed 2d 778 (1984), but may not be "relied upon to sustain a forfeiture." *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 698; 85 S Ct 1246; 14 L Ed 2d 170 (1965); *$639,558*, *supra* at 715 n 5. Despite its exclusion, the illegally seized property remains subject to forfeiture under MCL 333.7521 if the forfeiture can be supported by a preponderance of other, untainted evidence. See *In re Forfeiture of United States Currency*, *supra* at 89; *People v United States Currency*,

158 Mich App 126, 130; 404 NW2d 634 (1986); *United States v "Monkey," a Fishing Vessel*, 725 F2d 1007, 1012 (CA 5, 1984).[3]

B. MAJORITY'S REDEFINITION OF EXCLUSIONARY RULE

While the majority purports to apply this law, it effectively redefines the law to avoid the necessary consequences of the exclusionary rule. It does this through its central assertions that the use of suppressed evidence "should be limited to the circumstances surrounding its existence," *ante* at 460, that the court must not "turn a blind eye to the conclusions one reaches when considering all of the circumstances surrounding [the suppressed evidence's] existence and its implications," *ante* at 462[4] and that "while the court may not consider the specific physical characteristics of the item itself, the court can consider evidence presented in relation to the fact of the item's existence, such as the fact that claimant's testimony

[3] As the majority correctly notes, the Court of Appeals in *In re Forfeiture of United States Currency* relied on an erroneous standard of proof; the correct burden of proof is "preponderance of evidence," not "probable cause." See *People v United States Currency*, 158 Mich App 126, 130; 404 NW2d 634 (1986).

[4] In support of this assertion, the majority cites *United States v $242,484 in United States Currency*, 389 F3d 1149, 1167 (CA 11, 2004), in which the federal court stated, "[W]e do not take an academic or theoretical approach. Instead, we eschew clinical detachment and use a common sense view to the realities of normal life." Whatever a "common sense view" may suggest to the majority, this statement is taken entirely out of context. Unlike the instant case, *$242,484 in United States Currency* involved a lawful search after which the evidence of money was not suppressed. The court there merely addressed the extent to which evidence of money could be considered for the purposes of establishing probable cause that the money was related to illegal drugs. While the federal court's proposition is commonplace, the majority's application of this proposition is extraordinary.

about the money itself is questionable," *ante* at 463.[5] The majority also effectively redefines this law through its conclusion that "the court can consider the reliability of the claimant's testimony concerning the money's origin, its existence in her rental car, its intended purpose, the amount of the money in relation to her reported income . . . , and any other circumstantial factors not specifically related to the physical characteristics of the money," *ante* at 463, and that "the trial court could properly consider the implications of the presence of such a large amount of cash in the vehicle." *Ante* at 464. Apparently, all that the majority would exclude from consideration is the color of the currency and the Presidents who are pictured on it.

However, as noted, suppressed evidence is admissible only to "establish its existence," not "the *circumstances* surrounding its existence" or their "implications." While we may consider the fact that the excluded property subject to forfeiture *exists*, as a consequence of the suppression, we may not rely on *any other* information relating to this property, such as the place where it was found, its value, its physical characteristics, or any explanation regarding its origin or intended use, to sustain the property's forfeiture. The "establishment of its existence" exception to suppression is required to allow identification of the defendant property and to justify the court's jurisdiction over the property. Because suppressed evidence is inadmissible for broader purposes, *LoCicero*, *supra* at 508, the majority's new

[5] It is not clear whether the majority is suggesting that the suppressed evidence of money was properly admitted because it was used to impeach Smith. The majority simply utters this assertion without any apparent context or purpose. However, even if this evidence *were* used for such a purpose, it was *also* used by the trial court, the Court of Appeals, and the majority for obvious non-impeachment purposes to affirmatively support a finding of forfeiture.

rule, which allows the "surrounding circumstances" of the illegally seized property and their "implications" to be considered, constitutes an incorrect reading of the law.[6]

In avoiding the necessary consequences of the exclusionary rule, the trial court, the Court of Appeals, and now the majority have each made increasing use of evidence that must be considered nonexistent. The trial court based its forfeiture, in part, on the fact that Smith was transporting "a very large amount of money," which was unlikely to be the product of her legitimate income, and that Smith had not given a credible explanation for the presence of the money in the trunk of her rental car. The Court of Appeals noted that "[a]n expert opined that the large amount of cash claimant was transporting west on I-94 was consistent with claimant's being a courier and intending to purchase drugs." Slip op at 2. The majority quotes with approval both the trial court and Court of Appeals decisions, and concludes that "while the cash itself was excluded from evidence, the trial court could properly consider the implications of the presence of such a large amount of cash in the vehicle." *Ante* at 464.

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[6] Moreover, the majority fails to apply its own rule in an understandable or consistent manner. On the one hand, that the money was seized in a rental car driven by a low-income driver in a known drug corridor are all circumstances relied on by the majority to sustain the present forfeiture. *Ante* at 464-472. On the other hand, the majority states that "the state should not be permitted to exploit the search by asking how the money was packaged, or whether evidence of drugs was detected on the money." *Ante* at 460. However, the latter are also "circumstances surrounding the property's existence." I fail to understand, and the majority does not explain, the basis for differentiating those circumstances that the majority would allow to be considered and those circumstances that it would not. What are the standards for distinguishing between these classes of "circumstances"?

C. MAJORITY'S RELIANCE ON IRRELEVANT CASES

I cannot recall an opinion of this Court that employs caselaw as much to obscure as to illuminate. The several dozen cases cited in the majority opinion, with a single exception, either stand for undisputed propositions of law or are irrelevant to the question whether the "surrounding circumstances" and "implications" of illegally seized property may be considered to support a forfeiture. With that single exception, the cases cited by the majority can fairly be characterized as standing for three distinct propositions of law—none of which is in dispute and none of which actually supports the rule announced by the majority. These propositions of law may be stated as follows: (1) illegally seized property may only be offered into evidence for the limited purpose of establishing its existence and the court's jurisdiction over it; (2) illegally seized property may still be forfeited, as long as the forfeiture is supported by sufficient untainted evidence; and (3) the circumstances surrounding the *lawful* seizure of property, such as the amount or value of the property, a claimant's lack of legitimate income, the place where the property was seized, and a claimant's false statements, can be relied on to support a forfeiture.

There is no dispute, for example, that illegally seized property may be offered into evidence for the limited purpose of establishing its existence and the court's jurisdiction. Moreover, there is no dispute that illegally seized property may be forfeited on the basis of other, lawfully obtained evidence. However, the cases cited by the majority in support of these commonplace propositions of law do *not* speak to the permissibility of allowing consideration of the "surrounding circumstances" or "implications" of illegally seized property. From a commonplace proposition, the majority pro-

ceeds to an invented proposition. Indeed, some of the cases cited by the majority are not merely irrelevant, but support the opposite of the majority's new rule. For example, in *$639,558,* evidence of a positive drug-dog sniff of the claimant's luggage and money seized from his luggage were suppressed because of an illegal search. With that evidence suppressed, the only remaining untainted evidence was the fact that the claimant was engaged in a "suspicious" form of travel and that he was departing from a city known to be a source of drugs—evidence that bears a striking similarity to the untainted evidence in the instant case. Solely on the basis of the untainted evidence, the prosecutor conceded,[7] and the District of Columbia Circuit Court of Appeals did not dispute, that there was insufficient evidence remaining to support the forfeiture. In other words, the "surrounding circumstances" of the illegally seized money, such as the fact that the claimant was carrying a "large amount of money," were not considered and, therefore, the forfeiture proceeding was dismissed. Likewise, in *"Monkey",* the Fifth Circuit Court of Appeals did not rely on the "surrounding circumstances" of the evidence illegally seized from the fishing vessel, but rather held that a forfeiture was supported *in spite of* the suppression on the basis of inferences resulting from the claimant's criminal trial and certain admissions made by the claimant in his appellate brief.

Finally, the majority purports to set forth a catalog of cases supporting its view that the "surrounding circumstances" and "implications" of illegally seized property may be considered to support a forfeiture. However,

[7] Apparently, the prosecutor in *$639,558*, unlike the majority, understood that "suppressed" means "suppressed," and "excluded" means "excluded," and thus recognized that the "surrounding circumstances" or "implications" of illegally seized property could not be used to support its forfeiture.

each of these cases, with, as already noted, a single exception, involved *legal* searches and seizures. Once more, there is no dispute that evidence drawn from *lawfully* seized property is fully admissible in support of a forfeiture. *Any* information concerning such evidence, including their "surrounding circumstances" and "implications," was admissible in support of their forfeiture. Most certainly, these cases do not stand for the majority's proposition that unlawfully obtained evidence may be relied on to sustain its own forfeiture.[8]

Once the majority's irrelevant caselaw is set aside, there is not much left. All that remains is a single trial court decision containing not a single sentence of reasoning and not a single word of analysis, indeed a decision subsequently rendered a nullity by the appellate court. *United States v $22,287 in United States Currency*, 520 F Supp 675, 680 (ED Mich, 1981).[9] In *$22,287*, the court noted that $22,287, which had been excluded, constituted "an unusually large amount of cash for any individual to have on hand, [and] is very close to the price of 'nineteen five' ($19,500.00) noted by Johnny [an alleged drug dealer] as the cost of an 'lb' (pound of heroin)." As a result, the court relied on this excluded evidence, as well as other untainted evidence, to grant the forfeiture. The court reached this conclusion with absolutely *no* analysis justifying its reliance

[8] The majority responds that these cases are relevant because they relate to the prosecutor's belated argument that the exclusionary rule does not apply to a civil forfeiture proceeding. *Ante* at 464 n 29. However, the issue of the applicability of the exclusionary rule to a civil forfeiture proceeding is *not* before this Court; the *only* issue is whether the suppressed evidence may be used to support its own forfeiture. Thus, the cases strewn throughout this opinion by the majority may be "relevant," but only to an irrelevant issue.

[9] Given that this Court is not bound by the decisions of lower federal courts, perhaps the majority might wish to share what it is they find most persuasive in the district court's analysis.

on the suppressed evidence. Moreover, the persuasive force of this case—already minimal to begin with given its absence of analysis—is further diminished, if not altogether nullified, by the fact that the Sixth Circuit Court of Appeals subsequently determined that no illegal search had occurred and therefore rejected *any* exclusion of evidence. 709 F2d 442 (CA 6, 1983).[10]

D. PROPER APPLICATION OF EXCLUSIONARY RULE

The majority acknowledges that the *only* purpose for which excluded evidence may be used in the instant forfeiture action is to establish its "existence" and the court's jurisdiction over it, but then concludes that other information regarding the excluded property is admissible. However, under traditional understandings of what it means for property to be "suppressed," the trial court could not rely on the fact that Smith was actually carrying money in the car, that the money was seized in a known drug corridor, that the amount of money was substantial, that Smith did not have the means to legitimately possess this amount of money, or that Smith could not give a credible explanation about why she was carrying this amount of money with her.[11]

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[10] That is, because the trial court erred in excluding evidence, the Sixth Circuit had no need to consider whether the trial court also erred in relying on excluded evidence; concomitantly, if the trial court had not erred, it would also have had no need to rely on excluded evidence.

[11] The majority argues that this dissent's "reasoning has been rejected" in *United States v $493,850 in United States Currency*, 2006 US Dist LEXIS 2370 (D Ariz, January 23, 2006). *Ante* at 462. In that case, the "[c]laimants argue[d] [that] the Court may not even acknowledge that one of the defendants is money but rather must deal with the defendant money as if it were a 'widget.' " *$493,850 in United States Currency, supra* at *15. The court held that it

> does not believe that exclusion of the cash means the Court must consider the defendant cash as a "widget." The Court believes it can still take notice of the fact that the defendant is

Under the rule of *In re Forfeiture of United States Currency*, except for its mere existence, *all* other evidence pertaining to the money is deemed inadmissible; no matter how indispensable this evidence, the court may not rely on it in support of a forfeiture.

Absent the suppressed evidence, the evidence in this case is clearly insufficient to support forfeiture by a preponderance of the evidence. Rather, the untainted evidence—what is left after the illegally seized money has been excluded from consideration, as it must be—supports two points of fact: (1) Smith, who has a very low income, was driving a rental car to Chicago for the fifth time in three months; and (2) drug couriers frequently carry large sums of money from Detroit to Chicago in rental cars. However, absent the evidence that Smith was actually carrying a large sum of money in a drug corridor at the time of the stop, there is simply no logical connection or nexus between these propositions. Such a logical connection or nexus is simply severed by the exclusionary rule. What is left is that

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> cash. This is obviously stated in the caption of the case. Perhaps the denominations making up the amount and the actual money itself cannot be put into evidence. However, there is no way for the Government to show that a "widget" is the product of a drug transaction and, therefore, the Court does not believe it has to disregard the fact that one of the defendants is cash. [*Id*. at *15-16.]

$493,850 merely stands for the proposition that the illegally seized cash must be identified as what it is, i.e., that the defendant's identity need not be obscured or hidden. Moreover, the trial court did not rely on the fact of the money, or any inferences drawn from the amount of money identified as the defendant, in order to support the forfeiture. Rather, it relied exclusively on untainted evidence, including the facts that the claimants met on several occasions with known drug dealers, were negotiating with the drug dealer on price, and the vehicle that the government sought to forfeit was observed by the police at the drug dealer's home. Nothing in *$493,850* refutes what is set forth in this dissent.

Smith, a person of low income, was a frequent traveler between Detroit and Chicago, a well-recognized drug corridor, in a rental car. These circumstances undoubtedly describe many persons who are not involved in the drug trade, and they describe what may be understood as entirely innocent behavior. It is only when the money is taken into consideration that this ordinary and innocent behavior is transformed into something less benign.[12] It is only when the money is taken into consideration that there is some semblance of a "drug courier profile" that emerges. Yet, the money cannot be taken into consideration because it has been suppressed and because the prosecutor has chosen not to challenge this suppression.

Moreover, Smith made no admissions of any kind, no evidence arose out of any criminal proceedings against her (for there were no such proceedings), Smith was not traveling with a known drug courier, and there was no witness testimony connecting Smith and large amounts of money, or otherwise indicating her involvement in

[12] The majority argues that Smith's "behavior was not 'ordinary and innocent' " if we take into consideration "claimant's inability to provide a credible explanation for how she came to have such a large amount of cash in a rental car" and "the absence of evidence supporting her explanation for the intended use of such a large quantity of cash," *ante* at 470 and 471 , "juxtaposed with the testimony of the illegal drug trafficking expert." *Id*. Indeed, this is quite true *if* we are allowed to consider these circumstances. But that, of course, is the nub of the question. *Are* we allowed to consider these circumstances under the exclusionary rule? I believe not, because such evidence has been made nonexistent under the rule for almost all purposes. Because the majority evaluates the presence of the money in Smith's car, the amount of the money, and the source and use of the money, it is clearly acting beyond the scope of the exclusionary rule. Credible or not, the trial court could not rely on this evidence to establish that the money was connected to an illegal drug activity. Absent such evidence, Smith resembles any other person who travels from Detroit to Chicago in a rental car.

drug trafficking. Accordingly, the untainted evidence is insufficient to support the forfeiture under MCL 333.7521(1)(f).

III. OBSERVATIONS

This Court has previously acknowledged the "very high cost of the exclusionary rule." *People v Goldston*, 470 Mich 523, 540; 682 NW2d 479 (2004); see also *People v Hawkins*, 468 Mich 488, 500 n 9; 668 NW2d 602 (2003). When suppression occurs, the prosecutor on behalf of the people is deprived of essential evidence in the presentation of his or her case, the fact-finder is denied access to potentially relevant facts and information, the justice system is impeded in its ability to discern the truth about wrongdoing, and the people must suffer within their communities persons who have harmed others and gone unpunished for their conduct. As Justice CORRIGAN has observed, by denying the fact-finder access to evidence, the exclusionary rule "impedes, rather than promotes, the truth-seeking function of the judiciary and thereby hinders public confidence in the integrity of the judicial process." *Goldston*, *supra* at 540 n 9. The criminal trial regrettably must proceed "as though the dead body in the basement did not exist, as though the illegal firearm under the sofa was never really there, and as though the incendiary materials in the garage were merely a figment of one's imagination." *Goldston*, *supra* at 545 (MARKMAN, J., concurring).

Given that there is no more important function of government than ensuring domestic tranquility and protecting people from violent predators, the costs of the exclusionary rule are extraordinarily high. I do not favor this rule, for I do not believe that it is required by the constitution. Nonetheless, the United States Su-

preme Court has mandated this rule, and evidence that is illegally seized must be suppressed. And "suppressed" means "suppressed"; it does not mean that courts may characterize evidence as "suppressed" while, in fact, relying upon that evidence to support its own forfeiture. While I too might wish that suppression of evidence could be less painful to the justice system, it is precisely because of its painfulness that I, as well as others in the majority, have been so concerned about the rule for so long. Where evidence has been illegally obtained, the rule of suppression requires that the legal system be deprived of even the most credible evidence, including whatever "implications" can be drawn from its "surrounding circumstances." The majority alleviates the costs of suppression, but only by transforming suppression into something other than what it must be.

IV. CONCLUSION

On the basis of MCL 333.7521, *In re Forfeiture of United States Currency*, and the traditional meaning of "suppression," I would hold that suppressed evidence is admissible in a civil forfeiture proceeding for the limited purpose of establishing its existence as the defendant and the court's jurisdiction over the property, but that such evidence may not properly be relied on in a substantive fashion to sustain a forfeiture, even when this is done purportedly to assess the "circumstances surrounding the existence" of the evidence, and the "implications" of the evidence. Rather, the trial court must determine whether legally seized evidence, i.e., untainted evidence, is sufficient to sustain the forfeiture. Because the untainted evidence here was not sufficient to support the forfeiture, I would reverse the judgment of the Court of Appeals and vacate the judgment of forfeiture.

CAVANAGH, J. (*dissenting*). I concur with parts I, II, and IV of Justice MARKMAN's dissenting opinion.

KELLY, J. (*dissenting*). I agree with Justice MARKMAN's conclusion and join all but part III of his opinion. I write separately to note that *One 1958 Plymouth Sedan v Pennsylvania*[1] is still valid and binding precedent of the United States Supreme Court. While the majority recognizes this point, it goes out of its way to make the argument that the underpinnings of that decision have been weakened. The cases cited by the majority in that regard are of no consequence in deciding whether *One 1958 Plymouth Sedan* is still good law. The Supreme Court has not overruled *One 1958 Plymouth Sedan*. In fact, that Court continues to recognize its viability. See e.g., *United States v James Daniel Good Real Prop*, 510 US 43, 49; 114 S Ct 492; 126 L Ed 2d 490 (1993) (stating that "the exclusionary rule applies to civil forfeiture"); *Austin v United States*, 509 US 602, 608 n 4; 113 S Ct 2801; 125 L Ed 2d 488 (1993) (stating that "the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings"). Therefore, this Court, like every court in the country, is bound by that decision unless the United States Supreme Court decides to overrule it.

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[1] 380 US 693; 85 S Ct 1246; 14 L Ed 2d 170 (1965).

RENNY v DEPARTMENT OF TRANSPORTATION

Docket No. 131086. Argued April 10, 2007 (Calendar No. 3). Decided July 11, 2007.

Karen and Charles Renny brought an action in the Court of Claims against the Michigan Department of Transportation, seeking damages for injuries sustained when Karen Renny slipped on a patch of ice and snow on a sidewalk in front of a doorway to a rest area building. The plaintiffs alleged that the absence of gutters and downspouts, among other defects in the building, permitted the ice and snow to accumulate on the sidewalk. In addition to the allegations of a design defect of the building, the plaintiffs alleged that the defendant failed to repair and maintain the building. The Court of Claims, Michael J. Baumgartner, J., granted summary disposition in favor of the defendant, ruling that the plaintiffs failed to allege a claim that fits within the public building exception to governmental immunity, MCL 691.1406. The Court of Appeals, SMOLENSKI, P.J., and WHITBECK, C.J., and O'CONNELL, J., reversed the order of the Court of Claims, holding that the plaintiffs' claim was cognizable as a design defect claim under the public building exception and that Karen Renny's injury was directly attributable to a dangerous or defective condition of the building itself, even though the dangerous condition of snow and ice existed outside the building. 270 Mich App 318 (2006). The Supreme Court granted the defendant's application for leave to appeal. 477 Mich 958 (2006).

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

The public building exception does not permit a cause of action premised on an alleged design defect. To the extent that the plaintiffs' claim is based on an alleged design defect of a public building, the claim is barred by governmental immunity. The judgment of the Court of Appeals reversing summary disposition in favor of the defendant is affirmed, but its holding that a design defect claim is cognizable under the statute must be reversed, and the matter must be remanded to the Court of Claims for a determination whether the plaintiffs' claim may proceed with respect to the alleged failure to repair and maintain the public building.

1. The statutory duty to "repair and maintain" public buildings does not encompass a duty to design or redesign a public building in a particular manner. The sentence in MCL 691.1406 that imposes liability on governmental agencies "for bodily injury and property damage resulting from a dangerous or defective condition of a public building" does not expand the duty beyond the repair and maintenance of a public building.

2. Any obiter dicta in earlier decisions of the Supreme Court, such as that in *Bush v Oscoda Area Schools*, 405 Mich 716 (1979), and *Reardon v Dep't of Mental Health,* 430 Mich 398 (1988), and any dicta from Court of Appeals decisions that suggest that a design defect claim falls within the plain language of the public building exception must be disavowed.

3. Any cases such as *Sewell v Southfield Pub Schools,* 456 Mich App 670 (1998), and *Williamson v Dep't of Mental Health* (*On Resubmission*), 176 Mich App 752 (1989), that can be construed to stand for the proposition that design defects fall within the public building exception must be overruled.

Justice WEAVER, concurring in the result only, stated that, because the majority holds that the plaintiffs' complaint adequately alleged a claim based on the defendant's failure to "repair and maintain" the rest area building, the Supreme Court can decide this case without resorting to consideration of whether the plaintiffs could pursue a claim of defective building design. Therefore, the majority's commentary with regard to the question of defective building design is obiter dictum.

Affirmed in part, reversed in part, and remanded to the Court of Claims for further proceedings.

Justice KELLY, joined by Justice CAVANAGH, concurring in part and dissenting in part, agreed that this matter should be remanded to the Court of Claims for further proceedings with regard to the plaintiffs' claim that the defendant failed to properly repair and maintain the public building, but disagreed that design defects are not actionable under the public building exception to governmental immunity. A duty to design safe public buildings is implicit in the duty to repair and maintain them. The longstanding precedent of the Supreme Court indicating that design defects are actionable under the public building exception should be affirmed. Integral to the Court's holding in *Bush* was the Court's determination that a public building may fall within the exception to governmental immunity as dangerous or defective because of improper design. The *Bush* Court's language was not dicta and constitutes binding precedent. The Legislature's failure to amend the language of MCL 691.1406 in the many years following *Bush*

suggests that the Legislature intended that a design defect be actionable under the public building exception. A review of the factors stated in *Robinson v Detroit*, 462 Mich 439 (2000), that are to be considered in deciding whether to overturn precedent indicates that *Bush* should not be overruled.

GOVERNMENTAL IMMUNITY — PUBLIC BUILDING EXCEPTION — DESIGN DEFECTS.

The public building exception to governmental immunity imposes a duty on a governmental agency to repair and maintain governmental buildings under its control when open for use by members of the public; the public building exception does not encompass a duty to design or redesign a public building in a particular manner and does not permit a cause of action premised on a design defect (MCL 691.1406).

Robert Charles Davis, for the plaintiffs.

Michael A. Cox, Attorney General, *Thomas L. Casey,* Solicitor General, and *Patrick F. Isom* and *Harold J. Martin,* Assistant Attorneys General, for the defendant.

Amici Curiae:

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Hilary A. Dullinger*), for the Michigan Municipal League, the Michigan Municipal League Liability and Property Pool, and the Michigan Townships Association.

YOUNG, J. In this case we consider whether a "design defect" claim is cognizable under the public building exception to governmental immunity, MCL 691.1406. The plain language of the public building exception imposes a duty only to "repair and maintain" a public building. In the absence of any additional language addressing design defects, we hold that the public building exception to governmental immunity does not permit a cause of action premised upon an alleged design defect. We disavow any dicta to the contrary in our earlier cases and overrule any cases, such as *Sewell*

v Southfield Pub Schools[1] and *Williamson v Dep't of Mental Health*,[2] that can be construed to stand for the proposition that design defects fall within the public building exception. However, because plaintiff's[3] complaint alternatively alleged that defendant Michigan Department of Transportation (MDOT) failed to repair and maintain the public building, we remand to the Court of Claims to determine whether plaintiff's suit may proceed with respect to these allegations.[4] Accordingly, we affirm the Court of Appeals reversal of summary disposition in favor of MDOT, reverse the Court of Appeals holding that design defects are actionable under the public building exception, and remand the case to the Court of Claims for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Karen Renny visited a rest area in Roscommon County, Michigan, in January 2000. She alleged that while leaving the rest area building, she slipped on a patch of snow and ice on the sidewalk in front of the doorway and suffered serious injuries to her right wrist. Plaintiff sued MDOT, alleging that her injuries resulted from a defective condition of the rest area building. According to plaintiff, "by [MDOT] designing, con-

[1] 456 Mich 670; 576 NW2d 153 (1998).

[2] 176 Mich App 752; 440 NW2d 97 (1989).

[3] Coplaintiff Charles Renny filed a claim for loss of consortium, which is derivative of his wife's claim. Therefore, we will refer to plaintiff singularly.

[4] We do not pass judgment on the legal viability of plaintiff's allegations with respect to a failure to maintain and repair the rest area building, nor should this opinion be construed as holding that plaintiff is entitled to proceed to trial. We simply observe that plaintiff in her complaint minimally pleaded in avoidance of governmental immunity, and therefore we remand for further proceedings on that basis. See part IV of this opinion.

structing, keeping and/or maintaining" the rest area in a defective condition, melted snow and ice accumulated on the sidewalks in front of the entranceway and created a hazardous, slippery surface.[5] Plaintiff attributed the accumulated snow and ice, in part, to MDOT's failure to install and maintain gutters and downspouts around the roof of the building. Plaintiff maintained that gutters and downspouts would have safely channeled the snow and ice that melted off the roof away from the sidewalks. Moreover, plaintiff alleged that MDOT had actual or constructive notice of these defects for more than 90 days before the accident, but failed to remedy them. MDOT moved for summary disposition, which the Court of Claims granted on the basis of governmental immunity.

In a published per curiam decision, the Court of Appeals reversed the Court of Claims.[6] The panel held that plaintiff's claim was cognizable as a design defect claim under the public building exception. It further concluded that plaintiff's injured wrist was directly attributable to a dangerous or defective condition of the building itself even though the dangerous condition of snow and ice existed outside the building.

This Court granted MDOT's application for leave to appeal.[7]

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[5] Plaintiff also sued the Roscommon County Road Commission and Roscommon Township in a separate circuit court action that was consolidated with this case at the trial court level. Both parties were dismissed, and neither party is participating in this appeal.

[6] *Renny v Dep't of Transportation*, 270 Mich App 318; 716 NW2d 1 (2006).

[7] 477 Mich 958 (2006). In our order granting leave, we asked the parties to address three questions: (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

II. STANDARD OF REVIEW

This Court reviews de novo motions for summary disposition.[8] Questions of statutory interpretation are questions of law that are also reviewed de novo by this Court.[9] This Court approaches the task of statutory interpretation by seeking to give effect to the Legislature's intent as expressed in the statutory language.[10] "When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."[11]

III. ANALYSIS

This case pivots on the proper interpretation of the public building exception to governmental immunity. MCL 691.1406 states, in pertinent part, that

> *[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public.* Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. [Emphasis added.]

This Court has held that in order for a plaintiff to avoid governmental immunity under the public build-

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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; 483 NW2d 26 (1992).

[8] *Grimes v Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006).

[9] *Id*.

[10] *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005).

[11] *Id*.

ing exception, the plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time.[12] In this case, the parties dispute whether plaintiff has satisfied the third element, that is, whether plaintiff was injured by a dangerous or defective condition of the rest area building.

Plaintiff maintains that the dangerous or defective condition of the rest area building arose from a design defect, and that a design defect claim is cognizable under the public building exception.[13] She rests her argument on certain language from *Bush v Oscoda Area Schools*[14] that we have reiterated in *Reardon v Dep't of Mental Health*[15] and other subsequent cases.[16] In *Bush*, the plaintiff, the mother of an injured student, sued the student's school and school officials after a jug of wood alcohol exploded in a non-laboratory classroom temporarily used to hold science class. Concluding that the plaintiff stated a claim against the defendants under the public building exception, this Court opined that

> [t]he defective building provision is structurally similar to the defective highway provisions. It states a duty, "repair

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[12] *de Sanchez v Dep't of Mental Health*, 467 Mich 231, 236; 651 NW2d 59 (2002).

[13] Plaintiff argues alternatively that the defective condition of the rest area building arose from a failure to maintain gutters around the building.

[14] 405 Mich 716; 275 NW2d 268 (1979).

[15] 430 Mich 398; 424 NW2d 248 (1988).

[16] See, e.g., *Johnson v Detroit*, 457 Mich 695; 579 NW2d 895 (1998); *Sewell, supra*; *Hickey v Zezulka (On Resubmission)*, 439 Mich 408; 487 NW2d 106 (1992); see also *Williamson, supra*.

> and maintain", and in providing a cause of action extends it to "a dangerous or defective condition of a building". We construe the defective building provision as we have the defective highway provision. Governmental agencies are subject to liability for a dangerous or defective condition of a public building without regard to whether it arises out of a failure to repair and maintain.
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> As in the highway cases, a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices. [17]

In *Reardon*, this Court quoted *Bush* approvingly to make the point that the public building exception applies only where an injury "is occasioned by a physical defect or dangerous condition of the building itself"[18] rather than where an injury merely occurs on the premises. In its discussion of the governmental agency's duty under the public building exception, the *Reardon* Court opined that

> [t]he first sentence [of the public building exception] imposes upon governmental agencies the duty to "repair and maintain public buildings under their control . . . ." In *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979), we held that this duty is not strictly limited to the repair or maintenance of public buildings. Instead, we held that "a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices." *Id*. at 730. We reiterate this proposition, as the holding in *Bush* is entirely consistent with today's conclusion that the injury must be occasioned by the dangerous or defective condition of the building itself. As long as the danger of injury is presented by a physical condition of the building, it little matters that the condition arose because of improper design, faulty construction, or absence of safety devices. However, while the public building exception is not strictly limited to failures of repair or

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[17] *Bush*, 405 Mich at 730.

[18] *Reardon*, 430 Mich at 400.

> maintenance, the Legislature's choice of those terms to define the governmental duty is indicative of its intention regarding the scope of the exception. The duty to repair and maintain a premises clearly relates to the physical condition of the premises.[19]

Citing *Bush* and *Reardon*, this Court has stated elsewhere that a defective design claim falls within the public building exception.[20] Plaintiff rests her design defect claim on this line of cases.

MDOT responds that this Court has never squarely held that a design defect is cognizable under the public building exception. According to MDOT, *Reardon*'s discussion of *Bush* and design defect claims was obiter dictum. *Reardon* considered and rejected the notion that the public building exception extended to injuries that occur in a public building but were not occasioned by a physical condition of the building itself. It did not pass on the merits of a design defect claim.

Moreover, MDOT argues that *Reardon* mischaracterized *Bush* as *holding* that design defects fall within the public building exception, when *Bush* in fact only considered the intended use of the classroom and the lack of safety devices in its holding. Thus, MDOT argues, it was unnecessary for the *Bush* Court to opine on the propriety of a design defect claim and its statement on that question was dictum. Finally, MDOT points out, this Court more recently has openly questioned whether a design defect claim fits within the public building exception. In *de Sanchez v Dep't of Mental Health*,[21] we stated that

> [d]espite the oft-cited proposition that a public building may be dangerous or defective because of its improper design, the issue whether a design defect may actually

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[19] *Id*. at 409-410.

[20] See, e.g., *Johnson, supra*; *Sewell, supra*; *Hickey*, *supra*.

[21] 455 Mich 83, 96; 565 NW2d 358 (1997).

> constitute a defect in a public building sufficient to invoke the public building exception has caused this Court considerable difficulty. Nonetheless, that issue is not before this Court.

In short, MDOT argues, any support provided by the caselaw on which plaintiff heavily relies is illusory.

More specifically, MDOT contends that plaintiff's reliance on *Bush* is misplaced because this Court has since dismantled the reasoning underpinning *Bush*. The majority in *Bush* relied heavily on the structural and linguistic similarities between the highway exception and the public building exception. Therefore, because our caselaw held that a design defect claim fell within the highway exception, the *Bush* majority placed the same judicial gloss on the public building exception. Beginning with *Nawrocki v Macomb Co Rd Comm*,[22] this Court returned to a more textually faithful interpretation of the highway exception. This trend continued in *Hanson v Mecosta Co Rd Comm*,[23] where this Court disavowed the line of highway exception cases that recognized a design defect claim and held that "the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways." MDOT reasons syllogistically, then, that this Court, since deciding *Bush*, has recognized that the highway exception does not allow for a design defect claim. It was vital to the *Bush*

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[22] 463 Mich 143; 615 NW2d 702 (2000).

[23] 465 Mich 492, 502; 638 NW2d 396 (2002). The Court of Appeals also signaled a more principled approach to the highway exception. See, e.g., *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 587-588; 546 NW2d 690 (1996) ("The Legislature thus did not purport to demand of governmental agencies having jurisdiction of highways that they improve or enhance existing highways . . . . The only statutory requirement and the only mandate that, if ignored, can form the basis for tort liability is to 'maintain' the highway in reasonable repair.").

majority's logic that the highway exception permitted design defect claims. Now that this central premise has been repudiated, there is no reason for a similarly erroneous statutory construction to persist with regard to the public building exception.

With respect to the plain language of the statute, MDOT notes that plaintiff's position is entirely at odds with the statute itself. The statutory language refers only to the governmental agency's duty to "repair and maintain public buildings," and does not refer to any duty to design a public building. Therefore, to hold that the language of the statute includes a design defect claim is inconsistent with its plain language.

While plaintiff relies almost exclusively on caselaw, MDOT largely appeals to the statutory language. In order to decide an issue of statutory construction, we must *first* resort to the plain language of the public building exception to determine the Legislature's intent.[24] We agree with MDOT that this provision clearly does not support a design defect claim. The first sentence of MCL 691.1406 states that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." This sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings. Neither the term "repair" nor the term "maintain," which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner. "Design" is defined as "to conceive; invent; contrive."[25] By contrast, "repair" means "to restore to

[24] *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005).

[25] *The American Heritage Dictionary of the English Language, New College Edition* (1978).

sound condition after damage or injury."[26] Similarly, "maintain" means "to keep up" or "to preserve."[27] Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. "Design" refers to the initial conception of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception.

The second sentence of MCL 691.1406, which imposes liability on governmental agencies "for bodily injury and property damage resulting from a dangerous or defective condition of a public building," does not expand the duty beyond the repair and maintenance of a public building. The phrase imposes liability where the "dangerous or defective condition of a public building" arises out of the governmental agency's failure to repair and maintain that building. It is not suggestive of an additional duty beyond repair and maintenance. There is no reason to suspect that the Legislature intended to impose a duty to prevent "dangerous or defective condition[s]" in public buildings in a manner wholly unrelated to the obligation clearly stated in the first sentence.[28]

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[26] *Id*.

[27] *Id*.

[28] According to the dissent, it "defies logic" that a governmental agency would have a duty to repair and maintain a public building but would not be liable if a public building could have been more safely designed. Such a statement fails to recognize that the very purpose of governmental immunity is to *limit* the government's exposure to liability. Clearly, this is precisely what the Legislature intended to convey with its deliberately chosen words. It is entirely logical that it would have chosen *not* to expose a governmental agency to liability for a design defect. The duty to repair

Contrary to the dissent's suggestion that *Bush* represents an unbroken precedent, *Bush* has been consistently undermined by subsequent decisions of this Court. First, *Bush* was succeeded by *Ross v Consumers Power Co (On Rehearing)*,[29] a case that fundamentally altered the way we construe the governmental immunity statute. Second, we agree with MDOT that *Hanson* collapsed the "logic" in *Bush* supporting a design defect claim. Finally, we also note that the propriety of a claim under the public building exception premised on a lack of safety devices is also undermined by *Fane v Detroit Library Comm*[30]—a decision authored by the dissent. In *Fane*, we held under the facts of that case that an elevated terrace was "of a public building." We emphasized that the public building exception only refers to injuries resulting from dangerous or defective conditions "of a public building" and that a fixtures analysis is useful in determining whether the condition giving rise to the injury is "of a public building." In light of *Fane*, we fail to see how injuries from an exploding jug could have resulted from a dangerous or defective condition "of a public building" or could survive a fixtures analysis under *Fane*.

Because we conclude that the statutory language is unambiguous and imposes a duty only to repair and maintain a public building, we must reconsider our earlier cases suggesting that a design defect claim is

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and maintain a public building does not impose an unforeseeable and potentially significant liability on governmental agencies. The same cannot be said of a duty to *design* a safe public building, which would be measured in hindsight by courts that are ill-equipped to consider the budgetary and architectural trade-offs involved in the construction of any structure. Thus, far from being illogical, a narrowly tailored duty of repair and maintenance is entirely consistent with the government's interest in limiting its liability.

[29] 420 Mich 567; 363 NW2d 641 (1984).

[30] 465 Mich 68; 631 NW2d 678 (2001).

cognizable under the public building exception.[31] As we said in *de Sanchez*, it is an oft-cited proposition that design defect claims fall within the public building exception. Yet there are few instances where this Court or the Court of Appeals has endorsed a design defect claim. We agree with MDOT that *Bush* involved an alleged lack of safety devices and was not a design defect case, so its discussion of the latter was dictum. Although at one point the *Bush* majority stated that "[p]laintiff has alleged that the improper design of the classroom and absence of safety devices rendered it unsafe as a science classroom," elsewhere it opined that "[p]laintiff's defective building theory is based on lack of safety devices."[32] We also agree with MDOT that *Reardon* was not a design defect case and its discussion of design defect claims was dictum. Rather, *Reardon* held that the public building exception "impose[s] a duty to maintain safe public buildings, not necessarily safety *in* public buildings."[33]

In subsequent cases, this Court has not endorsed a plaintiff's design defect claim. In *Hickey, supra*, responding to the plaintiff's argument that the alleged improper design of a Michigan State University Department of Public Safety holding cell caused the decedent

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[31] The dissent claims that the Legislature acquiesced in *Bush*'s erroneous interpretation of the public building exception. That this Court highly disfavors the doctrine of legislative acquiescence has been elsewhere stated. See, e.g., *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007); *Grimes*, 475 Mich at 84; *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000); *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999). Thus, for the reasons stated in these opinions, the dissent's reliance on this spurious rule is a nonstarter.

[32] *Bush*, 405 Mich at 730-731, 728 n 7.

[33] *Reardon*, 430 Mich at 415 (emphasis in original). Thus, the dissent attributes too much significance to the *Reardon* Court's recitation of the design defect language from *Bush* and certainly is incorrect in suggesting that we are overturning *Reardon*.

to hang himself, this Court stated that "[a]lthough we agree that a claim of improper design may allow the public building exception to be applied, that outcome is not required"[34] because the connection between the alleged design defect and the injury was too tenuous to invoke the exception. So, this Court did not pass judgment on the plaintiff's design defect claim. In *de Sanchez, supra*, where the decedent hung himself in a restroom, this Court expressly stated that the plaintiff's design defect claim was not before the Court.[35] In *Johnson, supra*, another suicide case, a majority of this Court concluded that the public building exception was applicable because the police station holding cell was defective given its intended use as a suicide-deterrent cell. This Court did not focus on a design defect claim.

In addition to the Court of Appeals decision in this case, we are aware of only two cases where a design defect claim was recognized implicitly or explicitly by a court. In *Williamson, supra*, the Court of Appeals affirmed the Court of Claims determination that the plaintiff alleged a design defect or absence of safety features that was a proximate cause of the decedent's death. The decedent, a mildly retarded, epileptic teenager, drowned while taking an unsupervised bath at a Department of Mental Health residential treatment facility. The Court of Claims found that the plaintiff proved by a preponderance of the evidence that the improper design of the shower and bathing facilities constituted a dangerous or defective condition of the public building that the defendant had a duty to alter or modify with safety devices.

And, in *Sewell, supra*, this Court reversed summary disposition in favor of the defendant Southfield Public

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[34] *Hickey*, 439 Mich at 423 (opinion by BRICKLEY, J.).

[35] *de Sanchez*, 455 Mich at 96.

Schools, where the minor plaintiff suffered a spinal cord injury after diving into a shallow pool at the high school, holding that the plaintiff created a question of fact regarding the existence of an actual defect in the pool. We examined the intended use of the pool, and held that diving, and not just swimming, was an intended use. Second, we held that the plaintiffs' allegations of faulty construction and improper design sufficiently alleged an actual defect. These defects included an uneven pool floor and mismarked depth markers. The plaintiffs' experts opined about the poor design and layout of the pool, claiming that there was a design failure. We disagreed with the lower courts that this was merely a case of improper supervision.

In light of our foregoing analysis of the public building exception, we disavow the dicta in earlier decisions from this Court such as in *Bush* and *Reardon*, and any dicta from Court of Appeals decisions, suggesting that a design defect claim falls within the plain language of the provision. Also, we overrule any cases such as *Sewell* and *Williamson* that can be construed to stand for the proposition that design defects fall within the public building exception.[36]

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[36] To the extent that it overrules *Sewell*, our decision today does not contravene the policy considerations that underpin the doctrine of stare decisis. See *Robinson*, *supra*. First, without question, *Sewell* relied on dicta originating in *Bush* that was clearly inconsistent with the plain language of the statute. This explains why the dissent treats the duty of safe design as "implicit" in the statute rather than "explicit" because that duty is nowhere to be found in the actual words. *Post* at 509, 515. Therefore, we are faithfully discharging our judicial responsibility by accurately interpreting and applying the statutory language in this case. Also, we are largely disavowing dicta rather than overruling prior established cases. We will not elevate dicta above the plain language of a statute. See *Hanson,* 465 Mich at 501 n 7. And, by repudiating dicta that is patently contrary to the statutory language, we are simply enforcing the plainly expressed intent of the Legislature.

IV. APPLICATION

Returning to the facts of this case, plaintiff alleges that she was injured by a dangerous or defective condition of the rest area building. She argues that the absence of gutters and downspouts, among other defects in the building, permitted an unnatural accumulation of snow and ice on the sidewalks in front of an entranceway and created slippery, hazardous conditions for members of the public. Consistent with today's decision, to the extent that plaintiff's claim is premised on a design defect of a public building, it is barred by governmental immunity. However, plaintiff also alleged that MDOT failed to repair and maintain the rest area building.[37] Indeed, there is record evidence suggesting that the rest area building was once equipped with

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Second, the practical workability of a design defect claim has elsewhere been called into question by this Court. A majority of this Court (which included the dissenting justice) noted that "whether a design defect may actually constitute a defect in a public building sufficient to invoke the public building exception has caused this Court considerable difficulty." *de Sanchez*, 455 Mich at 96. Third, turning to the question of reliance interests, it is hard to imagine that overruling *Sewell* and precluding design defect claims will be so jarring as to create practical, real-world dislocations. *Robinson*, 462 Mich at 466-467. Finally, contrary to what the dissent claims, there have been substantial changes in the law since *Bush* was decided, which undercuts the notion that *Bush* has functioned as an integral part of our jurisprudence for 28 years. As we discussed earlier, subsequent cases from this Court have undermined *Bush* and its progeny, including *Sewell*. See *Fane, supra*; *Hanson, supra*; *Nawrocki, supra*; *Ross, supra.* The dissent's correct assertion that *Hanson* dealt with a different portion of the governmental tort liability act and its belief that *Hanson* was wrongly decided misses the larger point that the law of governmental immunity has *significantly* changed since *Bush* was decided.

[37] For instance, her complaint alleged:

> 11. This accumulation of ice and snow occurred as a result of the defective condition of the roof of the building located immediately above this entrance/exit way to the building. By way of illustration, not limitation, these defective conditions include the

gutters and downspouts. Although we do not pass judgment on the legal viability of plaintiff's claim or whether her claim may ultimately proceed to trial, plaintiff sufficiently pleaded in avoidance of governmental immunity. Accordingly, we remand to the Court of Claims to determine whether plaintiff's suit may proceed with respect to the alleged failure to repair and maintain the public building.

V. CONCLUSION

We hold that design defect claims are not cognizable under the unambiguous, plain language of the public building exception, which refers only to the governmental agency's duty to "repair and maintain" the public building. Therefore, while we affirm the Court of Appeals reversal of summary disposition in favor of MDOT, we reverse the Court of Appeals holding that design defects are actionable under the public building exception, and we remand the case to the Court of Claims for further proceedings consistent with this decision.

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

WEAVER, J. (*concurring in the result only*). I concur only in the result reached by the majority to affirm the Court of Appeals reversal of summary disposition in

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failure to install *and maintain* gutters and downspouts to redirect melting snow and ice on the roof above the entrance/exit away from the walkway.

* * *

19. Defendant breached this statutory duty [MCL 691.1406] by designing, constructing, *keeping and/or maintaining* the restroom building described herein which had dangerous and/or defective conditions . . . .

favor of defendant Michigan Department of Transportation and to remand this case to the Court of Claims for further proceedings on the basis that plaintiffs' complaint alternatively alleged that defendant failed to "repair and maintain" a public building pursuant to MCL 691.1406.[1]

Because a majority of this Court has concluded that plaintiffs' complaint adequately alleged a claim against defendant for injuries plaintiff Karen Renny sustained as a result of defendant's failure to "repair and maintain" the rest area building, this Court need not address the issue whether plaintiffs could also pursue a claim for defective building design. In this respect, our order[2] granting leave to appeal and requesting the parties to address this issue was unnecessary and improvident. Moreover, any commentary by the majority on the question of defective building design is obiter dictum.

Thus, because the Court can decide this case without resorting to consideration of whether recovery is available under MCL 691.1406 for a plaintiff who alleges that injuries occurred as a result of a defectively designed public building, I would leave for another day consideration of the question whether recovery is available on the basis of defective design.

KELLY, J. (*concurring in part and dissenting in part*). I believe that the public building exception to govern-

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[1] MCL 691.1406 provides, in pertinent part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

[2] *Renny v Dep't of Transportation,* 477 Mich 958 (2006).

mental immunity[1] extends to the design of public buildings. The duty of safe design is implicit in the duty to maintain safe buildings. This interpretation of the public building exception is consistent with longstanding precedent of this Court. The Court should not disturb it.

THE PUBLIC BUILDING EXCEPTION TO GOVERNMENTAL IMMUNITY

The public building exception to governmental immunity, MCL 691.1406, states, in relevant part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

It is undisputed that the statute imposes on governmental agencies the duty to "repair and maintain" public buildings.

Accordingly, it defies logic that a governmental agency would be required to maintain a dangerously designed building and be exempted from liability for harm to the public caused by the building's design. It must be presumed that the Legislature intended that the design of public buildings should not cause injury to people. Accordingly, I would hold that the duty to "repair and maintain" public buildings necessarily includes the duty to design safe public buildings.

MICHIGAN CASELAW ADDRESSING DESIGN DEFECT CLAIMS

My interpretation is consistent with longstanding precedent of this Court. See *Bush v Oscoda Area Schools*,

[1] MCL 691.1406.

405 Mich 716; 275 NW2d 268 (1979), *Reardon v Dep't of Mental Health*, 430 Mich 398; 424 NW2d 248 (1988), and *Sewell v Southfield Pub Schools*, 456 Mich 670; 576 NW2d 153 (1998). However, today the majority overturns this precedent. Not only do I find unpersuasive the majority's attempt to dismiss the holding in *Bush* as dictum, but I disagree that *Bush, Reardon,* and *Sewell* should be overturned.

BUSH v OSCODA AREA SCHOOLS

The issue in *Bush*, among others, was whether the defendant public school district, its superintendent, a principal, and a classroom teacher were liable under the public building exception. *Bush*, 405 Mich at 724-725. The plaintiff high school student was enrolled in an introductory physical science class. *Id.* at 725. Although the class regularly met in a chemical laboratory equipped with safety features, because of increased enrollment, it met in a nonlaboratory room. *Id.* The temporary classroom lacked gas lines and gas-fired burners. *Id.* at 726. The students had to fill portable alcohol burners at a counter and carry them to and from their desks. *Id.* It was while the plaintiff student was returning her burner to the counter that an explosion occurred and she was enveloped in flames, suffering severe burns.

During the lawsuit that followed, the plaintiffs alleged that the temporary laboratory was dangerous and defective because of the improper design of the room *and* the absence of safety devices. *Id.* at 730-731. In order to determine whether the plaintiffs' complaint was within the public building exception to governmental immunity, it was necessary to interpret MCL 691.1406. Writing for the Court, Justice CHARLES LEVIN stated:

> We construe the defective building provision as we have the defective highway provision. Governmental agencies are subject to liability for a dangerous or defective condition of a public building without regard to whether it arises out of a failure to repair and maintain.
>
> As in the highway cases, a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices. [*Bush*, 405 Mich at 730.]

On the basis of its interpretation of the statute, the *Bush* Court concluded that the plaintiffs' complaint had sufficiently stated a claim upon which relief could be granted. *Id.* at 733. The Court remanded the case to the trial court. *Id.* It was left to the trier of fact the determination whether, among other things, the classroom was defective when used as a physical science laboratory. *Id.* at 732. Integral to the holding was *Bush*'s determination that a public building may fall within the exception to governmental immunity as dangerous or defective because of improper design. Therefore, the language cited from *Bush* was, by definition, not dicta and constitutes binding precedent.

For the past 28 years, our courts have relied on that reasoning from *Bush*. In the years immediately following *Bush*, the Michigan Court of Appeals cited the case numerous times for the proposition that a design defect claim is actionable under the public building exception to governmental immunity. See *Lee v Highland Park School Dist*, 118 Mich App 305, 309; 324 NW2d 632 (1982); *Young v City of Ann Arbor*, 119 Mich App 512, 520-521; 326 NW2d 547 (1982); *Landry v Detroit*, 143 Mich App 16, 22; 371 NW2d 466 (1985).

REARDON v DEP'T OF MENTAL HEALTH

Nine years after *Bush*, in *Reardon,* this Court once again analyzed MCL 691.1406. *Reardon,* 430 Mich at

409-410. It considered carefully the first sentence of the statute, imposing a duty to "repair and maintain public buildings." *Id.* at 410. It explicitly reaffirmed the holding in *Bush* that a building may be defective because of improper design. *Id*. With regard to the second sentence of the statute, the Court held that the phrase "dangerous or defective condition of a public building" showed that the Legislature intended that the exception apply in cases where the physical condition of a building causes injury. *Id.* at 411.

The *Reardon* Court specifically noted that its holding was consistent with *Bush*: "As long as the danger of injury is presented by a physical condition of the building, it little matters that the condition arose because of improper design, faulty construction, or absence of safety devices." *Id.* at 410. Therefore, when this Court had the opportunity to reexamine its interpretation of MCL 691.1406, it reaffirmed the holding in *Bush* that defective design is actionable under the public building exception to governmental immunity.

WILLIAMSON v DEP'T OF MENTAL HEALTH[2]

In *Williamson v Dep't of Mental Health*, the Court of Appeals cited *Bush* for the proposition that a building may be dangerous for the purpose of MCL 691.1406 because of improper design, faulty construction, or the absence of safety devices.[3] The panel affirmed the trial court's finding that the building exception applied where the shower and bathing facilities of the building in question had been improperly designed. *Williamson,* 176 Mich App at 758-760.

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[2] 176 Mich App 752, 757; 440 NW2d 97 (1989).

[3] *Williamson,* 176 Mich App at 757, noted that *Reardon* reiterated this principle.

SEWELL v SOUTHFIELD PUB SCHOOLS

In *Sewell,* this Court again stated that a building may be dangerous or defective because of improper design.[4] We held that the grant of summary disposition to the defendant was improper because the plaintiff had sufficiently alleged a dangerous condition arising from faulty construction and improper design. *Sewell,* 456 Mich at 671-672.[5]

Therefore, the frequently repeated proposition that design defect claims fall within the public building exception to governmental immunity has become a bedrock of Michigan jurisprudence. The majority distracts attention from this fact by citing cases that this Court resolved without determining whether there was a design defect. See *Hickey v Zezulka (On Resubmission)*, 439 Mich 408; 487 NW2d 106 (1992); *de Sanchez v Michigan Dep't of Mental Health*, 455 Mich 83; 565 NW2d 358 (1997); *Johnson v Detroit*, 457 Mich 695; 579 NW2d 895 (1998).

However, in none of those cases did this Court overrule *Bush* or *Sewell* and hold that design defects do not fall within the public building exception. Rather, two of them, *Hickey* and *Johnson,* cited *Bush* for the proposition that a building may be defective because of improper design. *Hickey*, 439 Mich at 422; *Johnson*, 457 Mich at 704. This Court in *de Sanchez* noted that it is an "oft-cited proposition that a public building may be dangerous or defective because of its improper de-

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[4] *Sewell*, 456 Mich at 675, cited *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 422; 487 NW2d 106 (1992), which quoted *Bush* for the proposition that a public building may be dangerous or defective because of improper design.

[5] *Sewell* has been relied on for the proposition that a building may be dangerous or defective because of improper design, faulty construction, or the absence of safety devices. See *Kruger v White Lake Twp*, 250 Mich App 622, 626; 648 NW2d 660 (2002).

sign[.]" *de Sanchez*, 455 Mich at 96.[6] Moreover, *Hickey* and *de Sanchez* were decided before *Sewell*. If there had been any question about whether a design defect claim could be brought under the public building exception, *Sewell* resolved it.

Also, it should be noted that, had the Legislature disagreed with this Court's interpretation of MCL 691.1406, it had many years to amend the language of the statute. Its failure to do so suggests that the Legislature's intent was that a design defect claim be actionable under the public building exception to governmental immunity.[7]

THE *ROBINSON*[8] FACTORS

Because it erroneously characterizes the holding in *Bush* as dictum, the majority finds no need to consider the factors set forth in *Robinson* for deciding whether to overturn *Bush*. *Robinson,* 462 Mich at 464. But *Bush*'s holding that design defects are actionable under the public building exception was not dictum. Therefore, I will now review the *Robinson* factors.

The first consideration is whether the earlier decision was wrongly decided. *Robinson*, 462 Mich at 464. I

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[6] Although it is true that this Court opined in *de Sanchez* that the proposition has caused this Court difficulty, we did not disavow the proposition in that case. Rather, we noted that it was inapplicable to the facts before us.

[7] The majority, once again, takes issue with my use of the doctrine of legislative acquiescence. However, as I have previously noted, legislative acquiescence is a valid judicial tool for statutory interpretation. *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 53-54; 732 NW2d 56 (2007) (KELLY, J., dissenting); see also *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 259-264; 731 NW2d 41 (2007) (KELLY, J., concurring in part and dissenting in part). Merely because some members of the Court will not use it does not render it unusable.

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

believe it was not. As discussed above, implicit in a duty to "maintain and repair" a public building is a duty to properly design the building. Therefore, I believe that *Bush* properly interpreted the public building exception as including a duty to design public buildings to be safe. Moreover, the Legislature has acquiesced in *Bush*'s interpretation of MCL 691.1406. This suggests that *Bush* correctly interpreted the statute to mean that a design defect claim is actionable.

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 changes in the law or facts make the decision no longer justified. *Robinson*, 462 Mich at 464.

Bush does not defy practical workability. Rather, it has functioned as an integral part of our governmental immunity jurisprudence for the past 28 years. Conversely, reliance interests would work an undue hardship if *Bush* were overturned. As indicated above, it is a frequently cited proposition that design defect claims fall within the public building exception.[9] Clearly, overturning *Bush* will mark a drastic shift in Michigan jurisprudence.

No changes in the law or the facts render the decision unjustified. It is true that, in deciding *Bush*, the Court relied on the structural similarity between the public building exception and the highway exception statutes. *Bush*, 405 Mich at 730. It is also true that the Court in *Hanson v Mecosta Co Rd Comm'rs,* 465 Mich 492, 502; 638 NW2d 396 (2002), held that the highway exception does not include a duty to design or correct defects arising from the original design of highways. However, *Hanson* is not on point with this case. *Hanson* con-

[9] See *Lee, supra*; *Young, supra*; *Landry, supra*; *Reardon, supra*; *Williamson, supra*; *Hickey, supra*; *Kruger, supra*; and *Sewell, supra*.

cerned the highway exception, whereas this case concerns the public building exception. Especially considering that *Hanson,* in my estimation, was incorrectly decided, its holding should not be extended to the public building exception.[10]

The majority also claims that *Bush* has been undermined by subsequent decisions of this Court. The majority notes that *Bush* was succeeded by *Ross v Consumers Power Co (On Rehearing)*,[11] which altered the way this Court construes the governmental immunity statute. However, *Ross* did not overrule *Bush*. Moreover, *Reardon* and *Sewell* were decided after *Bush* and *Ross*. Neither *Reardon* nor *Sewell* determined that *Ross* affected *Bush*'s holding that defective designs are actionable under the public building exception. In fact, *Reardon* quoted *Ross* in order to explain the Legislature's rationale for enacting the governmental immunity act. *Reardon,* 430 Mich at 408. *Reardon* then reiterated the *Bush* holding that defective designs are actionable under the public building exception.

The majority also contends that *Fane v Detroit Library Comm*[12] undermines *Bush*. However, nothing in *Fane* undermines *Bush*'s holding that design defects are actionable under the public building exception. *Fane* interpreted the meaning of the phrase "of a building" in the public building exception. *Fane,* 465 Mich at 77-78. *Fane* did not interpret the phrase "repair and maintain."

CONCLUSION

I agree with the majority's decision to remand this case to the Court of Claims for further proceedings with

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[10] I would also note that I dissented in *Hanson*, and I continue to believe that *Hanson* was incorrectly decided.

[11] 420 Mich 567; 363 NW2d 641 (1984).

[12] 465 Mich 68; 631 NW2d 678 (2001).

regard to plaintiffs' claim that defendant failed to properly repair and maintain the public building.

But I would reaffirm the longstanding precedent of this Court that design defects are actionable under the public building exception to governmental immunity, MCL 691.1406. A duty to design safe public buildings is implicit in a duty to repair and maintain them. This interpretation of MCL 691.1406 is consistent with this Court's longstanding precedent and, as demonstrated by a review of the *Robinson* factors, should not be overruled.

CAVANAGH, J., concurred with KELLY, J.

CITY OF SOUTH HAVEN
v VAN BUREN COUNTY BOARD OF COMMISSIONERS

Docket No. 131011. Argued April 11, 2007 (Calendar No. 8). Decided July 11, 2007.

The city of South Haven brought an action in the Van Buren Circuit Court against the Van Buren County Board of Commissioners, the Van Buren County Board of County Road Commissioners, and the Van Buren County Treasurer, alleging that the defendants had breached their duty under MCL 224.20b to properly distribute millage revenues that had been levied for construction, maintenance, and repair of county roads after the city, which has no county roads, received none of the revenues. The trial court, William C. Buhl, J., granted the defendant's motion for summary disposition, ruling that the Tax Tribunal had exclusive jurisdiction of the case and that the plaintiff was not entitled to a portion of the road millage revenues. The Court of Appeals, BANDSTRA, P.J., and WHITE and HOOD, JJ., reversed the trial court's ruling that the Tax Tribunal had exclusive jurisdiction over the case and held that jurisdiction was proper in the circuit court. The panel held that the requirement to distribute funds to cities and villages could be avoided only if the cities and villages and the county road commission formed an agreement in accordance with MCL 224.20b(2). Because there was no such agreement, the Court held that the trial court had erred and the funds did need to be allocated as provided in the statute. The Court noted that it would be unlawful to use revenues approved by the voters for a specific purpose for some other purpose and, therefore, did not order restitution. The Court remanded the matter to the trial court for further proceedings consistent with its opinion. 270 Mich App 233 (2006). The board of county commissioners and the county treasurer sought leave to appeal. The Supreme Court granted their application for leave to appeal, limited to the issue whether the plaintiff was entitled to any of the millage proceeds. 477 Mich 958 (2006).

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

The part of the Court of Appeals judgment that held that the millage proposal in this case violated the provisions of MCL

224.20b must be affirmed. The part of the judgment and the order remanding the matter to the trial court must be reversed because, under the facts presented, the plaintiff is not entitled to any of the remedies it seeks.

1. The formula for allocating funds provided in MCL 224.20b(2) is mandatory and provides that taxes collected under its auspices must be allocated in conformity with the formula unless the cities and villages reach an agreement with the board of county road commissioners to allocate the funds in a different manner. The defendants violated the statute because the tax levies received were not allocated in conformity with the formula and no agreement to allocate the funds in a different manner existed.

2. Every tax millage, whether general or specific, established under MCL 224.20b must comply with the allocation formula established in the statute.

3. MCL 224.20b does not provide a remedy of restitution if a board of county commissioners violates its statutory obligations.

4. MCL 224.30 permits the Attorney General to file suit to address a violation of MCL 224.20b. The plaintiff's statutorily provided remedy is through the Attorney General.

5. A writ of mandamus is not appropriate in this matter to compel the defendants to allocate the funds in accordance with the statutory formula because the plaintiff is not entitled to receive any of the funds since the voters did not approve funds that were to be allocated for city roads.

6. The plaintiff has not shown that an actual controversy exists with regard to its entitlement to proceeds from future millages. Therefore, the plaintiff does not have standing to bring an action for a declaratory judgment.

Justice WEAVER, concurring, concurred in the result reached by the majority, which affirmed in part and reversed in part the judgment of the Court of Appeals, and joined in parts I, II, and III of the majority opinion. Under the facts of this case, no remedy exists for the plaintiff. MCL 224.20b does not provide a remedy, and a court cannot order a distribution of funds in a manner contrary to that statute. Injunctive relief is not available, because the funds have been expended, and MCL 211.24f does not allow such funds to be used for a purpose not approved by the voters of the county.

Affirmed in part and reversed in part.

Justice CAVANAGH, concurring in part and dissenting in part, agreed that the ballot proposal violated the allocation provisions of MCL 224.20b and thus joined parts I, II, and III of the majority

opinion. However, he dissented from parts IV and V and would not reach the issue of available remedies for the statutory violation because the lower courts have yet to address it. He would remand the case to the trial court for consideration of whether any of the plaintiff's claims can survive the defendants' motion for summary disposition in light of the Supreme Court ruling.

Justice KELLY, concurring in part and dissenting in part, agreed that the millage proposals under consideration violated MCL 224.20b, but disagreed that no remedy exists for the violations in light of the fact that the trial court could issue an order of mandamus if the plaintiff is entitled to relief. Justice KELLY also disagreed that the millage revenues were properly distributed when, although they were spent in accordance with the millage proposals, they were distributed in violation of the statute. That the millage proposals complied with MCL 211.24f does not excuse the violation of MCL 224.20b. The judgment of the Court of Appeals should be affirmed, and the case should be remanded for the trial court to set aside its denial of the plaintiff's motion for summary disposition and proceed with the case.

1. HIGHWAYS — COUNTIES — MILLAGES — ALLOCATION AND DISTRIBUTION.

Revenues derived from a tax levy by a county for highway, road, and street purposes may not be distributed inconsistently with the statutory formula for allocation of such revenue without the agreement of the governing bodies of the affected cities and villages and the board of county road commissioners. (MCL 224.20b[1], [2]).

2. HIGHWAYS — COUNTIES — MILLAGES — STATUTORY VIOLATIONS — REMEDIES.

The Attorney General is authorized to file a lawsuit to address a violation of the provisions of the statute governing distribution of revenues derived from a tax levy by a county for highway, road, and street purposes; a local governmental entity is not authorized to file such a lawsuit (MCL 224.20b, 224.30).

Law, Weathers & Richardson, P.C. (by *Michael J. Roth*), for the city of South Haven.

Schuitmaker, Cooper, Schuitmaker & Cypher, P.C. (by *Harold Schuitmaker* and *M. Brian Knotek*), for the Van Buren County Board of Commissioners and the Van Buren County Treasurer.

PER CURIAM. At issue in this case is whether defendants violated MCL 224.20b by presenting and securing voter approval of a road millage proposal and, if so, what remedy is available. We affirm the Court of Appeals decision that the millage proposal in this case violated the allocation provisions of MCL 224.20b, but reverse the Court of Appeals order remanding the case because, under the facts presented, plaintiff is not entitled to any of the remedies it seeks.

I

The statute at issue in this case is MCL 224.20b,[1] which permits county boards of commissioners to propose tax levies, also known as millage proposals, for roads and bridges, but requires the proceeds of such a

[1] MCL 224.20b reads:

(1) Notwithstanding any other provision of this act, the board of commissioners of any county by proper resolution may submit to the electorate of the county at any general or special election the question of a tax levy for highway, road and street purposes or for 1 or more specific highway, road or street purposes, including but not limited to bridges, as may be specified by the board.

(2) Unless otherwise agreed by the governing bodies of the cities and villages and the board of county road commissioners the revenues derived from the tax levy authorized by this section shall be allocated and distributed by the county treasurer as follows:

(a) To the county road fund:

(i) A percentage of the total revenues equal to the proportion that the state equalized valuation of the unincorporated area of the county bears to the total state equalized value of the county.

(ii) A percentage of the remainder of the revenues equal to the proportion that the county primary road mileage within cities and villages bears to the total of the city and village major street mileage in the county plus the county primary road mileage within cities and villages in the county. The mileages to be used are the most recent mileages as certified by the state highway commission.

levy to be distributed to cities and villages for their roads, as well as to the county, according to a specific formula unless the governing boards of the cities and villages agree with the county to a different distribution. The statute also expressly states that proposals must conform to this distribution requirement and unless they do, they are not properly before the voters.

Despite this fund distribution requirement, the voters of Van Buren County in 2003 were presented with and approved a road millage that had no provision for distributing funds to cities and villages. It simply gave one mill for five years to the Van Buren County Road Commission to repair and reconstruct county roads,[2] with no mention of city or village roads. No city or

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(b) The remaining revenues shall be distributed to the cities and villages in the proportion that the state equalized valuation of each bears to the total state equalized valuation of the incorporated areas of the county.

(3) The revenues allocated to the cities and villages shall be expended exclusively for highway, road and street purposes. The revenues allocated to the county road fund shall be expended by the board of county road commissioners exclusively for highway, road and street purposes.

(4) Notwithstanding the provisions of section 22 of this chapter, section 7 of Act No. 156 of the Public Acts of 1851, as amended, being section 46.7 of the Compiled Laws of 1948, or section 1 of Act No. 28 of the Public Acts of 1911, being section 141.71 of the Compiled Laws of 1948, a board of county commissioners shall not submit to the electorate of the county the question of a tax levy for any highway, road or street purpose, including but not limited to bridges, nor submit the question of borrowing money for any such purpose, to be voted upon at any election held on or after September 1, 1971 unless the revenues or proceeds are allocated and distributed in the same manner as the revenues derived from a tax levy authorized by this section.

[2] The millage proposal read:

village objected even though the statutory requirements in MCL 224.20b had not been followed. Moreover, going back to 1978, six other millages with the same flaw—no distribution provision—had been approved in six separate elections, and the funds derived had also been used exclusively by the Van Buren County Road Commission for the purpose of maintaining and repairing primary county roads and local county roads. Because plaintiff city of South Haven had no county roads within its municipal limits, it did not receive any of the funds from the six millages for road building and repair.

However, in 2004, South Haven for the first time objected to the county's failure to allocate to it any of the millage proceeds. It brought a five-count complaint, alleging that the defendants violated MCL 224.20b and seeking a constructive trust, restitution of plaintiff's portion of the tax levies plus interest and costs, an order of mandamus requiring defendants to remit the money owed to plaintiff, and a declaratory judgment that plaintiff is entitled to its portion of the tax levies in the future.

Both the city and the road commission moved for summary disposition. The trial court first found that the Michigan Tax Tribunal had exclusive jurisdiction, and therefore granted the road commission's motion under MCR 2.116(C)(4). It nonetheless went on to also find that the road commission was not a proper party because it owed no duty to the city, and that the

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Shall there be an additional one (1) mill levy in the amount of one (1) dollar per thousand dollars of the state equalized valuation for the property in Van Buren County, for a period of five (5) years, to be used by the Van Buren County Road Commission specifically for the purpose of repair and reconstruction of primary county roads and local county roads of Van Buren County?

allocation formula in MCL 224.20b(2) was inapplicable as a matter of law because the ballot language clearly indicated that only the county would get the funds.

The Court of Appeals reversed much of this decision.[3] First, it held that jurisdiction was proper in the circuit court, not the Tax Tribunal, because the case did not involve assessment, valuation, rates, special assessments, allocation, equalization, a refund, or a redetermination of a tax. Second, the Court agreed that the road commission was not a proper party because it played no role in the alleged misallocation of the funds; its role was merely ministerial and thus summary disposition in its favor was proper. Finally, the panel concluded that, contrary to the county's argument that the specificity of the millage proposal eliminated the need to allocate funds to cities and villages, the requirement of subsection 2 to distribute funds to cities and villages could only be avoided if an agreement was formed between the cities and villages and the county road commission in accordance with MCL 224.20b(2). Because there was no such agreement, the Court of Appeals concluded that the trial court had erred and funds did need to be allocated as provided in the statute.[4] However, the panel stopped short of ordering restitution, noting that "using revenues approved by the voters for a specific purpose for some other purpose would be unlawful."[5] Having pointed out the conundrum, the Court of Appeals then remanded to the trial court "for further proceedings consistent with this opinion."[6]

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[3] *South Haven v Van Buren Co Bd of Comm'rs*, 270 Mich App 233; 715 NW2d 81 (2006).

[4] *Id.* at 242-243.

[5] *Id*. at 245 n 4.

[6] *Id.* at 246-247.

This Court granted leave to appeal, limited to consideration of whether the city was entitled to any of the tax proceeds. Specifically, we ordered the parties to address whether the ballot proposal violated the statute and, if so, what remedy might be available, and whether the parties by their conduct "otherwise agreed" to a different allocation than that required by statute.[7]

II

This case requires us to interpret the language set forth in MCL 224.20b. This Court reviews de novo questions of statutory construction.[8] Unambiguous statutes are enforced as written.[9]

III

MCL 224.20b establishes a mandatory system for the collection and allocation of taxes levied under that statute, unless otherwise agreed to by the relevant cities and villages. MCL 224.20b(1) states:

> Notwithstanding any other provision of this act, the board of commissioners of any county by proper resolution may submit to the electorate of the county at any general or special election the question of a tax levy for highway, road and street purposes or for 1 or more specific highway, road or street purposes, including but not limited to bridges, as may be specified by the board.

This subsection permits the county board to submit for voter approval a millage "for highway, road and street purposes or for 1 or more specific highway, road or street purposes . . . ." MCL 224.20b(2) states:

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[7] 477 Mich 958 (2006).

[8] *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

[9] *Id*.

> Unless otherwise agreed by the governing bodies of the cities and villages and the board of county road commissioners the revenues derived from the tax levy authorized by this section shall be allocated and distributed by the county treasurer as follows . . . .

The statute then specifies a formula for the allocation of funds collected.[10] MCL 224.20b(2) indicates that all funds collected under the statute "*shall* be allocated" according to the delineated formula, "[u]nless otherwise agreed by the governing bodies of the cities and villages . . . ." (Emphasis added.) The term "shall" indicates that the formula for allocating funds is mandatory. Finally, MCL 224.20b(4) emphasizes and underscores the mandatory nature of the allocation formula established in subsection 2:

> [A] board of county commissioners *shall not* submit to the electorate of the county the question of a tax levy for any highway, road or street purpose, including but not limited to bridges, nor submit the question of borrowing money for any such purpose, to be voted upon at any election held on or after September 1, 1971 *unless* the

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[10] MCL 224.20b(2) states that funds must be allocated:

> (a) To the county road fund:
>
> (i) A percentage of the total revenues equal to the proportion that the state equalized valuation of the unincorporated area of the county bears to the total state equalized value of the county.
>
> (ii) A percentage of the remainder of the revenues equal to the proportion that the county primary road mileage within cities and villages bears to the total of the city and village major street mileage in the county plus the county primary road mileage within cities and villages in the county. The mileages to be used are the most recent mileages as certified by the state highway commission.
>
> (b) The remaining revenues shall be distributed to the cities and villages in the proportion that the state equalized valuation of each bears to the total state equalized valuation of the incorporated areas of the county.

> revenues or proceeds are allocated and distributed in the same manner as the revenues derived from a tax levy authorized by this section. [Emphasis added.]

Thus, the statute requires that taxes collected under its auspices be allocated in conformity with the formula established in MCL 224.20b(2), unless the cities and villages reach an agreement with the board of county road commissioners to allocate the funds in a different manner.

Because defendants never allocated the tax levies received in accordance with the requirements of MCL 224.20b, and no agreement existed between the cities and villages and the board of county road commissioners, defendants violated MCL 224.20b.

Defendants argue that only "general" road millages are subject to allocation and distribution in accordance with the statute. However, MCL 224.20b(1) applies to millages "for highway, road and street purposes on for 1 or more *specific* highway, road or street purposes . . . ." (Emphasis added.) The statute's references to highway, road, and street purposes indicate that tax levies for "general" or for "specific" highway, road, and street purposes are subject to the requirements of MCL 224.20b. Nothing in the remainder of the statute alters these requirements: subsection 3 says that the proceeds must be used "exclusively for highway, road and street purposes" and subsection 4 reiterates and emphasizes that millage proposals must conform to the allocation formula set forth in subsection 2, without distinguishing between general and specific projects.

Defendants also argue that the term "any" in the phrase "for any highway, road or street purpose" in MCL 224.20b(4) indicates that only tax levies for "general" purposes must follow the statutory requirements. "Any" is defined as "every; all." *Random House Web-*

ster's College Dictionary (1997). Contrary to defendants' argument, the term "any" indicates that every tax millage —whether "general" or "specific"—established under MCL 224.20b must comply with the allocation formula established in that statute.

Accordingly, the language of the statute clearly states that counties must either allocate proceeds in accordance with the formula or get the local governing bodies to agree to a different distribution. " 'If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.' "[11] The phrasing of the ballot proposal is irrelevant to these statutory responsibilities and cannot be a vehicle for avoiding their application.

IV

Although defendants violated their statutory duty under MCL 224.20b, at issue in this case is whether the city is entitled to any relief for these statutory violations. In this case, we conclude that the city is not entitled to restitution. "It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers."[12] To determine whether a plaintiff may bring a cause of action for a specific remedy, this Court "must determine whether [the Legislature] intended to create such a

[11] *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 772; 664 NW2d 185 (2003) (citation omitted). Justice KELLY criticizes this opinion for "refus[ing]" to enforce the statute. *Post* at 538. However, as explained *infra*, MCL 224.20b does not permit plaintiff to pursue the remedies sought. Consequently, this Court is not "refusing" to enforce the statute; rather, this Court is enforcing the Legislature's decision to limit the remedies available for a violation of MCL 224.20b.

[12] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 n 5; 642 NW2d 663 (2002).

cause of action."[13] " ' "Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." ' "[14] Accordingly, this Court has previously declined to establish a remedy that the Legislature has not provided.[15]

In this case, MCL 224.20b does not provide a remedy of restitution if a board of county commissioners violates its statutory obligations. The Legislature's decision not to specify such a remedy suggests that the Legislature did not intend to allow plaintiff to seek restitution for a violation of MCL 224.20b. This conclusion is buttressed by MCL 224.30, which states:

> (1) If an audit or investigation conducted under this act discloses statutory violations on the part of an officer, employee, or board of a county road commission, a copy of the report shall be filed with the attorney general who shall review the report and cause to be instituted a proceeding against the officer, employee, or board as the attorney general deems necessary.
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> * * *
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> (3) The attorney general or the prosecuting attorney shall institute civil action in a court of competent jurisdiction for the recovery of public moneys disclosed by an examination to have been illegally expended or collected

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[13] *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 496; 697 NW2d 871 (2005).

[14] *McClements v Ford Motor Co*, 473 Mich 373, 382; 702 NW2d 166 (2005), quoting *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich 41, 45; 559 NW2d 297 (1997), quoting *Lafayette Transfer & Storage Co v Pub Utilities Comm*, 287 Mich 488, 491; 283 NW 659 (1939).

[15] See, e.g., *Office Planning Group*, *supra*; *Jones v Dep't of Corrections*, 468 Mich 646; 664 NW2d 717 (2003); *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

> and not accounted for and for the recovery of public property disclosed to have been converted and misappropriated.

MCL 224.30 permits the Attorney General to file suit for a statutory violation of the county road law, and to seek "recovery of public property" that has been "misappropriated." Because the Legislature specifically authorized the Attorney General to bring a civil suit to recover "misappropriated" funds, but did not authorize plaintiff to bring a similar suit, MCL 224.30 indicates that the Legislature did not intend to allow plaintiff to pursue the remedy of restitution. " ' "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute . . . ." ' "[16] Rather, plaintiff's statutorily provided remedy is through the Attorney General.

Because nothing in the statute indicates any legislative intent to allow plaintiff to pursue a claim for restitution of misallocated funds, and the Legislature explicitly granted such authority to the Attorney General alone,[17] plaintiff cannot seek restitution of the

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[16] *People v Anstey*, 476 Mich 436, 444; 719 NW2d 579 (2006), quoting *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006), quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Moreover, other provisions of the county road law allow a plaintiff to bring suit for violations of specific statutes. See MCL 224.21(3) (specifying how a private party may bring a suit when a county violates its statutory duties under MCL 224.21[2]); MCL 224.18(13) to (19) (specifying how suit may be brought and what relief is available for a violation of MCL 224.18[12]). These statutes further suggest that the Legislature would have specified that a plaintiff may seek restitution for violations of MCL 224.20b if the Legislature had intended such a result.

[17] Justice KELLY contends that MCL 224.30 is "inapplicable" because "no audit or investigation revealed any statutory violations," and hence "there was no need for the Attorney General to institute proceedings under MCL 224.30." *Post* at 542. However, Justice KELLY ignores the fact that by granting only the Attorney General the power to seek restitution

misallocated funds in this case. We decline to permit plaintiff to pursue a remedy that the Legislature did not intend to allow because "[t]o do otherwise would be an exercise of *will* rather than *judgment*."[18]

However, although plaintiff may not seek restitution, this Court has permitted a plaintiff to seek injunctive relief when a government official does not conform to his or her statutory duty to distribute funds in a specified manner.[19] Thus, two possible judicial remedies are available in a case where voters approve a ballot proposal that improperly allocates proceeds: to enjoin collection of the improper millage or to refund collected taxes to the taxpayers. These remedies would be unexceptional exercises of the power of the judiciary to give injunctive relief to prevent illegal acts.[20]

Plaintiff seeks a third possible remedy: a writ of mandamus compelling defendants to disgorge the funds and allocate them in accordance with the statutory formula. This we decline to do because the city is not entitled to receive any of the funds. Under the General Property Tax Act, MCL 211.1 *et seq*., when a millage

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of a "misappropriation" of funds under the county road law, the Legislature indicated that plaintiff cannot pursue the same remedy. The fact that previous audits may have overlooked any statutory violation is wholly irrelevant. Justice KELLY would also find that the remedy available to plaintiff is "inadequate." *Post* at 542. However, the adequacy of a specified remedy is a judgment for the Legislature, not for this Court.

[18] *People v Stevens (After Remand)*, 460 Mich 626, 645; 597 NW2d 53 (1999) (emphasis in original).

[19] See *Thomson v Dearborn*, 347 Mich 365; 79 NW2d 841 (1956) (permitting a plaintiff to seek an injunction against the misappropriation of funds); see also *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 719; 26 NW2d 569 (1947) (a provision specifying that the distribution of levied funds among units of local government was "self-executing," and therefore could be enforced by mandamus).

[20] See Const 1963, art 6, §§ 1, 4, and 13. In this case, however, the millage has already been collected and the taxpayers are not seeking a refund, so neither of these remedies is appropriate.

proposal is submitted to the electors for approval, the ballot must "fully disclose each local unit of government to which the revenue from that millage will be disbursed," and must state "[a] clear statement of the purpose for the millage."[21] This statute does not expressly preclude using for one purpose tax revenue specifically approved for a different purpose. However, a fundamental rule of statutory construction is that the Legislature did not intend to do a useless thing.[22] If funds that voters approved for the purpose stated on the ballot could be redirected to another purpose without seeking new approval, there would be no reason for including the purpose on the ballot. Indeed, voters could be lulled into voting for a millage for a popular purpose, only to have the funds then used for something they may well have never approved. This is contrary to the General Property Tax Act.[23] The voters of Van Buren County did not approve the allocation of funds for city roads, and perhaps would not have approved a proposal including that purpose. While no court has warrant to violate MCL 224.20b by ordering distribu-

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[21] MCL 211.24f(1) and (2)(d).

[22] *Girard v Wagenmaker*, 437 Mich 231, 244; 470 NW2d 372 (1991).

[23] See also *Maas v City of Mountain Home*, 338 Ark 202; 992 SW2d 105 (1999) (Where state constitution provided that tax monies levied for one purpose cannot be used for any other purpose, voters were entitled to rely on the ballot title and the levying ordinance that specified an exclusive purpose; the city's unilateral diverting of funds for another use was an illegal exaction.); *Johnstone v Thompson*, 280 Ga 611; 631 SE2d 650 (2006) (Where statute required a special purpose, tax could only be used exclusively for the specified purpose, and any other use was prohibited.); *Denham Springs Econ Dev Dist v All Taxpayers*, 894 So 2d 325, 335 (La, 2005) ("The act of presenting a proposition to the voters and the voters' acceptance of same constitutes a covenant which should be respected and upheld."); *Ouachita Parish School Bd v Ouachita Parish Supervisors Ass'n*, 362 So 2d 1138, 1143 (La App, 1978) (Where statute required the purpose of the tax to be stated in the ballot proposal, proceeds could only be expended for the stated purpose.).

tion contrary to that statute, it likewise may not violate MCL 211.24f by ordering these funds to be used for a purpose not approved by the voters.[24] Accordingly, South Haven is not entitled to receive any of the proceeds of the millage.[25]

In addition to seeking restitution, plaintiff has also sought a declaratory judgment that plaintiff is entitled to proceeds from future millages in accordance with MCL 224.20b. However, no "actual controversy" exists in this case that would permit a declaratory judgment in

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[24] The case cited by the partial dissent, *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93; 422 NW2d 186 (1988), which allows tax increment revenues to be used for purposes other than those approved by voters, does not control here. This Court expressly limited the holding in that case to the narrow issue it presented. "The particular facts of a future litigation case, or questions premised upon other constitutional provisions or questions of statutory construction not presented in the request for advisory opinion, may present different problems that are not addressed here." *Id*. at 99.

Moreover, *Advisory Opinion* is distinguishable from the instant case. *Advisory Opinion* addressed solely whether Const 1963, art 9, § 6 required that funds be spent in accordance with the underlying purpose of the applicable levy, and limited its holding to the conclusion that under Const 1963, art 9, § 6, "the Legislature retains the power to allocate tax revenues" because "[Const 1963,] art 9, § 6 does not address the question of 'purpose'; it places a limitation on the tax *rate*, not on tax revenues or their use." *Id*. at 111-112 (emphasis in original). Contrary to the constitutional provision at issue in *Advisory Opinion*, the statutory scheme at issue in this case indicates that funds derived from levies must be used for the purposes stated in the ballot. Thus, *Advisory Opinion* is distinguishable from the instant case.

[25] Justice KELLY argues that this Court may order the distribution of taxes contrary to the express purpose in a ballot measure, because "regardless of the language in the proposals, the proposals themselves were illegal." *Post* at 539. However, Justice KELLY overlooks the clear import of MCL 211.24f, which indicates that taxes levied pursuant to a millage proposal may not be spent contrary to the express will of the voters. Although Justice KELLY claims this Court is "sanction[ing]" a violation of MCL 224.20b, *post* at 539, this Court is merely recognizing that the only remedy available to plaintiff is through the Attorney General. Contrary to her argument, mandamus is not available because that remedy would require a violation of MCL 211.24f.

plaintiff's favor.[26] Because plaintiff has not shown that a millage in violation of MCL 224.20b has currently been proposed by defendants, any injury to plaintiff from potential future millages is conjectural or hypothetical, and not actual or imminent.[27] Hence, plaintiff does not have standing to bring a declaratory judgment claim.[28]

V

In conclusion, the ballot proposal approved by the voters violated MCL 224.20b because it did not conform to the statutory requirement to allocate funds according to the specified formula and no agreement existed between the local governing bodies to allocate differently. However, restitution is not available to the city because the Legislature has not permitted plaintiff to bring a claim for restitution and this Court cannot use its judicial power to provide a remedy that would itself violate the law. Moreover, because plaintiff is not threatened by an "actual or imminent" injury, plaintiff does not have standing to bring a claim for a declaratory judgment regarding future ballot proposals.[29] Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals.

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[26] MCR 2.605(A)(1) provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

[27] *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 126; 693 NW2d 374 (2005), quoting *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001).

[28] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628; 684 NW2d 800 (2004).

[29] Thus, because plaintiff does not seek an available remedy, nothing remains to be litigated on remand.

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

WEAVER, J. (*concurring*). I concur in the result reached by the majority, affirming in part and reversing in part the judgment of the Court of Appeals. I join in parts I, II, and III of the majority opinion.

Under the facts of this case, I believe that no remedy exists for the plaintiffs because MCL 224.20b does not provide for a remedy and no injunctive relief is available inasmuch as the funds at issue in this case have already been expended. No mandamus is available because the city of South Haven is not entitled to receive any of the proceeds of the millage; no court may violate MCL 224.20b and order distribution contrary to the statute. Further, no court may violate MCL 211.24f by ordering funds to be used for a purpose not approved by the voters of Van Buren County.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree that the ballot proposal violated the allocation provisions of MCL 224.20b; thus, I join parts I, II, and III of the majority opinion. However, I dissent from parts IV and V because I would not reach the issue of the remedies available for a violation of MCL 224.20b when the lower courts have not yet addressed the matter. I would remand to the circuit court to consider whether any of plaintiff's claims survive defendants' motion for summary disposition in light of our ruling.

KELLY, J. (*concurring in part and dissenting in part*). I agree with the majority that defendants' millage proposals violated MCL 224.20b. However, I disagree that no remedy exists for the violations. I would hold that an equitable remedy is available, affirm the judgment of the Court of Appeals, and remand the case to the trial court for further proceedings.

THE GOVERNING STATUTORY PROVISIONS

I begin, as is appropriate, with the language of the statute. The taxes in this case were levied under the authority of MCL 224.20b. It provides:

> (1) Notwithstanding any other provision of this act, the board of commissioners of any county by proper resolution may submit to the electorate of the county at any general or special election the question of a tax levy for highway, road and street purposes or for 1 or more specific highway, road or street purposes, including but not limited to bridges, as may be specified by the board.
>
> (2) Unless otherwise agreed by the governing bodies of the cities and villages and the board of county road commissioners the revenues derived from the tax levy authorized by this section shall be allocated and distributed by the county treasurer as follows:
>
> (a) To the county road fund:
>
> (i) A percentage of the total revenues equal to the proportion that the state equalized valuation of the unincorporated area of the county bears to the total state equalized value of the county.
>
> (ii) A percentage of the remainder of the revenues equal to the proportion that the county primary road mileage within cities and villages bears to the total of the city and village major street mileage in the county plus the county primary road mileage within cities and villages in the county. The mileages to be used are the most recent mileages as certified by the state highway commission.
>
> (b) The remaining revenues shall be distributed to the cities and villages in the proportion that the state equalized valuation of each bears to the total state equalized valuation of the incorporated areas of the county.
>
> (3) The revenues allocated to the cities and villages shall be expended exclusively for highway, road and street purposes. The revenues allocated to the county road fund shall be expended by the board of county road commissioners exclusively for highway, road and street purposes.

> (4) Notwithstanding the provisions of section 22 of this chapter, section 7 of Act No. 156 of the Public Acts of 1851, as amended, being section 46.7 of the Compiled Laws of 1948, or section 1 of Act No. 28 of the Public Acts of 1911, being section 141.71 of the Compiled Laws of 1948, a board of county commissioners shall not submit to the electorate of the county the question of a tax levy for any highway, road or street purpose, including but not limited to bridges, nor submit the question of borrowing money for any such purpose, to be voted upon at any election held on or after September 1, 1971 unless the revenues or proceeds are allocated and distributed in the same manner as the revenues derived from a tax levy authorized by this section.

Pursuant to subsection 1, the board of county commissioners can submit to the electorate a tax levy for either a specific or a general purpose. MCL 224.20b(1). The monies raised from the levy must be allocated in accordance with the formula set forth in subsection 2. MCL 224.20b(2).[1] There is no dispute that plaintiff, the city of South Haven, is a municipality for purposes of subsection 2. Hence, plaintiff was entitled to a portion of the proceeds from each of the ballot proposals.

However, without dispute, plaintiff did not receive any of the revenues generated. They were all to be used for maintaining and repairing primary and local county roads.[2] Presumably because no county roads existed

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[1] The allocation set forth in subsection 2 is applicable unless there is an agreement to the contrary among the governing bodies of the county's municipalities and the board of county road commissioners. In the instant case, there was never an agreement.

[2] The 2003 ballot proposal stated:

> Shall there be an additional one (1) mill levy in the amount of one (1) dollar per thousand dollars of the state equalized valuation for the property in Van Buren County, for a period of five (5) years, to be used by the Van Buren County Road Commission specifically for the purpose and repair and reconstruction of primary county roads and local county roads of Van Buren County?

within plaintiff's city limits, plaintiff did not receive any of the revenues.

Yet, the statutory language is unambiguous. This Court has repeatedly stated that it will enforce unambiguous statutes as written.[3] Therefore, this Court should enforce the statute and remand the case to the trial court for a determination of what portion of the revenues should have been distributed to plaintiff.

But the majority refuses to do so, even though it (1) notes that the term "shall," as used in the statute, indicates that the formula for allocating funds is mandatory, (2) states that "[t]he phrasing of the ballot proposal is irrelevant to these statutory responsibilities and cannot be a vehicle for avoiding their application," and (3) states that " ' "[i]f the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." ' " *Ante* at 528, quoting *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth,* 468 Mich 763, 772; 664 NW2d 185 (2003).

Similar ballot proposals appeared in 1978, 1980, 1984, 1988, 1994, and 1998. The amounts and the renewal periods varied.

[3] One need look no further than the instant court term to observe that this Court has repeatedly stated that it will enforce unambiguous statutes as written. See, e.g., *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007) (" 'If the statute is unambiguous it must be enforced as written.' ") (citation omitted); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007) ("When the language is unambiguous, we give the words their plain meaning and apply the statute as written."); *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) ("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."); *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007) ("If the statute is unambiguous, this Court will apply its language as written."); *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007) (" 'If the statute is unambiguous it must be enforced as written.' ") (citation omitted).

THE EFFECT OF THE LANGUAGE OF THE MILLAGE PROPOSALS

The majority sanctions defendants' unlawful diversion of funds by noting that the General Property Tax Act (GPTA), MCL 211.1 *et seq*., requires that a ballot proposal "fully disclose each local unit of government to which the revenue from that millage will be disbursed,"[4] and make "[a] clear statement of the purpose for the millage."[5] See *ante* at 531-532. The majority essentially concludes that, because the ballot proposals satisfied the GPTA, described how revenues would be distributed, and stated why the millages were being levied, the proposals trumped MCL 224.20b. I disagree.

First, as noted earlier, this Court applies unambiguous statutes as written. The Legislature provided unambiguously in MCL 224.20b the method of distribution. Second, even if the ballot proposals satisfied MCL 211.24f, they violated MCL 224.20b. Therefore, regardless of the language in the proposals, the proposals themselves were illegal. Third, as the majority acknowledges, MCL 211.24f does not preclude using tax revenues generated by a ballot proposal for purposes other than the purpose stated in the proposal. This is especially significant in situations such as the instant case, in which the ballot proposals were illegal.

This Court acknowledged in 1988 that the Legislature has the power to determine how tax revenues may be spent. In *Advisory Opinion on Constitutionality of 1986 PA 281*,[6] this Court addressed the constitutionality of certain provisions of 1986 PA 281, MCL 125.2151 *et seq*., entitled the Local Development Financing Act. One of the questions presented was whether the capture and use of tax increment revenues by a local devel-

[4] MCL 211.24f(1).

[5] MCL 211.24f(2)(d).

[6] 430 Mich 93; 422 NW2d 186 (1988).

opment finance authority violated the state constitution at Const 1963, art 9, § 6. *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 97; 422 NW2d 186 (1988).

Amici curiae argued that, once the voters adopt an extra millage proposition for school funding purposes, any diversion of that millage to a local development funding authority violates the constitution. *Id.* at 108. This Court rejected that argument and concluded that article 9, § 6 of the constitution did not govern the capture and use of tax increment revenues. *Id.* at 107, 111. This Court further noted that " 'in exercising the powers of the state the legislature may require the revenue of a municipality, raised by taxation, to be applied to uses other than that for which the taxes were levied.' " *Id*. at 113, quoting *Tribe v Salt Lake City Corp*, 540 P2d 499, 504 (Utah, 1975).[7]

In keeping with the reasoning of *Advisory Opinion on Constitutionality of 1986 PA 281,* the Legislature may apply tax revenues for purposes other than those for which the people intended them. By contrast, no persuasive authority exists for the proposition that defendants here, through an illegal ballot proposal, could distribute the taxes raised contrary to the manner specified in a governing statute.

THE AVAILABILITY OF A REMEDY

Moreover, the majority is incorrect in concluding that the only remedies available to plaintiff were to enjoin

[7] The majority contends that *Advisory Opinion on Constitutionality of 1986 PA 281* does not control here because this Court limited the holding in that case to the issues presented. The majority is correct that *Advisory Opinion on Constitutionality of 1986 PA 281* is not binding authority. Nonetheless, it is persuasive and indicates this Court's willingness to abide by a distribution formula set forth by the Legislature, as opposed to that contained in an illegal ballot proposal.

collection of the millages or to compel refund of the monies to the taxpayers. Neither the trial court nor the Court of Appeals discussed whether any remedies or corresponding defenses were available. The question should be resolved first by the trial court on remand. However, I believe that equitable remedies are available, subject to any defense a defendant might have.

As an initial matter, the majority concludes that, because the Legislature did not expressly provide for a private cause of action, plaintiff cannot seek restitution for a violation of MCL 224.20b. It supports this conclusion by citing MCL 224.30, which states:

> (1) If an audit or investigation conducted under this act discloses statutory violations on the part of an officer, employee, or board of a county road commission, a copy of the report shall be filed with the attorney general who shall review the report and cause to be instituted a proceeding against the officer, employee, or board as the attorney general deems necessary.
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> * * *
>
> (3) The attorney general or the prosecuting attorney shall institute civil action in a court of competent jurisdiction for the recovery of public moneys disclosed by an examination to have been illegally expended or collected and not accounted for and for the recovery of public property disclosed to have been converted and misappropriated.

However, not only is MCL 224.30 inapplicable to the instant case, it provides an inadequate remedy to a city in plaintiff's position.

The procedure for an audit referred to in MCL 224.30(1) is set forth in MCL 224.26: "Every county road commission in counties of more than 50,000 population shall have an annual audit of its financial

records, accounts, and procedures, including those required by law governing the disposition of any state funding." MCL 224.26(1).[8]

In this case, it is presumed that, in accordance with MCL 224.26, the county road commission had an audit performed every year or every other year since 1976. However, no audit or investigation revealed any statutory violations. Because there were no reported violations, there was no need for the Attorney General to institute proceedings under MCL 224.30.[9] Therefore, not only is MCL 224.30 inapplicable in the instant case, it provides an inadequate remedy to plaintiff, as shown by the fact that no investigation was ever commenced.

The majority concludes that plaintiff's sole statutory remedy is through the Attorney General. It also concedes that plaintiff may enjoin collection of the improper millage or seek a refund of the collected taxes. See *ante* at 531. However, I believe that other remedies are available.

For example, in its complaint, plaintiff asked for relief in the form of an order of mandamus.[10] The wrong

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[8] MCL 224.26(2) provides that in counties with a population of less than 50,000, the audit shall be required not less frequently than biennially. The county road commission must have a certified public accountant perform the audit. MCL 224.27. If the county road commission fails to have the audit done, the Department of Treasury must have it done. *Id*.

[9] In fact, before the instant proceedings commenced, plaintiff informed defendant county treasurer that the funds collected by the millages were not being distributed as required by MCL 224.20b. Rather than commencing an investigation, defendants dismissed plaintiff's request for an accounting.

[10] As this Court noted in *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich 658, 666-667; 425 NW2d 80 (1988):

> [T]o obtain a writ of mandamus, the plaintiff must have a clear legal right to the performance of the specific duty sought to be

for which plaintiff seeks a remedy is a statutory violation, and in the past our courts have granted mandamus relief for statutory violations. In *City of Belding v Ionia Co Treasurer*, a statute required the county treasurer to apportion penal fines to libraries. *City of Belding v Ionia Co Treasurer*, 360 Mich 336, 343; 103 NW2d 621 (1960). This Court ordered the treasurer to comply with the statute. We recognized that "[a] clear legal duty reposes on the county treasurer in this regard, and a clear legal right is plaintiff's to receive the apportionment from him." *Id.* at 344. The plaintiff's action was properly brought against the treasurer, and the treasurer was required by mandamus to apportion the funds as the statute required. *Id.*

Similarly, in *Grand Rapids Pub Schools v Grand Rapids*,[11] the Court of Appeals recognized that, if required to do so by statute, the county treasurer had to properly distribute earned interest. The Court of Appeals noted that a city or county treasurer is a fiduciary in the management and application of public funds. *Id.* at 657.

In this case, defendant county treasurer had a statutory duty to distribute the millage revenue as set forth in MCL 224.20b(2) because there was no agreement to the contrary. It is undisputed that the treasurer neglected to do so, distributing nothing to plaintiff. Hence,

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compelled and the defendants must have a clear legal duty to perform the same. *Pillon v Attorney General*, 345 Mich 536, 539; 77 NW2d 257 (1956); *Janigian v Dearborn*, 336 Mich 261, 264; 57 NW2d 876 (1953). . . . The primary purpose of the writ of mandamus is to enforce duties created by law, *Kosiba v Wayne Co Bd of Auditors*, 320 Mich 322, 326; 31 NW2d 68 (1948), where the law has established no specific remedy and where, in justice and good government, there should be one. *Lenz v Detroit Mayor*, 338 Mich 383, 395; 61 NW2d 587 (1953).

[11] 146 Mich App 652; 381 NW2d 783 (1985).

the treasurer violated her statutory duty, and, as a consequence, plaintiff was denied its statutory right to receive the funds. If the trial court were to determine that plaintiff is entitled to relief in this case, it could issue an order of mandamus.[12]

CONCLUSION

I agree with the majority that the millage proposals under consideration in this case violated MCL 224.20b. However, I disagree that no remedy exists for the violations. I also disagree that the millage revenues were properly distributed when, although they were spent in accordance with the millage proposals, they were distributed in violation of the statute. Accordingly, I would remand this matter to the trial court with directions that it set aside its denial of plaintiff's motion for summary disposition and proceed with the case.

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[12] The majority disagrees that an order of mandamus is available, because the ballots complied with MCL 211.24f. However, for the reasons stated, I disagree with the majority that compliance with MCL 211.24f in any way diminishes the violation of MCL 224.20b.

BROWN v BROWN

Docket No. 131358. Decided July 11, 2007.

Lisa Brown brought an action in the Wayne Circuit Court against Michael Brown and his employer, Samuel-Whittar Steel, Inc., and others, seeking damages for injuries sustained when Michael Brown raped the plaintiff at Samuel-Whittar's facility while the plaintiff was assigned to work at the facility as a security guard by her employer, Burns International Security. The plaintiff alleged, in part, that Samuel-Whittar was negligent in failing to prevent the rape because it had notice of Michael Brown's propensity to commit violent acts inasmuch as the plaintiff had complained at least three times to a Samuel-Whittar plant manager about crude, offensive sexual remarks directed at the plaintiff by Michael Brown. The trial court, Edward M. Thomas, J., granted summary disposition in favor of Samuel-Whittar, ruling that there was no genuine issue of material fact concerning whether Samuel-Whittar was liable for the unforeseen criminal act of Michael Brown. The Court of Appeals, METER, P.J., WHITBECK, C.J., and SCHUETTE, J., reversed the order of the trial court with regard to the dismissal of the negligence claim, holding that a genuine issue of material fact existed with regard to whether Samuel-Whittar knew or should have known of Michael Brown's criminal sexual propensities. 270 Mich App 689 (2006). The Supreme Court, ordered and heard oral argument on Samuel-Whittar's application for leave to appeal. 477 Mich 1108 (2007).

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

1. Where an employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape. Samuel-Whittar cannot be held liable for the rape because Michael Brown did not commit prior acts that would have put Samuel-Whittar on notice of Brown's propensity to commit rape and Brown's work-

place speech was not predictive of the rape. An employer cannot reasonably anticipate that an employee's lewd, tasteless sexual comments are an inevitable prelude to a rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. Comments of a sexual nature do not inexorably lead to rape.

2. This Court considers several factors in determining whether a relationship exists between the actor and the injured person sufficient to impose a legal duty on the actor. Examination of these factors in this case weighs against imposing a duty on Samuel-Whittar. There was a lack of foreseeability of the harm in this case. Moral blame rests with the rapist, Michael Brown, not his employer, Samuel-Whittar. Imposing on Samuel-Whittar the legal duty articulated by the Court of Appeals would invite overinclusive, unreliable employer regulation of employee workplace speech and would not further a policy of preventing future harm.

Justice MARKMAN, concurring, joined fully in the majority opinion and wrote separately only to elaborate on the many practical questions that the dissent raised but failed to answer. The rule proposed by the dissent would create confusion and uncertainty among employers throughout Michigan.

Court of Appeals judgment reversed, trial court order reinstated, and case remanded to the trial court for further proceedings.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, noted that an employer must use due care to avoid the selection or retention of an employee whom the employer knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. Whether Samuel-Whittar had such knowledge in this case was a question for the jury. Also for the jury to decide was whether Samuel-Whittar breached its duty to keep the plaintiff safe by failing to take any corrective action once it had knowledge of the relentless harassment by Michael Brown. The plaintiff presented a genuine issue of material fact for the jury to decide regarding whether Samuel-Whittar breached its duty of due care. An employer has a duty to use due care in retaining an employee, and any number of things can suffice to provide notice to the employer that its retention of a particular employee may need a second look, even where a past history of violent behavior by the employee is lacking. The judgment of the Court of Appeals reversing the order of the trial court and remanding the matter for a trial should be affirmed.

NEGLIGENCE — MASTER AND SERVANT — VIOLENT PROPENSITIES OF EMPLOYEES — DUTY TO PROTECT THIRD PARTIES.

An employer is not liable under a theory of negligent retention solely on the basis of its knowledge of its employee's lewd, offensive sexual remarks directed to a third party for a rape perpetrated against the third party by the employee where the employee had no prior criminal record or history of violent behavior indicating a propensity to rape and the comments failed to convey an unmistakable, particularized threat of rape.

Weaver & Young, P.C. (by *Gregory T. Young*), for the plaintiff.

Plunkett & Cooney, P.C. (by *Christine D. Oldani* and *Thomas P. Vincent*), for Samuel-Whittar Steel, Inc.

YOUNG, J. Plaintiff Lisa Brown was a security guard who had been assigned by her employer, Burns International Security (Burns), to provide security for defendant Samuel-Whittar Steel, Inc.[1] Michael Brown (Brown), an employee of defendant and no relation to plaintiff, raped plaintiff at defendant's Detroit facility. Brown had no prior criminal record, no history of violent behavior, and certainly no history indicating that he harbored a propensity to commit rape. However, plaintiff alleges that Brown routinely made crude, sexually explicit comments to her when they interacted at defendant's facility. We are asked to consider whether defendant's knowledge of these comments created a basis for holding defendant, Brown's employer, liable for the rape committed by Brown.

We hold that where an employee has no prior criminal record or history of violent behavior indicating a

[1] Plaintiff filed suit against Samuel-Whittar Steel, Michael Brown, and Harlan Gardner. A default judgment was entered against Brown when he failed to respond to plaintiff's suit. Plaintiff failed to serve Gardner. Neither Brown nor Gardner is part of this appeal. Therefore, we refer to Samuel-Whittar Steel singularly as "defendant."

propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape. The Court of Appeals reliance on this Court's decision in *Hersh v Kentfield Builders, Inc*, 385 Mich 410; 189 NW2d 286 (1971), was misplaced. Because Brown did not commit prior acts that would have put his employer on notice of Brown's propensity to commit rape and Brown's workplace speech was not predictive of this criminal act, defendant cannot be held liable for the rape.

We reverse the judgment of the Court of Appeals, reinstate the trial court's order granting summary disposition in favor of defendant, and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Beginning in early 2000, plaintiff Lisa Brown worked for Burns as a security guard.[2] During this time, Burns assigned plaintiff to work the night shift at defendant's Detroit plant. Plaintiff's duties during the night shift included answering and transferring telephone calls, inspecting employees and truck drivers as they left the facility, and making nightly rounds through the plant.

Michael Brown worked for defendant as a foreman. The record does not disclose anything remarkable about Brown or his tenure with defendant. Brown did not have a criminal record until he pleaded no contest to attempted third-degree criminal sexual conduct arising

[2] Although the dissent characterizes plaintiff as Brown's "subordinate," *post* at 574 n 3, we note that plaintiff and Michael Brown worked for different employers.

out of his attack of plaintiff. At the time of the incident, Brown also worked the night shift.

Although it is unclear when the comments began, plaintiff alleges that Brown routinely made very crude, offensive sexual remarks to her.[3] Plaintiff testified that on at least three occasions she complained about Brown's offensive comments to one of defendant's plant managers, Harlan Gardner.[4] According to plaintiff, she last complained about Brown's language in August or September 2000. Plaintiff also testified that she told another Burns security guard, Kim Avalon, about Brown's lewd statements and that Avalon had been present during such an exchange between Brown and plaintiff. Plaintiff claims that the verbal harassment continued until the rape occurred in November 2000.[5]

On November 17, 2000, plaintiff was raped by Brown. As plaintiff made her nightly rounds through the plant, she noticed that a door leading into the administrative offices was ajar. As she walked toward that

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[3] Plaintiff summarized the nature of these remarks when she testified at deposition that Brown "would tell me how he loved my long hair and how he would want to f*** me and pull my long hair and umm, just how I would walk through the plant and he liked how I shaked [sic] my a** and I had big t*** and just all the terrible things like that."

[4] Plaintiff testified that she told Gardner "how uncomfortable I felt about Michael Brown saying these things and [asked] if he could tell him to stop."

[5] The dissent's general assertion that Brown made his comments to plaintiff "late at night when he was acting as her supervisor and no one else was around" and that "[h]e made them for no one to hear but her," *post* at 578-579, requires the dissent to speculate about an undeveloped record. The record indicates that Brown and plaintiff worked during the afternoon shift in the same time frame before they both were reassigned by their respective employers to work during the night shift. Moreover, plaintiff testified at her deposition that Brown made comments to her during the afternoon shift. Thus, it is simply unclear from the record how many of Brown's comments were made while the two worked during the night shift and how often he made his comments while the two were alone or in the presence of others.

part of the office building, plaintiff met Brown. Brown followed her into the offices and helped her turn off the lights and close the doors of the individual offices. After the office area was secured, Brown forced plaintiff into a nearby women's restroom inside the building and raped her. Plaintiff immediately reported the incident to the police, who arrested Brown. Brown later pleaded no contest to a charge of attempted third-degree criminal sexual conduct. Understandably, plaintiff has testified that she suffered psychological trauma as a result of the rape and, as a result of this trauma, cannot return to work.

Plaintiff filed suit against defendant, Brown, and Harlan Gardner, seeking to recover damages caused by the rape, including damages for physical and psychological injury, lost wages, and medical expenses. She asserted two theories of liability against defendant: first, that defendant was vicariously liable for Brown's actions under the doctrine of respondeat superior; and, second, that because she had complained about Brown's lewd comments, defendant had notice of Brown's propensity to commit violent acts and therefore defendant was negligent in failing to take reasonable steps to prevent the rape.

Defendant moved for summary disposition, which the trial court denied. After the parties conducted further discovery, defendant renewed its motion for summary disposition. The trial court granted this motion, ruling that there was no genuine issue of material fact concerning whether defendant was liable for the unforeseen criminal acts of Brown.

Plaintiff appealed to the Court of Appeals, challenging the dismissal of her negligence claim.[6] In a published opinion, deciding what it labeled a case of first

[6] Plaintiff did not pursue the dismissal of her respondeat superior claim, and it is not before us.

impression, the panel reversed the trial court's order and held that plaintiff had presented a genuine issue of material fact that defendant knew or should have known of Brown's criminal sexual propensities and, therefore, was liable under a negligence theory.[7] The panel cited in support this Court's decision in *Hersh* and its own decisions in *Samson v Saginaw Professional Bldg, Inc,*[8] and *Tyus v Booth*,[9] although it conceded that all of those cases involved individuals who had had a history of engaging in prior violent acts. It also recognized that those cases did not consider "whether sexually aggressive and predatory *words* are sufficient to put an employer on notice of its employee's propensity for violence."[10] Nevertheless, the Court of Appeals determined that "the language and the circumstances were sufficient to create a jury question regarding whether [defendant] knew or should have known of Michael Brown's violent propensities."[11]

Defendant sought leave to appeal in this Court. We heard oral argument on the application. In lieu of granting leave to appeal, pursuant to MCR 7.302(G)(1), we reverse the judgment of the Court of Appeals.

II. STANDARD OF REVIEW

This Court reviews de novo a decision to grant a motion for summary disposition.[12] We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by

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[7] *Brown v Brown*, 270 Mich App 689; 716 NW2d 626 (2006).

[8] 44 Mich App 658; 205 NW2d 833 (1973).

[9] 64 Mich App 88; 235 NW2d 69 (1975).

[10] *Brown*, 270 Mich App at 699 (emphasis in original).

[11] *Id.* at 700.

[12] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

the parties in the light most favorable to the nonmoving party.[13] Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.[14] Whether one party owes a duty to another is a question of law reviewed de novo.[15]

III. ANALYSIS

a. DEFENDANT OWED NO DUTY TO PLAINTIFF TO PREVENT THE RAPE BECAUSE DEFENDANT HAD NO NOTICE OF BROWN'S PROPENSITY TO RAPE

Defendant argues that the Court of Appeals erred because Brown's words alone could not have put defendant on notice of Brown's propensity to rape. Therefore, defendant argues that it owed no duty to plaintiff in this case. We agree.

In order to make out a prima facie case of negligence, the plaintiff must prove the four elements of duty, breach of that duty, causation, and damages.[16] "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff."[17] "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person."[18] This Court has elsewhere defined "duty" as

> a " 'question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and

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[13] *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[14] *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

[15] *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

[16] *Id.* at 463.

[17] *Id*.

[18] *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977).

> concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.' " " 'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." [*Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992) (citations omitted).]

In *Valcaniant v Detroit Edison Co*,[19] this Court described the factors that are relevant "[i]n determining whether a legal duty exists," such as the

> "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach." [*Id.,* quoting *Buczkowski,* 441 Mich at 101 n 4 (citing Prosser & Keaton, Torts [5th ed], § 53, p 359 n 24).]

When performing an analysis of whether a duty existed, this Court considers the foreseeability of harm to the plaintiff, although the " 'mere fact that an event is foreseeable does not impose a duty' " on the defendant.[20]

This case involves the initial question whether an employee's criminal activity is foreseeable by his employer and whether the employer is liable for that criminal activity. In *MacDonald v PKT, Inc*,[21] this Court dealt with the foreseeability of criminal acts committed by invitees and limited the duty owed by an invitor. We stated:

> A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect invitors to

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[19] 470 Mich 82, 86; 679 NW2d 689 (2004).

[20] *Buczkowski,* 441 Mich at 101, quoting *Samson*, 393 Mich at 406.

[21] 464 Mich 322; 628 NW2d 33 (2001).

> assume that others will disobey the law. 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.
>
> Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties.[22]

As in *MacDonald*, similar concerns of foreseeability and duty arise in the negligent retention context when we consider whether an employer may be held responsible for its employee's criminal acts. Employers generally do not assume their employees are potential criminals, nor should they. Employers suffer from the same disability as invitors when attempting to predict an employee's future criminal activity.

The harm suffered by plaintiff in this case was a criminal rape. It is argued that this rape was a foreseeable result of Brown's offensive speech. We disagree. Without question, Brown's words were crude and highly offensive. Plaintiff's complaints to one of defendant's plant managers that Brown's comments were offensive and made her uncomfortable, when coupled with her request that defendant make Brown cease

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[22] *Id.* at 335 (citations omitted).

making such comments, gave defendant awareness of Brown's propensity for vulgarity and arguably positioned her for remedies as provided in *McClements v Ford Motor Co*.[23] However, an employer can assume that its employees will obey our criminal laws. Therefore, it cannot reasonably anticipate that an employee's lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. Comments of a sexual nature do not inexorably lead to criminal sexual conduct any more than an exasperated, angry comment inexorably results in a violent criminal assault.

We do not hold that an employee's words alone can *never* create a duty owed by the employer to a third party. This obviously would be an entirely different case if Brown had threatened to rape plaintiff and defendant was aware of these threats and failed to take reasonable measures in response.[24] Justice CAVANAGH has no use for a traditional test of foreseeability. He would allow a jury to impose liability on an employer if, in retrospect,

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[23] 473 Mich 373; 702 NW2d 166 (2005). After the trial court adjudicated this case, this Court decided *McClements*, in which we held that a common-law claim for negligent retention cannot be premised on workplace sexual harassment, because a plaintiff's remedies for any act of sexual harassment in the workplace are those provided by the Civil Rights Act (CRA). *Id*. at 382-383. In *McClements*, we also clarified that a nonemployee may sue under the CRA if he or she is sexually harassed and the defendant affected or controlled a term, condition, or privilege of the worker's employment. *Id.* at 389. As in *McClements*, the availability of this statutory remedy augers against further expanding the scope of common-law negligent retention to the facts of this case. We note, however, that plaintiff did not file a CRA claim in this case. The record is thus undeveloped with respect to whether such a claim would have succeeded here, and we decline to speculate further.

[24] Although Justice CAVANAGH attempts to equate Brown's unwanted invitations with a declaration of intent to rape, none of the comments

somehow the harm was avoidable. However, we will not transform the test of foreseeability into an "avoidability" test that would merely judge in hindsight whether the harm could have been avoided.[25] Brown's comments, standing alone, were insufficient to place defendant on notice that Brown was a rapist.

To supply further context to Brown's comments, it is noteworthy that not even plaintiff suspected that Brown would physically attack or rape her. While she testified at her deposition that she thought Brown was "weird," she stated that she did not fear that he would perpetrate a physical assault. Plaintiff never testified that Brown had ever offensively touched her before November 17, 2000. It is inconceivable that defendant's management officials should have anticipated or predicted Brown's behavior any better than plaintiff, who directly witnessed the tone and tenor of Brown's offensive statements and yet indicated that she never feared for her physical safety. Therefore, the lack of foreseeability of the harm in this case weighs definitively against imposing a duty on defendant.

Moreover, in addition to the lack of foreseeability of the harm, other important considerations that this Court identified in *Buczkowski* convince us that the relationship between plaintiff and defendant does not give rise to a duty under these circumstances. The moral blame attached to the conduct in question, a rape, rests with the perpetrator, Michael Brown, not

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directed at plaintiff in this case approached a particularized threat of criminal violence. Not even plaintiff believed she was being threatened with potential rape.

[25] This is not the first occasion in which Justice CAVANAGH has articulated a position that would essentially eliminate foreseeability in favor of the imposition of strict liability on a business whenever a person is harmed. See *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20, 29; 664 NW2d 756 (2003) (CAVANAGH, J., dissenting).

with his employer. Also, there was a low degree of certainty of rape because there was not a "close" connection between Michael Brown's statements and the resulting rape. And imposing a duty on defendant would not effectively further a policy of preventing future harm, and would impose an undue burden on defendant and all employers.

In our estimation, the legal duty articulated by the Court of Appeals would invite burdensome, over-inclusive employer regulation of employee workplace speech. Modern workplace speech is, at times, boorish and undesirable, but, depending on what precisely is said, it may be no predictor at all of future criminal behavior, as is the case here.[26] As a general rule, an employer cannot accurately predict an employee's future criminal behavior solely on the basis of the employee's workplace speech. An employer diligently seeking to avoid such broad tort liability would inevitably err on the side of over-inclusiveness and cast a wide net scrutinizing *all* employee speech that could be remotely construed as threatening. However, as this Court astutely observed in *Hersh*, " 'not every infirmity of character' " is sufficient to forewarn the employer of its employee's violent propensities.[27] If every inappropriate workplace comment could supply sufficient notice of an employee's propensity to commit future violent acts, a prudent employer operating under the duty fashioned by the Court of Appeals *ought* to treat every employee who makes inappropriate workplace comments as a

[26] Contrary to our dissenting colleague, who finds that Brown's comments were beyond boorish, we note that "boorish" accurately describes Brown's words. "Boorish" is defined in *Random House Webster's College Dictionary* (2001) as "unmannered; crude; insensitive." The same dictionary defines "crude" as "vulgar" and "vulgar" as "indecent; obscene; lewd."

[27] *Hersh*, 385 Mich at 413, quoting 34 ALR2d 390, § 9.

potentially violent criminal. The additional social and economic costs associated with this type of monitoring, not to mention the burden on otherwise innocent employees who make inappropriate comments in the workplace but harbor no violent propensities, weigh further against imposing the duty created by the Court of Appeals.

b. *HERSH* DOES NOT PROVIDE SUPPORT FOR THE EXPANDED DUTY IMPOSED BY THE COURT OF APPEALS IN THIS CASE

In concluding that plaintiff created a jury-submissible question of negligence, the Court of Appeals relied on this Court's decision in *Hersh*. Regarding defendant's duty to plaintiff, the panel opined that there is

> no requirement, in *Hersh* or elsewhere, that an employer must know that the employee had a propensity to commit the actual crime that occurred. Rather, it is sufficient under *Hersh* if the employer knew of the employee's "impropriety, violence, or disorder," in short, whether the employer could have reasonably foreseen the employee's "violent propensity," that is, his or her "natural inclination or tendency" to violence. Given what Michael Brown said to Lisa Brown and what Lisa Brown reported to [defendant's] plant manager, we conclude that a jury could find that [defendant] should have, under these circumstances, known of Michael Brown's propensity for sexual violence. There was, therefore, a genuine issue of material fact, and the trial court erred when it granted summary disposition on Lisa Brown's negligence claim. The question whether [defendant] knew or should have known of Michael Brown's vicious propensities should not have been determined by the trial court as a matter of law, but by the jury. [*Brown,* 270 Mich App at 700-701.]

In *Hersh,* the plaintiff brought a negligence claim against the defendant, Kentfield Builders, Inc., arising out of an unprovoked attack inflicted by one of the

defendant's employees on the plaintiff. The plaintiff, a kitchen cabinet salesman, had scheduled a meeting with the president of Kentfield Builders at one of the defendant's model homes, and while he waited to meet with the president, he was seriously injured by Benton Hutchinson, an unskilled laborer employed by the defendant who ten years earlier had been convicted of manslaughter. The plaintiff alleged that the defendant was liable for his injuries because it knew or should have known that Hutchinson harbored vicious and murderous propensities.

The plaintiff received a favorable jury verdict, which the Court of Appeals set aside because it found no evidence, notwithstanding Hutchinson's prior manslaughter conviction, revealing that Hutchinson had "assaultive propensities" or that Kentfield Builders acted unreasonably in hiring him.[28]

This Court unanimously reversed the judgment of the Court of Appeals and reinstated the jury's verdict in *Hersh*, holding that whether Kentfield Builders knew or should have known of Hutchinson's vicious propensities was a jury question that could not be decided as a matter of law. In its analysis, this Court quoted with approval a headnote from *Bradley v Stevens*,[29] which stated that

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[28] *Hersh v Kentfield Builders, Inc*, 19 Mich App 43; 172 NW2d 56 (1969).

[29] 329 Mich 556; 46 NW2d 382 (1951). In *Bradley*, the defendant, the owner of an auto service shop, was sued by a customer who had been physically attacked by an employee in an attempted rape. This Court affirmed a judgment of no cause of action that had been entered in favor of the defendant, agreeing with the trial court that the defendant would have been liable only if he *knew or should have known* of his employee's propensities and criminal record. Significantly, although the defendant knew that the employee had been convicted of nonsupport, the record indicated that he had no knowledge that the employee had recently been charged with common-law rape.

> "[a]n employer who knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by employee upon customer who came to employer's place of business would be liable for damages to such customer." [*Hersh*, 385 Mich at 412.]

This Court also quoted with approval the statement from 34 ALR2d 390, § 9, that

> "[a]s has already been noted, a duty imposed upon an employer who invited the general public to his premises, and whose employees are brought into contact with the members of such public in the course of the master's business, is that of exercising reasonable care for the safety of his customers, patrons, or other invitees. It has been held that in fulfilling such duty, an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. *The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result.*" [*Hersh*, 385 Mich at 412-413 (emphasis added).]

In its analysis, the panel below emphasized selective portions of this passage from *Hersh*. Quoting *Hersh*, the panel held that "it is sufficient under *Hersh* if the employer knew of the employee's 'impropriety, violence, or disorder,' in short, whether the employer could have reasonably foreseen the employee's 'violent propensity,' that is, his or her 'natural inclination or tendency' to violence."[30] What the panel omitted from its quotation from *Hersh* was the complete statement that " '*[t]he employer's knowledge of past acts* of impropriety, vio-

[30] *Brown*, 270 Mich App at 701.

lence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer . . . .' "[31] This Court emphasized in *Hersh* that it is the employee's *known past acts* that provide a basis for the employer's knowledge of the employee's "impropriety, violence, or disorder" and that those acts potentially place an employer on notice of the employee's violent propensities.

Beyond the fact that the Court of Appeals misconstrued this portion of *Hersh*, *Hersh* is largely inapposite to this case.[32] The employee in *Hersh* who assaulted the

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[31] *Hersh*, 385 Mich at 413, quoting 34 ALR2d 390, § 9 (emphasis added).

[32] The Court of Appeals also relied on *Samson v Saginaw Professional Bldg, Inc*, 44 Mich App 658; 205 NW2d 833 (1973), and *Tyus v Booth*, 64 Mich App 88; 235 NW2d 69 (1975). The panel recognized that neither case provided direct support for its holding. Therefore, these cases are also not central to our analysis.

Samson did not address an employer's negligent retention of an employee. It addressed a landlord's duty to protect its tenants' employees from individuals with violent propensities in the common areas of the building over which the landlord had responsibility. In *Samson*, the plaintiff worked in a building owned by the landlord defendant, which leased space to the plaintiff's employer. Another tenant in the building was the Saginaw Valley Consultation Center, an agency that provided outpatient care for released mental patients. The plaintiff was attacked by a mental patient as they rode the elevator in the building. A split Court of Appeals panel held that the landlord defendant owed a duty to take reasonable precautions to protect its tenants from mental patients with a propensity toward violence who would be visiting the consultation center.

Tyus involved an employer's liability under a theory of negligent retention. In *Tyus*, the plaintiffs sued the owner of a service station whose employee assaulted the plaintiffs without provocation. One theory of liability advanced by the plaintiffs was that the owner had negligently exposed the public to an employee with known violent propensities. The Court of Appeals, citing *Hersh*, affirmed the trial court's grant of summary disposition in favor of the defendant. Significantly, the panel noted that the defendant had no actual prior knowledge of the employee's propensity for violence, and concluded that the defendant "was not

third party had a criminal record and had committed a prior, violent criminal *act*. The panel below acknowledged that Brown had not committed prior *acts* that would have put defendant on notice of Brown's propensity to commit any criminal act, including rape. This fact is enough to distinguish this case from *Hersh*. The more important question, which *Hersh* did not address, is whether an employer is entitled to judgment as a matter of law when the sole basis for imposing liability for an employee's rape of a third party is the employee's lewd and offensive *comments*. As we discussed earlier, however weak or strong a prior act of violence may be as a predictor of future violence, the workplace speech in this case and the entire absence of any history of violence provide an insufficient predicate for imposing a duty of care of the kind the panel below recognized.

IV. RESPONSE TO THE DISSENT

While we have sought to maintain in our duty analysis a key tort concept—foreseeability—Justice CAVANAGH in his dissent has swept this concept aside, concluding that any inappropriate workplace speech by an employee that is followed at some point by a criminal act is sufficient to create a jury-submissible question of negligent retention. In contrast, we have attempted to preserve a workable rule of foreseeability in this context, limiting employer liability to instances in which an employee has done or uttered something of which the employer has or should have knowledge that affords genuine notice of that employee's criminal propensities. This is not a novel or

required to conduct an in-depth background investigation of his employee." *Id.* at 92. Moreover, it held that "[a]n employer is not absolutely liable for assault committed by his employee," but only owes a duty "to use reasonable care to assure that the employee known to have violent propensities is not unreasonably exposed to the public." *Id*.

surprising requirement. By eliminating this link of foreseeability, which is what Justice CAVANAGH advocates, an employer would be held strictly liable for employee misbehavior, whether foreseeable or not.

Justice CAVANAGH emphasizes that once defendant learned of Brown's harassing comments, it was on notice of Brown's "habits, temperament, or nature." But this conclusion, of course, begs the question: Brown's habits, temperament, or nature signified his propensity *to do what*? Did his words demonstrate his "habit, temperament, and nature" to continue to harass women, in particular plaintiff, with foul and unwanted sexual comments, or did they demonstrate his "habit, temperament, and nature" to commit violent rape? Justice CAVANAGH's theory of liability is simply that defendant was on notice that Brown was a rapist because he made unwanted sexual comments. However, evidence of making unwanted sexual comments is not evidence of a propensity to commit violent rape. It simply cannot be the responsibility of the employer to determine with clairvoyant accuracy whether conduct of one sort might bear some relationship to conduct of a completely different sort. Rather, if an employee has not done or said anything that would afford a reasonable employer notice of a propensity to rape or commit some other type of criminal conduct, there is no sound legal or commonsense basis for the imposition of tort liability on an employer.

Justice CAVANAGH states, "I fail to see why it would not be more desirable to have employers scrutinize threatening speech than to ignore it when reported and have an innocent employee raped."[33] In light of the causal link, illogical as it is, that Justice CAVANAGH

[33] *Post* at 577.

forges between defendant's alleged "nonscrutiny" and the ensuing rape, it is worth asking Justice CAVANAGH to identify the purpose of the "scrutiny" that he urges. It is not clear whether proper scrutiny means that an employer must merely confirm that the employee's speech was "crude," or if the utterance of any crude statement is grounds for termination. It is equally unclear if, under Justice CAVANAGH's approach, an employer could successfully "rehabilitate" its "tainted" employees, or if it must inevitably fire them. Finally, Justice CAVANAGH's assertion offers no guidance concerning whether an employer's duty to scrutinize is limited to employee speech or whether it could extend to an employee's seemingly harmless but quirky behavior. These are but a few of the many practical questions Justice CAVANAGH's theory of liability poses without answering.

If Justice CAVANAGH's position were to prevail, the consequences would be considerable. Any rational employer would protect itself by refusing to hire or by terminating employees whose behavioral clues might allow courts, in hindsight, to hold the employer responsible if the employee commits a crime. In some instances, employers would find themselves in the unenviable position of seeking to protect themselves from liability for "negligent retention," while also avoiding liability under various antidiscrimination laws governing employment.[34]

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[34] Indeed, Justice CAVANAGH would impose a "Catch-22" duty on employers to detect their employees' criminal propensities even though employers are not fully equipped to reasonably fulfill that duty. A part of the judicially created common law, a negligent retention action works interstitially in the gaps of the positive law enacted by our Legislature, such as the CRA, or applicable federal law enacted by Congress. If the Legislature has determined as a matter of public policy that fruitful information regarding previous employee "conduct" is off limits, thus

In other instances, employees who have committed crimes in the past, but have presumably repaid their debts to society, would find it more difficult to secure employment, as would job applicants who have been identified by employers, or by the experts that employers would retain, as having the potential for negative behavioral actions, including crimes. It goes without saying that the effect of this new regime would, in both subtle and not-so-subtle ways, fall most heavily on social groups with the highest prevalence of past criminal behavior.[35] Unlike Justice CAVANAGH, we refuse to create a new standard for imposing tort liability on employers and thereby render large numbers of job applicants effectively unemployable.[36]

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hampering an employer from comprehensively investigating its employees' criminal propensities, we ought not to *broaden* our common law and create insurmountable barriers for employers working to fulfill their common-law duties. See, e.g., MCL 37.2205a (prohibiting an employer from requesting, making, or maintaining a record of information regarding a misdemeanor arrest if a conviction did not result). This is especially true in Justice CAVANAGH's world, where virtually any piece of information then available to an employer about an employee's speech, behavior, or actions could, when judged in hindsight, create a jury-submissible question of negligence if the employee later commits a criminal act. In light of the expansive tort liability to which Justice CAVANAGH would expose employers, they should not face the challenge of accurately forecasting their employees' future criminal acts when the *Legislature* has curtailed the scope of information at their disposal.

[35] See, e.g., Human Rights Watch Press Backgrounder, Percentage of Adult Men (Age 18-64) Incarcerated, by Race, available at <http://www.hrw.org/backgrounder/usa/race/pdf/table3.pdf.> (accessed June 6, 2007); see also Incarcerated America, Human Rights Watch Backgrounder, available at <http://www.hrw.org/backgrounder/usa/incarceration> (accessed June 6, 2007).

[36] Once again, we in no way make light of the comments that Brown made in this case. Although these comments did not put defendant on notice of a propensity to rape, they were obviously exceedingly inappropriate and offensive. However, the issue here is not whether the comments were offensive, or a violation of our Civil Rights Act, see MCL 37.2103(i), but whether the comments placed defendant on notice that a rape was foreseeable and thereby made defendant liable for the rape.

V. CONCLUSION

We conclude that defendant may not be held liable for the rape perpetrated against plaintiff by Brown. The Court of Appeals expanded defendant's duty on the basis of plaintiff's complaints that Brown's sexually explicit and offensive comments made her uncomfortable. Defendant could not reasonably have anticipated that Brown's vulgarities would culminate in a rape. We simply disagree with the Court of Appeals "that a jury could find that [defendant] should have, under these circumstances, known of Michael Brown's propensity for sexual violence."[37] Accordingly, we reverse the judgment of the Court of Appeals, reinstate the trial court's order granting summary disposition in favor of defendant, and remand this case to the trial court for further proceedings consistent with this opinion.

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

MARKMAN, J. (*concurring*). I fully support the majority opinion and write separately only to elaborate upon its assertion that the dissent raises, but fails to answer, "many practical questions." *Ante* at 564. The rule proposed by the dissent, and the unanswered questions arising from that rule, would create confusion and uncertainty among employers throughout this state and, as such decisions inevitably do, require employers to devote more time to consulting with lawyers and fending off and negotiating lawsuits, and less time to managing their businesses.

The dissent would produce this result by making employers increasingly liable for the workplace crimes

[37] *Brown*, 270 Mich App at 701.

of their employees. Under what circumstances would this liability arise? Well, we really do not know, except that the dissent would leave it to juries to decide whether employers possessed sufficient information concerning an employee's "habits, temperament, or nature" to justify holding them responsible for the crimes of that employee. *Post* at 570-571. In either hiring or failing to fire an employee who later committed a crime, "[i]t is for the jury to determine whether [an employer] decided correctly." *Post* at 572 n 1. In the instant case, the dissent opines, crude statements uttered by an employee are sufficient to require a jury trial for an employer that failed to recognize that such statements might be a prelude to a violent rape.[1]

Scope of the Assessment—The dissent asserts that "[t]he obligation to assess its employee's fitness for a job falls on the employer, not on the victims of that employee's actions." *Post* at 572 n 1. What exactly does this mean in the real world of employers and employees? What is an employer's obligation of "assessment" such that it might avoid a lawsuit? What policies must be adopted by an employer to stave off a potentially destructive lawsuit when one of its employees commits a crime? Is it enough that an employer ascertains whether an employee or a job applicant has a criminal record? Is it enough that an employer also ascertains whether an employee or a job applicant has an arrest record? Apparently none of this is enough because the perpetrator here had no criminal record. What additional kind of "assessment" would the dissent require? Would a psychiatric examination be required? Would

[1] The question here is not whether an employee's statements evidenced sexual harassment or whether they constituted reprehensible or sanctionable behavior, but only whether the *employer* should be held accountable here for an *employee's* criminal behavior.

continuing psychological testing be necessary? Must an employee's personal lifestyle be evaluated? To what extent must an employee's interpersonal relationships at work be scrutinized? In short, what type of "assessment" is required to ensure that an employee is a person of the requisite "habits, temperament, or nature" such that an employer will not be held accountable for future criminal misconduct by that employee?

Interpreting the Assessment—What meaning must an employer ascribe to the results of the "assessment" it must undertake? That is, what is an employer looking for in its "assessment"? Would an unorthodox personal lifestyle apprise an employer that an employee is not a person of requisite "habits, temperament, or nature"? What about unusual avocations, interests, politics, or reading and viewing preferences? What about off-color jokes, crude rhetoric, extreme opinions, odd insights, idiosyncratic body language, strange demeanor, or politically incorrect views reflected in the workplace? How extensively would an employee have to be questioned about such matters and with what specific purpose in mind? What if an employer's "assessment" merely concluded that an employee's crude statements were simply crude? What if the "assessment" merely concluded that an employee did not really intend to rape the person to whom such crude statements had been directed? What conceivably might be discovered by an "assessment" of an employee making crude statements that would lead the dissent to exonerate an employer from liability for a subsequent crime by that employee? What kind of information from the "assessment" would place an obligation upon an employer to undertake further inquiry and what kind of information would not, to avoid the risk of a lawsuit? In short, what is a prudent and responsible employer required to do with the information generated from the "assessment"?

Consequences of the Assessment—Finally, what actions must be undertaken by an employer that has performed the required assessment? Is it enough that an employer instruct an employee to cease certain conduct or behavior? If an employee or an applicant does have a criminal or arrest record, or if he or she has engaged in speech or conduct that might later be viewed by some as a prelude to a crime, is it obligatory that such person either not be hired or be fired? What type of criminal or arrest record would impose this obligation? Would a previous misdemeanor conviction, for example, of making a lewd comment or cursing in public sufficiently apprise an employer that a person is likely to commit a violent rape? What behaviors in the workplace and what personal "habits, temperament, or nature" will sufficiently apprise an employer that a person " 'may eventually,' " *post* at 578 n 9 (emphasis and citation omitted), commit a violent criminal offense? If professionally trained psychologists and psychiatrists are unable to predict criminal behavior, is it reasonable to obligate an employer producing machine tools or automotive products to engage in this kind of speculation at the risk of a lawsuit? Is it ever relevant, as in this case, that the victim herself, working in close proximity with the criminal perpetrator, failed to recognize that he posed a threat to violently rape her? Why under these circumstances would a rational employer not simply fire any person whose "habits, temperament, or nature," when viewed in retrospect, might someday constitute the basis for a lawsuit? Why would any rational employer expose itself to the vagaries of litigation-by-hindsight ("the employer *should have* recognized," "the employer *should have* been aware," "the employer *should have* connected the dots," "the employer *should have* seen things as clearly as we do now") where it fails to predict unpredictable behavior if this

could all be avoided by simply firing every odd or rude or quirky employee?

If employers are required to play by the dissent's rules, then the dissent owes them the courtesy of apprising them how they might comply. The dissent asserts that not " 'every inappropriate workplace comment' . . . [or] 'inappropriate workplace speech . . . is sufficient to create a jury-submissible question,' " *post* at 575 n 5, but never endeavors to explain why this is so or where the line would be drawn between comments and conduct that place an employer in the courtroom and those that do not. That is, the dissent never endeavors to explain what an employer can do to avoid tomorrow's crippling lawsuit when one of its employees acts in pursuit of his or her own personal demons and commits a crime.[2]

CAVANAGH, J. (*dissenting*). I dissent from the majority's conclusion that plaintiff's claim against defendant Samuel-Whittar Steel, Inc. (hereafter defendant), for negligent retention of defendant Michael Brown (hereafter Brown) was correctly dismissed as a matter of law. At the very least, plaintiff raised a genuine issue of

[2] The dissent's response to this concurring opinion is telling. I raise questions concerning the workability of its approach to the law and the dissent counts up these questions and calls them "histrionic." *Post* at 577 n 8. The dissent then eschews that it "fosters a general rule" and asserts that it is only issuing a decision applicable "in these particular circumstances . . . ." *Id.* But, of course, this is not the way the law operates. When we issue a decision, we set forth the law, not only for the instant case, but for all future cases as well. Our decisions establish precedent, and they instruct citizens who are not among the parties how they might conform to the law in order to avoid becoming a party in tomorrow's lawsuit. The dissent proclaims that it is simply "applying law to facts," *id.*, begging the question of what exactly that "law" is and what are the dispositive "facts," and what "facts" must be demonstrated by an employer in order not to breach that "law." These are several more questions that the dissent can add to its calculations and, doubtless, several more questions that it can choose not to answer.

material fact regarding whether information about Brown's " 'habits, temperament, or nature,' " which was reported to his employer, gave the employer sufficient notice of Brown's acts of " 'impropriety, violence, or disorder,' " see *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 413; 189 NW2d 286 (1971), quoting 34 ALR2d 390, § 9, so as to make the employer liable for negligently retaining him.

Plaintiff, a then-23-year-old night security guard who was assigned by her employer to work at defendant's plant, was raped by Brown after he forced plaintiff into a women's restroom while she was checking to make sure a block of offices was secure. Brown was a midnight foreman employed by defendant.

In the months leading up to this rape, Brown had made sexually aggressive comments to plaintiff on a daily or near-daily basis. In fact, plaintiff's coworker testified that plaintiff frequently locked the door to her guard shack and pretended that she was asleep to prevent Brown from entering and to discourage him from speaking to her.

Plaintiff reported Brown's conduct not once, not twice, but at least three times to Brown's supervisor, defendant Harlan Gardner. Plaintiff told Gardner, the plant manager, that Brown continually made crude sexual comments to her, and she asked Gardner to make Brown stop. Three other security guards informed plaintiff that they, too, had complained to their superiors regarding Brown's conduct. Plaintiff also asked Brown to stop making the comments on numerous occasions. Despite these multiple complaints, and despite Gardner's telling plaintiff each time that he would "take care of it," Brown continued to bombard plaintiff with his sexually aggressive comments until he eventually raped her.[1]

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[1] The majority opines that plaintiff's personal failure to predict Brown's potential to carry through with his verbally expressed desire to

Nothing in *Hersh*, the case on which the majority relies, compels a conclusion that repeated, sexually aggressive comments duly reported to an employer can never put the employer on notice that the offending employee " 'may eventually commit an assault . . . .' "[2] *Hersh*, *supra* at 413, quoting 34 ALR2d 390, § 9. In

commit a sexually violent act involving her "weighs definitively against imposing a duty on defendant." *Ante* at 556; see also *ante* at 555 n 24. The obligation to assess its employee's fitness for a job falls on the employer, not on the victims of that employee's actions. Many times an employee will have no idea of another employee's propensity for violence; certainly a member of the public would not. Thus, it is the employer's job to gauge whether a particular employee is fit to remain in a position or in the workplace. Indeed, the essence of a negligent retention claim is that the *employer* breached a duty to ensure that the workplace was safe. The fact that plaintiff did not interpret the comments as harbingers of the rape is immaterial. Moreover, she did report the comments, which definitively placed the duty on defendant to assess the danger, if any, and respond appropriately. It is for the jury to determine whether defendant decided correctly.

The majority's statement places an irrational burden on employees that will result in complaints going unheeded. Now an employee must specifically state to an employer, "I believe that I might be killed," or "I believe that I might be raped." I can only imagine how quickly the reaction of supervisory staff will shift from concern and diligence to apathy from a sense that employees are overreacting and "crying wolf."

[2] Despite its assertion to the contrary, *ante* at 555 ("We do not hold that an employee's words alone can *never* create a duty owed by the employer to a third party."), the majority does find that sexually aggressive comments can never put an employer on notice. See *ante* at 547-548. The majority holds that absent a criminal record or violent history, an employer cannot be held liable, "solely on the basis of the employee's lewd comments," for a rape the employee commits. *Ante* at 548. If the majority believed that some comments could, depending on the circumstances, suffice, then it would find a genuine issue of material fact for the jury in the present case. But even if its opinion were internally consistent, the majority's artificial line-drawing ("This obviously would be an entirely different case if Brown had threatened to rape plaintiff and defendant was aware of these threats," *ante* at 555), reinforces that assessing whether particular comments should put an employer on notice is a factual matter for the jury.

Hersh, this Court quoted these pertinent words from the ALR to describe an employer's duty in relation to hiring or retaining employees:

> "[A]n employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, *by habits, temperament, or nature*, to deal with the persons invited to the premises by the employer. The employer's knowledge of *past acts of impropriety, violence, or disorder* on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such a result." [*Hersh*, *supra* at 412-413, quoting 34 ALR2d 390, § 9 (emphasis added).]

Critically, the duty of an employer is set forth in the first sentence of the quoted passage: an employer has the duty to use "due care" in selecting or retaining employees. The balance of the passage simply provides guidance on what will generally be considered forewarning of a potentially dangerous employee. But when there are no known "past acts of impropriety, violence, or disorder," the duty of the employer is not changed or lessened because knowledge of "past acts of impropriety, violence, or disorder" is not the only mechanism by which an employer can be forewarned of potentially assaultive behavior. Further, the ALR passage does not restrict the term "impropriety, violence, or disorder" in any way, although the majority appears to restrict the phrase to mean only violent acts or, at best, specific words it has arbitrarily decided would suffice. See *ante* at 555 and n 24.

Under a proper understanding of the principles of negligent retention, it is clear that plaintiff presented a genuine issue of material fact with respect to whether

defendant breached its duty to use due care in retaining Brown in light of defendant's knowledge of how Brown was conducting himself in the workplace. Given plaintiff's allegations, it is for a jury to decide whether defendant's knowledge of Brown's actions sufficiently alerted defendant that there was a potential for assault and, if so, whether defendant should have investigated the situation or taken any corrective action.

And the majority errs in concluding that *Hersh* precludes plaintiff's claim as matter of law. First, although our state's published cases addressing negligent-retention claims involve facts such as a past history of violence or records of fear expressed by employees, this in no way precludes a case in which a past history of violent behavior is lacking from reaching a jury. An employer has a duty to use due care in retaining an employee, and any number of things can suffice to provide notice to the employer that its retention of a particular employee may need a second look. Here, certainly Brown's conduct, which consisted of repeatedly telling his subordinate[3] that he wanted to commit a violent sexual act involving her, can be considered " 'habits, temperament, or nature' " suggesting that he was " 'unworthy . . . to deal with the persons invited to the premises by the employer' " because of a potential for assaultive behavior. *Hersh*, *supra* at 413, quoting 34 ALR2d 390, § 9. Indeed, the multiple reports of this conduct to the plant manager should have provided some indication to defendant that Brown was unfit to be a supervisor, much less an

[3] Plaintiff was Brown's subordinate in the sense that she was to report to him any problems she encountered on her shift or anything that was amiss in the plant. In fact, he was the only person to whom plaintiff could report because he was the midnight foreman and the sole person with authority in the plant. He did not, however, have the authority to, as his boss described, "tell [plaintiff] what to do."

employee, and that he may have the potential for assault given his unambiguous indications that he wanted to "fuck" plaintiff and pull her hair.[4] Moreover, certainly Brown's past conduct toward plaintiff would fall into the category of "impropriety" and perhaps "disorder," which disorder may signal to a reasonable employer that Brown had the capacity to commit an assault on plaintiff.[5] Because a reasonable jury could reach that same conclusion, whether the employer was on notice is a factual matter, as the Court of Appeals correctly found. And this is all the more true given that the person Brown was harassing on the night shift was a subordinate female who worked, to a large extent, alone.

The majority justifies its holding by opining that "[m]odern workplace speech is, at times, boorish and undesirable . . . ." *Ante* at 557.[6] But a function of the majority's rejection of a blanket rule that would "treat

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[4] Might this not be equated with Brown saying he wanted to "rape" plaintiff and pull her hair?

[5] The majority misconceives my position as broad and all-encompassing. But I do not contend that "every inappropriate workplace comment could supply sufficient notice of an employee's propensity to commit future violent acts," *ante* at 557, nor do I assert that "any inappropriate workplace speech . . . is sufficient to create a jury-submissible question of negligent retention," *ante* at 562. I do not even believe that sexually charged speech in every situation should put an employer on notice of a potential assault. Rather, I believe that in this particular case, and under these particular facts, a question for the jury was created. And while the majority opinion is rife with suggestion that I have concluded that defendant was liable for this rape, I make no such conclusion. But neither do I conclude that, as a matter of law, defendant cannot be found liable.

[6] "Boorish" is defined as "[l]ike a boor; rude; ill-mannered." *The American Heritage Dictionary, New College Edition* (1981). Certainly Brown's telling plaintiff that he wanted "to fuck [her] and pull [her] long hair," that he liked how she "sh[ook] her ass," that she "ha[d] big tits," and that he had "something she can suck on" goes miles beyond being "boorish."

every employee who makes inappropriate workplace comments as a potentially violent criminal," *ante* at 557-558 is an equally dangerous rule that *no* workplace speech can form the basis for a negligent-retention claim. Although the majority points to the principle that " ' "not every infirmity of character' " is sufficient to forewarn the employer of its employee's violent propensities," *ante* at 557, quoting *Hersh*, *supra* at 413, quoting 34 ALR2d 390, § 9, the majority allows for *no* infirmity of character, shown by speech, to be sufficient to allow a jury to decide whether, in light of the employee's conduct, the employer had a duty to act. See *ante* at 547-548, 555. Thus, the majority creates its own new rule, inconsistent with *Hersh* and the ALR passage, that *as a matter of law*, employers who are notified that an employee is verbally harassing another in a sexually aggressive way can never be held liable for retaining that employee if that employee undertakes to carry out the sick sexual fantasies that employee has been verbalizing. *Id.* This in turn means that employers need not respond to complaints about such matters, thus eliminating another workplace protection for innocent employees.[7]

The majority also predicts that "[a]n employer diligently seeking to avoid such broad tort liability would inevitably err on the side of over-inclusiveness and cast a wide net scrutinizing *all* employee speech that could be remotely construed as threatening." *Ante* at 557

[7] Interestingly, the majority concludes that Brown's "boorish" speech was "no predictor at all of future criminal behavior . . . ." *Ante* at 557. I beg to differ and believe that the facts speak for themselves. I point out as well that had Brown told plaintiff, "I am going to rape you," and had she reported that to defendant, that, too, under the majority's analysis, would have been insufficient to put defendant on notice that it had a duty to reevaluate Brown's presence in the workplace because defendant had no criminal history or violent past. See *ante* at 547-548.

(emphasis in original). First, I disagree that the status quo of allowing a jury to determine whether, under the totality of the circumstances, an employer should have been on notice is "broad tort liability."[8] Moreover, I fail to see why it would not be more desirable to have employers scrutinize threatening speech than to ignore it when reported and have an innocent employee raped. The majority's preferred lower level of employer responsibility will ensure that to the extent that "[m]odern workplace speech is, at times, boorish and undesirable," *ante* at 557, it will remain that way. Last, the same exercise of reviewing an employee's fitness is necessary when the employee has a criminal history or violent past, and just as the presence of a criminal history or violent past will not always be sufficient notice for a negligent-retention claim, neither will every instance of questionable employee speech.[9]

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[8] The concurring justice's histrionic list of questions and concerns and the majority's overwrought proclamation that my position would render "large numbers of job applicants effectively unemployable," *ante* at 565, again ignores that I do not foster a general rule that all workplace speech has negligent-retention implications. Rather, I only advocate that in this case, and in these particular circumstances, there was a question of fact for the jury. Moreover, I would note that the questions Justice MARKMAN poses and others like them apply just as easily to situations in which an employee's criminal history or violent past must be assessed. I would also observe that Justice MARKMAN is quite seriously overreacting to the analysis contained in my dissent by demanding answers to at least 32 questions, not one of which is implicated in this case. Just as in myriad other cases resolved before this one, not every permutation of the facts possibly imaginable needs to be, or should be, resolved. Justice MARKMAN's list of incessant questions is best reserved for the day we are presented with a factual situation that requires us to answer them. But as it is, the outcome that I advocate in this case is simply the result of applying law to facts and is no different than the many other resolutions reached by reviewing courts in which additional, but untimely, questions flow naturally from the answer given.

[9] The majority concludes that "[a]s a general rule, an employer cannot accurately predict an employee's future criminal behavior solely on the

The particular facts of this case refute the majority's statement, *ante* at 556, that Brown's comments "[stood] alone" and further illuminate why the question in this case is one for a jury. Brown's comments did not "stand alone." Rather, Brown's comments must be assessed in light of the circumstances that existed when he made the comments: Brown was the nightshift plant manager; plaintiff had to comply with Brown's supervisory requests; plaintiff worked alone; few, if any, other people were around or accessible; Brown's comments were relentless over a period of months; plaintiff complained about Brown's behavior to coworkers and Brown's employer; and plaintiff would lock herself in her guard shack to avoid contact with Brown. Brown's behavior cannot be viewed in a vacuum. Perhaps it might be more tempting to characterize Brown's comments as typical "modern workplace speech" were this a typical "modern workplace" environment. In that context, perhaps comments like these might be made when an audience is present—to impress one's buddies or get a laugh from onlookers. But Brown did not make the vast majority of his comments in that type of setting.[10] Rather, he made them to plaintiff late at night

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basis of the employee's workplace speech." *Ante* at 557. But "accurate prediction" is not the standard for reviewing speech, just as it is not the standard for reviewing conduct or history. No employer can be expected to predict assaultive behavior with 100 percent certainty in any situation. But an employer can be found to have been put on notice that an assault "*may eventually*" be committed. *Hersh*, *supra* at 413 (emphasis added).

[10] The record indicates that Brown did make one sexually charged comment to plaintiff in front of another guard. That guard testified that Brown approached plaintiff when plaintiff was eating a "Blow Pop" lollipop. Brown stated, "I got something better [than] that you can suck on." The guard responded by telling Brown not to speak in that manner.

In response to the majority's statement, *ante* at 549 n 5, that the record is unclear regarding when Brown made his comments, I would note that although plaintiff, at one point, stated that the comments began

when he was acting as her supervisor and no one else was around. He made them for no one to hear but her. These unique circumstances should prevent the majority from chalking up Brown's comments to "modern workplace speech" and, consequently, removing from the jury the question whether the comments were potentially harbingers of dangerous behavior.

And, unlike the majority, I do not believe that the Court of Appeals "expanded" an employer's duty at all. See *ante* at 566. As discussed, "[A]n employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, *by habits, temperament, or nature*, to deal with the persons invited to the premises by the employer." 34 ALR2d 390, § 9 (emphasis added). Whether this employer knew or should have known that Brown's "habits, temperament, or nature" made him unfit to supervise plaintiff on a sparsely populated nightshift because of the *potential* for assault (as opposed to the *certainty* of an assault) was a question for the jury. Also for the jury to decide was whether defendant breached its duty to keep plaintiff safe by failing to take any corrective action once it had knowledge of Brown's relentless harassment.[11] As such, the Court of Appeals

on the afternoon shift, she stated immediately afterward, and several other times during her deposition, that she did not meet Brown until she was transferred to the midnight shift. As such, it appears she may have misspoken with respect to the comments occurring on the afternoon shift. But, in any event, aside from the comment regarding the lollipop, there is no record evidence that any comments were made in front of any other person at any other time.

[11] I do not, as the majority insists I do, seek to eliminate foreseeability in this or similar cases. The majority remains just as confused about my opinion in this regard as it was in *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20; 664 NW2d 756 (2003). See *ante* at 556 n 25. Moreover, before claiming a superior ability to apply principles of foreseeability, the majority might review its opinion in *MacDonald v PKT, Inc*, 464 Mich

properly found that a genuine issue of material fact existed regarding whether defendant, having been informed multiple times about Brown's conduct, should be held liable for negligently retaining Brown. Rather than usurp the role of the jury in this matter, I would remand the case for trial.

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

322; 628 NW2d 33 (2001). There the majority eschewed all notions of foreseeability and refused to hold the defendant liable for the criminal acts of third parties, despite the defendant's knowledge that the particular criminal act at issue had occurred many times before, making it likely that it would occur again. Under the majority's reasoning in *MacDonald*, namely, failing to find foreseeability when it clearly existed, the majority would be forced to conclude that Brown's act was not foreseeable, even if he had raped before.

KIRKALDY v RIM

Docket No. 129128. Decided July 11, 2007.

Mary and William Kirkaldy brought a medical-malpractice action in the Wayne Circuit Court against Choon Soo Rim, M.D., and others. The court, Marianne O. Battani, J., dismissed the complaint without prejudice after determining the plaintiffs' affidavit of merit to be defective. The Court of Appeals, KELLY, P.J., and HOOD and DOCTOROFF, JJ., affirmed. 251 Mich App 570 (2002). The Supreme Court, in lieu of granting leave to appeal, partially vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals, directing the Court to consider the defendants' argument that they were entitled to dismissal with prejudice because the period of limitations was not tolled by the plaintiffs' filing of a defective affidavit of merit. 471 Mich 924 (2004). On remand, the Court of Appeals, MURPHY and CAVANAGH, JJ. (KELLY, P.J., concurring in the result only), held that, because the plaintiffs' affidavit of merit was determined to be defective, the plaintiffs' claim must be dismissed with prejudice. The majority, however, indicated that it would not have reached that result if it were not bound by *Geralds v Munson Healthcare*, 259 Mich App 225 (2003), and *Mouradian v Goldberg*, 256 Mich App 566 (2003). 266 Mich App 626 (2005). The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 477 Mich 1063 (2007).

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

A medical-malpractice complaint and affidavit of merit toll the statutory period of limitations until the validity of the affidavit is successfully challenged in subsequent judicial proceedings. If a defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If the challenge is successful, the proper remedy is dismissal without prejudice, leaving the plaintiff with whatever time remains in the period of limitations to file a complaint with a conforming affidavit of merit. Accordingly, the holdings of the Court of Appeals in this case are reversed, and *Geralds*, *Mouradian*, and their progeny are overruled.

Justice CAVANAGH, concurring, agreed with the result reached by the majority but disagreed with the statement that "the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant." MCL 600.5856(a) states that the period of limitations is tolled when a complaint is filed, regardless of whether an affidavit of merit is filed with the complaint. In this case, the period of limitations was tolled when the plaintiffs filed their complaint.

Justice KELLY, concurring, joined the result of the majority opinion because the plaintiffs filed an affidavit of merit and thus *Scarsella v Pollak*, 461 Mich 547 (2000), which held that a medical-malpractice complaint filed without an affidavit of merit does not toll the period of limitations, does not control this case. Justice KELLY wrote separately, however, to note her concern that the issue decided peremptorily in *Scarsella* has never been fully briefed and argued, despite meritorious arguments indicating that the Court misread MCL 600.5856(a) in that case. The issue should be considered again more thoroughly.

Reversed and remanded to the trial court.

LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — TOLLING.

A medical-malpractice complaint and affidavit of merit toll the statutory period of limitations unless the validity of the affidavit is successfully challenged in subsequent judicial proceedings, at which time the period of limitations resumes running (MCL 600.2912d[1]; MCL 600.5856).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Erlich, Rosen & Bartnick, P.C.* (by *Sheldon D. Erlich*), for Mary and William Kirkaldy.

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman P.C. (by *Raymond W. Morganti*), for Choon Soo Rim, M.D., and Rim and Sol, M.D., P.C.

Saurbier & Siegan, P.C. (by *Renée S. Siegan* and *Debbie K. Taylor*), for Raina M. Ernstoff, M.D.; and Raina M. Ernstoff, M.D., P.C.

Amici Curiae:

Olsman Mueller, P.C. (by *Jules B. Olsman* and *Donna M. MacKenzie*), for Citizens for Better Care.

Janet M. Brandon for the Michigan Trial Lawyers Association.

MEMORANDUM OPINION. The issue presented in this case concerns the proper disposition of a medical-malpractice lawsuit after a court determines that the plaintiff's affidavit of merit does not meet the requirements of MCL 600.2912d.[1] The Court of Appeals held that, because plaintiffs' affidavit of merit was determined to be defective, plaintiffs' claim must be dismissed with prejudice. *Kirkaldy v Rim (On Remand)*, 266 Mich App 626, 636-637; 702 NW2d 686 (2005). However, the majority of the panel indicated that it would not reach that result if it were not bound by *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003), and *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003).[2] This Court scheduled oral argument on plaintiffs' application for leave to appeal. 477 Mich 1063 (2007).[3] In lieu of granting leave to appeal, we reverse the Court of Appeals and overrule *Geralds*, *supra*; *Mouradian*, *supra*; and their progeny. MCR 7.302(G)(1).

In *Geralds* and *Mouradian*, the Court of Appeals purported to rely on this Court's opinion in *Scarsella v*

[1] Plaintiffs here filed an affidavit of merit that the circuit court later determined to be nonconforming with the requirements of MCL 600.2912d.

[2] Judge KELLY concurred in the result only.

[3] The order directed the parties to address three issues: "(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." 477 Mich 1063 (2007).

Pollak, 461 Mich 547; 607 NW2d 711 (2000), to hold that filing a defective affidavit of merit is the functional equivalent of failing to file an affidavit of merit for the purpose of tolling the period of limitations. Therefore, the Court held that a defective affidavit of merit does not toll the period of limitations under MCL 600.5856.[4] Because the issue presented in *Scarsella* is distinct from the issues presented in *Mouradian* and *Geralds*, the Court of Appeals erred in extending *Scarsella*'s holding to these cases.[5]

Scarsella concerned the tolling effect of a medical-malpractice complaint filed *without* an affidavit of merit. This Court held that filing a medical-malpractice complaint without an affidavit of merit "is ineffective, and does not work a tolling of the applicable period of limitation." *Id*. at 553. However, in the very next sentence, this Court noted that "[t]his holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Id*. In a footnote to that sentence, this Court further stated that "[w]e do not decide today *how* well the affidavit must be framed. Whether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute is a question we save for later decisional development." *Id*. at 553 n 7 (emphasis in *Scarsella*).

Mouradian was the first attempt by the Court of Appeals at that decisional development. The Court held that the affidavit of merit was "grossly nonconforming"

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[4] When this case was filed, MCL 600.5856 provided in part:

> 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.

[5] Nothing in this decision calls into question our decision in *Scarsella*.

because it did not contain all the statutorily required statements. Because the affidavit was deemed "grossly nonconforming," it was "insufficient to constitute an affidavit of merit within the meaning of the statute . . . ." *Mouradian*, *supra* at 574. The Court went on to hold that "as a matter of law, plaintiffs' complaint against defendants for the second surgery was not commenced because of their failure to file an affidavit of merit before the period of limitations expired . . . ." *Id*. Thus, under *Mouradian*, filing a "grossly nonconforming" affidavit of merit, similar to failing to file any affidavit, does not toll the period of limitations under MCL 600.5856(a).

In *Geralds*, the Court of Appeals extended the *Mouradian* rule beyond a grossly nonconforming affidavit to *any* nonconforming affidavit. The *Geralds* panel held that

> whether the adjective used is "defective" or "grossly nonconforming" or "inadequate," in the case at bar, plaintiff's affidavit did not meet the standards contained in MCL 600.2912d(1) . . . . [P]laintiff's affidavit was defective and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action. [*Geralds*, *supra* at 240.]

Although bound by *Geralds*, the panel in the present case criticized it as "especially harsh," inconsistent with *Scarsella*, and inconsistent with MCL 600.5856(a). *Kirkaldy (On Remand)*, *supra* at 635-636.

We agree that *Geralds* and *Mouradian* are inconsistent with *Scarsella* and MCL 600.5856(a). Under MCL 600.5856(a) and MCL 600.2912d, the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant. *Scarsella*, *supra* at 549. In this case, as in *Geralds* and *Mouradian*,

plaintiff filed and served a complaint and affidavit of merit. Thus, the period of limitations was tolled on that date. Recently, this Court held that "when an affidavit is filed, it is presumed valid. It is only in subsequent judicial proceedings that the presumption can be rebutted." *Saffian v Simmons*, 477 Mich 8, 13; 727 NW2d 132 (2007). Therefore, a complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in "subsequent judicial proceedings." Only a successful challenge will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running.

Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice. *Scarsella*, *supra* at 551-552. The plaintiff would then have whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit.

We reverse the Court of Appeals holding to the contrary and remand to the Wayne Circuit Court for further proceedings consistent with this opinion.

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

CAVANAGH, J. (*concurring*). While I agree with the result reached by the majority, I disagree with the majority's formulation of its rule. Specifically, I believe that *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), was incorrectly decided, so I cannot agree with the majority's statement, *ante* at 585, that under the statutes at issue, "the period of limitations is tolled when a complaint and affidavit of merit are filed and

served on the defendant." Rather, I would hold that under the plain language of MCL 600.5856(a), the period of limitations is tolled when a complaint is filed, regardless of whether an affidavit of merit is filed with the complaint.

MCL 600.5856 states, in relevant part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At 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.

Clearly, the Legislature did not instruct that the period of limitations for a medical malpractice action would be tolled only when a complaint and an affidavit of merit are filed. In fact, as plaintiffs and their amici curiae point out, the Legislature considered and rejected a formulation of MCL 600.2912d that would have read, "If the complaint is not accompanied by the certificate required under this subsection, the complaint does not toll the statute of limitations as provided in § 5856(1) [sic]." See SB 270 as introduced on January 28, 1993. Moreover, the Legislature amended MCL 600.5856 in the same public act used to enact the affidavit-of-merit requirement, 1993 PA 78, so it could have easily adjusted the language of MCL 600.5856(a) had it so desired. It did neither. This Court is not free to add language to a statute or to interpret a statute on the basis of this Court's own sense of how the statute should have been written. Because the language of MCL 600.5856(a) is quite plain, I would hold that a period of limitations is tolled when a complaint is filed. And under that rule, I would conclude that when plaintiffs filed their complaint in this matter, the period of limitations was tolled.

KELLY, J. (*concurring*). In *Scarsella v Pollak,*[1] this Court held that filing a medical-malpractice complaint without an affidavit of merit "is ineffective, and does not work a tolling of the applicable period of limitation."[2] I did not join the majority opinion. I dissented because I did not think that we should decide the issue without the benefit of full briefing and argument.[3] In this case, plaintiffs filed an affidavit of merit. Therefore, *Scarsella* is not controlling, and this case does not require us to determine whether *Scarsella* was correctly decided. Consequently, I join the result of the majority opinion.

But I write separately to note my concern that the issue in *Scarsella* has never received a full hearing from this Court. As Justice CAVANAGH points out in his concurrence, meritorious arguments exist indicating that the Court misread MCL 600.5856(a) seven years ago when it acted peremptorily in *Scarsella.* Whether the filing of a complaint without an affidavit of merit tolls the running of the statutory period of limitations should be again, and more thoroughly, considered by this Court.

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[1] 461 Mich 547; 607 NW2d 711 (2000).

[2] *Id.* at 553, quoted *ante* at 584.

[3] *Scarsella,* 461 Mich at 554 (opinion by CAVANAGH and KELLY, JJ.).

BROWN v MAYOR OF DETROIT

Docket Nos. 132016, 132017. Decided July 11, 2007.

Gary A. Brown and Harold C. Nelthrope brought actions in the Wayne Circuit Court against the mayor of the city of Detroit and the city, asserting claims of slander and violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Nelthrope also alleged intentional infliction of emotional distress. The actions were brought after Brown, the deputy chief of the Professional Accountability Bureau of the Detroit Police Department, was terminated from his position following his authorization of a preliminary investigation into allegations made in a memorandum by Nelthrope, a detective in the Executive Protection Unit (EPU) of the police department, regarding illegal conduct and misconduct by fellow EPU officers and the mayor and his wife and Brown's issuance of a memorandum regarding the matter to the chief of police. The mayor publicly called Nelthrope a liar after Nelthrope was identified as the source of the allegations. The court, Michael J. Callahan, J., granted the city's motion for summary disposition of the slander claims but denied the mayor's motion for summary disposition of those claims. The court denied the defendants' motions for summary disposition of the WPA claims and granted Nelthrope's motion for partial summary disposition of the WPA claims. The Court of Appeals, NEFF, P.J., and SAAD and BANDSTRA, JJ., consolidated appeals brought by the defendants and affirmed in part, reversed in part, and remanded for further proceedings. 271 Mich App 692 (2006). The Court reversed the circuit court's denial of the mayor's motion for summary disposition of the slander claims and reversed the grant of partial summary disposition to Nelthrope regarding his WPA claims. The Court remanded for a determination whether Nelthrope reported allegations to the Federal Bureau of Investigation. The Supreme Court ordered and heard oral argument on whether to grant the defendants' application for leave to appeal and the plaintiffs' application for leave to appeal as cross-appellants, asking the parties to address whether an

employee of a public body must report to an outside or higher authority in order to be protected by the WPA. 477 Mich 1011 (2007).

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

The WPA does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority in order to receive the protections of the WPA. There is no requirement in the WPA that an employee of a public body who reports violations or suspected violations is entitled to the protections of the WPA only if such reporting is outside the employee's job duties. It does not matter that the public body to which the violations or suspected violations are reported is also the employer of the reporting person. The holding of the Court of Appeals that the defendants were not entitled to summary disposition with regard to whether the plaintiffs were engaged in protected activity under the WPA must be affirmed. The holding of the Court of Appeals that the jury must determine whether Nelthrope reported his allegations to the FBI must be vacated, because Nelthrope admitted that he made no such report.

Affirmed in part and vacated in part.

MASTER AND SERVANT — WHISTLEBLOWERS' PROTECTION ACT — REPORTS TO PUBLIC BODIES — SCOPE OF EMPLOYMENT.

The Whistleblowers' Protection Act does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority in order to receive the protections of the act; therefore, it does not matter that the public body to which the report is made is the employer of the person making the report; the protections of the act apply to such a reporting person even where the making of such a report is within the scope of the person's employment (MCL 15.361 *et seq.*).

Stefani & Stefani, P.C. (by *Michael L. Stefani* and *Frank J. Rivers*), for the plaintiffs.

Barris, Sott, Denn & Driker, P.L.L.C. (by *Morley Witus* and *Tiffany L. Robinson*), and *Valerie A. Colbert-Osamuede,* City of Detroit Law Department, for the defendants.

Lewis & Munday, P.C. (by *Samuel E. McCargo*), cocounsel for the mayor of Detroit.

Grier & Copeland, P.C. (by *Wilson A. Copeland, II*), cocounsel for the city of Detroit.

CAVANAGH, J. We granted oral argument on the applications for leave to appeal and leave to file a cross-appeal in this case to determine whether an employee of a public body must report violations or suspected violations to an outside agency or higher authority to be protected by the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Because there is no language in the statute that indicates such a requirement, we hold that the WPA does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority to receive the protections of the WPA. We further hold, again on the basis of the statutory language, that there is no requirement that an employee who reports violations or suspected violations receives the protections of the WPA only if the reporting is outside the employee's job duties. Accordingly, we affirm in part the opinion of the Court of Appeals, but we vacate that portion of the opinion that holds that there is question of fact concerning whether plaintiff Harold Nelthrope reported allegations to the Federal Bureau of Investigation because Nelthrope admitted in his deposition that he did not make this report.

I. FACTS AND PROCEEDINGS

Plaintiff Harold Nelthrope was a detective in the Executive Protection Unit (EPU) of the Detroit Police Department before he was transferred. Nelthrope reported allegations of illegal conduct and misconduct by fellow EPU officers and by Detroit Mayor Kwame Kilpatrick and his wife to the police department's Professional Accountability Bureau. These allegations were summarized in a memorandum. Plaintiff Gary

Brown, the deputy chief of the Professional Accountability Bureau, authorized a preliminary investigation into these allegations and prepared another memorandum regarding Nelthrope's allegations. This memorandum was given to the police chief and then passed along to the mayor's office. After the memorandum was submitted, Brown was discharged from his position as deputy chief of the EPU. Members of the mayor's office then identified Nelthrope as being the source of the allegations of misconduct to the media, and the mayor publicly called Nelthrope a liar.

Brown and Nelthrope filed complaints against the city of Detroit and Mayor Kilpatrick, asserting claims of slander and violations of the WPA. Nelthrope also sued for intentional infliction of emotional distress. The circuit court granted the city's motion for summary disposition of the slander claims on the basis of governmental immunity, but denied the mayor's motion for summary disposition of the slander claims. It also denied defendants' motions for summary disposition of the WPA claims. It also granted Nelthrope's motion for partial summary disposition of the WPA claim, leaving only the issue of damages for the jury.

The Court of Appeals issued a published opinion that affirmed in part, reversed in part, and remanded for further proceedings. It reversed the circuit court's denial of the mayor's motion for summary disposition of the slander claims and reversed the circuit court's grant of partial summary disposition to Nelthrope on his WPA claim. *Brown v Detroit Mayor*, 271 Mich App 692; 723 NW2d 464 (2006). This Court granted oral argument on the applications for leave to determine whether an employee of a public body must report to an outside agency or higher authority to be protected by the WPA. 477 Mich 1011 (2007).

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).

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*.

MCL 15.362 of the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to *a public body*, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [Emphasis added.][1]

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[1] MCL 15.361(a) provides: " 'Employee' means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service."

MCL 15.361(d) provides:

> "Public body" means all of the following:
>
> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (*ii*) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
>
> (*iv*) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.
>
> (*v*) A law enforcement agency or any member or employee of a law enforcement agency.
>
> (*vi*) The judiciary and any member or employee of the judiciary.

The statutory language in this case is unambiguous. The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to *a public body*. MCL 15.362. The language of the WPA does not provide that this public body must be an outside agency or higher authority. There is no condition in the statute that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA.[2] In this case, Nelthrope and

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[2] We disapprove of dictum in a footnote that suggested the contrary in *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 77 n 4; 503 NW2d 645 (1993). The statement was dictum because it was unnecessary to the decision of the case. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006). We also caution that to the extent that caselaw has followed this footnote, it is overruled. See, e.g., *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 495-496; 705 NW2d 689 (2005).

Brown reported their allegations of suspected violations to a public body. Nelthrope reported the suspected violations to the police department's Professional Accountability Bureau, and Brown reported the suspected violations to the chief of police. A "public body" includes a "law enforcement agency or any member or employee of a law enforcement agency." MCL 15.361(d)(*v*). It does not matter if the public body to which the suspected violations were reported was also the employee's employer.

While we affirm the Court of Appeals conclusion that defendants were not entitled to summary disposition on whether Nelthrope and Brown were engaged in protected activity under the WPA, we note that the Court's analysis of this issue addressed whether plaintiffs indeed reported the suspected violations to an outside agency. Because this requirement does not exist in the statute, it was unnecessary for plaintiffs to do so. Moreover, we vacate the Court's holding that it should be left to a jury to determine if Nelthrope reported the suspected violations to the FBI, because this holding is not supported by the facts. In his deposition, Nelthrope admitted that he did not report his concerns to the FBI.[3] Thus, because of Nelthrope's admission, there is no factual question left regarding whether Nelthrope contacted the FBI. However, because the WPA does not require that a report be made to an outside agency, Nelthrope's admission does not affect whether he can proceed with his WPA claim.

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[3] *Q*. Mr. Nelthrope, did you ever go to the FBI and report any of these matters pertaining to the Police Department?

A. No, I did not.

Q. Or the Mayor?

A. No, I did not.

Finally, there is also no language in the statute that limits the protection of the WPA to employees who report violations or suspected violations only if this reporting is outside the employee's job duties. The statute provides that an employee is protected if he reports a "violation or a suspected violation of a law or regulation or rule . . . ." MCL 15.362. There is no limiting language that requires that the employee be acting outside the regular scope of his employment. The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a public body. The statutory language renders irrelevant whether the reporting is part of the employee's assigned or regular job duties.

IV. CONCLUSION

The WPA does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority to receive the protections of the WPA. Further, the WPA does not provide that an employee who reports violations or suspected violations receives the protections of the WPA only if the reporting is outside the employee's job duties. Accordingly, we affirm in part the opinion of the Court of Appeals, but we vacate that portion of the opinion that holds that there is question of fact regarding whether plaintiff Nelthrope reported allegations to the FBI. Because Nelthrope has admitted that he did not contact the FBI, there is not a factual question regarding this issue that remains to be decided by a jury.

Affirmed in part and vacated in part.

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

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied May 11, 2007:

BENNETT v OFFICEMAX, INC, No. 132447; Court of Appeals No. 269562.

MARKMAN, J. (*dissenting*). I would deny leave to appeal and assess $250 in costs against the plaintiff and in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. I would also bar plaintiff from submitting additional filings in this Court until he offers proof that he has paid all outstanding court-imposed sanctions. By letter to the Clerk of this Court dated February 18, 2007, plaintiff has indicated that he may not pay sanctions imposed by this Court and the lower courts in prior cases.

CORRIGAN, J. I join the statement of Justice MARKMAN.

MURRY v YUCHASZ, No. 132682; Court of Appeals No. 268909.

MARKMAN, J. I would grant leave to appeal to consider the Court of Appeals dissent.

CAVANAGH, J., did not participate, due to a familial relationship with counsel of record.

Appeal Dismissed May 11, 2007:

SHEPARD v M & B CONSTRUCTION, LLC, No. 132351. 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. 261484.

Summary Disposition May 18, 2007:

PEOPLE v HOLT, No. 128034. On April 11, 2007, the Court heard oral argument on the application for leave to appeal the December 21, 2004, 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 result reached by the Court of Appeals that there was no violation of the 180-day rule of MCL 780.131(1) and 780.133, but not the rationale it employed to reach that result. We affirm that result because the defendant did not establish that the Department of Corrections caused to be delivered by certified mail to the prosecuting attorney the written notice, request, and statement as required by MCL 780.131(1). The rationale of the Court of Appeals opinion on this issue is vacated. 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. 250580.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. I would reverse because I believe the prosecution waived any complaints about the statutory notice, for the reasons set forth in my statement contained in this Court's order dated January 19, 2007.

Leave to Appeal Denied May 18, 2007:

PEOPLE v GIOVANNINI, No. 131631; Reported below: 271 Mich App 409.

CORRIGAN, J. (*dissenting*). I dissent from the majority's decision to deny leave to appeal. The Court of Appeals misapplied our rules of statutory construction in a published opinion and relied on rejected canons of statutory construction to hold that an offender convicted of more than one criminal offense may be eligible for youthful trainee status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11. Because the Court of Appeals analysis is flawed and the result may be incorrect, I would grant leave to appeal.

The Court of Appeals analysis contains three flaws. First, the Court of Appeals erred in holding that MCL 762.11 is ambiguous. At the time defendant sought youthful trainee status under the HYTA, the statute provided, in pertinent part:

> *If an individual pleads guilty to a charge of a criminal offense*, other than a felony for which the maximum punishment is life imprisonment, a major controlled substance offense, or a traffic offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee. [MCL 762.11 (emphasis added).]

"[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Public Service Comm*, 470 Mich 154, 166 (2004) (internal 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 Group Agency, Inc*, 468 Mich 459, 474 (2003). The meaning of MCL 762.11 can be determined from its text and by using conventional means of statutory construction, including the use of MCL 8.3b.[1] Nothing in MCL 762.11 conflicts or makes it equally susceptible to more than one meaning.

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[1] MCL 8.3b provides, in part, that "[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number."

Second, the Court of Appeals improperly held that the HYTA should be liberally construed because it is a remedial statute.

> We do not apply preferential rules of statutory interpretation- . . . without first discovering an ambiguity and attempting to discern the legislative intent underlying the ambiguous words. *Crowe v Detroit*, 465 Mich 1, 13; 631 NW2d 293 (2001). Only if that inquiry is fruitless, or produces no clear demonstration of intent, do we resort to a preferential or "dice-loading" rule. [*Koontz v Ameritech Services, Inc*, 466 Mich 304, 319 (2002).]

See also *DeRose v DeRose*, 469 Mich 320, 353 (2003) (KELLY, J., dissenting). Because MCL 762.11 is unambiguous, the Court of Appeals should not have resorted to preferential "dice-loading" rules of statutory construction.

Third, the Court of Appeals erred in relying on the legislative acquiescence doctrine. This Court has made clear that the legislative acquiescence doctrine is disfavored. See, e.g., *People v Anstey*, 476 Mich 436, 445 n 7 (2006). It never applies to an unambiguous statute. *Id.* Because the Court of Appeals analysis is flawed in these three respects, I would grant leave to appeal to analyze MCL 762.11 using the proper rules of statutory construction.

YOUNG, J. I join the statement of Justice CORRIGAN.

LIPTOW v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 132618; Reported below 272 Mich App 544.

KELLY, J. (*dissenting*). This Court should grant leave to appeal to consider whether MCL 600.5821(4) exempts a state governmental body from the one-year-back rule of MCL 500.3145(1). This is a jurisprudentially significant issue of first impression.

PEOPLE v BENJAMIN COLLINS, No. 132653; Court of Appeals No. 263020.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I believe that one question presented in this appeal should be reviewed by this Court. It appears that a juror withheld information that she should have revealed during voir dire. As a consequence, defendant may have been denied a fair and impartial jury. I would grant leave to appeal to determine whether defendant should have been granted a new trial.

PEOPLE v LESTER, No. 132692; Court of Appeals No. 264605.

KELLY, J. (*dissenting*). I agree with Court of Appeals Judge WHITBECK that defendant's sentence should be set aside and the case remanded for resentencing. Defendant showed plain error. He should not have been sentenced as an habitual offender without the prosecution confirming that his convictions in Ohio were for offenses that would have been felonies under Michigan law. This plain error undermined the fairness and integrity of the judicial proceeding. *People v Carines,* 460 Mich 750, 774 (1999).

PEOPLE v CARNICOM, No. 132803; Reported below: 272 Mich App 614.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J., (*dissenting*). I agree with Court of Appeals Judge COOPER that this Court should grant leave to appeal for the purpose of clarifying our opinion in *People v Jacobsen,* 448 Mich 639 (1995). As Judge COOPER pointed out, "[i]f the court provides to indigent defendants the right to a court appointed and funded expert witness, there can be no requirement that the defendant first show the expert will support his claim. Otherwise, the right affords defendants no protection at all."

WOLF V HOMECOMINGS FINANCIAL NETWORK, INC, No. 133333; Court of Appeals No. 270169.

In re WARNER (DEPARTMENT OF HUMAN SERVICES V IVANOVA), Nos. 133766, 133767; Court of Appeals Nos. 270822, 270823.

In re PETITION OF ATTORNEY GENERAL FOR INVESTIGATIVE SUBPOENAS, No. 133809; Reported below: 274 Mich App 696.

Appeals Dismissed May 18, 2007:

In re ESTATE OF MOUKALLED (BAKIAN V NATIONAL CITY BANK), No. 130810. 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. Attorney Laurie S. Longo's motion to withdraw as counsel is granted. Reported below: 269 Mich App 708.

KELLY, J. (*concurring*). I agree with the order dismissing the application for leave to appeal because the parties have stipulated to dismiss the case. I write separately to question the necessity or the desirability of Justice CORRIGAN's concurring statement.

First, I believe that the statement is unnecessary. The parties have agreed to dismiss the appeal, and therefore the issues involved are no longer before the Court. A bedrock of Michigan jurisprudence is that the Court reserves its judgment for "actual cases and controversies." See, e.g., *Glass v Goeckel*, 473 Mich 667, 703 (2005). There is no longer a case or controversy in the instant case, and therefore Justice CORRIGAN's statement questioning the reasoning of the Court of Appeals decision is unnecessary.

Second, Justice CORRIGAN questions whether the Court of Appeals expansion of equitable rights was proper. She espouses beliefs about and calls into question the appropriateness of a recognized legal doctrine when the validity of the doctrine is not before the Court. This does little more than indicate to future litigants that she is predisposed to questioning the applicability of the equitable lien doctrine in similar factual situations. In my view, this erodes the public's confidence in the impartiality of the judiciary by undermining the concept that cases are decided by a neutral and unbiased decision maker.

In response to this argument, Justice CORRIGAN asserts that her statement "merely articulates [her] view that the Court of Appeals legal analysis may be flawed." It would seem more appropriate to address that

analysis when a case or controversy puts it before this Court. Justice CORRIGAN compares her statement to other statements that a justice might sign, such as an opinion or concurrence. But a significant difference exists between signing a legal opinion about an issue being adjudicated and opining on the applicability of one no longer before the Court. In the first situation, the justice is possibly creating binding precedent. In the second, the justice is stating personal beliefs that neither resolve the case nor bind other courts.

Most importantly, I believe Justice CORRIGAN's concurring statement is premature. This Court has not received the benefit of the parties' full briefing or oral arguments. Two possible conclusions may be deduced: Either Justice CORRIGAN's view on the subject is set and she will not consider further information, or she would consider further information and her position could change in a future case. If the former is true, she betrays an unwillingness to approach the issue again with an open mind. If the latter is true, her current exposition of views serves no useful purpose. It only confuses the reader.

For all the above reasons I have stated, I believe that Justice CORRIGAN's concurring statement sets an undesirable example. The parties have settled their dispute on their own and ask nothing more from this Court. Judges should encourage, rather than discourage, settlements. Justice CORRIGAN's statement implies that at least one of the parties was wrong in settling the dispute. As a result, it is likely that the party will question the decision to settle and hesitate to do so in another case. Also, future litigants may feel that the applicability of the equitable lien doctrine is in a state of flux.

For the reasons stated earlier, I concur with the order dismissing the application for leave to appeal but question the appropriateness of Justice CORRIGAN's concurring statement.

CORRIGAN, J. (*concurring*). I concur with the order dismissing the application for leave to appeal because the parties agreed to the dismissal. But I write separately to question the Court of Appeals use of equity to create a lien where the "Security Agreement" does not meet the requirements of the relevant provision of article 9 of the Uniform Commercial Code (UCC), MCL 440.9104, or arguably meet the requirements of our recording statutes. I am raising this question because, although the Court of Appeals opinion is published and binding on trial courts and future Court of Appeals panels, the settlement of this appeal will preclude our consideration of the problematic Court of Appeals analysis. The lower courts and future litigants should be aware of the probable flaws in the Court of Appeals opinion.[1]

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[1] Justice KELLY argues that my statement is unnecessary because "this Court reserves its judgment for 'actual cases and controversies.' " But I do not pretend to pass judgment on this case. I write separately merely to heighten awareness that the binding Court of Appeals opinion reaches questionable legal conclusions.

I. FACTS AND PROCEDURAL POSTURE

Petitioner, Bruce Bakian, loaned Jihad Moukalled $381,000 in exchange for two promissory notes—one for $150,000 and another for $231,000. Moukalled failed to make all the agreed-upon payments for the loans. Rather than sue Moukalled, petitioner entered into an agreement with Moukalled (entitled the "Security Agreement"). Under the agreement, Moukalled promised not to file bankruptcy and promised to pay back the debts on time. If Moukalled did not make the agreed payments, he would be forced to liquidate his corporate and personal assets, including two vacant lots (the Heather Hills lots), to satisfy his debts to petitioner. Later that year, Moukalled killed his family and himself. Petitioner thereafter filed the Security Agreement with the Oakland County Register of Deeds. Approximately 18 creditors filed claims in excess of $2 million against the estate, but Moukalled's estate had only $312,023.36 in assets. Respondent, Fifth Third Bank, claimed $780,400.65 against the estate, while petitioner claimed $271,000 (the amount outstanding on the loans).

Petitioner moved to enforce the Security Agreement in probate court. The probate court ultimately held that the UCC applied and that the Security Agreement satisfied the requirements of a valid and enforceable security agreement under article 9 of the UCC.

The Court of Appeals affirmed for different reasons. 269 Mich App 708 (2006). The Court of Appeals held that the probate court erred in holding that the UCC applied to the creation or transfer of an interest in land. But the panel held that petitioner properly asserted an equitable lien on the Heather Hills lots. The panel held that the Security Agreement revealed that the parties intended to use identifiable pieces of property as security for the promissory notes, and that they had made a mutual mistake of law in preparing an agreement not enforceable under the UCC. The Court of Appeals concluded that because petitioner attempted to secure his loans to Moukalled and petitioner had no adequate remedy at law, petitioner sufficiently demonstrated that he was entitled to an equitable lien.

I also reject Justice KELLY's argument that my statement is premature because "[t]his Court has not received the benefit of the parties' full briefing or oral arguments." It is common practice for members of this Court to express their legal views in a statement without having the benefit of full briefing and oral argument. In fact, Justice KELLY frequently engages in this practice herself. Justice KELLY's view would preclude members of this Court from commenting on any case in which we have not heard oral argument. This would severely limit our discretion to express our views on important legal issues. Furthermore, as discussed, I do not pretend to pass judgment on this case, but only question the Court of Appeals decision after careful consideration of the parties' applications, the lower court record, and the lower court decisions.

II. ANALYSIS

At the time the parties entered into the Security Agreement, article 9 applied only to transactions intended to create a security interest in *personal* property. Article 9 did not apply to "the creation or transfer of an interest in or lien on real estate . . . ." MCL 440.9104(j). Nonetheless, the Security Agreement purports to create a security interest in real property. The Court of Appeals allowed petitioner to circumvent the requirements of article 9 by using the equitable lien doctrine to enforce the Security Agreement.[2]

> Equity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled. . . .
>
> In order to lay the foundation for an equitable lien upon real estate, there must be a contract in writing out of which the equity springs, indicating an intention to make particular property identified in the written contract security for the debt or obligation, or whereby it is promised to assign, transfer or convey the property as security. [*Cheff v Haan*, 269 Mich 593, 598 (1934).]

A party that has an adequate remedy at law is not entitled to an equitable lien. *Yedinak v Yedinak*, 383 Mich 409, 415 (1970).

In reaching its decision that petitioner is entitled to equitable relief, the Court of Appeals failed to apply several arguably applicable legal

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[2] The Court of Appeals also did not address whether the Security Agreement was subject to our recording statutes or whether the agreement satisfied the requirements of those statutes. The probate court, before it reversed itself on other grounds, held as follows:

> Petitioner first argues for a land contract mortgage. MCLA 565.358 states that "[a]ny document [that] would be sufficient to constitute a real estate mortgage upon interest in real property shall constitute a land contract mortgage." However, pursuant to MCLA 565.154 any mortgage of lands must be worded in the following[:] "A.B. mortgages and warrants to C.D." with a description of the property, sum granted, date of repayment, dated and signed. The document clearly does not meet these requirements because the document does not set a date for repayment nor does the document have a signature from Gerald Niester. Thus[,] the Petitioner's argument for a land contract mortgage must fail.

In addition to the statute raised by the probate court, there is a question regarding whether the Security Agreement met the requirements of other recording statutes such as MCL 565.201.

principles. In *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45 (1993), this Court explained that equity does not apply when a statute controls:

> "Courts of equity, . . . as well as law, must apply legislative enactments in accordance with the plain intent and language used by the legislature." Where . . . a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere. [*Id.* at 55-56, quoting *G F Sanborn Co v Alston*, 153 Mich 456, 461 (1908).]

This Court described the limits of the equitable lien doctrine in *Ashbaugh v Sinclair*, 300 Mich 673 (1942):

> "It is not a limitless remedy to be applied according to the measure of the conscience of the particular chancellor any more than, as an illustrious law writer said, to the measure of his foot. . . . In vain would a statute prescribe the limit of a curator's power to mortgage his ward's property if a court of equity should, by giving it another name, whether it be subrogation or equitable lien, invest an unauthorized deed with substantially the same effect it would have had if it had been expressly authorized by the statute." [*Id.* at 677, quoting *Capen v Garrison,* 193 Mo 335, 349-350 (1906).]

In *Jaenicke v Davidson*, 290 Mich 298, 304 (1939), this Court held:

> "It is a well-settled principle of law that all contracts which are founded on an act prohibited by a statute under a penalty are void, although not expressly declared to be so." *In re Reidy's Estate*, 164 Mich. 167 [173 (1910)].
>
> Neither law nor equity will enforce a contract made in violation of such a statute or one that is in violation of public policy.

Under these legal principles, I question whether it was proper for the Court of Appeals to use equity to enforce a security agreement that did not comply with article 9.

This Court's decision in *King v Welborn*, 83 Mich 195 (1890), deepens my concern regarding the Court of Appeals opinion. In *King, supra* at 196, the defendant argued that he had an equitable lien on a surplus of money remaining after foreclosure of a mortgage. But this Court rejected the defendant's argument because the applicable statute did not allow a verbal promise to give security to create a mortgage lien upon the homestead. *Id.* at 199. Similarly in the instant case, the statute does not permit an agreement to create a security interest in real property. Under *King, supra*, equity may not allow what the statute does not.

In conclusion, I question whether the Court of Appeals expansion of equitable rights was proper. If it was not, there is a danger that its

opinion will be used to justify further impermissible expansions of equitable remedies. The opinion could have far-reaching negative consequences for the priority rights of secured and unsecured creditors. It disregards the priority rights of creditors who properly complied with the statutory requirements and gives an advantage to purported creditors who loan money outside the applicable legal conventions. The rights of creditors who have followed all the applicable rules and have done everything right will be subject to attack from would-be creditors who have failed to comply with the statutory requirements for creating a security interest. Had the parties not stipulated to dismiss the application for leave to appeal, I would have favored granting leave to appeal to determine whether the Court of Appeals use of the equitable lien doctrine was proper.[3]

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[3] I reject Justice KELLY's erroneous view that my statement questioning the Court of Appeals opinion indicates that I lack the ability to impartially decide future cases involving the equitable lien doctrine. " '[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.' " *Cain v Dep't of Corrections*, 451 Mich 470, 496 (1996), quoting *Liteky v United States*, 510 US 540, 555 (1994). My statement merely articulates my view that the Court of Appeals legal analysis may be flawed. It does not indicate that that I am somehow biased or partial toward the litigants. If anything, it merely reveals an insight into my judicial philosophy, which a reader can also glean from reading any of my opinions. Justice KELLY's view would essentially preclude appellate jurists from hearing the same issue in a later case. The system would collapse were this so.

I also reject Justice KELLY's argument that I should not comment on the Court of Appeals opinion because it might cause one of the parties to question its decision to settle and discourage that party from settling future cases. The parties have already settled this case. My statement no longer has the power to encourage or discourage the parties to settle this case. Because the facts of any future case will be different, I fail to see how my statement in this case will affect the party's willingness to settle future cases.

Justice KELLY also argues that my statement will create uncertainty regarding the applicability of the equitable lien doctrine. I agree. If the Court of Appeals opinion is incorrect, then the law should be uncertain. Future litigants *should* question the Court of Appeals opinion if it is flawed, rather than mindlessly accept the opinion just because it is legally binding. It is better for an area of the law to be uncertain than for it to be certain and wrong.

MAZUMDER v UNIVERSITY OF MICHIGAN REGENTS, Nos. 130859, 130860. By order of April 4, 2007, the application for leave to appeal the February 23, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St. Joseph Mercy Hospital* (Docket No. 131879). 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. The application for leave to appeal in Docket No. 130836 remains pending. Reported below: 270 Mich App 42.

Leave to Appeal Granted May 23, 2007:

PEOPLE v PISCOPO, No. 127129. The parties shall include among the issues to be briefed: (1) whether the rape-shield statute, MCL 750.520j, bars the admission of evidence of past sexual assault; (2) whether the rape-shield statute bars the admission of evidence of imaginary sexual activity; (3) whether the rape-shield statute bars the admission of unsubstantiated allegations of prior sexual assault; (4) what procedures and standards a trial court should employ to determine whether the rape-shield statute applies to otherwise admissible evidence involving unsubstantiated allegations of sexual assault or evidence of imaginary sexual activity; (5) what party has the burden of proof at each stage of the process of determining the applicability of the rape-shield statute; (6) whether barring the admission of evidence of actual past sexual assault in this case would constitute a denial of the constitutional right to confrontation or the right to present a defense; and (7) whether the trial court erred in barring the admission of evidence regarding the questionnaire filled out by the complainant prior to the church ritual.

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. 245835.

WESCHE v MECOSTA COUNTY ROAD COMMISSION, No. 129282. The parties shall address the issue whether MCL 691.1405's exception to governmental immunity permits the spouse of a person who sustains bodily injury as a result of the negligent operation of a motor vehicle owned by a governmental agency to recover damages for loss of consortium.

We further order that this case be argued and submitted to the Court together with the case of *Kik v Sbraccia* (Docket No. 132849), at such future session of the Court as both cases are ready for submission.

The Attorney General, Michigan Defense Trial Counsel, Inc., and the Michigan Trial Lawyers Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 267 Mich App 274.

HASTINGS MUTUAL INSURANCE COMPANY v MOSHER, DOLAN, CATALDO & KELLY, INC, No. 131546. On order of the Court, the application for leave to

appeal the May 18, 2006, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. The application for leave to appeal as cross-appellant is granted, limited to the issues whether genuine issues of material facts in dispute exist as to (1) whether the actions of the defendant cross-appellant's subcontractors for which the defendant cross-appellant was held liable by the arbitrator were an "occurrence" within the meaning of the comprehensive general liability (CGL) policies issued by the plaintiff cross-appellee; (2) whether the "Damage to Your Own Work Exclusion" or "Fungi Exclusion" in any of those policies is applicable; and (3) which of the 2001, 2002, and 2003 policies control this dispute. The remaining issue in the application for leave to appeal as cross-appellant and the application for leave to appeal remain under consideration.

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. 265621.

PEOPLE v CANNON, No. 131994. The application for leave to appeal is granted, limited to the issues of the scope of predatory conduct defined in offense variable 10, MCL 777.40(3)(a), and whether the trial court properly assessed 15 points for predatory conduct in this case. The parties shall address whether predatory conduct is limited to exploitation of a "vulnerable victim" and, if so, what factors may be considered in determining whether a victim is "vulnerable." We order the Saginaw 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 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. 259532.

COOPER v AUTO CLUB INSURANCE ASSOCIATION, No. 132792. The parties shall address whether the plaintiffs' common-law cause of action for fraud is subject to the one-year-back rule of MCL 500.3145(1). Court of Appeals No. 261736.

KIK v SBRACCIA, No. 132849. The application for leave to appeal the October 10, 2006, and November 15, 2005, judgments of the Court of Appeals is granted, limited to the issues: (1) whether MCL 691.1405's exception to governmental immunity permits the spouse of a person who sustains bodily injury as a result of the negligent operation of a motor vehicle owned by a governmental agency to recover damages for loss of consortium; (2) whether MCL 691.1405, providing that governmental agencies "shall be liable for bodily injury and property damage resulting from the negligent operation . . . of a motor vehicle" owned by a governmental agency, limits the damages recoverable in a wrongful death action, as enumerated in MCL 600.2922(6); and (3) in light of MCL 691.1405's waiver of governmental immunity for bodily injury and property damage resulting from the negligent operation of a motor vehicle owned by a governmental agency and operated by an officer,

agent, or employee of the governmental agency, whether a governmental officer, agent, or employee whose alleged gross negligence causes death or bodily injury is subject to personal liability for loss of consortium pursuant to MCL 691.1407(2)(c). We further order that this case be argued and submitted to the Court together with the case of *Wesche v Mecosta Co Rd Comm* (Docket No. 129282), at such future session of the Court as both cases are ready for submission. The Attorney General, Michigan Defense Trial Counsel, Inc., and the Michigan Trial Lawyers 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 690.

NATIONAL PRIDE AT WORK, INC v GOVERNOR, No. 133429. 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: 274 Mich App 147.

NATIONAL PRIDE AT WORK, INC v GOVERNOR, No. 133554. The motion for stay is denied. 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: 274 Mich App 147.

CAVANAGH and KELLY, JJ. We would grant the motion for stay.

Summary Dispositions May 23, 2007:

ROBINS v GARG, No. 131182. 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). Reported below: 270 Mich App 519.

PEOPLE v PHANEUF, No. 132856. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court, and we remand this case to the trial court for resentencing. The initial sentence of 18 years to life was invalid, MCL 769.9(2), and the trial court erroneously resentenced defendant when she was not present. *People v Mallory*, 421 Mich 229, 247 (1984). See also MCL 768.3; MCR 6.425(E). We do not retain jurisdiction. Court of Appeals No. 274138.

PEOPLE v TERRANCE WHITE, No. 132868. 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 to the Court of Appeals, and/or any appropriate postconviction motions in the trial court, in accord with MCR 7.205(F), except that the time for filing shall be determined based on the date of the circuit court's order appointing counsel. 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. The motion for bond pending appeal is denied as moot. We do not retain jurisdiction. Court of Appeals No. 272675.

Leave to Appeal Denied May 23, 2007:

PEOPLE v VANDONKELAAR, No. 133308; Court of Appeals No. 265897.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 25, 2007:

MILLER v PROGRESSIVE CORPORATION, No. 131987. 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 plaintiff is "named in the policy" within the meaning of MCL 500.3114(1) where the policy states, "The Declarations, endorsements and application are hereby incorporated into and made a part of this policy" but the Declarations sheet effective February 2, 2001, which lists the plaintiff as an occasional driver, is preceded by a clause stating, "Your Policy Premium Is Based On The Following Information Which Is Not Part Of The Policy." The parties should not submit mere restatements of their application papers. 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. 259504.

PEOPLE v HOLLEY, No. 133264. 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 MCL 750.483a(1)(b) requires proof beyond a reasonable doubt that a person committed or attempted to commit a crime. They may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their applications. Court of Appeals No. 264584.

Leave to Appeal Granted May 25, 2007:

TOLL NORTHVILLE, LTD v NORTHVILLE TOWNSHIP, No. 132466. The parties shall address the constitutionality of MCL 211.34d(1)(b)(viii) and whether "public service" improvements (such as water service, sewer service, utility service) are "additions" to the property within the meaning of Proposal A, Const 1963, art 9, § 3, which allows for increased taxation of the property. The motion to add to the record is denied. The motions for leave to file briefs amicus curiae are granted. Other persons or groups interested in determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 272 Mich App 352.

ESTES v TITUS, No. 133098. The parties shall include among the issues to be briefed: (1) whether a judgment of divorce is subject to judicial review for purposes of a claim under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.*; (2) whether a division of marital assets pursuant to a judgment of divorce is a transfer subject to the UFTA; (3) whether and under what circumstances a division of marital assets under a judgment of divorce can be deemed fraudulent; (4) whether a judgment debtor can attach marital property for the debt of one of the spouses; and (5) the significance, if any, of the plaintiff's failure to appeal the denial of the motion to intervene in the divorce action. The Family Law and Business Law sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 273 Mich App 356.

Summary Disposition May 25, 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. On May 10, 2007, the Court heard oral argument on the applications for leave to appeal the August 1, 2006, judgment of the Court of Appeals. On order of the Court, the applications are again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we affirm only that portion of the Court of Appeals judgment holding that the vehicles in question are exempt from the imposition of a use tax under the resale exemption contained in MCL 205.94(1)(c). The MCL 205.94(1)(c) "purchased for resale" exemption precludes use tax under MCL 205.93(1). We vacate the balance of the judgment of the Court of Appeals and adopt the trial court's August 2, 2005, opinion and order holding that MCL 205.94(1)(c) applies and that no use tax is due. The "exemption for demonstration purposes" exemption of MCL 205.94(1)(c) and the "purchased for resale" exemption of MCL 205.94(1)(c) are independent of one another; both provide exemptions from use tax upon satisfaction of applicable statutory criteria. The Court of Appeals also erred in applying the Black's Law Dictionary definition of "consumer," rather than the statutory definition of "consumer" set forth in MCL 205.92(g). "We need not, indeed we must not, search afield for meanings where the act supplies its own." *W S Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 350 (1958). Reported below: 272 Mich App 14.

CAVANAGH, J. I concur in the result.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Denied May 25, 2007:

MATTHEWS v REPUBLIC WESTERN INSURANCE COMPANY, No. 130912; Court of Appeals No. 251333.

Summary Dispositions May 30, 2007:

HOOVER v MICHIGAN MUTUAL INSURANCE COMPANY, No. 132660. 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. 269206.

PEOPLE v KANYAMA HAMPTON, No. 132873. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for correction of the judgment of sentence to reflect the sentence and restitution actually imposed by the court at sentencing. The trial court sentenced the defendant to serve a prison term of 40 to 120 months for his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84; however, the judgment of sentence indicates that the sentence for this offense is one to five years. In addition, the judgment of sentence fails to reflect that the trial court ordered the defendant to pay restitution of $9,115. The trial court is further ordered to ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. 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. 262956.

PEOPLE v ERTMAN, No. 133003. 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 reconsideration of the defendant's application for leave to appeal under the standard applicable to direct appeals. The Court of Appeals erred in denying the defendant's application for leave to appeal under MCR 6.508(D) because the defendant's appeal was not based on a motion for relief from judgment. Court of Appeals No. 274360.

MADAY v HAROLD I MILLER REAL ESTATE DEVELOPMENT & LEASING, No. 133180. 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. 272087.

MILLER v GRAND HAVEN STAMPED PRODUCTS COMPANY, No. 133315. 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 plaintiff is disabled and, if so, whether she is entitled to an award of differential weekly wage loss benefits. 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. 273042.

Leave to Appeal Denied May 30, 2007:

J W HOBBS CORPORATION v DEPARTMENT OF TREASURY, No. 129688; reported below: 268 Mich App 38.

CAVANAGH, J. I would grant leave to appeal.

PAPALAS v FORD MOTOR COMPANY, Nos. 130157, 130158; Court of Appeals No. 252470.

GAINES v KERN, No. 131726; Court of Appeals No. 266049.

PEOPLE v LAMARIO BROWN, No. 132034; Court of Appeals No. 260310.

JENNINGS v WAYNE COUNTY CLERK, No. 132595; Court of Appeals No. 270557.

PEOPLE v GOMEZ, No. 132655. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270018.

PEOPLE v LEE-BRYANT, No. 132674. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273382.

PEOPLE v ORTWINE, No. 132693. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273638.

PEOPLE v RODNEY RODGERS, No. 132701; Court of Appeals No. 272474.

PEOPLE v ERIC WILLIAMS, No. 132711. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 274204.

PEOPLE v BERG, No. 132719; Court of Appeals No. 272715.

PEOPLE v PILLETTE, No. 132735. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270513.

PEOPLE v TILLERY, No. 132744. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269844.

PEOPLE v OLIVER, No. 132746. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269622.

PEOPLE v CHARLES PARKS, No. 132758. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269595.

PEOPLE v DERRICKUS GREEN, No. 132768. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269750.

PEOPLE v COE, No. 132775. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269499.

CASEY v ASU GROUP, No. 132778; reported below: 273 Mich App 388.

PEOPLE v WALTONEN, No. 132779; reported below: 272 Mich App 678.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ROGERS, No. 132783. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270240.

PEOPLE v RONALD BANKS, No. 132786. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270844.

PEOPLE v DAMON THOMAS, No. 132789. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270306.

PEOPLE v KLUK, No. 132800. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270516.

PEOPLE v DERRICK COLEMAN, No. 132806. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270148.

PEOPLE v IVES, No. 132810. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270346.

PEOPLE v MARC KING, No. 132814. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273674.

PEOPLE v HNATIUK, No. 132819; Court of Appeals No. 273246.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 132829; Court of Appeals No. 261027.

PEOPLE v MCRUNELS, No. 132832. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270094.

PEOPLE v MOFFETT, No. 132837. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270218.

PEOPLE v SWEEZER, No. 132842. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270472.

PEOPLE v KALLAS, No. 132843. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270128.

PEOPLE v SIMPSON, No. 132847. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270220.

PEOPLE v LANG, No. 132861; Court of Appeals No. 263050.

PEOPLE v TANSKI, No. 132878; Court of Appeals No. 273457.

KELLY, J. I would remand this case to the trial court to allow the defendant to withdraw his plea.

PEOPLE v BELLMAN, No. 132886. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270038.

PEOPLE v DONALD LOGAN, No. 132906. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273924.

PEOPLE v WOODWARD, No. 132907. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270601.

PEOPLE v TURNER, No. 132911. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270348.

PEOPLE v CHARLES JONES, No. 132919. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269510.

PEOPLE v SLUCHAK, No. 132925; Court of Appeals No. 262674.

PEOPLE v REED, No. 132936; Court of Appeals No. 263033.

PEOPLE v GRIFFIN, No. 132944; Court of Appeals No. 263510.

MERRITT v CASSENS TRANSPORT COMPANY, No. 132948; Court of Appeals No. 271007.

PEOPLE v RICHARD BROWN, JR, No. 132951; Court of Appeals No. 263600.

PEOPLE v ROSE, No. 132954; Court of Appeals No. 274213.

NICKELL v AUTO-OWNERS INSURANCE COMPANY, No. 132956; Court of Appeals No. 259944.

PEOPLE v SONES, No. 132961. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271137.

PEOPLE v BRILEY, No. 132966; Court of Appeals No. 275011.

PEOPLE v HELBLING, No. 132968; Court of Appeals No. 270910.

PEOPLE v COLE, No. 132971; Court of Appeals No. 274358.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v CHESTER PATTERSON, No. 132974; Court of Appeals No. 274219.

PEOPLE v EARNEST STEWART, No. 132976. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270688.

PEOPLE v BOLENBAUGH, No. 132984. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270489.

PEOPLE v DAVID KENNEDY, No. 132990; Court of Appeals No. 252104.

PEOPLE v O'BRIEN, No. 132992; Court of Appeals No. 273930.

PEOPLE v PATILLO, No. 132993; Court of Appeals No. 262689.

PEOPLE v ANTHONY, No. 132994; Court of Appeals No. 265918.

PEOPLE v HILLS, No. 132995; Court of Appeals No. 273877.

PEOPLE v DAVIS, No. 133001. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271181.

PEOPLE v QUENTIN JONES, No. 133002. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270387.

PEOPLE v POWERS, No. 133005. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270553.

PEOPLE v DYKES, No. 133006; Court of Appeals No. 273594.

PEOPLE v WILKERSON, No. 133007. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270922.

PEOPLE v TETREAU, No. 133010; Court of Appeals No. 264365.

PEOPLE v ASHMORE, No. 133011; Court of Appeals No. 262305.

PEOPLE v CORNELIUS WEBB, No. 133015. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270436.

NELSON v WAYNE COUNTY, No. 133019; Court of Appeals No. 270852.

PEOPLE v JOHNATHAN WEBB, No. 133021. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270705.

PEOPLE v MEADE, No. 133022; Court of Appeals No. 274183.

PEOPLE v ARTHUR JACKSON III, No. 133024; Court of Appeals No. 263507.

PEOPLE v CAMPBELL, No. 133030. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 274980.

PEOPLE v DAVIDSON, No. 133039; Court of Appeals No. 263013.

PEOPLE v FOX, No. 133047; Court of Appeals No. 261972.

PEOPLE v NEWMAN, No. 133049; Court of Appeals No. 261974.

PEOPLE v MARKS, No. 133051; Court of Appeals No. 273595.

PEOPLE v BURTON, No. 133053; Court of Appeals No. 273343.

PEOPLE v PEATROSS, No. 133055; Court of Appeals No. 263508.

PEOPLE v BERNARD KELLY, No. 133059; Court of Appeals No. 261936.

PEOPLE v SORLIEN, No. 133062; Court of Appeals No. 264593.

PEOPLE v DOUGLAS HOUGH, No. 133063; Court of Appeals No. 270969.

PEOPLE v TRUE, No. 133067; Court of Appeals No. 274076.

PEOPLE v THRUSHMAN, No. 133069; Court of Appeals No. 271994.

PEOPLE v WIECZOREK, No. 133082; Court of Appeals No. 263592.

PEOPLE v NEELY, No. 133093; Court of Appeals No. 262542.

PEOPLE v KELLEY, No. 133094; Court of Appeals No. 274651.

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 FREDERICK, No. 133100; Court of Appeals No. 262303.

PEOPLE v HASAN, No. 133102; Court of Appeals No. 261843.

PEOPLE v SELF, No. 133105; Court of Appeals No. 274382.

PEOPLE v BOWER, No. 133106; Court of Appeals No. 263438.

PEOPLE v ROQUE, No. 133108; Court of Appeals No. 263855.

PEOPLE v DELANEY, No. 133110; Court of Appeals No. 272225.

PEOPLE v DENNIS, No. 133111; Court of Appeals No. 274277.

PEOPLE v LAMAR TATE, No. 133112; Court of Appeals No. 264234.

PEOPLE v JERMAINE BANKS, No. 133113; Court of Appeals No. 263395.

PEOPLE v LANCASTER, No. 133115; Court of Appeals No. 263483.

PEOPLE v CHARLES JOHNSON, No. 133117; Court of Appeals No. 275146.

PEOPLE v DETRICK WILLIAMS, No. 133118; Court of Appeals No. 272888.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v CALHOUN, No. 133119; Court of Appeals No. 264233.

PEOPLE v BERRY, No. 133120; Court of Appeals No. 274205.

PEOPLE v FIELDS, No. 133135; Court of Appeals No. 265139.

PEOPLE v FOSTER, No. 133137; Court of Appeals No. 264173.

PEOPLE v MCCLURE, No. 133138; Court of Appeals No. 265374.

PEOPLE v KATTULA-DOWELL, No. 133139; Court of Appeals No. 264179.

PEOPLE v HUYSER, No. 133140; Court of Appeals No. 264058.

PEOPLE v LEGREE, No. 133141; Court of Appeals No. 265577.

PEOPLE v CURTIS MARTIN, No. 133143; Court of Appeals No. 274378.

PEOPLE v SINCLAIRE COLLINS, No. 133144; Court of Appeals No. 273174.

ACE AMERICAN INSURANCE COMPANY v EMMET COATING SERVICES, INC, No. 133150; Court of Appeals No. 268138.

PEOPLE v NICHOLS, No. 133151; Court of Appeals No. 274362.

PEOPLE v JOHNATHAN JOHNSON, No. 133152; Court of Appeals No. 273487.

PEOPLE v THERESA JOHNSON, No. 133153; Court of Appeals No. 275523.

PEOPLE v BAKER, No. 133158; Court of Appeals No. 267087.

PEOPLE v O'NON, No. 133160; Court of Appeals No. 263626.

PEOPLE v ENSER, No. 133161; Court of Appeals No. 273280.

PEOPLE v ROBERTS, No. 133162. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271572.

PEOPLE v STOKEN, No. 133164; Court of Appeals No. 268959.

PEOPLE v MCELLIGOTT, No. 133165; Court of Appeals No. 274521.

PEOPLE v ANTOINE JORDAN, No. 133167; Court of Appeals No. 264331.

PEOPLE v MYRON WATKINS, No. 133171; Court of Appeals No. 264957.

PEOPLE v HORTON, No. 133173; Court of Appeals No. 264604.

PEOPLE v MICHAEL PATTERSON, No. 133181; Court of Appeals No. 264707.

CAPRICCIOSO v DEPARTMENT OF COMMUNITY HEALTH, No. 133184; Court of Appeals No. 271237.

PEOPLE v MORENO, No. 133185; Court of Appeals No. 264057.

PEOPLE v RONALD BROWN, No. 133187; Court of Appeals No. 263621.

PEOPLE v MCPHAIL, No. 133188; Court of Appeals No. 274562.

PEOPLE v REDMOND, No. 133191; Court of Appeals No. 264330.

PEOPLE v BREWSTER, No. 133206; Court of Appeals No. 274691.

PEOPLE v TRACY MARTIN, No. 133220. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275275.

PEOPLE v ROBERSON, No. 133221; Court of Appeals No. 273763.

JAQUES v BASKIN, No. 133229; Court of Appeals No. 270715.

GROSSKLAUS v GROSSKLAUS, No. 133234; Court of Appeals No. 263376.

PEOPLE v ORR, No. 133236; Court of Appeals No. 264599.

PEOPLE v ARMSTRONG, No. 133239; Court of Appeals No. 272104.

YPSILANTI FIRE MARSHAL v KIRCHER AND BARNES v KIRCHER, Nos. 133240-133243; reported below: 273 Mich App 496 (on reconsideration).

PEOPLE v DAVID EDWARDS, No. 133247; Court of Appeals No. 264826.

PEOPLE v CHAUNCEY JOHNSON, No. 133248; Court of Appeals No. 274436.

PEOPLE v ANDERSON, No. 133252; Court of Appeals No. 263035.

PEOPLE v LARSON, No. 133257; Court of Appeals No. 274723.

PEOPLE v STATON, No. 133258; Court of Appeals No. 262292.

MOXON v MOXON, No. 133262; Court of Appeals No. 271747.

PEOPLE v MILTON, No. 133263; Court of Appeals No. 262111.

PEOPLE v BOOKER, No. 133267; Court of Appeals No. 263214.

PEOPLE v TYRONE JACKSON, No. 133268; Court of Appeals No. 275490.

PEOPLE v WILSON, No. 133275; Court of Appeals No. 267945.

FRISCH v STATE FARM FIRE AND CASUALTY COMPANY, No. 133281; Court of Appeals No. 263939.

HARRIS v OLIVER, No. 133282; Court of Appeals No. 263172.

PEOPLE v BOOTERBAUGH, No. 133284; Court of Appeals No. 262978.

PEOPLE v BRANDON HARRIS, No. 133285; Court of Appeals No. 275008.

PEOPLE v BRASHERS, No. 133286; Court of Appeals No. 274839.

PEOPLE v DOOLEY, No. 133288; Court of Appeals No. 274645.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

GREAT LAKES TOWING COMPANY v DEPARTMENT OF TREASURY, No. 133291; Court of Appeals No. 271556.

PEOPLE v ASHMAN, No. 133296; Court of Appeals No. 262373.

PEOPLE v EARL RODGERS, No. 133297; Court of Appeals No. 263946.

CAVANAGH, J. I would grant leave to appeal to consider the videotaping issue.

KELLY, J. I would grant leave to appeal.

PEOPLE v MORTON, No. 133300; Court of Appeals No. 273883.

PEOPLE v VELIZ, No. 133310; Court of Appeals No. 265049.

DAVIS v GENERAL MOTORS CORPORATION, No. 133318; Court of Appeals No. 272238.

PEOPLE v GRAY, No. 133321; Court of Appeals No. 264828.

PEOPLE v SAYER, No. 133331; Court of Appeals No. 260101.

PEOPLE v BEDNAR, No. 133335; Court of Appeals No. 274559.

PEOPLE v MCINTOSH, No. 133338; Court of Appeals No. 263394.

PEOPLE v JUSTICE, No. 133339; Court of Appeals No. 274953.

HOLLAND v STONEY POINT TANK TRUCK SERVICE, INC, No. 133342; Court of Appeals No. 273730.

ZERBST v KEWEENAW HOME NURSING & HOSPICE, No. 133344; Court of Appeals No. 271009.

PEOPLE v ALEXANDER, No. 133361. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275635.

PEOPLE v TOPP, No. 133365; Court of Appeals No. 275013.

PEOPLE v CARROLL, No. 133376; Court of Appeals No. 275915.

GAINFORTH v BAY HEALTH CARE, No. 133378; Court of Appeals No. 271313.

PEOPLE v GRAVES, No. 133385. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275674.

STEEL v IVANHOE HUNTLEY-OAKHURST BUILDERS, LLC, No. 133414; Court of Appeals No. 271494.

BURTON v BEST BUY COMPANY, INC, No. 133417; Court of Appeals No. 272417.

PEOPLE v ANDREW STEWART, JR, No. 133422; Court of Appeals No. 262620.

PEOPLE v MANN, No. 133423; Court of Appeals No. 275007.

PLASTIPAK PACKAGING, INC v UNITED STATES FIRE INSURANCE COMPANY, No. 133428; Court of Appeals No. 271523.

PEOPLE v SCHACHT, No. 133431; Court of Appeals No. 275272.

PEOPLE v EDDIE JACKSON, No. 133443; Court of Appeals No. 264363.

PEOPLE v SPENCER, No. 133445; Court of Appeals No. 263961.

GRAFF TRUCK CENTERS, INC v CITY OF FLINT, No. 133447; Court of Appeals No. 271361.

BUSCH DRIVE, LLC v BLOUW CONSTRUCTION COMPANY, INC, No. 133471; Court of Appeals No. 272049.

PEOPLE v HOUGHTELING, No. 133608. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276857.

UNIVERSITY OF MICHIGAN REGENTS v TITAN INSURANCE COMPANY, No. 133687; Court of Appeals No. 276710.

Interlocutory Appeals

Leave to Appeal Denied May 30, 2007:

PAPALAS v FORD MOTOR COMPANY, Nos. 130476, 130477; Court of Appeals No. 252527.

WISE v AUTO-OWNERS INSURANCE COMPANY, No. 133293; Court of Appeals No. 274145.

Reconsiderations Denied May 30, 2007:

PEOPLE v HATCHETT, No. 131949. Summary disposition entered at 477 Mich 1061. Court of Appeals No. 261132.

PEOPLE v BURGER, No. 132004. Leave to appeal denied at 477 Mich 1031. Court of Appeals No. 268986.

PEOPLE v NEWSON, No. 132043. Leave to appeal denied at 477 Mich 1031. Court of Appeals No. 259715.

PEOPLE v MAGEE, No. 132515. Leave to appeal denied at 477 Mich 1055. Court of Appeals No. 261158.

PEOPLE v TWILLEY, No. 132521. Leave to appeal denied at 477 Mich 1055. Court of Appeals No. 261570.

PEOPLE v PARKER, No. 132634. Leave to appeal denied at 477 Mich 1034. Court of Appeals No. 271689.

CITY OF DETROIT v MOORE, No. 132691. Leave to appeal denied at 477 Mich 1057. Court of Appeals No. 270520.

SCHAEFER v BORMANS, INC, No. 132716. Leave to appeal denied at 477 Mich 1057. Court of Appeals No. 270935.

PEOPLE v SINGH, No. 132729. Leave to appeal denied at 477 Mich 1057. Court of Appeals No. 272040.

PEOPLE v HEARD, No. 132777. Leave to appeal denied at 477 Mich 1058. Court of Appeals No. 262687.

MARTIN v DEPARTMENT OF CORRECTIONS, No. 132980. Leave to appeal denied at 477 Mich 1059. Court of Appeals No. 272384.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal June 1, 2007:

ENGLISH GARDENS CONDOMINIUM, LLC v HOWELL TOWNSHIP, No. 132859. 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 trial court correctly granted the township's motion for summary disposition in its entirety, and whether the Court of Appeals erroneously treated an ordinance provision as governing the operation of the letter of credit. 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. Reported below: 273 Mich App 69.

PEOPLE v BARRETT, No. 133128. 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 this Court should overrule *People v Burton*, 433 Mich 268 (1989), which requires independent proof of a startling event before an out-of-court statement may be admitted as an excited utterance under MRE 803(2). 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 Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to files briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 261382.

CAVANAGH, J. I would deny leave to appeal.

PEOPLE v MCBRIDE, No. 133142. 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 Macomb 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 42 days of the date of the order appointing counsel, or ruling that the defendant is not entitled to appointed counsel, addressing whether, under all the circumstances, the defendant made a knowing, intelligent, and voluntary waiver of her Fifth Amendment rights. Reported below: 273 Mich App 238.

SIMPSON v BORBOLLA CONSTRUCTION & CONCRETE SUPPLY, INC, No. 133274. 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 *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), does not apply where the preexisting condition is work-related. 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. Reported below: 274 Mich App 40.

Leave to Appeal Granted June 1, 2007:

MATHER INVESTORS, LLC v LARSON, No. 131654. The parties shall include among the issues to be briefed: (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 Maddock's estate would represent any separate rights or interests that are not otherwise represented by defendant Larson; (4) whether defendant Larson has sufficient information and/or standing to raise any defenses or counterclaims the estate may have against plaintiff; (5) whether the Uniform Fraudulent Transfer Act (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; (6) whether the UFTA permits an action *solely* against the first transferee of an asset, MCL 566.38(2)(a), regardless of whether a right to payment has been reduced to judgment, MCL 566.31(c); (7) whether the UFTA displaces those cases that evaluate whether a debtor is a necessary party in an action to set aside a fraudulent conveyance under the common law, such as *Paton v Langley*, 50 Mich 428 (1883), and *Bixler v Fry*, 157 Mich 314 (1909), both discussed in the Court of Appeals opinion; (8) whether a judgment against a debtor is ever necessary to obtain a judgment avoiding a transfer against the transferee under MCL 566.38, and if not, whether the avoidance of the transfer is enforceable against the transferred asset, MCL 566.37(2), or only against the transferee's unrelated assets; and (9) whether the UFTA and MCR 2.205(A) are in conflict in this case and, if so, which should prevail. The Probate and Estate Planning and Elder Law and Advocacy sections of the State Bar of Michigan, the Michigan Health and Hospital Association, and the Michigan Creditors Bar 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.

Summary Disposition June 1, 2007:

MUNICIPAL EMPLOYEES RETIREMENT SYSTEMS OF MICHIGAN v DELTA CHARTER TOWNSHIP, No. 129041. We affirm the May 24, 2005, judgment of the Court of Appeals. The Court of Appeals reasoned that the vacant properties were held by Municipal Employees Retirement Systems of Michigan, "not for ancillary investment purposes, but as part of a diversified investment portfolio pursuant to [its] statutory duty to administer funds" under MCL 38.1139(2) and 38.1536(10). *Muni Em-*

ployees Retirement Systems of Michigan v Delta Charter Twp, 266 Mich App 510, 513 (2005). It further noted:

> Under [the Municipal Employees Retirement Act, MCL 38.1501 *et seq.*,] "[a]ll money and other assets of the retirement system shall be held and invested for the sole purpose of meeting disbursements authorized in accordance with the provisions of this act and shall be used for no other purpose . . . ." MCL 38.1539(2). By the plain language of this statute, petitioner is required to *hold* and *invest* other assets, such as the land in question, for the purpose of meeting its disbursement requirements. Furthermore, the statute specifically states that the assets held or invested "shall be *used* for no other purpose." *Id.* (emphasis added). The phrase "used for no other purpose" necessarily contemplates that the only proper "uses" for assets under the act, is to hold or invest them. Consequently, the act of holding real property assets in petitioner's portfolio, ready for liquidation to meet its statutorily mandated disbursement requirements, is a present use rather than "an indefinite prospective use." [*Traverse City v East Bay Twp,* 190 Mich 327, 331 (1916).] Therefore, the land held by petitioner was properly exempt from taxation under MCL 211.7m because it was land used for a public purpose. [*Id.* at 513-514.]

We emphasize that the Municipal Employees Retirement Systems of Michigan was *statutorily required* to *hold* and *invest* assets. We further note that if the Municipal Employees Retirement Systems of Michigan is unable to meet pension disbursements, municipalities themselves must produce these funds. The Municipal Employees Retirement Systems of Michigan's acquisition of land in Delta Township carries out the public purpose of the retirement system by diversifying the portfolio and investing in a way that is not subject to the vicissitudes of the stock or bond market, but instead disseminates the risk. For the reasons stated by the Court of Appeals, and the additional reasons stated here, the property at issue is exempt from ad valorem taxation under MCL 211.7m of the General Property Tax Act.

MARKMAN, J. (*dissenting*). Petitioner is a public entity that administers a pension system for public employees. It owns vacant property for investment purposes and claims that this property is exempt from property taxes under MCL 211.7m because such property is being "used to carry out a public purpose." The Tax Tribunal concluded that the property was not tax-exempt because the passive ownership of property for investment purposes does not constitute a present public use. The Court of Appeals reversed, 266 Mich App 510, 514 (2005), and this Court granted respondent's application for leave to appeal. 474 Mich 1053 (2006). The majority now affirms the Court of Appeals holding that the property is tax-exempt. I respectfully dissent.

MCL 211.7m provides:

> 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. . . . [Emphasis added.]

The issue here is whether petitioner's property is being "used to carry out a public purpose."

In *Traverse City v East Bay Twp*, 190 Mich 327, 331 (1916), this Court held that "the use which warrants exemption mentioned in the statute is a *present use*, and not an indefinite prospective use." (Emphasis added.) In that case, the city was holding vacant land for the purpose of possible future development of an additional power plant. It was undisputed that an additional power plant was not needed at the time and that nothing at all had been done to develop the property. We held that "[t]he lands not only are not used for any public purpose, but they are not used for any purpose. They lie in a state of nature and no attempt has, to the present time, been made to utilize them for the development of power, which is the only use of value that can be made of them." *Id.* at 330-331.

Much more recently, in *City of Mt Pleasant v State Tax Comm,* 477 Mich 50, 51 (2007), this Court held that "[b]ecause 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, . . . the property was exempt from taxation under MCL 211.7m." In that case, the city purchased property with the intention of reselling it to developers. During the time the city owned the property, it prepared the property for development by installing such things as water lines, sewer lines, curbs, gutters, and roads. In determining whether the property was used for a public purpose, the court "consider[ed] what steps the city ha[d] taken to move from merely holding the land to actually using it for a public purpose." *Id.* at 56.

In the instant case, petitioner acquired the property with the hope of selling it at a profit at some future time. Assuming that earning such a profit for its members serves a "public" purpose, the property is still not being "used" for a public purpose at the present time. Indeed, it is not being used for any purpose at this time. It is simply vacant and unused property. As Justice COOLEY noted, "Land not needed for municipal uses but held for speculative increase in value is, of course, not used for a public purpose." 2 Cooley, Taxation (4th ed), § 638, p 1338. "[P]roperty of a municipal corporation which is not devoted to any public or municipal use but is merely held for its value as property or for the income to be derived therefrom is taxable by any other body politic

having jurisdiction thereof." 71 Am Jur 2d, State & Local Taxation, § 281, p 562. It is the *property* that must be "used" for a public purpose, not the *proceeds* from the property.

As with the property in *Traverse City,* and unlike the property in *Mt Pleasant,* nothing at all has been done to develop the property at issue here. That is, the city has not taken any steps "to move from merely holding the land to actually using it for a public purpose." *Mt Pleasant, supra* at 56.

The Court of Appeals held:

> This case presents circumstances distinct from those involved in the cases relied on by the Tax Tribunal, where a governmental entity holds real property for investment purposes. Here, the vacant properties are held by petitioner not for ancillary investment purposes, but as part of a diversified investment portfolio pursuant to petitioner's statutory duty to administer funds. . . . [P]etitioner is [statutorily] required to *hold* and *invest* . . . assets, such as the land in question, for the purpose of meeting its disbursement requirements. . . . Consequently, the act of holding real property assets in petitioner's portfolio, ready for liquidation to meet its statutorily mandated disbursement requirements, is a present use rather than "an indefinite prospective use." [266 Mich App at 513-514 (emphasis in original).]

The majority adopts this reasoning, and I respectfully disagree. "Had the Legislature intended to provide a blanket exemption for all land owned by entities such as plaintiff, it clearly would have done so. However, it chose to exempt only that land 'used to carry out a public purpose.' " *Rochester Hills Pub Library v Rochester Hills*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 1997 (Docket No. 196077), slip op at 2. Merely because petitioner is required to hold onto assets for investment purposes does not mean that petitioner is entitled to a tax exemption when it does so. By adopting the Court of Appeals reasoning, the majority has created a tax exemption for a category of public entities that simply has no basis in the text of the statute. The statute exempts property from taxation that is "*used* to carry out a public purpose." MCL 211.7m. It does not exempt *all* property owned by a public entity that has a statutory duty to hold onto assets for investment purposes. Under the clear language of the statute, such property would *only* be exempt from taxation if it were "*used* to carry out a public purpose." The proper question under MCL 211.7m is not whether the property is *owned* by a public entity, or whether a public entity has the *authority* to hold such property for investment purposes, or even whether the ownership of the property is "*useful*" to, or serves, some public purpose. Rather, the proper question is simply whether the property is currently being "*used*" to carry out a public purpose. Because the

property here is not currently being used at all, it is not being used to carry out a public purpose, and, thus, is not tax-exempt under MCL 211.7m.

Under the majority's analysis, it is difficult to comprehend what property owned by a public entity would *ever* be subject to taxation by virtue of *not* being "used" to carry out a public purpose. Even accepting the novel categorization of public entities formulated by the majority, how could it not be said that *any* public entity investing in land—whether or not that was its exclusive mission—was "using" the land by virtue of its investment value. By nullifying the concept of non-"use," the majority consumes the rule—that public lands are equally taxable as private lands—with the exception—that public lands are tax-exempt only when being "used to carry out a public purpose." As a result of this order, there is no rule left, only the exception.

Leave to Appeal Denied June 1, 2007:

FARMERS INSURANCE EXCHANGE v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 132179; reported below: 272 Mich App 106.

CAVANAGH, J. I would grant leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent. By denying leave to appeal in this priority dispute, the majority leaves intact a published decision of the Court of Appeals that subjects no-fault insurance carriers to liability for vehicles not covered by an insurance policy and driven by persons with whom the insurer has no relationship whatsoever. This is a remarkable expansion of the concept of insurance responsibility in this state. The Court of Appeals erred, in my judgment, by failing to read the relevant provision of the no-fault act, MCL 500.3114(5)(a), in the context of the entire no-fault act and the financial responsibility act. Given that necessary context, the statute can only reasonably be read as imposing liability on an insurer when the vehicle involved in the accident is covered by a no-fault insurance policy.

The claimant in the underlying first-party no-fault case, a motorcyclist, was injured when he was struck by an uninsured van driven by Lynn Smith. Although the van was purchased for Smith's exclusive use, it was co-owned with her boyfriend, John Petiprin. Smith purchased a no-fault insurance policy for the van from Pioneer State Insurance Company. However, before the accident, Smith had allowed the policy to lapse. Petiprin, on the other hand, had a no-fault insurance policy with defendant Farm Bureau General Insurance Company of Michigan on his personal vehicle. However, Smith's van had never been covered by defendant's policy, Smith was not listed as a named insured in defendant's policy, and Smith was neither a resident of Petiprin's household nor related to him so as to fall within defendant's policy. The injured motorcyclist applied for and received personal protection insurance benefits from the Assigned Claims Facility, pursuant to MCL 500.3172, which assigned the claim to plaintiff Farmers Insurance Exchange. Plaintiff then filed the instant action for declaratory relief, claiming that defendant is liable for the benefits received by the motorcyclist under MCL 500.3114(5)(a). The trial court granted summary disposition to plaintiff, holding that, as the insurer of the co-owner of the vehicle,

defendant owed coverage pursuant to MCL 500.3114(5)(a). The Court of Appeals affirmed in a published opinion, 272 Mich App 106 (2006), and leave to appeal was sought in this Court. 477 Mich 995 (2007).

MCL 500.3114(5) states in relevant part:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

When construing a statute, this Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the express words of the statute. *Chandler v Muskegon Co*, 467 Mich 315, 319 (2002). The interpretative doctrine of *noscitur a sociis*, i.e., that "a word or phrase is given meaning by its context or setting," affords courts assistance in interpreting the words of the law. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420 (2003).

> "[Words and phrases] must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). "Words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *Gen Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 255; 249 NW2d 41 (1976) (opinion by COLEMAN, J.). Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. *McCarthy v Bronson*, 500 US 136, 139; 111 S Ct 1737; 114 L Ed 2d 194 (1991); *Hagen v Dep't of Ed*, 431 Mich 118, 130-131; 427 NW2d 879 (1988). "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." *People v Vasquez*, 465 Mich 83, 89; 631 NW2d 711 (2001), quoting *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955). [*G C Timmis, supra* at 421.]

In holding that MCL 500.3114(5) imposes liability on defendant for the underlying accident, the Court of Appeals looked selectively at the context of this provision; it looked to *some,* but not *all*, of the context of the act. Specifically, the Court of Appeals noted that MCL 500.3115(1)(a), which specifies the priority of insurers liable for payment of no-fault benefits to persons suffering injury in an automobile accident while not an occupant of a motor vehicle, assigns the highest priority to "insurers

of owners or registrants of motor vehicles involved in the accident." In *Pioneer State Mut Ins Co v Titan Ins Co*, 252 Mich App 330, 336 (2002), the Court of Appeals held that the language of MCL 500.3115(1)(a)

> clearly states that the insurer of the owner or registrant of the motor vehicle involved in the accident is liable for payment of personal protection insurance benefits. Contrary to Pioneer's argument, the statute does not state that the injured person must seek these benefits from the insurer of the motor vehicle. Stated another way, the statute does not mandate that the vehicle involved in the accident must have been insured by the insurer of the owner before an injured person can seek benefits.[1]

Because MCL 500.3114(5) and MCL 500.3115(1) are essentially identical, the Court of Appeals applied the reasoning of *Pioneer State* to the instant case and concluded that defendant was the insurer of highest priority for the motorcyclist's injuries.

However, the reasoning of the Court of Appeals left open the question of *which* "insurer of the owner of the motor vehicle" was responsible to provide coverage. Defendant argued that it was just one of many "insurers" of Petiprin and that, under the Court of Appeals reasoning, defendant's home "insurer," his health-care "insurer," his dental "insurer," his mortgage "insurer," or the "insurer" of his stamp collection were equally responsible for coverage. The Court of Appeals rejected this argument, holding that it was inconsistent with the language of the no-fault act "as a whole." Specifically, the Court of Appeals noted that MCL 500.3114 is codified within Chapter 31 of the Insurance Code of 1956, and that the first section of that chapter, MCL 500.3101, refers to insurers that issue automobile insurance policies. Therefore, the Court of Appeals concluded that, when read in the context of the no-fault act "as a whole," the term "insurer" must be limited to no-fault insurers.

However, had the Court of Appeals looked at the *entire* context of the no-fault act, i.e., the act "as a whole," it would have been equally obvious that the phrase "insurer of the owner or registrant of the motor vehicle," just as it must be limited to *motor vehicle* insurers, must also be limited to the insurer of the motor vehicle *involved in the accident*. The general priority statute, MCL 500.3114(1),[2] states that when an insured, his or her spouse, or a relative domiciled in the same home is injured in an automobile accident, they are generally entitled to benefits as set forth in

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[1] While not referenced by the Court of Appeals, I note that MCL 500.3114(4), which specifies the priority of insurers liable for payment of no-fault benefits to passengers who are not otherwise covered under MCL 500.3114(1) but suffer injury in an automobile accident, also lists the insurer of highest priority as "the insurer of the owner or registrant of the vehicle occupied."

[2] MCL 500.3114(1) provides:

their personal protection insurance policy. Section 3114(1), in turn, refers to MCL 500.3101(1), which requires every vehicle registered in this state to carry no-fault insurance. In other words, it is the insurer of *that motor vehicle,* and not just any random automobile insurance company, that is responsible for no-fault benefits. Similarly, § 3114(2)[3] specifies the insurer of the highest priority for a vehicle operator or passenger as "the insurer of the motor vehicle." Likewise, § 3114(3)[4] provides that the insurer of highest priority for an employee injured in an accident while occupying a vehicle owned by his or her employer is "the insurer of the furnished vehicle." Thus, the Legislature's definition of the relevant "insurer" responsible for the payment of no-fault benefits, at least in the context of MCL 500.3114(1), (2) and (3), suggests that the term refers to the insurer of the motor vehicle involved in the accident.

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in section 3103(2) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.

[3] MCL 500.3114(2) provides, in pertinent part:

> A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle.

[4] MCL 500.3114(3) provides, in pertinent part:

> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

Other provisions of the no-fault act provide further textual indicators that the phrase "insurer of the owner or registrant of the vehicle involved in the accident" refers only to motor vehicles covered by a no-fault insurance policy. First, MCL 500.3113(b)[5] and MCL 500.3173[6] link insurance coverage to the vehicle involved in the motor vehicle accident and specifically exclude from coverage persons who have failed to obtain a no-fault policy for their vehicle or who have failed to pay the insurance premiums for such a policy. Second, MCL 500.3101(1)[7] and MCL 500.3102(1)[8] require the owner or registrant of a motor vehicle to pay insurance premiums for all vehicles owned and registered in Michigan.

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[5] MCL 500.3113 provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

[6] MCL 500.3173 provides:

> A person who because of a limitation or exclusion in sections 3105 to 3116 is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan.

[7] MCL 500.3101(1) provides:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.

[8] MCL 500.3102(1) provides:

Thus, an examination of the text surrounding MCL 500.3114(5) and of other provisions of the no-fault act suggests that the phrase "insurer of the owner or registrant of the vehicle involved in the accident" means that the vehicle involved in the accident must be covered by a no-fault policy issued by the relevant insurer in order for that insurer to have priority to pay benefits to an injured motorcycle operator or passenger.

The Court of Appeals error is made starker when one considers the financial responsibility act, MCL 257.501 *et seq*. In *Cason v Auto-Owners Ins Co*, 181 Mich App 600, 606 (1989), the Court of Appeals held that the no-fault act and the Michigan Vehicle Code, which includes the financial responsibility act, are to be construed *in pari materia* because they relate to an identical class of things. Further, courts will look to "financial responsibility laws to determine the required scope of liability coverage with respect to an injury incurred in this state," because "the financial responsibility act determine[s] the extent of liability coverage required under no-fault." *State Farm Mut Auto Ins Co v Ruuska*, 90 Mich App 767, 772 (1979), citing *State Farm Mut Auto Ins Co v Sivey*, 404 Mich 51, 56 (1978).

The financial responsibility act recognizes several forms of mandatory policies and limits the insurers' liability to those vehicles for which premiums have been paid. MCL 257.520(b)(1) provides that an owner's policy of liability insurance "[s]hall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted." Thus, under the financial responsibility act, an insurer's liability coverage is limited to only the vehicles listed in the policy. *State Farm Mut Auto Ins Co v Ruuska*, 412 Mich 321, 336 n 7 (1982). The Court of Appeals here recognized that, "for purposes of the financial responsibility act, the Legislature only requires an insurer to provide liability coverage to those automobiles listed in the policy . . . [however,] [t]he plain language of MCL 500.3114(5)(a) is obviously contrary to defendant's argument regarding the financial responsibility act." 272 Mich App at 118-119. It is a long-accepted principle of statutory construction that "[s]tatutes which may appear to conflict are to be read together and reconciled, if possible." *People v Bewersdorf*, 438 Mich 55, 68 (1991). The Court of Appeals resolved the alleged conflict between these two statutes by simply failing to consider the provisions of the financial responsibility act. The proper interpretative approach, in my judgment, would have been to reconcile the no-fault act and the financial responsibility act by interpreting the no-fault provisions to refer to the insurer of the owner *with respect to the vehicle involved in the accident*.

To summarize, the premise of the no-fault act is that a person injured in a motor vehicle accident generally looks to his own no-fault carrier to

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> 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.

provide coverage for his injuries. MCL 500.3114(1). Every vehicle registered or operated for more than 30 days in a calendar year must be covered by a no-fault policy, MCL 500.3101(1) and 500.3102(1), and the failure to obtain or maintain such a policy bars an injured party from obtaining benefits. MCL 500.3113(b) and MCL 500.3173. Likewise, the financial responsibility act makes clear that an insurer's duty to pay benefits is triggered by a valid policy for the vehicle involved in the accident. The no-fault act permits a person injured in a motor vehicle accident not involving their own vehicle to recover benefits from *another* insurer when that person is injured: (1) as a passenger of a motor vehicle, MCL 500.3114(2); (2) while occupying an employer-furnished vehicle, MCL 500.3114(3); (3) while occupying another motor vehicle, where the injured party does not have his own no-fault insurance policy, MCL 500.3114(4); (4) as the driver or passenger of a motorcycle, where a motor vehicle is involved in the accident, MCL 500.3114(5); or (5) while not an occupant of a motor vehicle, MCL 500.3115. Nothing in these exceptions suggests that the owner or operator of a vehicle is relieved of his obligation to obtain no-fault insurance. It follows that these exceptions do not alter an insurer's obligation under the financial responsibility act to pay benefits only when a vehicle involved in a motor vehicle accident is covered by a no-fault insurance policy. When understood in the full context of the no-fault act and the financial responsibility act, "insurer of the owner or registrant of the motor vehicle involved in the accident" can only reasonably be understood to mean that the motor vehicle involved in the accident must be covered by a no-fault insurance policy.

Finally, even if I were persuaded that the Court of Appeals interpretation of MCL 500.3114(5) was correct, which I am not, I would nevertheless grant leave to appeal to consider whether this statute would, under such interpretation, implicate the Contracts Clause of the federal or state constitution. Const 1963, art 1, § 10 provides that "[n]o . . . law impairing the obligations of contract shall be enacted."[9] Here, the only conceivable rationale for imposing liability on an insurer in defendant's position is the existence of a contract, albeit a contract between defendant and Petiprin whose terms are irrelevant to the accident for which the Legislature has imposed liability under MCL 500.3114(5). Exclusively on the basis of this contract—one establishing a specific and well-defined legal relationship between the parties—the Legislature purports to impose an additional obligation, running between these parties, and bearing no relationship with the contract. This new obligation diminishes the value of the contract to the insurer and enhances its value to the insured, by establishing a new financial obligation. I would grant leave to appeal to consider the constitutional propriety of MCL 500.3114(5) in light of *Bank of Minden v Clements*, 256 US 126, 128 (1921) (holding that " 'one of the tests that a contract has been impaired is that its value has by legislation been diminished' "

[9] The analogous provision in the federal constitution, US Const, art I, § 10, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."

[citation omitted]); see also *In re Headnotes to Opinions of the Supreme Court*, 43 Mich 641 (1881); cf. *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1 (1985).[10]

In conclusion, I believe that the Court of Appeals has misread MCL 500.3114(5)(a) by its inconsistent reliance upon statutory context and has imposed liability upon a business that bears no more relationship to the vehicle involved in this accident than does Petiprin's grocer or pharmacist. If I am wrong in my interpretation of MCL 500.3114(5)(a), then this case warrants consideration by this Court to determine whether the Contracts Clause of the federal or state constitution is implicated. Accordingly, I would reverse the Court of Appeals and remand to the trial court for the entry of judgment in favor of defendant. Alternatively, I would grant leave to appeal to determine whether the instant statute, if properly construed by the Court of Appeals, implicates the Contracts Clause.

PEOPLE V GETSCHER, No. 132659; Court of Appeals No. 262113.

CAVANAGH AND KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal. Defendant was convicted of one count of first-degree criminal sexual conduct and five counts of second-degree criminal sexual conduct. Although the sentencing guidelines with regard to the second-degree CSC convictions called for a minimum sentence range of 36 to 71 months of imprisonment, the trial court sentenced defendant to a minimum of 120 months without providing any reason for its departure from the guidelines. These sentences were to run concurrently with defendant's 180-month minimum sentence for the first-degree CSC conviction. The Court of Appeals affirmed.

Before January 9, 2007, MCL 777.21(2) stated, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part." The reference to section 14 of

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[10] On granting leave to appeal, one critical area of inquiry would be to compare and contrast, for Contracts Clause purposes, MCL 500.3114(5) and MCL 500.3171 *et seq.*, pertaining to assigned claims. An insurer can also be liable for the payment of no-fault benefits that it has not contracted to provide under the assigned claims provisions. However, in contrast to MCL 500.3114(5), an insurer's obligation under the assigned claims plan has no nexus to, or grounding in, an existing contract, but rather is wholly a creature of statute. Moreover, the assigned claims plan uniformly and randomly apportions responsibility for payment of no-fault benefits to persons who are injured by uninsured or underinsured motorists to all insurers doing business in this state. That is, there is arguably a very considerable difference, for Contracts Clause purposes, between the Legislature requiring members of an industry generally to contribute to a pool or fund, and requiring individual members of that industry to pay non-contractual claims as a direct function of the existence of a contract.

chapter IX (MCL 769.14) appears to have been a mistake because it has nothing to do with the guidelines. However, effective January 9, 2007, MCL 777.21(2) states, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in this part." Section 14 of chapter XI (MCL 771.14[2][e]) requires the probation department to score only the highest crime class offense when concurrent sentences are imposed. Therefore, the prosecutor argues that when concurrent sentences are imposed, the trial court only has to score the highest crime class offense.

In *People v Mack*, 265 Mich App 122 (2005), the Court of Appeals, in agreement with the prosecutor, held that with regard to multiple concurrent convictions, the sentencing guidelines only apply to the highest crime class felony conviction. However, in *People v Johnigan*, 265 Mich App 463, 472 (2005), the Court of Appeals stated that "while the *probation department* need only score the guidelines for the highest crime, the *sentencing court* must score the guidelines for the remaining crimes as well." (Emphasis added.) Both *Mack* and *Johnigan* were decided before MCL 777.21(2) was amended.

MCL 769.34(2) states, "[T]he minimum sentence imposed by a court of this state for a felony . . . committed on or after January 1, 1999 shall be within the appropriate sentence range" unless the court departs pursuant to subsection (3). MCL 769.34(3) states, "A court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Defendant argues that even if the probation department only has to score the guidelines for the highest felony, the sentencing court must score the guidelines for all felonies. He further argues that because the trial court sentenced him outside the guidelines without articulating a substantial and compelling reason, we should remand for resentencing.

I would grant leave to appeal to determine whether the trial court is obligated under the statutory sentencing guidelines to score all felonies or only the highest class felony.

In re BRUDER (DEPARTMENT OF HUMAN SERVICES v BRUDER), No. 133920; Court of Appeals No. 276228.

Reconsideration Denied June 1, 2007:

MCDOWELL v CITY OF DETROIT, No. 127660. Summary disposition entered at 477 Mich 1079. Reported below: 264 Mich App 337.

CAVANAGH and KELLY, JJ. We would grant reconsideration for the reasons set forth in Justice CAVANAGH's dissent to the April 11, 2007, order.

WEAVER, J. (*dissenting*). I would grant plaintiff's motion for reconsideration. 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).

Summary Disposition June 6, 2007:

OSER v CLEAR!BLUE MANAGEMENT, INC, No. 133189. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment that ruled that the evidence established that the defendant had good cause to terminate the plaintiff. The plaintiff presented sufficient evidence to create a genuine issue of material fact whether the defendant had good cause to terminate the plaintiff. Summary disposition cannot be granted under such circumstances. MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. Court of Appeals No. 269195.

Leave to Appeal Denied June 6, 2007:

BEVIS v BARTHOLOMEW, No. 131744; Court of Appeals No. 266266.

DAIMLERCHRYSLER CORPORATION v HADLER PUBLIC RELATIONS, INC, No. 132288; Court of Appeals No. 266608.

WAUN v UNIVERSAL COIN LAUNDRY MACHINE, LLC, No. 132404; Court of Appeals No. 267954.

KURZ v DETROIT OSTEOPATHIC HOSPITAL CORPORATION, No. 132406; Court of Appeals No. 261441.

KAKISH v DOMINION OF CANADA GENERAL INSURANCE COMPANY, No. 132412; Court of Appeals No. 260963 (on remand).

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

CATES v MELHADO, No. 132445; Court of Appeals No. 264557.

KELLY, J. I would grant leave to appeal.

CARNOSKES v AETNA INDUSTRIES, INC, No. 132602; Court of Appeals No. 269439.

THOMPSON v ROCHESTER COMMUNITY SCHOOLS, No. 132644; Court of Appeals No. 269738.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY v DEPARTMENT OF TREASURY AND PRUDENTIAL INSURANCE COMPANY v DEPARTMENT OF TREASURY, Nos. 132698, 132699; reported below: 272 Mich App 269.

FERGUSON v PIONEER STATE MUTUAL OF MICHIGAN AND FERREE v PIONEER STATE MUTUAL INSURANCE COMPANY, Nos. 132795, 132796; reported below: 273 Mich App 47.

GARON v CITY OF HAMTRAMCK, No. 132920; Court of Appeals No. 271234.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

TERRILL v RAYTHEON NUCLEAR, No. 133060; Court of Appeals No. 271140.

ABEN v OAKWOOD HEALTHCARE, INC, No. 133079; Court of Appeals No. 263813.

ROBINSON v STATE OF MICHIGAN, No. 133136; Court of Appeals No. 270781.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WILLIAMS v CHELSEA COMMUNITY HOSPITAL, No. 133146; Court of Appeals No. 261946.

In re JOHNSON (DEPARTMENT OF HUMAN SERVICES v JACQUES), Nos. 133797, 133895; Court of Appeals No. 271915.
KELLY, J. I would grant leave to appeal.

Reconsideration Denied June 6, 2007:

KREBS v NYGREN, No. 132151. Leave to appeal denied at 477 Mich 974. Court of Appeals No. 258813.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal June 8, 2007:

HOUDINI PROPERTIES, LLC v CITY OF ROMULUS, No. 132018. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether the claim of appeal to the Wayne Circuit Court from the city of Romulus Zoning Board of Appeals' (ZBA) variance denial was a "pleading" to which the compulsory joinder rule of MCR 2.203(A) applies, so as to require the plaintiff to assert and include its taking claim in the same document as its claim of appeal; (2) whether, when the plaintiff filed its claim of appeal to the Wayne Circuit Court from the ZBA's variance denial, the plaintiff's claim was ripe for review under the rule in *Paragon Properties Co v Novi*, 452 Mich 568, 583 (1996), which requires a property owner to obtain "a final decision from which an actual or concrete injury can be determined" before asserting a constitutional taking claim; and (3) whether, once the Wayne Circuit Court affirmed the plaintiff's appeal, pursuant to MCL 125.585(11) (now MCL 125.3606[1]), of the ZBA's variance denial, that determination was res judicata with respect to the plaintiff's constitutional taking claim. The parties may file supplemental briefs within 49 days of the date of this order, but they should not submit mere restatements of their application papers. The Appellate Practice, Litigation, and Real Property Law sections of the State Bar of Michigan are invited to file a brief or 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. 266338.

JONES v OLSON, No. 132385. 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 reversing the trial court's grant of the defendants' motion for summary disposition, in light of *Kreiner v Fischer* and *Straub v Collette*, 471 Mich 109 (2004). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 268929.

Summary Dispositions June 8, 2007:

HARTMAN & EICHHORN BUILDING COMPANY, INC v DAILEY, No. 129733. By order of May 4, 2006, we granted the defendant's application for leave to appeal, limited to the questions involving the Michigan Consumer Protection Act's application to residential builders. We now vacate the opinion of the Court of Appeals to the extent it is inconsistent with *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007). However, because the defendant seeks to rely on the affirmative defense provided in MCL 445.904(1)(a), and the defendant failed to raise the affirmative defense of the Michigan Consumer Protection Act exemption of regulated activities in his first responsive pleading, that defense is not properly before this Court. We remand this case to the Oakland Circuit Court for further proceedings consistent with this order and *Liss*. Reported below: 266 Mich App 545, 801.

PEOPLE v LABELLE, No. 133126. 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 53rd District Court for further proceedings not inconsistent with this order. The driver of the motor vehicle in which the defendant was a passenger violated MCL 257.652(1) by failing to come to a full stop before entering a highway from a private drive. Thus, there were objective and reasonable grounds to stop the vehicle. If a stop of a motor vehicle is objectively lawful, the subjective intent of the officer is irrelevant to the validity of the stop or a subsequent arrest or search and seizure of evidence. *Whren v United States*, 517 US 806 (1996). That is, a valid stop on the basis of a traffic violation will not be invalidated on the ground that the officer had an ulterior motive when he or she made the stop. *Id*.; *People v Davis*, 250 Mich App 357, 363 (2002). Thus, even if the defendant had standing to raise a constitutional objection to the stop of the vehicle, there exists a valid ground to declare the stop lawful. The search of the interior of the vehicle was valid because the driver consented to the search. *Schneckloth v Bustamonte*, 412 US 218 (1973); *People v Frohriep*, 247 Mich App 692, 703 (2001). Alternatively, since the law enforcement officer who effectuated the stop had the authority to arrest the driver of the vehicle because the driver failed to produce a valid operator's license, the search was valid. The search incident to arrest exception to the warrant requirement "applies whenever there is probable cause to arrest, even if an arrest is not made at the time the search is actually conducted." *People v Solomon (Amended*

Opinion), 220 Mich App 527, 530 (1996). See also *People v Arterberry*, 431 Mich 381, 384-385 (1988); *People v Champion*, 452 Mich 92, 116 (1996). The search of the backpack was valid. Because the stop of the vehicle was legal, the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle. See *Rakas v Illinois*, 439 US 128 (1978); *People v Smith*, 420 Mich 1 (1984); *People v Armendarez*, 188 Mich App 61 (1991). Authority to search the entire passenger compartment of the vehicle includes any unlocked containers located therein, including the backpack in this case. Moreover, the defendant did not assert a possessory or proprietary interest in the backpack before it was searched but, rather, left the backpack in a car she knew was about to be searched. See *People v Mamon*, 435 Mich 1, 6-7 (1990), quoting *United States v Thomas*, 275 US App DC 21, 23-24 (1989). Reported below: 273 Mich App 214.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. (*dissenting*). I dissent from the Court's decision to resolve the jurisprudentially significant issues presented in this case in a peremptory fashion. This case deserves a full hearing to consider whether defendant, an automobile passenger, had standing to object to the traffic stop and, if so, whether the stop was valid.

The majority relies on *Whren v United States*[1] and *People v Davis*[2] for the proposition that a legal traffic stop will not be invalidated merely because the officer had an ulterior motive in making the stop. However, in those cases, the police stopped the respective defendants for violating traffic code provisions. *Whren*, 517 US at 810; *Davis*, 250 Mich App at 362. Therefore, regardless of the officers' motivations for making the stops, the courts found that they did not violate the Fourth Amendment of the United States Constitution. *Whren*, 517 US at 812-813; *Davis*, 250 Mich App at 362. These cases do not hold that the officer can justify the stop by asserting a previously unknown basis for the stop when the reason stated originally is declared invalid.

In this case, the officer detained a vehicle and ticketed the driver for failing to stop at a stop sign. It was later revealed that no stop sign existed. Therefore, unlike in *Whren* and *Davis*, here it appears that the arresting officer did not rely on objective and reasonable grounds to stop the vehicle.

The Court should grant leave to appeal to determine whether the traffic stop was valid. The other significant issue that has been raised is whether defendant had standing to challenge the stop. Because of the significance of the issues involved, this case should not be disposed of in a peremptory fashion.

PEOPLE V WINKLER, No. 133157. 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. 274483.

WEAVER, J. (*dissenting*). I dissent. I would not remand this case and I would deny leave to appeal because I am not persuaded that the decision

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[1] 517 US 806 (1996).

[2] 250 Mich App 357 (2002).

of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice in this case.

CORRIGAN, J. (*dissenting*). Defendant, an adult, engaged in sexual intercourse with a 14-year-old girl over a six-month period. He ultimately pleaded guilty of second-degree criminal sexual conduct, MCL 750.520c. At sentencing, the trial court scored five points for offense variable (OV) 3 because "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). Defendant now argues he should have received zero points for OV 3, as is appropriate when "[n]o physical injury occurred to a victim." MCL 777.33(1)(f).

I would not remand on this issue because defendant failed to preserve it. At the sentencing hearing, he did not object to the score. Only now on appeal does he claim there was insufficient evidence of injury. For instance, he notes that the victim's mother indicated that the victim contracted a sexually transmitted disease (STD). He now claims he cannot be held responsible because he has been tested and was not diagnosed with an STD. If defendant had properly objected at the sentencing hearing, the prosecutor or sentencing judge would have had the opportunity to clarify the reasons underlying the score with the aid of the victim, her mother, and the medical records. The court then could have ruled on the matter. As it stands, defendant failed to make a record to support his argument. I would not remand to give him a second bite at the apple.

Leave to Appeal Denied June 8, 2007:

BIERLEIN v SCHNEIDER, No. 128913; Court of Appeals No. 259519.

MARKMAN, J. (*concurring*). I concur in the Court's order in this very tragic case. At issue are the proceeds of a settlement on behalf of plaintiff, a minor child, stolen by the child's attorney. I agree with the dissent that an injustice has been done here, but from the outset of this case there was never any question that an injustice would be done, only a question of to whom it would be done. Settlement proceeds cannot be stolen and dissipated by a corrupt attorney without some injustice resulting, either to the party deprived of the proceeds or to the party required to pay the proceeds a second time.

In the end, however, the critical fact is that the injustice here was perpetrated by *plaintiff's* attorney. Moreover, before approving the settlement, the trial court asked *plaintiff's* attorney whether a conservator had been appointed and he responded that one would be appointed "shortly," and on the basis of this representation, the settlement was paid jointly to *plaintiff's* attorney and *plaintiff's* mother as next friend.

The court rule cited by the dissent, MCR 2.420(B), requires that "a conservator must be appointed by the probate court *before* the entry of the judgment or dismissal." MCR 2.420(B)(4)(a). As acknowledged by plaintiff's appellate counsel at oral argument, this rule is directed not at defendants, but at the *trial court*, which erred in allowing disbursement of the settlement in the absence of a conservator. Justice WEAVER is wrong to assert that the court rule imposes a duty on *defendant* to ensure that

a conservator be appointed. Unless the dissent is prepared to modify the judicial immunity rule by which judges are immune from liability for erroneous actions taken in their official capacity, plaintiff has no recourse against the one person in this case who was ultimately responsible for ensuring the appointment of a conservator. If plaintiff believed that the judgment was invalid for failure to follow the court rule, *plaintiff* should have appealed the trial court's decision. Plaintiff never did so and now seeks belatedly to challenge it on collateral grounds. It is not *defendant's* obligation to preserve issues on *plaintiff's* behalf.

Moreover, even if the trial court *had* appointed a conservator, it is clear that it would not have altered the results here. Plaintiff's mother testified that she and her husband agreed that she would be appointed conservator. Thus, even *if* plaintiff's mother had been appointed conservator, there is no indication that the settlement check would have been issued to anyone other than the mother and her attorney, or that anything at all would have been different in the management of the account. The record indicates that plaintiff's mother was utterly uninvolved in the investment of the proceeds, to the point where she did not even *discover* that her attorney had stolen these proceeds until nearly four years after the court authorized a distribution of the proceeds. During this time, she completely relied on her attorney's personal management of this account. Thus, even if plaintiff's mother had been appointed as conservator, her attorney would have maintained control over the proceeds and would have been in a position to steal those proceeds.

Again, this is a very tragic case and one is moved by natural sympathy to try and find a way for plaintiff to recover the money that was stolen from her. Cf. *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189, 202-203 (1989).[1] But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by defendants, but by plaintiff's own attorney. Defendants should not be required to pay a second settlement; they did not do anything wrong in paying the original settlement. Rather, the proper source of relief for plaintiff must be her former attorney (who is now incarcerated and apparently judgment-proof) and the Client Protection Fund of the state bar. Plaintiff's counsel noted at oral argument that it had already received $10,221 from the fund, but that the fund had already paid the $200,000 maximum reimbursement for losses resulting from the dishonesty of her lawyer. However, Rule 12(E) of the Client Protection Fund Rules states:

> The [State Bar of Michigan] Board of Commissioners may approve payment of a claim at an amount that exceeds the

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[1] "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father." *Id*.

maximum limits where the totality of the circumstances, in light of the purposes and policies of the Fund, warrants doing so.

It is hard to imagine a case in which the "purposes and policies" of the fund—to compensate persons victimized by the wrongdoing of their attorneys—would be more significantly furthered, and on behalf of a more deserving beneficiary, than by the application of Rule 12(E) in the instant case. I respectfully urge the fund to give consideration to whether application of this rule is warranted in this case. I also urge this Court to promptly review its policies in order to ensure more adequate funding for the Client Protection Fund.[2]

CORRIGAN, J. I join the statement of Justice MARKMAN.

CAVANAGH, J. (*dissenting*). I respectfully disagree with the majority that we improvidently granted leave to appeal. This case involves a settlement reached on behalf of a minor child that was approved before a conservator had been appointed or a bond was posted, in violation of MCR 2.420(B). Because this Court has the inherent authority to enforce its own rules, I would address the merits of this case. All parties to a proceeding are responsible for following the court rules. MCR 2.420(B) does not merely safeguard minor plaintiffs; it also protects defendants from liability to minor plaintiffs. If defendants pay settlements to someone other than a conservator, or pay when there has been no

[2] In order to facilitate the fund's ability to either increase the overall caps or to exceed the caps under Rule 12(E), this Court has already opened an administrative file, ADM 2007-19, to consider adding the Client Protection Fund as a recipient of Interest on Lawyers Trust Accounts (IOLTA) funds. Under Administrative Order No. 1997-9, this Court has allocated ten percent of IOLTA proceeds to the State Court Administrative Office (SCAO) to implement the recommendations of the task forces on gender issues and racial/ethnic issues in the courts. Because of recent changes in how IOLTA accounts are invested, SCAO received an allocation of $324,402 to implement the recommendations of the task force. At the moment, however, the only planned expenditure out of this fund amounts to approximately $75,000. Given the marked increase in revenue generated by IOLTA accounts, the proposal before this Court would reduce allocation for task force implementation to five percent and would allocate the remaining five percent to the Client Protection Fund. Such an allocation would substantially increase the fund's annual receipts. Currently, the fund is supported by a direct annual assessment on members of the bar and by unspent judicial campaign funds. According to the state bar, the fund receives approximately $550,000 a year and has paid out claims totaling $252,000 over the past three years. The fund could use the additional proceeds generated from IOLTA's earnings to either increase the per-lawyer cap on payments or to more easily exceed the cap in appropriate circumstances.

conservator appointed, they do so at their own peril. Thus, I would reverse the decision of the Court of Appeals, reopen the settlement, and set aside the order of dismissal pursuant to this Court's authority under MCR 7.316(A)(7).

KELLY, J. I join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). I agree with and join Justice CAVANAGH's dissent from the majority's decision to deny leave to appeal in this case. The majority refuses to correct the injustice done in this case despite having the power to do so under MCR 2.612(C)(1)(f).

This Court has created rules carefully crafted to protect minors and incompetent persons who receive a settlement in a lawsuit. When a minor child is to receive a settlement in a lawsuit, a conservator must be appointed by the probate court before the case may be dismissed.[1] Further, the trial court must receive written verification from the probate court that a sufficient bond has been posted by the conservator before the case may be dismissed.[2]

But in this case the trial court failed to follow the Michigan Court Rules. No conservator was appointed for the minor child and no bond was posted before the trial court approved the settlement and dismissed the case. Moreover, although defendant was aware that no conservator had been appointed and no bond had been posted, it nevertheless paid the minor child's settlement in a check made out to the child's mother and attorney. The attorney embezzled this money.

The child's newly appointed conservator now seeks to have this Court enforce its own court rules and hold that the case was improperly dismissed under MCR 2.420(B)(3) and (4)(a). But, after receiving three sets of briefs and twice hearing oral arguments in this case, the majority now dismisses the appeal without correcting the injustice done in this

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[1] MCR 2.420(B)(4)(a) provides:

> 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 in any single year during minority, a conservator must be appointed by the probate court before the entry of the judgment or dismissal.

[2] MCR 2.420(B)(3) provides:

> If a next friend, guardian, or conservator for the minor or legally incapacitated individual has been appointed by a probate court, the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court.

case, refusing to exercise its authority under MCR 2.612(C)(1)(f) to enforce its own court rules, and leaving the one individual, the injured, innocent child, who was supposed to be protected by the court rules, with no remedy.

I

When Samantha Bierlein was two years old she suffered a traumatic brain injury in a car accident. Through her mother and next friend, Mrs. Norma R. Bierlein, Samantha filed suit in the Saginaw Circuit Court. Mrs. Bierlein reached a settlement agreement with defendant for $55,000. The trial court approved the settlement at a July 1997 hearing. When the trial court asked if a conservator had been appointed by the probate court, plaintiff's attorney, Patrick Collison, said that "[t]here will be one very shortly." Defendant's attorney presented the order approving the settlement, which had been drawn up by defendant's attorney. The court approved the settlement, despite having been informed that no conservator had been appointed, and dismissed the case.

The trial court erred in approving the settlement for a minor child when no conservator had been appointed for that child. The Michigan Court Rules specifically require that when a minor child is receiving a settlement, "a conservator must be appointed by the probate court before the entry of the judgment or dismissal." MCR 2.420(B)(4)(a). Further, no judgment or dismissal may enter "until the court receives written verification from the probate court that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court." MCR 2.420(B)(3).

Defendant, who was aware that no conservator had been appointed and that no bond had been approved by the probate court, made the settlement check out to Mrs. Bierlein, as next friend, and Samantha's attorney, Mr. Collison. Mr. Collison assured Mrs. Bierlein that the settlement money was placed in a high-interest-bearing account.

In April 2001 Mrs. Bierlein brought to the attention of the circuit court that she had unsuccessfully attempted to contact Mr. Collison several times, requesting copies of documents showing where and how the settlement funds had been invested. Mr. Collison lied about the status of the settlement funds, and after three show-cause hearings, it was discovered that Mr. Collison had embezzled and converted the settlement funds.[3]

On October 17, 2001, Kirt Bierlein, Samantha's father, was appointed her conservator, and added as a party plaintiff. Mr. Bierlein filed a motion to reopen the proceedings and reevaluate the settlement, which was granted on June 21, 2002, by Judge Fred L. Borchard, the previous circuit

[3] Mr. Collison is now in jail, apparently having embezzled money from 27 other clients. Mr. Collison is essentially judgment-proof. The maximum available under the Client Protection Fund had been reached, and Mr. Collison had no legal malpractice insurance.

judge's successor with regard to the case. Defendant appealed from that order by leave granted by the Court of Appeals, which held that the trial court had erred in setting aside the settlement and remanded the case to the trial court. On remand, Judge Borchard's successor, Judge Lynda L. Heathscott, denied plaintiff's motion to enforce the settlement and reinstated dismissal of the case. Plaintiff applied for leave to appeal from the dismissal order, which the Court of Appeals denied on May 12, 2005.

Plaintiff then sought relief in this Court. In December 2005 this Court ordered oral argument on whether to grant the application for leave to appeal, asking the parties to address

> whether, when no conservator had been appointed, and no bond had been approved or filed with the probate court, (1) the circuit court had subject matter jurisdiction to approve the settlement and enter an order of dismissal; or (2) any other reason justifying relief from the operation of the judgment in this case exists; or (3) as a prophylactic measure, in the exercise of this Court's inherent power to enforce its own rules pursuant to MCR 7.316(A)(7), the dismissal in this case ought to be set aside and the settlement reopened. [474 Mich 989 (2005).]

Following oral argument on the application for leave to appeal, this Court granted leave to appeal pursuant to MCR 7.302(G)(1). 474 Mich 1112 (2006).

Now, after two rounds of oral arguments and three sets of briefing, the majority has decided that it is "no longer persuaded the questions presented should be reviewed by this Court," and has dismissed the appeal, refusing to enforce its own court rules to grant relief to the innocent child, when the Court, under its own rules, has the authority to do so.

II

This Court has the authority to grant the relief that plaintiff seeks. MCR 2.612(C)(1)(f) provides that a court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the basis of "[a]ny other reason justifying relief from the operation of the judgment." In order for relief to be granted under this subsection, three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under MCR 2.612(C)(1)(a) through (e); (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside; and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. *Altman v Nelson,* 197 Mich App 467, 478 (1992). This unusual and tragic case satisfies all three requirements.

Defendant conceded that the reasons for setting aside the judgment do not fall under any of the five grounds for relief listed in MCR 2.612(C)(1)(a) through (e). However, defendant argues that its substantial rights would be affected if the settlement is set aside, because it already paid the settlement once. This argument is unpersuasive. Defen-

dant paid the settlement, knowing that no conservator had been appointed for Samantha and no bond had been posted, despite the court rules prohibiting dismissal of the case without those things occurring. Defendant knew the case was improperly dismissed and, therefore, had no reasonable expectation that the settlement would stand.

The concurrence asserts that "from the outset there was never any question that an injustice would be done" in this case.

I disagree.

The party that is supposedly being asked to pay the proceeds a "second time" was represented by capable counsel, who was retained by an insurer charged with protecting that party's interests. Defense counsel was explicitly informed, at the settlement hearing, when the trial court inquired and was informed by plaintiff's counsel that no conservator had been appointed, that the protections built into MCR 2.420(B) were not yet in place. Therefore, defendant, defendant's counsel, and defendant's insurer knew that the settlement proceeds intended for the benefit of the minor plaintiff were being turned over to plaintiff's attorney *before* securing what defendant was bargaining for—dismissal of the action with prejudice in compliance with the rule governing settlements with minors—contrary to the explicit requirements of MCR 2.420(B).

I certainly do not argue that defendants had a *duty to plaintiff* "to make sure that plaintiff's attorney conducted himself in a particular fashion." On the contrary, defendant, defense counsel, and defendant's insurer all owed it to *themselves* to ensure that plaintiff's counsel secured appointment of a conservator: Only by doing so could they properly secure dismissal with prejudice of the action against defendant, and thereby extinguish defendant's liability to a minor plaintiff through a court-approved settlement.

Friedman v Dozorc, 412 Mich 1 (1981), is simply inapposite here. The suggestion that holding defendant, defense counsel, and defendant's insurer accountable for *failing to look out for their own interests* by insisting on strict compliance with the court rule designed not only for their protection, but for the protection of minor plaintiffs, is somehow inconsistent with the principles of an adversarial legal system reflects a fundamental failure to grasp the rather simple workings of that rule, and what happened here.

It is unjust to suggest that the "solution" is to quell our "natural sympathy" for the minor plaintiff and instead hope for some discretionary largesse from the Client Protection Fund. Had defendant, defense counsel, and defendant's insurer looked out for *their own interests* by insisting on compliance with MCR 2.420(B) before handing over a check payable to defense counsel, instead of to the minor plaintiff's (unappointed) conservator, as the rule requires, and as counsel for the Auto Club Insurance Association correctly did in *In re Contempt of Auto Club Insurance Ass'n*, 243 Mich App 697 (2000), plaintiff's corrupt attorney could not have converted the settlement. More importantly, had they followed the rule's dictates, and insisted on compliance with them, thereby ensuring that the "probate court has passed on the sufficiency of the bond of the conservator," there would be a remedy, one that would

insulate them from the risk that the funds would be misappropriated, and that they might be required to pay the settlement amount again, this time in accordance with the rule they ignored. In short, there likely would be a source of recovery for plaintiff, which would have protected not only plaintiff, but defendant, defense counsel, and defendant's insurer, as well.

Defendant is not being asked to pay plaintiff a "second time." Defendant has never paid plaintiff *in accordance with our rule*, which required "that payment be made payable to the minor's conservator on behalf of the minor." MCR 2.420(B)(4)(a). We know this, because, as defense counsel was informed at the settlement hearing, no conservator ever was appointed.

III

It is tragic that a majority of four that proudly professes a commitment to enforcing statutes and rules as written, in accordance with their plain meaning, claims itself to be so helpless in this instance. Just what is it about "a conservator *must* be appointed by the probate court *before* entry of the judgment or dismissal," or "the judgment or dismissal *must require* that payment be made payable to the minor's conservator on behalf of the minor," or "[t]he court *shall not* enter the judgment or dismissal *until* the court receives written verification . . . that the probate court has passed on *the sufficiency of the bond of the conservator*" that this self-proclaimed textualist Court cannot comprehend or enforce?

Our rules have a structure, a meaning, and a purpose that is evident when the rules are examined. The purpose of MCR 2.420(B)(4)(a)—protecting minor plaintiffs, in this case a brain-injured plaintiff—could not be plainer. The concurrence bemoans the supposed choice that confronts the Court if it enforces our rule: On one hand, it would have to visit a "tragic" injustice on a defense insurer that failed to comply with a court rule that is designed to protect its interests and those of its insured by making it possible to settle with a minor plaintiff. Its interests, and those of its insured, could have been safeguarded by simply abiding by the rule and paying the settlement *with a check made payable to the child's duly appointed conservator*, as the rule required. In fact, the defense has never paid the settlement in this case *in accordance with our rule*, and therefore is not being asked to pay a "second time." It has not yet paid *for the first time*.

Instead, the majority chooses to visit the "tragic" injustice on the minor child, who suffered betrayal first at the hands of the attorney charged with protecting her interests; then at the hands of the defense and the trial court, which failed to follow our rule, despite being explicitly informed that it had been ignored; and now at the hands of this Court, which today refuses to enforce its own plainly worded rule. Our duty is clear. Just as clearly, the majority has abdicated that duty in favor of the insurer.

Rather than dismiss this appeal, this Court should exercise its authority under MCR 2.612(C)(1)(f) to enforce its own court rules that

were designed to protect the minor child, and grant Samantha the relief requested. This Court should hold that a defendant who pays a settlement in excess of $5,000 to a minor child, knowing that, in violation of the Michigan Court Rules, no conservator has been appointed and no bond has been posted, does so at its own risk.

JONES v RIBBRON, No. 132165; Court of Appeals No. 260040.

CORRIGAN, J. (*dissenting*). I dissent from the decision to deny leave to appeal. I would grant leave to appeal to consider whether *Allen v Cheatum*, 351 Mich 585 (1958), remains good law.

Defendant Secura Insurance sought to avoid liability under the insurance policy on the ground that the insured, defendant Robert Ribbron, violated a policy provision requiring him to cooperate in the defense of a lawsuit. The Court of Appeals, relying on *Cheatum, supra* at 595, held that in order for Secura to successfully claim noncooperation of the insured as a defense, it must show that it was actually prejudiced by the noncooperation. As I stated in my dissenting statement in *Qarana v North Pointe Ins Co*, 474 Mich 1015, 1016 (2006), I question the continued validity of *Cheatum, supra*:

> I question the continuing validity of *Allen, supra*, especially following this Court's decision in *Rory* [*v Continental Ins Co*, 473 Mich 457 (2005)]. Although the Court in *Allen* held that an insurer must show prejudice, the Court did not apply contract principles to reach its conclusion and, instead, formulated a rule that was applicable only to insurance contracts. This is entirely inconsistent with our recent holding in *Rory* that insurance policies are to be enforced the same as any other contract, according to their language, unless they violate the law or unless one of the traditional contract defenses such as fraud, duress, waiver, or unconscionability are proven. *Rory, supra*, at 461, 491. It is also inconsistent with our holding in *Rory* that courts do not have the authority to modify unambiguous contracts or rebalance the contractual equities struck by the parties. *Id.* at 461. I would thus grant leave to appeal.

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), this Court recently overruled cases engrafting an actual prejudice requirement onto MCL 691.1404(1). The same principle should apply to insurance contracts. I remain convinced that we should grant leave to appeal to address this jurisprudentially significant issue.

MARKMAN, J. I join the statement of Justice CORRIGAN.

PEOPLE v NICKERSON, No. 133594. We are not persuaded that the question presented should be reviewed by this Court. As stated in the Staff Comment to the 2005 amendment of MCR 6.610, the Court has declined to add a new MCR 6.610(F) providing for discovery in district court. Court of Appeals No. 271459.

In re LUCKING (DEPARTMENT OF HUMAN SERVICES v LUCKING) and (DEPART-

MENT OF HUMAN SERVICES v WALTERS), Nos. 133934, 133939; Court of Appeals Nos. 273762, 273705.

In re WESTRATE (DEPARTMENT OF HUMAN SERVICES v DANIELS), Nos. 133967, 133968; Court of Appeals Nos. 272622-272624.

DROOMERS v PARNELL, No. 133999; Court of Appeals No. 278162.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 15, 2007:

JAMES v STATE FARM FIRE & CASUALTY COMPANY, No. 130460. 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 56 days of the date of this order addressing: (1) whether State Farm, by failing to plead release as an affirmative defense in this declaratory relief action, waived its right to oppose plaintiffs' attempt to invoke offensive collateral estoppel as inconsistent with the terms of the parties' Release and Settlement Agreement in the underlying action; (2) whether, for purposes of collateral estoppel, the identity of the jet-ski driver was actually litigated and determined by a final judgment in the underlying action; (3) whether, for purposes of collateral estoppel, State Farm was a party, or in privity with a party, to the underlying action; (4) how an insurer should proceed when it believes its insured is committing fraud to invoke coverage, and does that depend on whether the insurer learns of the conflict of interest during the course of litigation; and (5) if an adverse judgment procured by fraud of the insured is entered, whether the insurer is estopped from contesting liability. The parties should not submit mere restatements of 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. 262805.

Leave to Appeal Granted June 15, 2007:

ROSS v AUTO CLUB GROUP, No. 130917. The parties shall include among the issues to be briefed: (1) what is the appropriate standard of review of a trial court's decision on whether to award attorney fees pursuant to MCL 500.3148(1), see *Attard v Citizens Ins Co of America,* 237 Mich App 311, 316 (1999) (clear error); contrast *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634-635 (1996) (abuse of discretion); compare *Sweebe v Sweebe,* 474 Mich 151, 154 (2006) (waiver is a mixed question of law and fact); *Herald Co, Inc v Eastern Mich Univ Bd of Regents,* 475 Mich 463, 471-472 (2006) ("the clear error standard has historically been applied when reviewing a trial court's factual findings whereas the abuse of discretion standard is applied when reviewing matters left to the trial court's discretion"; any inherent "legal determinations are reviewed under a de novo standard"); (2) what is the appropriate method of determining whether a claimant is entitled to work loss benefits pursuant to MCL 500.3107(1)(b) for loss of income where the claimant is the

sole shareholder and employee of a subchapter S corporation, 26 USC 1361 *et seq.*; (3) in evaluating the claimant's work loss claim, what is the relevance, if any, of (a) the subchapter S corporation's profit or loss and (b) the wages the sole shareholder reports to the federal government for income tax purposes; and (4) when an insurer refuses or delays payment of benefits, is a rebuttable presumption that the refusal or delay was unreasonable (see *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73 [1982]) consistent with the language of MCL 500.3148(1)? The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., and any interested section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 269 Mich App 356.

KELLY, J. I would deny leave to appeal.

PONTIAC FIRE FIGHTERS UNION LOCAL 376 v CITY OF PONTIAC, No. 132916. The parties shall include among the issues to be briefed: (1) whether the circuit court had jurisdiction to grant a preliminary injunction with respect to the breach of contract claim (count I) and the unfair labor practice claim (count II), and (2) if the circuit court had jurisdiction: (a) whether it abused its discretion in issuing an injunction to prevent layoffs based on alleged irreparable harm to the laid-off employees; (b) whether the plaintiff presented sufficient evidence to support its claim of an increased risk of harm to the firefighters who would not be laid off; and (c) whether the plaintiff is likely to prevail on its breach of contract and unfair labor practice claims. 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. Court of Appeals No. 271497.

DEPARTMENT OF TRANSPORTATION v TOMKINS, No. 132983. The parties shall include among the issues to be briefed: (1) what was the ratifiers' common understanding of the phrase "just compensation" when they ratified Const 1963, art 10, § 2, and was it commonly understood that "just compensation" in inverse condemnation cases was different than "just compensation" in direct, partial taking cases; and (2) whether § 20(2) of the Uniform Condemnation Procedures Act, MCL 213.70(2), impermissibly conflicts with this established meaning of "just compensation." The motion for leave to file brief amicus curiae is granted. 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. 256038.

Summary Dispositions June 15, 2007:

PEOPLE v JOHNSTON, No. 130526. We reverse that part of the Court of Appeals decision analyzing defendant's sentence and we remand this case

to the Wayne Circuit Court for resentencing. The sentencing court in this case scored defendant's offense variables 1, 2, and 3 identically to the scores given to his codefendants because each of these variables directs that for "multiple offender cases," if one offender is assessed points under the variable, "all offenders shall be assessed the same number of points." MCL 777.31(2)(b); MCL 777.32(2); MCL 777.33(2)(a). However, defendant was the only offender convicted of larceny from the person and conspiracy to commit larceny from the person. Thus, his was not a "multiple offender case" for either of these crimes. Accordingly, the multiple offender provision does not apply to the scoring of defendant's guidelines in this case. See *People v Morson*, 471 Mich 248, 260 n 13 (2004). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 254284.

WEAVER, J. (*dissenting*). I dissent and would not remand this case for resentencing for the reasons stated in Justice YOUNG's dissenting statement, which I join.

YOUNG, J. (*dissenting*). I dissent. When this Court granted leave to appeal, we specifically asked the parties to address whether the multiple offender provisions in MCL 777.31(2)(b), 777.32(2), and 777.33(2)(a) apply to the scoring of codefendants for different offenses. Rather than address this issue, the majority simply declares, without analysis or explanation, that defendant's participation in the criminal transaction was not part of a "multiple offender case" because defendant was not convicted of the same crimes as his codefendants. By requiring identical criminal convictions, the majority erroneously deprives the phrase "multiple offender case" of its plain and ordinary meaning.

Nothing in the plain language of the phrase "multiple offender cases" requires that the multiple offenders be convicted of identical *crimes*. Had the Legislature so intended, then it would have used the phrase "multiple offender crimes" or perhaps "multiple offender offenses." A crime is defined as "an act that the law makes punishable." Black's Law Dictionary (8th ed). The definition of the word "case" is much broader, and in this context is defined as a "criminal proceeding." Black's Law Dictionary (8th ed). Thus, neither the plain meaning nor any textual indication in the sentencing guidelines supports the majority's belief that the word "case" is synonymous with the word "crime."

In my opinion, the facts presented represent a classic "multiple offender case." By defendant's own admission, he and his two codefendants planned to steal jewelry from a busy shopping center. Defendant, the getaway driver, communicated with his codefendants by cell phone and knew that one codefendant was armed with a hammer. Both codefendants used weapons to effectuate their escape, resulting in serious injuries when one codefendant slashed a bystander with a box cutter. Defendant then transported the knife wielding codefendant away from the scene of the crime, and both men pawned the stolen merchandise.

All three men were tried and convicted of various crimes at a joint trial. Because defendant did not commit the assault, he was neither charged with nor convicted of an assaultive crime. However, the fact that

defendant did not commit the same crimes as his codefendants does not change the fact that this criminal proceeding involved multiple offenders. Thus, defendant is required to be "assessed the same number of points" for the use of a weapon offense variable (OV) 1, the lethal potential of the weapon used (OV 2), and physical injury to a victim (OV 3).

Moreover, even if the sentencing judge were not *required* to score defendant's offense variables the same as his codefendants, the facts of the case would compel the same scoring. In ascertaining defendant's minimum sentence for larceny from a person, a ten year felony, a sentencing judge must score OV 1, OV 2, and OV 3. The undisputed facts indicate that two victims were assaulted during the larceny—one with a hammer and one with a box cutter. A larceny involving an assault is more serious, and properly demands a higher *minimum* sentence, than a larceny that does not involve an assault.

It should also be noted that the defendant in this case has already served his minimum sentence and has been paroled. Resentencing defendant at this juncture potentially exposes defendant to a higher minimum sentence and return to prison, particularly if the sentencing judge uses the same facts as a "substantial and compelling reason" to depart from the minimum sentencing guidelines range.

CORRIGAN, J. I join the statement of Justice YOUNG.

PEOPLE v WHEETLEY, No. 132863. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Newaygo Circuit Court for further proceedings. While the defendant chose to represent himself at trial, there is no adequate record from which to review the question whether the trial court complied with the waiver of counsel procedures set out in MCR 6.005(D). Consistent with MCR 7.210(B)(2)(c) and (d), we order that court to commence whatever proceedings it deems appropriate, to include an evidentiary hearing, to the end of determining whether MCR 6.005(D) was complied with. Such proceedings may include seeking the assistance of the prosecuting attorney, the defendant, and attorneys David C. Jaunese and Robert MacAyeal, to construct a record concerning whether the trial court complied with MCR 6.005(D). We further order the Newaygo 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 the proceedings on remand. We further order that court, within 28 days of the conclusion of the hearing, to file with the Clerk of the Supreme Court a transcript of the hearing and its findings on whether the defendant's waiver of counsel was unequivocal and whether it complied with MCR 6.005(D). We retain jurisdiction. Court of Appeals No. 270967.

Leave to Appeal Denied June 15, 2007:

PEOPLE v MITCHELL, No. 132102; Court of Appeals No. 271295.

YOUNG, J. (*concurring*). I concur in the order denying leave to appeal. However, I write separately to note that I believe that the evidence proffered in this case may well have satisfied the Michigan *corpus delicti* rule. A defendant's confession may not be admitted unless there is direct

or circumstantial evidence independent of the confession establishing the occurrence of a specific injury and some criminal agency as the source of the injury. *People v Konrad*, 449 Mich 263, 269-270 (1995). However, the elements need not be proved beyond a reasonable doubt and courts may draw reasonable inferences and weigh the probabilities. *People v Mumford*, 171 Mich App 514, 517 (1988). Moreover, it is not necessary to present independent evidence on all elements of the crime before the confession can be admitted. *People v Williams*, 422 Mich 381, 391 (1985). Where the defendant makes admissions of fact that do not amount to confessions of guilt, those admissions may be admitted to prove the *corpus delicti* of the crime. *People v Rockwell*, 188 Mich App 405, 407 (1991). Nevertheless, rather than appeal the circuit court's ruling on the sufficiency of the evidence, the prosecutor concedes the point and asks that this Court adopt an alternative rule. As the evidence in this case would seem to satisfy the current *corpus delicti* rule, I see no basis for the intervention of this Court in this case.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant the prosecutor's application for leave to appeal to consider: (1) whether the evidence presented in the instant case was sufficient to satisfy the requirements of the Michigan *corpus delicti* rule; (2) if the evidence was not sufficient to satisfy the requirements of this rule, whether the evidence was sufficient to satisfy the requirements of the federal *corpus delicti* rule; and (3) if the evidence was sufficient only to satisfy the federal rule, whether this Court should replace the Michigan *corpus delicti* rule with the federal *corpus delicti* rule.

Defendant confessed to his wife, his parents-in-law, his minister, police officers, and a Department of Human Services worker that he had sexually abused his infant son. Moreover, defendant both wrote down and videotaped his confession. Despite all of this, the trial court concluded that the evidence presented in this case was insufficient to establish the *corpus delicti* of criminal sexual conduct under Michigan law.

The Michigan *corpus delicti* rule provides that "a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270 (1995). However, "courts may draw reasonable inferences and weigh the probabilities." *People v Mumford*, 171 Mich App 514, 517 (1988).

The federal *corpus delicti* rule provides that a defendant's confession is admissible if the prosecutor "introduce[d] substantial independent evidence which would tend to establish the trustworthiness of the statement." *Opper v United States*, 348 US 84, 93 (1954). Independent evidence is sufficient "if [it] supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.*

The principal distinction between the state and federal rules is that, under the latter, the focus is on ensuring the trustworthiness of the confession, while under the former the focus is on the force of the independent evidence.

In the instant case, defendant admitted to his wife that he was sexually aroused when changing the diapers of their then-two-month-old

son, and that he had sexually fondled the infant. At the insistence of his wife and his in-laws, both of whom are ministers, defendant wrote a statement and made a videotape in which he reiterated his sexual desire for his son. Defendant and his wife subsequently divorced. After several months of counseling in Georgia, defendant returned home and remarried his ex-wife. Defendant told the members of his church about how he had been cured. However, defendant's wife and mother-in-law began to notice unusual behavioral changes in the then-two-year-old boy, namely, that when his mother changed his diapers, the child covered his penis and said "owie" and "no," and he developed an aversion to defendant, ran away from defendant, and refused to hold his hand during prayers. On the basis of her prior experience as a day care worker, defendant's wife concluded that the child must have been molested again and confronted defendant. Defendant's mother-in-law reached the same conclusion, on the basis of her experience as a mother and a grandmother. Defendant admitted to his wife, his parents-in-law, and the church that he continued to sexually abuse the child. Defendant also admitted the fondling to police officers and to a social worker.

I am not yet persuaded, as are the trial court and the prosecutor, that no reasonable inference can be drawn independently from these facts to corroborate defendant's confession of criminal sexual abuse under the Michigan *corpus delicti* rule. Moreover, I strongly disagree with the trial court's conclusion that defendant's confession would be inadmissible as untrustworthy under *any* rule. The trial court stated in this regard:

> Even if this case were governed by the federal rule, defendant's confessions would likely be inadmissible . . . . The evidence tends to undermine the trustworthiness of defendant's confessions. This Court is very concerned, having carefully read [the confessions], that they reflect what defendant has come to believe and/or has been convinced, out of religious fervor, he must have done, given his and his fellow congregants' beliefs about homosexuality. The Court readily accepts that defendant, his wife and her family hold their beliefs in good faith, but that does not establish that his confessions are accurate. Fervor can be distorting.

After reviewing defendant's written confessions, I see no evidence that defendant's confessions were somehow a function of his "religious fervor" and I see no relevance in defendant's church's "beliefs about homosexuality." Indeed, not only do I view defendant's religious convictions as not being "distorting," but I see them as rehabilitating and cleansing in causing defendant to recognize the wrongfulness of his conduct and to seek atonement for such conduct. There is no factual basis for the trial court to transform something positive into something suspect. Moreover, defendant made his first confessions to his wife and in-laws, and recorded such confessions, before he even became involved with the church.

Under the federal *corpus delicti* rule, I believe that the number and circumstances of defendant's confessions, the actions taken by the

parties after the first confessions, and the change in the child's behavior clearly establish the trustworthiness of defendant's statements. I would grant leave to appeal to consider whether this rule should be adopted by our state.

There is no more compelling and generally trustworthy evidence available to the criminal justice system than confession evidence. Before such evidence becomes increasingly unavailable under our state's *corpus delicti* rule, I would grant leave to consider the merits and demerits of the federal rule.[1]

In re SERWATOWSKI (DEPARTMENT OF HUMAN SERVICES V SERWATOWSKI), No. 134010; Court of Appeals No. 274395.

Summary Dispositions June 20, 2007:

PEOPLE V ARNONE, No. 131902. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we grant the defendant's motion for extension of time to file reply, and we vacate that portion of the sentence of the Monroe Circuit Court that ordered the defendant to pay attorney fees, and we remand this case to the trial court for a decision on attorney fees that considers the defendant's ability to pay now and in the future. See *People v Dunbar*, 264 Mich App 240, 252-256 (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 the defendant to pay attorney fees, it shall do so in a separate order, and not the judgment of sentence. *Id*. at 256; *People v Nowicki*, 213 Mich App 383,

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[1] In response to Justice YOUNG's statement, the prosecutor here is appealing the trial court's order suppressing evidence of defendant's confessions of criminal sexual conduct. The prosecutor's theory is that this confession is not admissible under the Michigan *corpus delicti* rule, but that it is admissible under the federal rule, which he recommends be adopted. This Court is not bound by the prosecutor's theory of the law. If this Court believes that the trial court erred in suppressing evidence, we may reverse that decision on the strength of our own analysis. Thus, if after further appellate review this Court disagrees with the prosecutor's view that these confessions are only admissible if we adopt a new *corpus delicti* rule, we are free to reverse the suppression. If, on the other hand, after further review, we come to agree with the prosecutor, we are also free to consider whether to adopt the federal rule. In further response to Justice YOUNG, the "basis for the intervention of this Court" is that a prosecution of a serious criminal offense has been thwarted by a suppression decision that may have been in error. If not in error, such decision seems so disregardful of independently corroborated confession evidence that a court might naturally inquire into whether a more responsible rule had been adopted by another jurisdiction, in this case perhaps by the federal judiciary.

386-388 (1995). 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. 271028.

DOE v HENKE, No. 132439. 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 *Miller v Chapman Contracting,* 477 Mich 102 (2007). The motion to reverse and remand is denied. We do not retain jurisdiction. Court of Appeals No. 271311.

PEOPLE v KRAMP, No. 133211. 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. 274942.

PEOPLE v BARKUS, No. 133309. 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 Oakland Circuit Court erred in scoring sentencing guidelines offense variable 13, MCL 777.43, at 25 points. See *People v Francisco,* 474 Mich 82, 86 (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. 274765.

Leave to Appeal Denied June 20, 2007:

PEOPLE v ADKINS, No. 132545; reported below: 272 Mich App 37.
KELLY, J. I would grant leave to appeal.

PEOPLE v JOMARC EDWARDS, No. 132580; Court of Appeals No. 273185.

PEOPLE v COURTNEY, No. 132798; Court of Appeals No. 273616.

ROBY v CITY OF MT CLEMENS, No. 132836; reported below: 274 Mich App 26.
KELLY, J. I would grant leave to appeal.

PEOPLE v JOLLY, No. 132896; Court of Appeals No. 274730.

PEOPLE v CHRIS WILLIAMS, No. 133042; Court of Appeals No. 274037.
CAVANAGH, J. I would grant leave to appeal.
KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).
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 MILLER, No. 133044; Court of Appeals No. 274071.

PEOPLE v LEE, No. 133056; Court of Appeals No. 263671.
KELLY, J. I would grant leave to appeal.

PEOPLE v LEWIS, No. 133130; Court of Appeals No. 270318.
CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HOUGHTALING, No. 133176; Court of Appeals No. 274040.

KELLY, J. I would remand this case to the trial court for preparation of a corrected presentence report that omits the information that the defendant successfully challenged, as required by MCR 6.425(E)(2).

PEOPLE v LAPWORTH, No. 133261; reported below: 273 Mich App 424.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

BRISTOL WEST INSURANCE COMPANY v GONZALEZ, No. 133277; Court of Appeals No. 270527.

CAVANAGH, J. I would grant leave to appeal.

RODDY v GRAND TRUNK WESTERN RAILROAD, INC, No. 133393; Court of Appeals No. 271208.

PEOPLE v BISGEIER, No. 133472; Court of Appeals No. 266882.

KELLY, J. I would grant leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 22, 2007:

RAMANATHAN v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS, No. 133170. 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 there is any direct evidence, apart from the comments about a sitar and curried lamb, to indicate that the defendant Leon Chestang had a discriminatory animus toward the plaintiff; (2) whether the sitar and curried lamb comments by the defendant were more than mere stray remarks; (3) whether defendant Chestang's comments and actions are subject to the same-actor inference; (4) whether there is any evidence that the provost of defendant university had any knowledge of, or relied in any manner on, any discriminatory animus by defendant Chestang; and (5) whether there is any evidence that the provost harbored any national origin or racial animus toward the plaintiff or had any retaliatory motivation in reaching her tenure decision. 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. 266238.

Summary Dispositions June 22, 2007:

PEOPLE v RICKY PARKS, No. 126509. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee Circuit Court for an evidentiary hearing, affording the defendant the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person. The circuit court shall determine if there is any such evidence. Such evidence does not implicate the rape shield statute. MCL 750.520j. We further order the circuit court to determine whether the defendant is indigent and, if so, to appoint counsel to represent him in connection with the evidentiary hearing. The hearing shall take place no later than 120 days after retention or

appointment of counsel. We direct the circuit court to submit a transcript of the hearing along with its findings to the clerk of this Court within 28 days of the hearing. We retain jurisdiction. Court of Appeals No. 244553.

MARKMAN, J. (*concurring*). I concur in the order to remand for an evidentiary hearing, because I respectfully disagree with the dissent that such order "gives defendant a second bite at the apple, in contravention of MRE 103(a)."

Here, defense counsel stated that he would seek to introduce evidence that the alleged victim of sexual abuse had previously made a complaint to the Family Independence Agency of sexual abuse by her grandfather, which resulted in an investigation but no charges being brought. The prosecutor moved to exclude any reference to allegedly false accusations of sexual abuse by the victim. This motion was granted by the trial court, which held that the rape shield law, MCL 750.520j, prevented defendant from introducing such evidence. The Court of Appeals affirmed the trial court, and held that "[d]efendant failed to make the requisite offer of proof required by MCL 750.520j(2)."

Under *People v Jackson*, 477 Mich 1019 (2007), MCL 750.520j simply does not apply when a defendant seeks to introduce evidence of prior false accusations by an alleged victim. However, defendant still must comply with MRE 103(a), which states:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> * * *
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> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Thus, a defendant must indicate the "substance of the evidence" either "by offer or . . . from the context within which questions were asked." In this case, defendant made clear that the "substance of the evidence" he wished to introduce was the earlier complaint by the alleged victim, the ensuing investigation, and the absence of eventual charges resulting from the investigation. Because the "substance of the evidence" was "apparent from the context," the dissent errs in concluding that "defendant failed to comply with the preservation requirement codified in MRE 103(a)."

The present order does not afford defendant a "second bite at the apple" because the defendant "already had an opportunity to offer proof of the alleged falsity of the prior accusation." To the contrary, the trial court's ruling prevented defendant from presenting *any* evidence of a prior false accusation. Consequently, this order allows defendant only a "first bite at the apple."

Because the trial court prevented defendant from making reference to prior false accusations, it is unclear precisely what evidence defendant would have produced. An order of a remand to the trial court to conduct an evidentiary hearing is appropriate to resolve whether the trial court's incorrect application of MCL 750.520j constituted harmless error or whether a new trial is required.

WEAVER, J. (*dissenting*). I dissent. I would not remand this case and I would deny leave to appeal because I am not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice in this case.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the majority's decision to remand this case to the trial court for an evidentiary hearing, and to thereby give defendant a *second* chance to offer proof that the complainant made a prior false accusation of sexual abuse against another person. The majority ignores the fact that defendant *already* had an opportunity to offer proof of the alleged falsity of the prior accusation, and that he failed to do so. Under the plain language of MRE 103(a), error may not be predicated on the exclusion of evidence where no offer of proof was made. Yet the majority, for reasons that it wholly fails to explain, now gives defendant a second bite at the apple, in contravention of MRE 103(a).

A jury found defendant guilty of two counts of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a), arising out of the sexual abuse of his nine-year-old stepdaughter. On appeal, defendant contended that the trial court erred in excluding evidence that the victim had made prior false claims of sexual abuse against her grandfather. The Court of Appeals rejected defendant's argument, noting that under *People v Hackett*, 421 Mich 338, 350 (1984), "the defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted," and "[u]nless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion." The Court of Appeals further explained that in *People v Williams*, 191 Mich App 269, 272 (1991), it had rejected an effort to elicit testimony of a prior false accusation where the defendant was "unable to offer any concrete evidence" that such an accusation had been made. The defense counsel in *Williams* "had no idea whether the prior accusation was true or false and no basis for believing that the prior accusation was false. Counsel merely wished to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false." *Id*. at 273-274.

The Court of Appeals reasoned that defendant here also failed to make an adequate offer of proof:

> Similarly, in the instant case, defendant failed to offer any concrete evidence establishing that the victim had made a prior false accusation of being sexually abused by her grandfather. Pursuant to MRE 103(a)(2), error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected, and the substance of the evidence was made

> known to the court by an offer of proof. Defense counsel admitted that he did not know the age of the victim at the time of the alleged prior false accusation, guessed that she was four years old, and merely stated that reports had been made to the Family Independence Agency and that as a result, the victim was examined by a doctor at that time. [*People v Parks*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2004 (Docket No. 244553), p 3.]

The Court of Appeals concluded that, as in *Williams*, defendant here "was not entitled to use the trial as a forum to determine the existence of a prior accusation made by the victim against her grandfather, and whether that accusation was true or false." *Id*. at 3-4.

It is not clear why the majority questions the Court of Appeals analysis. The language of MRE 103(a)(2) supports the Court of Appeals reasoning: error may not be predicated on a ruling that excludes evidence unless a substantial right of the party is affected and an offer of proof revealed to the court the substance of the evidence. Defense counsel here failed to offer proof that the complainant had made a prior false accusation against her grandfather.[1]

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[1] Even assuming that defense counsel's assertion that reports had been made to the Family Independence Agency could prove the *existence* of a prior accusation of sexual abuse, counsel's assertion does not establish the *falsity* of any such accusation. Nor does the complainant's inability to recall an event that allegedly occurred when she was (according to defense counsel's "guess") four years old prove that any prior accusation was false. I note that in addition to the complainant's tender age, she suffered a closed head injury earlier in life and has attended special education classes.

Justice MARKMAN asserts that the substance of the evidence was somehow apparent from the "context." While MRE 103(a)(2) does permit preservation where the "context within which questions were asked," MRE 103(a)(2), made the substance of the evidence apparent, Justice MARKMAN does not identify any "questions" whose "context" he thinks demonstrated the falsity of the prior allegations. The Family Independence Agency report, which defense counsel referred to but did not seek to introduce, may have established the existence of the prior allegations, but counsel did not explain how the report would have demonstrated the *falsity* of the allegations.

Justice MARKMAN also refers to "the earlier complaint by the alleged victim, the ensuing investigation, and the absence of eventual charges resulting from the investigation." But the mere fact that charges were never filed does not prove that the allegations were false, as a prosecutor at his discretion may decline to file charges for any number of reasons.

MRE 103(a) does not provide for a second bite at the apple.[2] This Court should not condone, let alone order, "a fishing expedition," *Williams*, *supra* at 274, where defendant failed to comply with the preservation requirement codified in MRE 103(a).

For these reasons, I respectfully dissent from the majority's order remanding for an evidentiary hearing.

YOUNG, J. I join the statement of Justice CORRIGAN.

PEOPLE v JAMES HALL, No. 133050. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for further proceedings. At the sentencing hearing, the trial court stated that it "has resolved any challenges as to [the presentence report's] accuracy in favor of the defendant." To the extent that the trial court found there was inaccurate information in the presentence report, the trial court shall direct the probation officer to amend the report by correcting or deleting the information successfully challenged by the defendant, and forward a copy of the amended report to the Department of Corrections, MCL 771.14(6) and MCR 6.425(E)(2). In the alternative, the trial court shall clarify what was meant by the statement set forth above. We do not retain jurisdiction. Court of Appeals No. 273973.

Leave to Appeal Denied June 22, 2007:

DROBOT v WAY, No. 132852; Court of Appeals No. 270132.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. I would grant leave to appeal to consider whether so-called "black ice" constitutes a hazard that should be assessed in terms of traditional "open and obvious" jurisprudence.

PEOPLE v HASTINGS, No. 133095; Court of Appeals No. 262698.

CAVANAGH, J. I would grant leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal. I do not know whether Vicki Cook was murdered by the defendant or by Thomas Mowrer, but I know that she was murdered by only one of them. Both have confessed to her murder, yet neither one knows the other. If it is defendant who committed this murder, justice is

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[2] Justice MARKMAN asserts that defendant is not getting a second bite at the apple because "the trial court's ruling prevented defendant from presenting *any* evidence of a prior false accusation." (Emphasis in original.) In reviewing the record, however, I have found no indication that defendant sought to present evidence of falsity and that the trial court prevented him from doing so.

Indeed, it is notable that after ruling on this matter, the trial court stated that it would be "free and open minded to take a look at" any contrary appellate authority that defense counsel could find. Defense counsel then conceded that he had found no such authority.

being done for he is serving a sentence of life imprisonment without parole. If, however, it is Mowrer who committed this murder, a double injustice is being done, for an innocent man is serving life imprisonment without parole while a guilty man escapes punishment.

Following his conviction, defendant filed a motion for a new trial, producing evidence that Mowrer had confessed to the crime for which defendant was convicted. Although it determined that such evidence was newly discovered and would likely produce a different result on retrial, the trial court denied defendant's motion on the ground that the confession was not credible.

The trial court's determination is entitled to great weight, *People v Cress*, 468 Mich 678 (2003), and I have great respect for the judgment of that court. However, as in *Cress*, where this Court was also confronted with a confession that suggested that an innocent person was being wrongly imprisoned for murder and in which we concluded the confession was not credible, this defendant's case merits the same kind of review. The consequences of an error by the trial court are simply too great to dispense with such review. It is not an everyday occurrence in this Court that we have a confession that seriously calls into question the guilt of a person serving a life term for murder. When such cases arise, they merit the fullest possible review by this Court.

Although, in the end, the trial court may be proven correct in its decision to deny defendant's motion for a new trial, I do not find the issue of Mowrer's confession to be frivolous in any way. Mowrer did not know defendant and had no apparent motive, unlike the confessor in *Cress*, to make a false confession. Mowrer made his confession orally, and on tape, to relatives, law enforcement officers and prosecutors. Mowrer had been the subject of suspicion before defendant's trial. Mowrer provided an extremely detailed description of the homicide and the events leading up to it, while defendant in his confession never described any details of the murder. Mowrer's behavior at his videotaped confession was consistent with his proclaimed remorse. Mowrer's confession was corroborated in significant respects by the recorded and unrecorded statements of an alleged accomplice, Jamie Stone.

Of course, balanced with this evidence is the evidence that served as the basis for defendant's conviction as well as the aspects of Mowrer's confession that caused the trial court to disbelieve it. Most damning to defendant at trial were his own confessions, some of which he acknowledged and others of which he denied. However, as noted, none of these confessions sets forth any details of the crime: defendant asserts that he admitted to his girlfriend to having killed Cook only to "keep her in line," and a friend with whom he used illicit drugs claimed that he made a similar admission when he was in a "binged-out" state. Other alleged admissions were made to an acquaintance in another state and to two jail-mates, although these are in dispute.

Further, the trial court identified a number of what it viewed as inconsistencies in Mowrer's confession, none of which, in my judgment, at least absent further review, appears *necessarily* to be a function of anything other than the fact that Mowrer's confession occurred three years after the crime and Mowrer had been under the heavy influence of

methamphetamines before and during the alleged criminal episode. In several instances, I respectfully disagree with the trial court and believe that it identified as inconsistencies matters that are not, in fact, inconsistencies.

The specter of defendant's possibly unwarranted confinement does not presently command that he be afforded a new trial. It does, however, command, in my judgment, that he be afforded further appellate review.

KELLY, J. I join the statement of Justice MARKMAN.

CHAPIN v A & L PARTS, INC, Nos. 133178, 133410, 133412; reported below: 274 Mich App 122.

MARKMAN, J. (*dissenting*). I respectfully dissent. I would grant leave to appeal to determine whether the trial court acted properly under MRE 702 to "ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 (2004). The trial court denied defendants' motion to exclude plaintiff's expert testimony in this asbestos products-liability action, and the Court of Appeals affirmed in a split decision with Judge O'CONNELL dissenting.

For the following reasons, I believe that this is a case of substantial significance that ought to be heard by this state's highest court: (a) the sole issue in this appeal concerns the effect of plaintiff's occupational exposure to asbestos, a product whose carcinogenic qualities have given rise to one of the most costly products-liability crises ever within our nation's legal system; (b) in particular, this appeal concerns occupational exposure to asbestos fibers contained in automotive brake linings and, therefore, directly implicates the nation's automobile industry in the asbestos products-liability crisis; (c) this appeal directly affects this Court's, and our Legislature's, efforts to replace the *Davis-Frye* test for assessing expert scientific testimony with the United States Supreme Court's *Daubert* test in MRE 702 and MCL 600.2955; (d) this appeal also affects this Court's efforts in adopting an administrative order concerning asbestos litigation in July of 2006 to ensure that asbestos litigants are subject to regular legal standards of due process; (e) our legal system's treatment of plaintiff's expert's testimony in this case will serve as precedent for how similar testimony will be treated in the substantial number of asbestos cases queued in this system; (f) the Court of Appeals published decision, in which the concurring judge held that the trial court's opinion "epitomized a proper exercise of discretion," will constitute controlling caselaw in this state concerning the responsibilities of trial courts in assessing expert scientific testimony under MRE 702; (g) the Wayne circuit judge in this case has been given individual responsibility for the asbestos docket of this state and, absent further review by this Court, he will indelibly have set the rules for expert scientific testimony in asbestos litigation, if not the rules for generally assessing expert scientific testimony in complex litigation; and (h) there is perhaps no state whose businesses and economy have been more severely harmed in recent years by the introduction of what later proved to be dubious scientific testimony than Michigan. Given the potentially far-reaching impact of this case, it is essential that the science communicated by plaintiff's expert be thoroughly evaluated under the standards that we and the Legislature have set forth in MRE 702 and § 2955.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MCL 600.2955(1) provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
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> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
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> (d) The known or potential error rate of the opinion and its basis.
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> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

The United States Supreme Court has concluded under a similar federal court rule that "the trial judge must ensure that any and all

scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v Merrell Dow Pharmaceuticals*, *Inc,* 509 US 579, 589 (1993). This Court has concluded that MRE 702 "incorporate[s] *Daubert*'s standards," *Gilbert*, *supra* at 781, and therefore that the judiciary must play a "gatekeeper role" under this rule in the admission of expert scientific testimony. *Id.* at 780. "MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Id*. at 780. Indeed, "the trial court's obligation under MRE 702 is even stronger than that contemplated by [the federal rule] because Michigan's rule specifically provides that the court's determination is a precondition to admissibility." *Id*. at 780 n 46. "This gatekeeper role applies to *all stages* of expert analysis," and "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 that data." *Id*. at 782 (emphasis in original). "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id*. Moreover, § 2955 complements and reinforces MRE 702. "The Legislature enacted [§] 2955(1) in an apparent effort to codify the United States Supreme Court's holding in *Daubert*. . . ." *Greathouse v Rhodes*, 242 Mich App 221, 238 (2000), rev'd on other grounds 465 Mich 885 (2001). Application of these standards constitutes an additional aspect of the trial court's "gatekeeper role." *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067-1068 (2007).

The lone issue on appeal concerns whether the trial court abused its discretion in concluding that plaintiff's expert's testimony satisfied the standards of MRE 702 and § 2955. It is not this Court's function to compare the parties' expert testimonies, but only to determine whether the trial court properly carried out its "gatekeeper role" in admitting plaintiff's expert's testimony. While it is the jury's responsibility to compare testimonies, it is the trial court's responsibility to determine whether such testimonies meet threshold standards for reliability sufficient to warrant their presentation to the jury.

In reviewing the trial court's ruling, I would grant leave to appeal to consider at least the following questions arising from the testimony of plaintiff's expert, Dr. Richard A. Lemen:

(1) Whether it is relevant in assessing the reliability of Dr. Lemen's testimony that there are 15 epidemiological studies that have failed to identify an increased risk of mesothelioma among brake mechanics and no epidemiological studies to the contrary.

(2) Whether the trial court abused its discretion in concluding that Dr. Lemen's opinion is "generally accepted" by the relevant scientific community when it is contrary to each of the 15 epidemiological studies that have been carried out concerning the relationship between asbestos exposure by brake mechanics and mesothelioma. Cf. *Nelson v Amer Sterilizer Co (On Remand)*, 223 Mich App 485, 488 (1997) ("Where as here, no epidemiological study has found a statistically significant link . . . the expert testimony fails to exhibit the level of reliability required by MRE 702.").

(3) Whether the trial court sufficiently required Dr. Lemen to explain the shortcomings of existing epidemiological studies involving brake

mechanics and mesothelioma as a precondition to considering epidemiological studies drawn from what are arguably significantly different occupations that necessarily require extrapolation.

(4) Whether the trial court abused its discretion in allowing Dr. Lemen in his conclusions to extrapolate from studies addressing higher levels of asbestos exposure to conditions involving lower levels of exposure.

(5) Whether, where the lowest level at which epidemiological studies have shown a causal relationship between asbestos exposure and mesothelioma allegedly is 9 fibers per cubic centimeter, the trial court abused its discretion in allowing Dr. Lemen to extrapolate from such studies to testify concerning an occupational environment in which exposure levels to asbestos are less than 0.1 fibers per cubic centimeter.

(6) Whether the trial court abused its discretion in allowing Dr. Lemen to testify concerning "peak" levels of asbestos exposure by brake mechanics exceeding 0.1 fibers per cubic centimeter without assessing whether only total asbestos exposure levels are relevant in establishing a relationship with mesothelioma.

(7) Whether the trial court abused its discretion in allowing Dr. Lemen in his conclusions to extrapolate from studies concerning types of asbestos fibers different from those to which brake mechanics are typically exposed.

(8) Whether the trial court abused its discretion in allowing Dr. Lemen in his conclusions to extrapolate from studies concerning sizes of asbestos fibers different from those to which brake mechanics are typically exposed.

(9) Whether the trial court abused its discretion in allowing Dr. Lemen in his conclusions to extrapolate data from occupations arguably involving different types of asbestos exposure, such as asbestos mining and factory work.

(10) Whether the trial court was required to assess the statistical methods, and the reliability of such methods, by which Dr. Lemen "extrapolated" from various asbestos studies.

(11) Whether the trial court was required to have Dr. Lemen identify all the specific asbestos studies from which his conclusions had been extrapolated.

(12) Whether, where *Craig v Oakwood Hosp*, 471 Mich 67, 93 (2004), counseled that "correlation is not causation," and that it constitutes a lapse in logic to "infer that A causes B from the mere fact that A and B occur together," the trial court was required to undertake adequate precautions to ensure that a jury would not be confused by these distinct concepts and thereby conflate relationship with causation.

(13) Whether the Court of Appeals abused its discretion in asserting that "studies have continued to confirm that asbestos causes mesothelioma," *Chapin v A & L Parts, Inc,* 274 Mich App 122, 133 (2007), without distinguishing between levels of asbestos exposure, the nature of asbestos exposure, types and sizes of asbestos fibers, and the form of asbestos transmission.

(14) Whether the trial court abused its discretion in observing that "no court in the country has felt that it was necessary to hold a hearing to determine whether auto mechanics exposed to asbestos in brake linings are at a greater risk for mesothelioma."

(15) Whether there is an adequate scientific basis for Dr. Lemen's statement that "there is no known safe exposure to asbestos below which it would not cause mesothelioma," 274 Mich App at 135, and, if so, what that basis is.

(16) Whether Dr. Lemen's conclusion concerning a causal relationship between brake mechanics' exposure to asbestos and mesothelioma was scientifically reliable, where it was allegedly based on the presence of asbestos in automobile friction products and the connection in arguably different occupational environments between asbestos exposure and mesothelioma.

(17) Whether the trial court abused its discretion in asserting that there is affirmative evidence indicating a causal relationship between exposure to automobile friction products and mesothelioma, where defendants allege that the only support for this proposition consists of one article that was never introduced into evidence and a second article—Dr. Lemen's—that did not assert this proposition but merely concluded that the evidence "by no means exonerates the brake mechanic from being susceptible to a causal relationship between asbestos exposure and mesothelioma."

(18) Whether, where *Gilbert*, *supra* at 789, asserts that the trial court must take care not to treat an issue of reliability of expert testimony as a matter of "weight," rather than "admissibility," the trial court here abused its discretion in enabling a jury to draw conclusions concerning the existence of a scientifically valid causal relationship between brake mechanics' exposure to asbestos and mesothelioma.

(19) Whether, where *Gilbert*, *supra* at 782, asserts that "[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation," the trial court here abused its discretion in enabling a jury to draw conclusions concerning the existence of a scientifically valid causal relationship between brake mechanics' exposure to asbestos and mesothelioma.

(20) Whether the trial court properly assumed the relevance of precautionary warnings by the government concerning safe levels of asbestos exposure where plaintiff's legal obligation is to prove a causal relationship between brake mechanics' exposure to asbestos and mesothelioma.

(21) Whether, where *Gilbert*, *supra* at 783, counsels that the trial court must take care under MRE 702 to avoid a "yawning 'analytical gap' " between an expert's testimony and the underlying data, the trial court adequately undertook to avoid such a gap in this case.

(22) Whether, in view of *Gilbert*'s admonition, *supra* at 782, that the court's "gatekeeper role" under MRE 702 "applies to all *stages* of expert analysis," the trial court "searchingly" attempted to ensure that the scientific method was adhered to at every linkage point in Dr. Lemen's argument and that both his data and his intermediate and final conclusions drawn from such data were reliable.

(23) Whether it is significant, in terms of the MRE 702 evaluation, that an expert witness would assert concerning the causal relationship between brake mechanic work and mesothelioma, "[T]he answer is that time will tell . . . and we will know an answer probably at some point in time. But we're not going to know that answer right now . . . what I am saying is that there is adequate information in my opinion in the literature to show that brake repair workers have the potential to be exposed to concentrations of asbestos that can cause disease."

(24) Whether it is significant, in terms of the MRE 702 evaluation, that an expert witness would respond to a question concerning whether there is a causal relationship between exposure to small asbestos fibers and mesothelioma, "I cannot state to a reasonable degree of scientific certainty that they do or do not."

(25) Whether, where *Craig*, *supra* at 93, states that "the connection between the defendant's negligent conduct and the plaintiff's injuries [cannot be] entirely speculative," and that plaintiff cannot satisfy his or her burden "by showing only that the defendant *may* have caused his injuries," *id*. at 87, plaintiff's expert's testimony was sufficient to satisfy MRE 702.

(26) Whether it is relevant that Dr. Lemen's written work, which did not apparently conclude that mesothelioma is caused by long-term exposure to automotive friction products, was peer-reviewed, whereas his actual testimony, which concluded that such a causal relationship existed, was not peer-reviewed.

(27) Whether the Court of Appeals misapprehended the trial court's responsibilities in concluding that the "gatekeeper" role "does not require the trial court to search for absolute truth," and whether it is nonetheless the role of the "gatekeeper" to ensure that the jury is presented only with sufficiently reliable scientific evidence to assist the latter in determining "absolute truth."

(28) Whether the trial court impermissibly shifted the burden of proof among the parties by commenting on the alleged *absence* of evidence concerning a causal relationship between asbestos exposure and mesothelioma.

(29) Whether, where it appears that at least some forms of mesothelioma are idiopathic, there is a burden on an expert witness to address why a party's mesothelioma was not of such a nature.

(30) Whether epidemiological studies are merely the "best evidence" for establishing causation between asbestos exposure and mesothelioma, as acknowledged by plaintiff's expert, or constitute the "only way" of establishing such causation, as argued by defendant's expert.

(31) Whether the trial court misapprehended its responsibilities under MRE 702 and abused its discretion when it asserted, "It is not really important to have an epidemiological study to determine whether the risk of cancer is increased by asbestos exposure in every occupation. What is important to know is the permissible exposure level and to make a determination whether in that work or occupation an employee is exposed to asbestos in excess of the permissible exposure levels."

(32) Whether, in "assisting the trier of fact" in the exercise of its "gatekeeper role," there are any responsibilities imposed on the trial

court that go beyond ensuring the reliability of evidence, such as, for example, ensuring the logic or clarity of its presentation to the jury.

(33) Whether the trial court and the Court of Appeals majority clearly recognized that the *Davis-Frye* standard of evaluating expert scientific evidence had been superseded in this state by the *Daubert* standard.

I do not purport to know the answers to each of these questions. But I do believe that it is essential to the fairness and integrity of the justice system that these questions be reviewed and answered. These questions go to the heart of the differences between the *Davis-Frye* and *Daubert* tests. Defendants have raised legitimate questions concerning the application of MRE 702 and § 2955. Therefore, I would grant leave to appeal.

PARRISH v SHERRILL, No. 133303; Court of Appeals No. 263256.

MARKMAN, J. I would grant leave to appeal to consider whether, where plaintiff rejected a $75,000 offer to settle and subsequently was determined to be 99% at fault and received only $3,000 in damages, the trial court abused its discretion by concluding that plaintiff had "improved his position" by the litigation, and was thus entitled to costs as the prevailing party "on the entire record" under MCR 2.625(B)(2).

FAHR v GENERAL MOTORS CORPORATION, No. 133500. We note that the Workers' Compensation Appellate Commission majority misinterpreted this Court's decision in *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), when it asserted that *Rakestraw* does not require a "pathological change in a pre-existing condition" in order for a plaintiff to establish that a work-related personal injury has occurred. *Rakestraw* clearly requires a plaintiff who is suffering from a pre-existing condition to show that his work has caused an injury that is medically distinguishable from the progression of an underlying pre-existing condition. This cannot be done merely by showing a worsening of symptoms. Rather, to demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed. Although a medical expert need not use the phrase "change in pathology," there must be record evidence from which a legitimate inference may be drawn that the plaintiff's underlying condition has pathologically changed as a result of a work event or work activity in order to meet the legal test for a personal injury under MCL 418.301(1) and *Rakestraw*. In this case, the record contains evidence that the plaintiff's pre-existing medical condition was pathologically aggravated by his working conditions. Accordingly, leave to appeal 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 No. 271865.

KELLY, J. I concur in the result only.

CAVANAGH, J. I would deny leave to appeal without the further statements found in the majority's order.

In re CHESTER (DEPARTMENT OF HUMAN SERVICES v CHESTER), No. 134059; Court of Appeals No. 276011.

HAMILTON'S HENRY THE VIII LOUNGE, INC v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, No. 134141; Court of Appeals No. 278422.

Reconsideration Denied June 22, 2007:

MATTHEWS v REPUBLIC WESTERN INSURANCE COMPANY, No. 130912. Leave to apeal denied at 478 Mich 864. Court of Appeals No. 251333.

Summary Dispositions June 26, 2007:

PEOPLE v CUNNINGHAM, No. 132109. The prosecution has affirmatively stated its lack of objection to the defendant receiving 24 days of jail credit in this case. Accordingly, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court with directions to amend the judgment of sentence to reflect 24 days of credit for time served. 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). Court of Appeals No. 268012.

HODGES v HALLSTROM, No. 132608. 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 *Apsey v Mem Hosp*, 477 Mich 120 (2007). Court of Appeals No. 270165.

PEOPLE v STOCKMAN, No. 133078. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of (1) whether the defendant has raised a "significant possibility" that he is innocent of the alleged crimes under MCR 6.508(D)(3); (2) whether the affidavits accompanying the defendant's motion for relief from judgment entitle him to an evidentiary hearing on any of the issues his application has raised regarding that proposed evidence; and (3) whether the defendant is entitled to an evidentiary hearing on the ineffective assistance of trial counsel for the alleged failures to investigate and procure the favorable medical testimony referenced in the affidavits. 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). Court of Appeals No. 269343.

PEOPLE v VERNON SIMMONS, No. 133195. 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 reconsideration of the defendant's application for leave to appeal under the standard applicable to direct appeals. The Court of Appeals erred in denying the defendant's application for leave to appeal under MCR 6.508(D) because the defendant's appeal was not based on a motion for relief from judgment. Court of Appeals No. 274214.

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).

Leave to Appeal Denied June 26, 2007:

KETTERMAN v CITY OF DETROIT, No. 131846; Court of Appeals No. 258323.

SWEATT v GARDOCKI, No. 131969; Court of Appeals No. 259272.

JUCKETT v ELLURU, No. 132558; Court of Appeals No. 260350.

PEOPLE v SAM JONES, III, No. 132604. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270282.

PEOPLE v GIBBS, No. 132614. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269866.

PEOPLE v NOLEN, No. 132671. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270244.

PEOPLE v GARNER, No. 132706. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269744.

PEOPLE v DEMOND HARRIS, No. 132717. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270181.

KELLY, J. I would grant the application for leave to appeal and remand this case to the trial court for a *Ginther* hearing.

PEOPLE v MACEO BRADLEY, No. 132766. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 270483.

PEOPLE v LYLE, No. 132771. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 273845.

PEOPLE v LAYTON, No. 132781. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270180.

PEOPLE v JERMAINE HUNTER, No. 132885. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270438.

PEOPLE v ADAMS, No. 132964. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270936.

PEOPLE v CAL, No. 133023. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270800.

PEOPLE v PHELPS, No. 133029; Court of Appeals No. 262367.

PEOPLE v JEFFERS, No. 133034; Court of Appeals No. 273933.

PEOPLE v STEVEN SMITH, No. 133037. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270905.

PEOPLE v PATE, No. 133041; Court of Appeals No. 262696.

PEOPLE v SUMMERS, No. 133045. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271068.

PEOPLE v ROBERT GARRETT, No. 133057. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270821.

PEOPLE v CONWAY, No. 133066. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270860.

PEOPLE v OPELTON KELLY, No. 133073. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 274728.

PEOPLE v STRINGER, No. 133074. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275144.

PEOPLE v DYKHOUSE, No. 133075. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271089.

CITY OF DETROIT v DETROIT PLAZA LIMITED PARTNERSHIP, No. 133081; reported below: 273 Mich App 260.

PEOPLE v WILBON, No. 133091; Court of Appeals No. 263153.

PEOPLE v THORNTON, No. 133109; Court of Appeals No. 273847.

PEOPLE v CURRY, No. 133116. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271301.

HALL v OAKLAND CIRCUIT JUDGE, No. 133125; Court of Appeals No. 274821.

PEOPLE v SIWIK, No. 133159. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271018.

PEOPLE v DANIELS, No. 133175; Court of Appeals No. 263346.

PEOPLE v TUMPKIN, No. 133179; Court of Appeals No. 263439.

PEOPLE v HENDERSON, No. 133182; Court of Appeals No. 274818.

PEOPLE v REUTHER, No. 133183; Court of Appeals No. 274280.

PEOPLE v CARICO, No. 133186; Court of Appeals No. 263155.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v TYRONE WILLIAMS, No. 133193. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275217.

PEOPLE v SPAN, No. 133198; Court of Appeals No. 264030.

PEOPLE v GREENE, No. 133201; Court of Appeals No. 262676.

PEOPLE v HARDY, No. 133204. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271355.

PEOPLE v COOK, No. 133205; Court of Appeals No. 261850.

PEOPLE v PAYTON, No. 133207; Court of Appeals No. 264704.

PEOPLE v DANIEL, No. 133222; Court of Appeals No. 263622.

PEOPLE v BURD, No. 133226. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271200.

MONEY SOURCE FINANCIAL v ANN ARBOR COMMERCE BANK, No. 133227; Court of Appeals No. 270084.

DESTINY 98 TD SCIO TOWNSHIP v ALL OCCUPANTS AND BEAL v DESTINY 98 TD SCIO TOWNSHIP, Nos. 133230, 133231; Court of Appeals Nos. 270400, 270401.

PEOPLE v MCCARTY, No. 133233. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271034.

PEOPLE v ELLIOTT, No. 133237; Court of Appeals No. 274550.

PEOPLE v DONALD SIMMONS, No. 133244. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271385.

PEOPLE v SMART, No. 133246; Court of Appeals No. 263435.

PEOPLE v STIDHAM, No. 133249. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271091.

PEOPLE v LEO KENNEDY, No. 133250. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271235.

PEOPLE v CHISOM, No. 133254. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271067.

PEOPLE v JANSSEN, No. 133259. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271905.

PEOPLE v SLUSSER, No. 133265; Court of Appeals No. 262997.

PEOPLE v LAWANDA TISDALE, No. 133269; Court of Appeals No. 271618.

PEOPLE v LONG, Nos. 133270, 133272; Court of Appeals Nos. 274454, 274649.

PEOPLE v RUBEN JORDAN, No. 133271. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271711.

PEOPLE v PAYNE, No. 133278; Court of Appeals No. 273566.

PEOPLE v RIVERA-DELGATO, No. 133280; Court of Appeals No. 274012.

PEOPLE v MILLER, No. 133283; Court of Appeals No. 263350.

PEOPLE v JOSEPH TATE, No. 133299; Court of Appeals No. 264416.

PEOPLE v BLAKE, No. 133304. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271455.

PEOPLE v JAMES WILLIAMS, No. 133311; Court of Appeals No. 270972.

PEOPLE v EVANS, No. 133320. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271979.

PEOPLE v BURNS, No. 133324; Court of Appeals No. 263393.

PEOPLE v MICHAEL GARRETT, No. 133325; Court of Appeals No. 265913.

PEOPLE v DARIEL HOUGH, No. 133326; Court of Appeals No. 276012.

PEOPLE v BARTH, No. 133327; Court of Appeals No. 274847.

PEOPLE v DERRICK HAMPTON, No. 133328. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271583.

PEOPLE v ROBERT KING, No. 133329; Court of Appeals No. 265365.

PEOPLE v PARHAM, No. 133330; Court of Appeals No. 274690.

PEOPLE v LLOYD COLEMAN, No. 133332; Court of Appeals No. 271220.

PEOPLE v RAYMOND HALL, No. 133336; Court of Appeals No. 263860.

PEOPLE v GARZA, No. 133337; Court of Appeals No. 275179.

PEOPLE v HUDSON, No. 133346; Court of Appeals No. 273615.

PEOPLE v KEYON BROWN, No. 133347; Court of Appeals No. 274694.

LUTES v ST JOHN HOSPITAL AND MEDICAL CENTER, No. 133356; Court of Appeals No. 272414.

CAVANAGH, J. I would grant leave to appeal.

PRICE v DEPARTMENT OF TRANSPORTATION, No. 133358; Court of Appeals No. 257577 (on remand).

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

KAMMERAAD v AUTO SPORTS UNLIMITED, INC, No. 133363; Court of Appeals No. 262166.

PEOPLE v TROY HUNTER, No. 133364. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270786.

PEOPLE v DEANGELO THOMAS, No. 133368; Court of Appeals No. 258394.

PEOPLE v SWANSON, No. 133380. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271750.

PEOPLE v VENSON BRADLEY, No. 133381; Court of Appeals No. 274222.

PEOPLE v LLOYD RANDALL, No. 133382; Court of Appeals No. 266083.

PEOPLE v MUSTAIN, No. 133384. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271727.

PEOPLE v WILKISON, No. 133387; Court of Appeals No. 274757.

PEOPLE v BARKLEY, No. 133388. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275556.

PEOPLE v BRANCACCIO, No. 133390; Court of Appeals No. 263321.

PEOPLE v GRACY, No. 133391; Court of Appeals No. 275175.

PEOPLE v FISHER, No. 133398; Court of Appeals No. 262941.

ESTATE OF GEIL v GRATA, No. 133407; Court of Appeals No. 263532.

PEOPLE v VINES, No. 133409. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271749.

PEOPLE v DERRICK SNOW, No. 133411; Court of Appeals No. 275010.

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 MITCHELL, No. 133419; Court of Appeals No. 274843.

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 grant leave to appeal for the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006).

PEOPLE v HINTON, No. 133420. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271652.

PEOPLE v SCHNEIDER, No. 133421; Court of Appeals No. 275353.

PEOPLE v GRAHAM, No. 133424; Court of Appeals No. 263945.

PEOPLE v PENNELL, No. 133426; Court of Appeals No. 275349.

PEOPLE v HAIRSTON, No. 133432; Court of Appeals No. 275111.

PEOPLE v GIVHAN, No. 133434; Court of Appeals No. 264708.

PEOPLE v HELWIG, No. 133435. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 274786.

PEOPLE v TERRANCE HALL, No. 133436; Court of Appeals No. 266087.

AMERICAN AXLE & MANUFACTURING, INC v MURDOCK, Nos. 133439, 133440; Court of Appeals Nos. 262786, 265111.

PEOPLE v MORSE, No. 133448; Court of Appeals No. 274687.

PEOPLE v STEWARD, No. 133450; Court of Appeals No. 263941.

PEOPLE v GAJDA, No. 133451. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271550.

PEOPLE v BROCKMAN, No. 133453; Court of Appeals No. 266364.

PEOPLE v THOMAS LOGAN, No. 133454; Court of Appeals No. 264333.

PEOPLE v ROY WHITE, No. 133456; Court of Appeals No. 264594.

PEOPLE v VANCE, No. 133457; Court of Appeals No. 264582.

PEOPLE v SENIOR, No. 133458; Court of Appeals No. 264118.

PEOPLE v MCCLAIN, No. 133459; Court of Appeals No. 264098.

PEOPLE v KERN, No. 133463; Court of Appeals No. 275427.

PEOPLE v CARL JOHNSON, No. 133469; Court of Appeals No. 274816.

PEOPLE v DAVID, No. 133470; Court of Appeals No. 273451.

FORNER v ROBINSON TOWNSHIP BUILDING DEPARTMENT, No. 133473; Court of Appeals No. 270597.

PEOPLE v MIRACLE, No. 133475; Court of Appeals No. 266035.

PEOPLE v ROJAS, No. 133477; Court of Appeals No. 265161.

PEOPLE v RICHARDS, No. 133480; Court of Appeals No. 275818.

PEOPLE v WEBER, No. 133482; Court of Appeals No. 266894.

CONN v ASPLUNDH TREE EXPERT COMPANY, No. 133483; Court of Appeals No. 272563.

PEOPLE v POWELL, No. 133487; Court of Appeals No. 273245.

PEOPLE v WILLIAM JACKSON, No. 133490; Court of Appeals No. 265140.

PEOPLE v HAGELE, No. 133491; Court of Appeals No. 275422.

PEOPLE v JAMES, No. 133492. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272109.

PEOPLE v FOREMAN, No. 133495; Court of Appeals No. 265244.

PEOPLE v GILDERSLEEVE, No. 133501; Court of Appeals No. 275452.

PEOPLE v FRED WILLIAMS, No. 133502; Court of Appeals No. 273203.

PEOPLE v KALFS, No. 133505; Court of Appeals No. 275486.

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 grant leave to appeal for the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006).

PEOPLE v HOWARD, No. 133510; Court of Appeals No. 266552.

EDWARDS v VISTEON CORPORATION, No. 133511; Court of Appeals No. 275778.

PEOPLE v MUSGROVE, No. 133512. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271386.

PEOPLE v BURLEY, No. 133517; Court of Appeals No. 273477.

PEOPLE v CASNER, No. 133518; Court of Appeals No. 276300.

PEOPLE v KEVIN JOHNSON, No. 133519; Court of Appeals No. 266174.

PEOPLE v HANKINS, No. 133520; Court of Appeals No. 266365.

PEOPLE v BEDENFIELD, No. 133521; Court of Appeals No. 264850.

NIEMI v AMERICAN AXLE MANUFACTURING & HOLDING, INC, No. 133528; Court of Appeals No. 269155.

PEOPLE v ROEDERICK HUNTER, No. 133530; Court of Appeals No. 264367.

PEOPLE v MANNING, No. 133532. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275762.

PEOPLE v LOWE, No. 133533; Court of Appeals No. 263725.

PEOPLE v MOORE, No. 133534; Court of Appeals No. 265378.

PEOPLE v LARRY SNOW, No. 133535; Court of Appeals No. 274812.

KELLY, J. I would grant leave to appeal.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Hill*, 477 Mich 897 (2006).

NICANDER v GENERAL MOTORS CORPORATION, No. 133543; Court of Appeals No. 272601.

PEOPLE v FARQUHARSON, No. 133544; reported below: 274 Mich App 268.

PEOPLE v GRIFFITHS, No. 133549; Court of Appeals No. 267661.

PEOPLE v MOTLEY, No. 133563; Court of Appeals No. 267298.

PEOPLE v SIEBIGTEROTH, No. 133567; Court of Appeals No. 265830.

PEOPLE v STROUD, No. 133574; Court of Appeals No. 274696.

PEOPLE v BRANCH, No. 133581; Court of Appeals No. 262899.

MORGAN v HIGGINSON, No. 133589; Court of Appeals No. 261236.

COVIN v GRANDVIEW HEALTH SYSTEMS, INC, No. 133591; Court of Appeals No. 271370.

CHASE MORTGAGE COMPANY v JACKSON, No. 133599; Court of Appeals No. 259627.

AMERISURE INSURANCE COMPANY v COLEMAN, No. 133625; reported below: 274 Mich App 432.

MURPHY v FORD MOTOR COMPANY, No. 133642; Court of Appeals No. 273037.

PEOPLE v ANTHONY RANDALL, No. 133649; Court of Appeals No. 267689.

PEOPLE v DETEAISE JONES, No. 133651; Court of Appeals No. 275142.

PEOPLE v MINYARD, No. 133663; Court of Appeals No. 275308.

PEOPLE v LARRY GREEN, No. 133672; Court of Appeals No. 276101.

MENDEZ v BIXLER, No. 133718; Court of Appeals No. 274856.

HODGES v RENAISSANCE CENTER, No. 133721; Court of Appeals No. 272157.

CRANICK v TRANSPORTATION DESIGN & MANUFACTURING, INC, No. 133723; Court of Appeals No. 272296.

In re KLAGER ESTATE (KLAGER v KLAGER), No. 133732; Court of Appeals No. 273663.

PEOPLE v LEVIE WILLIAMS, No. 133872; Court of Appeals No. 265851 (on remand).

NUCKOLS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 133955; Court of Appeals No. 277137.

Reconsiderations Denied June 26, 2007:

DAIMLERCHRYSLER SERVICES OF NORTH AMERICA, LLC v DEPARTMENT OF TREASURY, No. 131995. Leave to appeal denied at 477 Mich 1043. Reported below: 271 Mich App 625.

PEOPLE v BIBLER, No. 132568. Leave to appeal denied at 477 Mich 1111. Court of Appeals No. 272797.

PEOPLE v TILLMAN, No. 132591. Leave to appeal denied at 477 Mich 1112. Court of Appeals No. 268709.

MAY v GREINER, No. 132600. Leave to appeal denied at 477 Mich 1034. Court of Appeals No. 269516.

GENERAL CASUALTY OF WISCONSIN v SECURA INSURANCE, No. 132628. Leave to appeal denied at 477 Mich 1056. Court of Appeals No. 270457.

HILEMAN v TRAILER EQUIPMENT, INC, No. 132850. Summary disposition entered at 477 Mich 1067. Court of Appeals No. 265641.

Summary Dispositions June 29, 2007:

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC v MARION TOWNSHIP, No. 130698. 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 remand this case to the Michigan Tax Tribunal for it to determine whether the special assessment levied against petitioner's property is proportionate to the benefit to the property. Court of Appeals No. 262437.

In 1996, respondent township levied a special assessment against petitioner's property in the amount of $3.25 million for a sanitary sewer project that included a trunk line across petitioner's property. In 1998, petitioner discovered that the township had unofficially eliminated the trunk line across petitioner's property from the project sometime after the time for challenging the special assessment roll had passed. The Tax Tribunal dismissed petitioner's petition to challenge the special assessment on the basis that it lacked jurisdiction because petitioner had not objected at the public hearing or commenced an appeal within 30 days after the 1996 resolution confirming the special assessment roll as required by MCL 205.735(1) and MCL 41.726(3).

Also in 1998, petitioner filed a separate complaint in the circuit court alleging breach of contract and challenging the proportionality of the special assessment. The circuit court granted respondent's motion for summary disposition on the basis that the tribunal has exclusive jurisdiction over petitioner's claims. However, on appeal, this Court held that the circuit court has jurisdiction over the breach of contract claim and the tribunal has jurisdiction over the proportionality claim. *Highland-Howell Dev Co, LLC v Marion Twp*, 469 Mich 673, 676, 676 n 4 (2004). Presumably because this Court held that the tribunal has exclusive jurisdiction over the proportionality claim, petitioner filed an amended

complaint that excluded the proportionality claim. On remand, the circuit court granted respondent's motion for summary disposition on the basis that there was no contract.

In 2004, the township passed a formal resolution ratifying changes in the sewer plan, including elimination of the trunk line across petitioner's property. Petitioner timely filed a petition with the Tax Tribunal within 30 days of that resolution. The tribunal dismissed petitioner's challenge of the 2004 resolution on the basis of res judicata, and the Court of Appeals affirmed on the basis of collateral estoppel. Unpublished opinion per curiam, issued January 31, 2006 (Docket No. 262437).

There must be a proportionate relationship between a special assessment and the benefit to property from a special assessment. MCL 41.725(1)(d); *Dixon Rd Group v City of Novi,* 426 Mich 390, 403 (1986) ("a failure by this Court to require a reasonable relationship between the [amount of the special assessment and the amount of the benefit] would be akin to the taking of property without due process of law"). Further, before an assessment is levied, the property owner is entitled to notice and an opportunity to be heard. *Thomas v Gain,* 35 Mich 155, 164-165 (1876). Therefore, in this case, in which petitioner argues that the special assessment is no longer proportionate to the benefit to his property due to the change that the township made to the improvement plan, petitioner must be afforded an opportunity to be heard.

Because "[s]tatutes must be construed in a constitutional manner if possible," *In re Trejo*, 462 Mich 341, 355 (2000), the statutes at issue here cannot be construed in a manner that would deny petitioner due process of law. See *W & E Burnside, Inc v Bangor Twp*, 402 Mich 950 (1978), in which this Court remanded the case to the tribunal to determine whether the petitioner was entitled to notice even though the protest requirement of § 735(1) was not satisfied. That is, § 735(1) cannot be construed to require petitioner to have objected to the removal of the trunk line across its property at the hearing since that removal *had not yet taken place* at the time of the hearing. In addition, § 726(3) cannot be construed to require petitioner to have objected within 30 days after the date of confirmation of the special assessment roll because when the special assessment roll was confirmed, petitioner had no basis to object because the plan included the trunk line through petitioner's property. MCL 205.735(2) grants the tribunal jurisdiction over petitioner's 2004 petition because the 2004 resolution is a "final decision" and petitioner filed a written petition within 30 days after that "final decision."

Finally, petitioner's 2004 claim cannot be barred by res judicata or collateral estoppel. In dismissing petitioner's 2004 claim, the tribunal stated, "The Tribunal's March 19, 2004, final Opinion and Judgment that dismissed Docket No. 261431 fully considered and rendered legal conclusions with regard to all issues pertaining to *official or unofficial* changes to the plans in relation to the jurisdiction of the Tribunal." No official changes existed at that time, however, as respondent did not pass the 2004 resolution until May 13, 2004. Accordingly, the tribunal's March 19, 2004 opinion could not have fully considered and rendered legal conclusions regarding official plan changes that had not yet occurred, and, thus, neither res judicata nor collateral estoppel applies.

PAPADELIS V CITY OF TROY, No. 132366. The motion for leave to file brief amicus curiae is granted. The application for leave to appeal the September 19, 2006, judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgments of the Oakland Circuit Court and the Court of Appeals to the extent that they hold that the Right to Farm Act, MCL 286.471 *et seq*. (RTFA), and the state construction code, MCL 125.1502a(f), exempt the plaintiffs from the defendant city's ordinances governing the permitting, size, height, bulk, floor area, construction, and location of structures used in the plaintiffs' greenhouse operations. Assuming that the plaintiffs' acquisition of additional land entitled them under the city's zoning ordinance to make agricultural use of the north parcel (a point on which we express no opinion, in light of the defendant city's failure to exhaust all available avenues of appeal from that ruling after the remand to the Oakland Circuit Court in the prior action, see *City of Troy v Papadelis* [*On Remand*], 226 Mich App 90 [1997]), the plaintiffs' structures remain subject to applicable building permit, size, height, bulk, floor area, construction, and location requirements under the defendant city's ordinances. The plaintiffs' greenhouses and pole barn are not "incidental to the use for agricultural purposes of the land" on which they are located within the meaning of MCL 125.1502a(f). As no provisions of the RTFA or any published generally accepted agricultural and management practice address the permitting, size, height, bulk, floor area, construction, and location of buildings used for greenhouse or related agricultural purposes, no conflict exists between the RTFA and the defendant city's ordinances regulating such matters that would preclude their enforcement under the facts of this case. We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. In all other respects, the applications are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 268920.

Leave to Appeal Denied June 29, 2007:

CERVANTES V FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, Nos. 132499-132502; reported below: 272 Mich App 410.

MARKMAN, J. (*dissenting*). I respectfully dissent. By denying leave to appeal in this case, the majority leaves intact a published decision of the Court of Appeals that holds that a person who is unlawfully in the United States, and who is therefore subject to deportation at any time, may nevertheless be considered "domiciled" in Michigan. Because I strongly disagree with this proposition, I would reverse the judgment of the Court of Appeals and remand the case to the trial court for the entry of an order of summary disposition in favor of defendant Farm Bureau.

Plaintiffs, four illegal aliens, were injured while riding in an automobile owned by Cesar Garcia and insured by defendant Founders Insurance Company. Plaintiffs Leonila and Estelbina Robles-Macias lived in the home of their brother, Salvadore Robles-Macias, and plaintiffs Fidel and Joel Martinez lived in the home of Fidel's brother, Sebastian

Martinez Lopez. Defendant Farm Bureau insured both Salvadore Robles-Macias and Sebastian Martinez Lopez. Plaintiffs brought the instant action, claiming that they are each entitled to no-fault benefits from Farm Bureau through their relatives' policies. The trial court denied Farm Bureau's motion for summary disposition, concluding that plaintiffs' status as illegal aliens did not disqualify them from being "domiciled" in Michigan for purposes of MCL 500.3114(1). The Court of Appeals affirmed in a published opinion.

MCL 500.3114(1) states, in relevant part:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either *domiciled* in the same household, if the injury arises from a motor vehicle accident- . . . . [Emphasis supplied.]

When construing a statute, this Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the express words of the statute. *Chandler v Muskegon Co*, 467 Mich 315, 319 (2002). "Domicile" is a legal term defined in Black's Law Dictionary (5th ed) as "[t]hat place where a man has his true, fixed, and permanent home and principal establishment and to which, whenever he is absent he has the intention of returning." Similarly, it is defined as a legal term in the New Shorter Oxford English Dictionary (1993) as "[t]he place of a person's permanent residence, which he or she leaves only temporarily."

In *Workman v DAIIE*, 404 Mich 477, 496-497 (1979), this Court set forth a four-factor test to determine whether for purposes of the no-fault act a person is "domiciled in the same household" as a relative. The factors set forth in *Workman* are:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household. [Citations omitted.]

The Court of Appeals erred by applying the *Workman* test without considering the *purpose* of that test—i.e., to differentiate a "domicile" from other sorts of living arrangements. For 160 years, this Court has defined the term "domicile" as a person's *permanent* home. See, e.g., *In re High*, 2 Doug 515, 523 (Mich, 1847) ("[N]o person can have more than one such domicile [which is] . . . the place where a person has his true, fixed, permanent home, and principal establishment, and to which,

whenever he is absent, he has the intention of returning."). *Beecher v Detroit Common Council,* 114 Mich 228, 230 (1897) ("If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."); *Henry v Henry,* 362 Mich 85, 101-102 (1960) ([A domicile is] " 'that place where a person "has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time." ' ") (Citation omitted.)

Moreover, while the Court of Appeals correctly points out that the terms "domicile" and "residence" have often been defined synonymously, this Court has routinely defined "residence" in terms of a person's *permanent* residence. See, e.g., *Campbell v White*, 22 Mich 178, 196 (1871) ("Reside" for purposes of the tolling provision to the statute of limitations, 1847 CL 5369, "must be understood as importing something so distinct, definite and fixed as to constitute the party's home the place of permanent abode, which, whenever left temporarily or on business, the party intends to return to, and on returning to, is at home.");[1] *Wright v Genesee Circuit Judge*, 117 Mich 244, 245 (1898) (defining "residence" as "the place where one resides; an abode; a dwelling or habitation; especially, a settled or permanent home or domicile."); *Beecher, supra* at 230 (1897) (holding that a "temporary abode in a place does not establish a residence there"); *Reaume & Silloway v Tetzlaff*, 315 Mich 95, 99 (1946) (relying on *Wright*'s definition of "residence").

Perhaps most significantly, in *Gluc v Klein*, 226 Mich 175, 177 (1924), this Court noted that "while 'Any place of abode or dwelling place,' however temporary it might have been, was said to constitute a residence," a person's "domicile" has been traditionally understood as "his *legal* residence or home in *contemplation of law*." *Id.* at 177-178 (emphasis supplied).

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[1] In discussing the relationship between a "residence" and "domicile," this Court cited the New York Court of Appeals for the following proposition:

> "Ordinarily one's residence and domicile (if they do not always mean the same thing) are in fact the same, and where they so concur they are that place which we all mean when we speak of one's home. And it may be safely asserted that where one has a *home*, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort, rest, and relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call—that is his residence, both in the common and legal meaning of the term. And to one who has such a home, and habitually uses it as such, a place of business elsewhere is not his residence within any proper definition of the term." [*Id.* at 178, quoting *Chaine v Wilson*, 1 Bos 673 (NY, 1858).]

Thus, the *Workman* test must be understood in the context of the longstanding rule defining a "domicile" as a person's *permanent* and *legal* residence. The *Workman* test does not substitute for that rule; it is intended merely to facilitate application of the rule by identifying factors for distinguishing between a permanent and a temporary dwelling place. While a person may have numerous "temporary abodes," e.g., a summer home or cottage, "[o]ne cannot be permanently located in more than 1 place; one cannot be domiciled in more than 1 place; one cannot intend to remain for an extended period of time in more than 1 place." *In re Scheyer's Estate*, 336 Mich 645, 652 (1953). See also *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 345 (1999) (defining "domicile" as "the place where [a person] permanently reside[s]").

Persons who are in the United States unlawfully simply cannot be considered to permanently reside in this state. As I observed in my dissenting statement in *Sanchez v Eagle Alloy, Inc*, 471 Mich 851, 852-853 (2004), "the illegal alien is in violation of the law, and subject to immediate arrest and incarceration or deportation." The illegal alien is essentially a fugitive whose presence in Michigan is at all times in violation of the law and who, if apprehended, would be subject to immediate deportation from this country. His status thus is of a transient nature, because he can only remain in this state as long as he can avoid detection. He cannot be considered a "legal" resident of this country or this state, or otherwise to be dwelling within this country or this state in "contemplation of law." Therefore, plaintiffs fail to meet the threshold requirement under MCL 500.3114(1), and defendant cannot be held liable for payment of no-fault benefits under the statute.[2]

To the extent that application of the *Workman* factors suggests that plaintiffs were domiciled in Michigan for purposes of the no-fault act, I note the obvious, i.e., that when the *Workman* opinion was issued in 1979, illegal immigration was virtually nonexistent when compared to the present and there was no issue of immigration status in that case. Thus, *Workman* simply did not contemplate the effect of a person's immigration status on the question of domicile. Had it done so, it can hardly be doubted that this Court would have included such a factor in the determination of domicile. Once again, it is "domicile" that is at issue, not the factors that *Workman* promulgated to *assist* in this determination.

The trial court and the Court of Appeals have misread MCL 500.3114(1) by failing to define the term "domicile" as a person's "legal and permanent residence."[3] Because plaintiffs are in this country unlaw-

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[2] Whether plaintiffs may be entitled to no-fault benefits from the insurer of the vehicle they were riding in at the time of the accident, MCL 500.3114(4), is not an issue before the Court.

[3] For the reasons set forth in my dissent in *Sanchez,* the Court of Appeals also seriously errs in placing the burden on the Legislature to *exclude* illegal aliens from statutes, when that is the Legislature's intention, rather than placing the burden on the Legislature to *include*

fully, and are subject at all times to immediate arrest and deportation, they cannot in any sense be considered "legal" and "permanent" residents of this state. Therefore, plaintiffs are not "domiciled" in Michigan as required by MCL 500.3114(1). Accordingly, I would reverse the judgment of the Court of Appeals and remand this case to the trial court for the entry of an order of summary disposition in favor of defendant.

It is hard to conceive of a proposition more antithetical to the rule of law than that an illegal alien—a person who is *unlawfully* within this country and subject at all times to deportation if apprehended—may be considered to be "lawfully" and "permanently" domiciled within this state. In allowing the rule of law to be devalued as it is here, the majority owes a substantially greater obligation of explanation than it gives to the people of this state, whose law this Court serves as custodian.

CORRIGAN, J. I join the statement of Justice MARKMAN.

(*In re* STEPHENS DEPARTMENT OF HUMAN SERVICES V STEPHENS) AND *In re* STURGIS (DEPARTMENT OF HUMAN SERVICES V STURGIS), Nos. 134094, 134095; Court of Appeals Nos. 271015, 271016.

In re JACKSON (DEPARTMENT OF HUMAN SERVICES V JACKSON), No. 134145; Court of Appeals No. 272459.

In re PUENTE (DEPARTMENT OF HUMAN SERVICES V ATKINS), No. 134173; Court of Appeals No. 274293.

Leave to Appeal Denied July 9, 2007:

SHERIDAN V WEST BLOOMFIELD NURSING & CONVALESCENT CENTER, INC, No. 133655; Court of Appeals No. 272205.

SHINHOLSTER V ANNAPOLIS HOSPITAL, NO. 133943

CORRIGAN, J. I continue to adhere to the view set forth in my opinion in this case that a full retrial is warranted. 471 Mich 540, 596-597 (2004) (CORRIGAN, C.J., concurring in part and dissenting in part).

In re WALL AND *In re* CHAPLIN (DEPARTMENT OF HUMAN SERVICES V CHAPLIN), No. 134205; Court of Appeals No. 273224.

SHRIMPTON V ANANDAKRISHMAN, No. 134276; Court of Appeals No. 276278.

Reconsideration Denied July 9, 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. Summary disposition entered at 478 Mich 864. Reported below: 272 Mich App 14.

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illegal aliens in statutes when that is their intention. Regrettably, the majority continues to avoid addressing this critical issue.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal July 13, 2007:

BEAVERS v BARTON MALOW COMPANY, No. 133294. 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, in light of MCR 7.205(F)(3), the following cases were properly decided: *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981); and *People v Kincade (On Remand)*, 206 Mich App 477 (1994). 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. 269007.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Leave to Appeal Denied from the Attorney Discipline Board May 30, 2007:

GRIEVANCE ADMINISTRATOR v TROMBLEY, No. 133099.

Leave to Appeal Denied from the Attorney Discipline Board June 6, 2007:

GRIEVANCE ADMINISTRATOR v BARNES, Nos. 132703, 132734.

Rehearing Denied June 12, 2007:

AL-SHIMMARI v DETROIT MEDICAL CENTER, No. 130078. Reported at 477 Mich 280.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant rehearing.

Order Entered June 15, 2007:

DETROIT FIREFIGHTERS ASSOCIATION, IAFF LOCAL 344 v CITY OF DETROIT, No. 131463. Leave to appeal granted at 477 Mich 927. The motion for leave to file a supplemental brief is granted. In light of the new issues being raised on appeal, the parties are directed to file additional supplemental briefs by August 1, 2007, addressing whether *Metropolitan Council No 23 AFSCME v Center Line*, 78 Mich App 281 (1977), correctly held that jurisdiction to enforce section 13 of Act 312, MCL 423.243, resides in the circuit court, and whether the Michigan Employment Relations Commission has primary jurisdiction to enforce section 13, see *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185 (2001). The Court will determine whether to schedule reargument of the case next term after consideration of the briefs filed pursuant to this order. 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.

Rehearing Denied July 9, 2007:

PEOPLE v RANDY SMITH, No. 130245. Reported at 478 Mich 64.

CAVANAGH and KELLY, JJ. We would grant rehearing.

Rehearing Denied July 16, 2007:

PEOPLE v FRAZIER, No. 131041. Reported at 478 Mich 231.

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design or redesign a public building in a particular manner and does not permit a cause of action premised on a design defect (MCL 691.1406). *Renny v Dep't of Transportation*, 478 Mich 490.

HEARSAY—*See*

EVIDENCE 2

HIGHWAYS

COUNTIES

1. Revenues derived from a tax levy by a county for highway, road, and street purposes may not be distributed inconsistently with the statutory formula for allocation of such revenue without the agreement of the governing bodies of the affected cities and villages and the board of county road commissioners. (MCL 224.20b[1], [2]). *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518.
2. The Attorney General is authorized to file a lawsuit to address a violation of the provisions of the statute governing distribution of revenues derived from a tax levy by a county for highway, road, and street purposes; a local governmental entity is not authorized to file such a lawsuit (MCL 224.20b, 224.30). *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518.

HUNTING AREA CONTROL—*See*

ADMINISTRATIVE LAW 2

INDIANS

TRIBAL-STATE CASINO COMPACTS

1. A provision in a compact between the state and an Indian tribe pertaining to tribal casinos that allows amendment of the compact by the Governor without legislative approval does not violate the Separation of Powers Clause of the Michigan Constitution where the provision is properly approved by legislative resolution and the Governor's exercise of the provision is within the limits of the constitution (Const 1963, art 3, §2). *Taxpayers of Michigan Against Casinos v State of Michigan*, 478 Mich 99.

INDIVIDUALIZED ASSESSMENTS—*See*

ZONING 3

contract of hire was made in Michigan (MCL 418.845). *Karaczewski v Farbman Stein & Co*, 478 Mich 28.

ZONING

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

1. The Religious Land Use and Institutionalized Persons Act forbids a government from imposing or implementing a land use regulation that imposes a substantial burden on the religious exercise of a person; a religious exercise is not the equivalent of any exercise by a religious body; the burden is on the plaintiff to prove that an exercise is a religious exercise (42 USC 2000cc[a][1]; 42 USC 2000cc-5[7][A] and [B]). *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373.
2. The Religious Land Use and Institutionalized Persons Act forbids a government from imposing or implementing a land use regulation that imposes a substantial burden on the religious exercise of a person; a substantial burden on one's religious exercise exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires; something that simply makes it more difficult in some respect to practice one's religion does not constitute a substantial burden (42 USC 2000cc[a][1]). *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373.

REZONING

3. The Religious Land Use and Institutionalized Persons Act applies to any case in which a substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved; an "individualized assessment" is an assessment based on one's particular circumstances; a refusal to rezone does not constitute an "individualized assessment" (42 USC 2000cc[a][2]). *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373.