MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

September 10, 2007 to May 6, 2008

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

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

Commissioners

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

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

State Court Administrator: CARL L. GROMEK

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
HENRY WILLIAM SAAD, Bloomfield Hills	2009
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2009
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2013
MARK J. CAVANAGH, Royal Oak	2009
KATHLEEN JANSEN, St. Clair Shores	2013
E. THOMAS FITZGERALD, Owosso	2009
HELENE N. WHITE, Detroit	2011
RICHARD A. BANDSTRA, Grand Rapids	2009
JOEL P. HOEKSTRA, Grand Rapids	2011
JANE E. MARKEY, Grand Rapids	2009
PETER D. O'CONNELL, Mt. Pleasant	2013
MICHAEL R. SMOLENSKI, Middleville	2013
WILLIAM C. WHITBECK, Lansing	2011
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
BRIAN K. ZAHRA, Northville	2013
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
KIRSTEN FRANK KELLY, Grosse Pointe Park	2013
PAT M. DONOFRIO, Macomb Township	2011
KAREN FORT HOOD, Detroit	2009
BILL SCHUETTE, Midland	2009
STEPHEN L. BORRELLO, Saginaw	2013
ALTON T. DAVIS, Grayling	2009
DEBORAH A. SERVITTO, Mt. Clemens	2013
JANE M. BECKERING, Grand Rapids	2009[1]
ELIZABETH L. GLEICHER, Pleasant Ridge	2009[2]

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

[1]From August 20, 2007.

[2]From August 20, 2007.

CIRCUIT JUDGES

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

[1] From February 25, 2008.

		Term Expires January 1 of
	DAVID ALAN GRONER, Grosse Pointe Park,	2011
	RICHARD B. HALLORAN, Jr., Detroit,	2013
	AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2013
	CYNTHIA GRAY HATHAWAY, Detroit,	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
	MICHAEL M. HATHAWAY, Detroit,	2011
	MURIEL D. HUGHES, Grosse Pointe Woods,	2009
	THOMAS EDWARD JACKSON, Detroit,	2013
	VERA MASSEY JONES, Detroit,	2009
	MARY BETH KELLY, Grosse Ile,	2009
	TIMOTHY MICHAEL KENNY, Livonia,	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
	KATHLEEN M. McCARTHY, Dearborn,	2013
	WADE H. McCREE, Detroit,	2009
	WARFIELD MOORE, Jr., Detroit,	2009
	BRUCE U. MORROW, Detroit,	2011
	JOHN A. MURPHY, Plymouth Twp.,	2011
	MARIA L. OXHOLM, Detroit,	2013
	LITA MASINI POPKE, Canton,	2011
	DANIEL P. RYAN, Redford,	2013
	MICHAEL F. SAPALA, Grosse Pointe Park,	2013
	RICHARD M. SKUTT, Detroit,	2009
	MARK T. SLAVENS, Canton,	2011
	LESLIE KIM SMITH, Northville Twp.,	2013
	VIRGIL C. SMITH, Detroit,	2013
	JEANNE STEMPIEN, Northville,	2011
	CYNTHIA DIANE STEPHENS, Detroit,	2013
	CRAIG S. STRONG, Detroit,	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,	2011
	DEBORAH A. THOMAS, Detroit,	2013
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	CAROLE F. YOUNGBLOOD, Grosse Pointe,	2013
	ROBERT L. ZIOLKOWSKI, Northville,	2009
4.	SUSAN E. BEEBE, Jackson,	2011[2]
	EDWARD J. GRANT, Jackson,	2011[3]
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHAD C. SCHMUCKER, Jackson,	2011

[2] From March 31, 2008.

[3] To March 31, 2008.

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

[4] From October 1, 2007.

[5] To May 1, 2008.

		Term Expires January 1 of
	DARNELL JACKSON, Saginaw,	2013
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2013
	TIMOTHY G. HICKS, Montague,	2011
	WILLIAM C. MARIETTI, North Muskegon,	2011
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Twp.,	2011
	DIANE M. DRUZINSKI, Shelby Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2009
	PETER J. MACERONI, Clinton Twp.,	2009
	DONALD G. MILLER, Harrison Twp.,	2013
	EDWARD A. SERVITTO, Jr., Warren,	2013
	MARK S. SWITALSKI, Ray Twp.,	2013
	MATTHEW S. SWITALSKI, Clinton Twp.,	2009
	ANTONIO P. VIVIANO, Clinton Twp.,	2011
	DAVID VIVIANO, Sterling Heights,	2013
	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[6]
	DENNIS B. LEIBER, Grand Rapids,	2013
	STEVEN MITCHELL PESTKA, Grand Rapids,	2011
	JAMES ROBERT REDFORD, East Grand Rapids,	2011
	PAUL J. SULLIVAN, Grand Rapids,	2009
	MARK A. TRUSOCK, Comstock Park,	2013
	CHRISTOPHER P. YATES, East Grand Rapids,	2013[7]
	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

[6] To April 22, 2008.

[7] From April 22, 2008.

		Term Expires January 1 of
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2009
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2013
	MELINDA MORRIS, Ann Arbor,	2013
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009
23.	RONALD M. BERGERON, Standish,	2009
	WILLIAM F. MYLES, East Tawas,	2009
24.	DONALD A. TEEPLE, Sandusky,	2009
25.	THOMAS L. SOLKA, Marquette,	2011
	JOHN R. WEBER, Marquette,	2009
26.	JOHN F. KOWALSKI, Alpena,	2009
27.	ANTHONY A. MONTON, Pentwater,	2013
	TERRENCE R. THOMAS, Newaygo,	2009
28.	WILLIAM M. FAGERMAN, Cadillac,	2009
29.	MICHELLE M. RICK, DeWitt,	2011[8]
	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

[8] From September 10, 2007.

		Term Expires January 1 of
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2013
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2013
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2013
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	MICHAEL J. BEALE, Midland,	2009[9]
	JONATHAN E. LAUDERBACH, Midland,	2013
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2013
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2013
46.	JANET M. ALLEN, Gaylord,	2011
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	WILLIAM A. BAILLARGEON, Saugatuck,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2013
	RONALD C. NICHOLS, Big Rapids,	2015
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2013
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Port Austin,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2013
55.	THOMAS R. EVANS, Beaverton,	2009
	ROY G. MIENK, Gladwin,	2013
56.	THOMAS S. EVELAND, Dimondale,	2013
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2013

[9] From December 3, 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
	MICHAEL J. KLAEREN, Jackson,	2009
	R. DARRYL MAZUR, Jackson,	2009
14A.	RICHARD E. CONLIN, Ann Arbor,	2009
	J. CEDRIC SIMPSON, Ypsilanti,	2013
	KIRK W. TABBEY, Saline,	2011
14B.	JOHN B. COLLINS, Ypsilanti,	2009
15.	JULIE CREAL, Ann Arbor,	2013

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

[1] From November 19, 2008.

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

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

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

[2] From December 10, 2007.

		Term Expires January 1 of
	JOHN D. MONAGHAN, Port Huron,	2013
	CYNTHIA SIEMEN PLATZER, Lakeport,	2009
73A.	JAMES A. MARCUS, Applegate,	2009
73B.	DAVID B. HERRINGTON, Bad Axe,	2009[3]
	KARL E. KRAUS, Bad Axe,	2009[4]
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2013
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	STEVEN CARRAS, Midland,	2011
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2013
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

[3] From February 8, 2008.

[4] To January 1, 2008.

MUNICIPAL JUDGES

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

PROBATE JUDGES

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

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

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

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

12 CASES; 25 OPINIONS; 2044 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.)

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

C

PAGE

PAGE

PAGE

PAGE

PAGE

D

PAGE

PAGE

PAGE

F

PAGE

G

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

I

PAGE

PAGE

J

PAGE

K

PAGE

PAGE

L

PAGE

PAGE

PAGE

PAGE

PAGE

N

O

PAGE

P

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

T

PAGE

PAGE

U

V

W

PAGE

PAGE

PAGE

X

PAGE

Y

Z

TABLE OF SPECIAL ORDERS NOT RELATED TO SPECIFIC CASES

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

RULES AMENDED

RULES PROPOSED AMENDMENT

RULES RESCINDED

RULES RETAINED

ADMINISTRATIVE ORDER 1998-5

Entered September 18, 2007, effective October 1, 2007 (File No. 2006-19)—REPORTER.

On order of the Court, the following amendments of Administrative Order No. 1998-5 are effective October 1, 2007:

1. In subsection II, delete the first two sentences.

2. In subsection II, insert "court" between "proposed" and "budget" in the third sentence.

3. In subsection II, insert "court" between "a" and "budget" in the fourth sentence.

KELLY, J. I would not adopt the proposed changes without first publishing the proposal for comment.

ADMINISTRATIVE ORDER 2007-4

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 49TH CIRCUIT COURT, THE 77TH DISTRICT COURT, AND PROBATE DISTRICT 18 OF MECOSTA AND OSCEOLA COUNTIES

Entered December 18, 2007, effective April 1, 2008 (File No. 2004-04) —REPORTER.

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

The Court hereby approves the adoption of the following concurrent jurisdiction plan, effective April 1, 2008:

The 49th Circuit Court, the 77th District Court, and Probate District 18 of Mecosta and Osceola Counties

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

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

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

LOCAL ADMINISTRATIVE ORDER 2006-12

Adopted February 8, 2008. —REPORTER.

We rescind in part Third Judicial Circuit Court Local Administrative Order 2006-12 (LAO 2006-12), dated November 1, 2006.

The Third Judicial Circuit Court's LAO 2006-12 is valid to the extent that it reassigns all *general* constitutional challenges to the circuit's jury pool summoning and qualification procedures for the "limited purpose of adjudicating the challenge[s]" in order to "avoid the risk of inconsistent rulings, and to avoid the possibility of the Court's administrative staff being subject to inconsistent requirements." LAO 2006-12. The chief judge may order such reassignment as the chief judge has "administrative superintending power and control over the judges of the court and all court personnel," MCR 8.110(C)(3), and authority to "direct the apportionment and assignment of the business of the court, subject to the provisions of MCR 8.111," MCR 8.110(C)(3)(b), and to "perform any act or duty or enter any order necessarily incidental to carrying out the purposes of [MCR 8.110]," MCR 8.110(C)(3)(i).

The chief judge's authority to reassign challenges to the circuit's jury pool summoning and qualification procedures is not inconsistent with MCR 8.111 because these general issues are common to each case in the circuit, they implicate administrative policy and practice, and their resolution does not require dispositive

rulings in individual cases. See *Schell v Baker Furniture Co,* 461 Mich 502, 511, 513-515 (2000) (stating that under MCR 8.110[C] and MCR 8.111 a chief judge "had authority to issue . . . a directive for cases pending before other judges of the court" but not "to enter dispositive orders in these cases, which had been assigned to other judges of the circuit"). Reassignment limited to resolution of the common issues is not inconsistent with the requirements that all *cases* be assigned by lot, MCR 8.111(B), and that *cases* be reassigned only under certain circumstances, MCR 8.111(C). Moreover, to the extent such reassignment could implicate the rule requiring assignment by lot, that rule expressly permits "a different system" if the system is adopted by local court administrative order. MCR 8.111(B).

Because a defendant has a right to be tried by a jury drawn from a fair cross-section of the community, *Taylor v Louisiana,* 419 US 522, 527 (1975); *People v Smith*, 463 Mich 199, 214 (2000), resolution of constitutional challenges to the jury venire may not be held in abeyance until after trial.

Accordingly, we rescind the Third Judicial Circuit Court's LAO 2006-12 to the extent that it postpones resolution of challenges to jury venires in individual cases until after trial and to the extent that it purports to reassign resolution of issues unrelated to the Third Judicial Circuit's overall jury summoning and qualification procedures. The chief judge may hold any proceedings necessary to resolve common issues raised in challenges to these overall procedures. The chief judge also remains empowered to enact administrative policies or issue local administrative orders consistent with this order, MCR 8.110, MCR 8.111, and MCR 8.112, in

the interest of establishing consistency among the circuit judges in resolving challenges to jury venires in particular cases.

CAVANAGH and WEAVER, JJ. We concur with the result of the order.

KELLY, J. (*dissenting*). I would have remanded *People v Hopson*, 480 Mich 1061 (2008), to the Court of Appeals for a ruling on the validity of Local Administrative Order No. 2006-12 before the Supreme Court takes action on it. The defendant in *Hopson* made several good arguments. Among them was that the language of MCR 8.111 and this Court's decision in *Schell v Baker Furniture Co,* 461 Mich 502 (2000), prohibit a chief judge from reassigning a case to himself or herself in order to make a substantive ruling. The Court of Appeals has not had the opportunity to address this issue. This Court's partial rescission of the local administrative order sanctions the reassignment that occurred in the *Hopson* case. The Court rescinded the order without hearing oral argument and without the benefit of analysis by the Court of Appeals.

ADMINISTRATIVE ORDER 2008-1

PILOT PROJECT NO. 1 17TH JUDICIAL CIRCUIT COURT
(EXPEDITED PROCESS IN THE RESOLUTION OF THE
LOW CONFLICT DOCKET OF THE FAMILY DIVISION)

Entered April 8, 2008 (File No. 2006-25)—REPORTER.

On order of the Court, the 17th Judicial Circuit Court is authorized to implement a domestic relations pilot project. The pilot project will study the effectiveness of the use of pleadings that contain nonadversarial language, and the requirement that parents submit parenting time plans to encourage settlements and reduce postjudgment litigation.

The pilot project shall begin April 1, 2008, or as soon thereafter as is possible, and shall remain in effect until July 30, 2009, or until further order of this Court.

The 17th Judicial Circuit Court will track the degree of participation and the overall effectiveness of this pilot project and shall report to and provide information as requested by the State Court Administrative Office.

1. Purpose of the Pilot Project.

The purpose of the pilot project is to study the effectiveness of the use of nonadversarial language in pleadings, judgments, and orders, and the effectiveness of a proposed provision for inclusion of parenting time

plans, particularly in relation to the just, speedy, and economical determination of the actions involved in the pilot project and the reduction of postjudgment litigation. Except for matters related to the form of pleadings and orders, requirements for parenting time plans, and the use of nonadversarial language during the pilot project, the Michigan Court Rules govern all other aspects of the cases involved in the pilot project.

2. Construction and Participation.

(a) The 17th Judicial Circuit Court shall determine a method by local administrative order that creates a pool of pilot-project cases and also a pool of control-group cases. The local administrative order shall specify the cases to be included in the pilot project by one of the following methods: the date an action is filed, a specific number of consecutive cases or actions filed, or by the assigned judge.

(b) Participation also shall include postjudgment proceedings in qualifying cases that were included in the pilot pool.

(c) This is a mandatory project. A self-represented party is not excused from the project merely because the individual does not have counsel.

3. Nonadversarial Terms.

The pilot project will incorporate the use of nonadversarial terms, such as "mother" or "parent" instead of "plaintiff" or "defendant." However, the use of nonadversarial language will not change the roles of parents as custodians for purposes of any state or federal law for which custody is required to be determined. Judgments and orders produced in the pilot project will clearly delineate how custody is to be determined for purposes of state and federal laws that require a person to be designated as a custodian.

4. Procedure.

When an attorney or a pro se parent files a complaint with the clerk's office, and the clerk's office determines that the new case meets the requirements of the pilot project, that parent will be given two informational pamphlets explaining the purpose of the project, as well as two sets of instructions for a parenting time plan and two blank forms for proposed parenting time plans. Each of these documents must be approved by the State Court Administrative Office before they are distributed by the court to the parent.

The parent's attorney or the pro se parent seeking the divorce will be responsible for serving the informational pamphlet regarding parenting time instructions and the proposed parenting time plan on the other parent. The parent's attorney must ensure that his or her client receives the informational pamphlet containing the parenting time instructions and the proposed parenting time plan.

Each parent must complete the proposed parenting time plan and file it with the court within 28 days of filing his or her initial pleadings. The parents must also serve the other parent's attorney, or the other parent if that parent is not represented, and the friend of the court with a copy of the proposed parenting time plan.

5. Amendment.

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

6. Expiration.

Unless otherwise directed by the Michigan Supreme Court, this pilot program shall continue until July 30, 2009.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted October 2, 2007, effective January 1, 2008 (File No. 2005-31)—REPORTER.

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

RULE 3.602. ARBITRATION.

(A) [Unchanged.]

(B) Proceedings to Compel or to Stay Arbitration.

(1) A request for an order to compel or to stay arbitration or for another order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions.

(2) On motion of a party showing an agreement to arbitrate that conforms to the arbitration statute, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement and the arbitration statute. If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the motion.

(3) On motion, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. If there is a substantial and good-faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration.

(4) A motion to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown.

(C) Action Involving Issues Subject to Arbitration; Stay. Subject to MCR 3.310(E), an action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or a motion for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If a motion for an order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay.

(D)-(I) [Unchanged.]

(J) Vacating Award.

(1) A request for an order to vacate an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2) On motion of a party, the court shall vacate an award if:

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

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

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

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

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

(3) A motion to vacate an award must be filed within 91 days after the date of the award. However, if the motion is predicated on corruption, fraud, or other undue means, it must be filed within 21 days after the grounds are known or should have been known. A motion to vacate an award in a domestic relations case must be filed within 21 days after the date of the award.

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

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

(K) Modification or Correction of Award.

(1) A request for an order to modify or correct an arbitration award under this rule must be made by motion. If there is not a pending action between the

parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to correct or modify an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2) On motion of a party filed within 91 days after the date of the award, the court shall modify or correct the award if:

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

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

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

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

(4) A motion to modify or correct an award may be joined in the alternative with a motion to vacate the award.

(L)-(N) [Unchanged.]

Staff Comment: The amendments eliminate the term "application," and substitute the word "motion" or "complaint," depending upon whether there is a pending action. "Application" is not a defined term within the Michigan Court Rules or in the arbitration act, MCL 600.5025.

The revisions also clarify that a complaint to stay or compel arbitration, or to vacate, modify, or correct an award must first be filed, and then a motion, consistent with the spirit of MCR 3.602(B)(1), must be filed. They also set timing deadlines consistent with the time frame allowed under the federal arbitration act, 9 USC 1 *et seq.*, by requiring that a motion to vacate, modify, or correct an award be filed within 91 days.

However, for domestic relations cases, and for motions that claim an award is based on corruption, fraud, or other undue means, the current 21-day filing period applies for motions to vacate an arbitration award.

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

Retained October 2, 2007 (File No. 2006-21)—REPORTER.

By order dated March 20, 2007, this Court amended Rules 5.307 and 5.310 of the Michigan Court Rules, effective immediately. 477 Mich ccxii-ccxiii (2007). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment, which conformed a requirement for a personal representative to file a Notice of Continued Administration in the rules to MCL 700.3951. Notice and an opportunity for comment at a public hearing having been provided, the amendments of MCR 5.307 and MCR 5.310 are retained.

Adopted October 11, 2007, effective January 1, 2008 (File No. 2006-28)—REPORTER.

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

RULE 5.207. SALE OF REAL ESTATE.

(A) Petition. Any petition to approve the sale of real estate must contain the following:

(1) the terms and purpose of the sale,

(2) the legal description of the property,

(3) the financial condition of the estate before the sale, and

(4) an appended copy of the most recent assessor statement or tax statement showing the state equalized

value of the property. If the court is not satisfied that the evidence provides the fair market value, a written appraisal may be ordered.

(B) [Unchanged.]

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. When filing either an application or petition to commence a decedent estate, a copy of the death certificate must be attached. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. Requiring additional documentation, such as information about the proposed or appointed personal representative, is prohibited.

(B)-(D) [Unchanged.]

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

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) [Unchanged.]

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

"Inventory Information: Within 91 days of the date of the letters of authority, you must submit to the court

the information necessary for computation of the probate inventory fee. You must also provide the name and address of each financial institution listed on your inventory at the time the inventory is presented to the court. The address for a financial institution shall be either that of the institution's main headquarters or the branch used most frequently by the personal representative.

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

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

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

(C)-(D) [Unchanged.]

RULE 5.409. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A) [Unchanged.]

(B) Inventories.

(1) [Unchanged.]

(2) Filing and Service. Within 56 days after appointment, a conservator or, if ordered to do so, a guardian

shall file with the court a verified inventory of the estate of the protected person, serve copies on the persons required by law or court rule to be served, and file proof of service with the court.

(3) Contents. The guardian or conservator must provide the name and address of each financial institution listed on the inventory. The address for a financial institution shall be either that of the institution's main headquarters or the branch used most frequently by the guardian or conservator. Property that the protected individual owns jointly or in common with others must be listed on the inventory along with the type of ownership and value.

(C) Accounts.

(1) Filing, Service. A conservator must file an annual account unless ordered not to by the court. A guardian must file an annual account if ordered by the court. The provisions of the court rules apply to any account that is filed with the court, even if the account was not required by court order. The account must be served on interested persons, and proof of service must be filed with the court. The copy of the account served on interested persons must include a notice that any objections to the account should be filed with the court and noticed for hearing. When required, an accounting must be filed within 56 days after the end of the accounting period.

(2)-(3) [Unchanged.]

(4) Exception, Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no assets have been received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within

28 days of the conservator's qualification or as otherwise ordered by the court. The conservator must file with the court an annual verification of funds on deposit with a copy of the corresponding financial institution statement attached.

(5) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to a personal representative shall be to a conservator. A copy of the corresponding financial institution statement must be presented to the court or a verification of funds on deposit must be filed with the court, either of which must reflect the value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting period, unless waived by the court for good cause.

(6) [Unchanged.]

(D)-(F) [Unchanged.]

Staff Comment: These amendments were proposed by the Probate and Estate Planning Section of the State Bar of Michigan, and are intended to address and clarify practice issues within the amended rules. The amendment of MCR 5.207(A)(4) provides the alternative of including a tax statement to show the state equalized value of property. The amendments of MCR 5.307(B) and MCR 5.409(B)(3) require the name and address of each financial institution be added to the inventory, and requires that the institution's main address or branch used most frequently by the filer be identified. The amendment of MCR 5.409(C)(1) requires any account filed with the court to comply with relevant court rules. The amendment of MCR 5.409(C)(4) extends the time in which to file proof of a minor's assets in a restricted account from 14 to 28 days. The amendment of MCR 5.409(C)(5) allows the option of filing an annual verification of funds on deposit or presenting a copy of a financial institution statement with an annual account.

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

Adopted October 11, 2007, effective January 1, 2008 (File No. 2006-44)—REPORTER.

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

RULE 7.306. BRIEFS IN CALENDAR CASES.

(A)-(C) [Unchanged.]

(D) Amicus Curiae Briefs.

(1) Except as provided in subsection(2), an amicus curiae brief may be filed only on motion granted by the Court and must conform to subrules (A) and (B) and MCR 7.309. The brief of an amicus curiae is to be filed within 21 days after the brief of the appellee, or at such other time as the Court directs. An amicus curiae may not participate in oral argument except by Court order.

(2) No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the people of the state of Michigan or the state of Michigan, or any of its agencies or officials, by the Attorney General; on behalf of any political subdivision of the state when submitted by its authorized legal officer, its authorized agent, or an association representing a political subdivision; or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

Staff Comment: These amendments alter the requirements for filing amicus curiae briefs with the Michigan Supreme Court. They allow amicus curiae 21 days after the filing of the appellee's brief to file its amicus curiae brief, and add a provision similar to Rule 37 of the Rules of the Supreme Court of the United States to allow state agencies and attorneys operating on behalf of public agencies to submit an amicus curiae brief without filing a motion to seek permission to do so.

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

Adopted October 16, 2007, effective January 1, 2008 (File No. 2007-12)—REPORTER.

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

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

(A)-(B) [Unchanged.]

(C) Manner of Service. Service of a copy of a paper on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally;

(b) leaving it at the attorney's office with the person in charge or, if no one is in charge or present, by leaving it in a conspicuous place; or

(c) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there.

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally; or

(b) leaving it at the party's usual residence with some person of suitable age and discretion residing there.

(3) Mailing. Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing.

(4) E-mail. Some or all of the parties may agree to service by e-mail by filing a stipulation in that case. E-mail service shall be subject to the following conditions:

(a) The stipulation for service by e-mail shall set forth the e-mail addresses of the parties or attorneys that agree to e-mail service, which shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission.

(b) The parties shall set forth in the stipulation all limitations and conditions concerning e-mail service, including but not limited to:

(i) the maximum size of the document that may be attached to an e-mail;

(ii) designation of exhibits as separate documents;

(iii) the obligation (if any) to furnish paper copies of e-mailed documents; and

(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.

(c) Documents served by e-mail must be in PDF format or other format that prevents the alteration of the document contents.

(d) A paper served by e-mail that an attorney is required to sign may include the attorney's actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).

(e) Each e-mail that transmits a document shall include a subject line that identifies the case by court,

party name, case number, and the title or legal description of the document(s) being sent.

(f) An e-mail transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday. Service by e-mail under this subrule is treated as service by delivery under MCR 2.107(C)(1).

(g) A party may withdraw from a stipulation for service by e-mail if that party notifies the other party or parties in writing at least 28 days in advance of the withdrawal.

(h) Service by e-mail is complete upon transmission, unless the party making service learns that the attempted service did not reach the e-mail address of the intended recipient.

(i) The e-mail sender shall maintain an archived record of sent items that shall not be purged until the conclusion of the case, including the disposition of all appeals.

(D)-(F) [Unchanged.]

(G) Filing With Court Defined. The filing of pleadings and other papers with the court as required by these rules must be with the clerk of the court, except that the judge to whom the case is assigned may accept papers for filing when circumstances warrant. A judge who does so shall note the filing date on the papers and transmit them forthwith to the clerk. It is the responsibility of the party who presented the papers to confirm that they have been filed with the clerk. If the clerk dockets papers on a date other than the filing date, the clerk shall note the filing date on the register of actions.

Staff Comment: The amendments allow parties to stipulate to agree to e-discovery, or service of papers among the parties, by e-mail. Further, the amendments require that court clerks note the date pleadings are filed if that date is different than the date the filing is docketed.

The e-discovery rules allow parties or those represented by attorneys to stipulate to service by e-mail. The stipulation establishes the maximum document size, the designation of exhibits as separate documents, the persons who are entitled to receive an e-mailed document other than the party or attorney, and the obligation, if any, to furnish paper copies of e-mailed documents. The rule also requires that the subject line of an e-mail that contains a document or has a document attached indicate the court, case number, party name, and title of the document being sent. Documents are required to be in a format, such as PDF, that precludes alteration, and a designation of "s/" or "/s/" is sufficient for a signature. Documents e-mailed after 4:30 p.m. Eastern Time are considered filed the next day, and service by e-mail is equivalent to service by delivery. Service is complete upon transmission, unless the sender receives notice that the e-mail did not reach the intended e-mail address. An e-mail sender is required to maintain an archived record of sent items until the case concludes, including the disposition of all appeals.

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

Adopted November 27, 2007, effective January 1, 2008 (File No. 2003-59)—REPORTER.

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

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(G) [Unchanged.]

(H) Statutes, Ordinances, or Charters. In pleading a statute, ordinance, or municipal charter, it is sufficient to identify it, without stating its substance, except as provided in subrule (M).

(I)-(L) [Unchanged.]

(M) Headlee Amendment Actions. In an action alleging a violation of Const 1963, art 9, §§ 25-34, the factual basis for the alleged violation or a defense must be stated with particularity. In an action involving Const 1963, art 9, § 29, the plaintiff must state with particu-

larity the type and extent of the harm and whether there has been a violation of either the first or second sentence of that section. In an action involving the second sentence of Const 1963, art 9, §29, the plaintiff must state with particularity the activity or service involved. All statutes involved in the case must be identified, and copies of all ordinances and municipal charter provisions involved, and any available documentary evidence supportive of a claim or defense, must be attached to the pleading. The parties may supplement their pleadings with additional documentary evidence as it becomes available to them.

RULE 7.206. EXTRAORDINARY WRITS, ORIGINAL ACTIONS, AND ENFORCEMENT ACTIONS.

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff shall file with the clerk:

(a) for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of a complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of a complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy;

(b)-(d) [Unchanged.]

(2) Answer. The defendant or any other interested party must file with the clerk within 21 days of service of the complaint and any supporting documents or affidavits:

(a) for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of an answer to the complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of an answer to the complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy.

(b)-(c) [Unchanged.]

(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment: The amendments establish special pleading requirements in actions alleging a violation of the Headlee Amendment, Const 1963, art 9, §§ 25-34. The amendments require that a complaint or answer state the factual basis for an alleged violation or defense with particularity. Additionally, documentary evidence supportive of a claim or defense must be attached to the pleading as an exhibit.

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

YOUNG, J. (*concurring*). I concur with this Court's adoption of the amendments to MCR 2.112 and 7.206. I write to respond to Justice WEAVER's assertion that the "amendments are another attempt by the majority to reduce the ability of the average taxpayer, who is unlikely to have legal experience, to seek enforcement of the Headlee Amendment . . . ."[1] Justice WEAVER's criticisms ignore the practical difficulties associated with the Court of Appeals exercise of original jurisdiction over Headlee claims.

The Headlee Amendment[2] vests original jurisdiction in the Court of Appeals for claims arising under its

[1] *Post* at clxv.

[2] Const 1963, art 9, §§ 25 to 34.

provisions.[3] The people of the state of Michigan chose to vest the Court of Appeals with original jurisdiction, and we are without authority to circumvent the import of what the constitution requires. We are, however, confronted with certain practical difficulties that inhere when an appellate court, such as the Court of Appeals, is required to exercise original jurisdiction over complex legal claims that require factual development.

The Court of Appeals is not a trial court.[4] In Michigan, the circuit courts and other lower courts are generally vested with the responsibility of aiding the parties in developing the facts that define and ultimately decide their claims and defenses. Trial courts are designed efficiently to preside over discovery matters, pretrial hearings, and ultimately a trial on the merits. Those are the means that our system of justice uses to fully and efficiently develop the facts underlying the parties' claims.

None of the tools available to our circuit courts for processing trials are available in the Court of Appeals. Thus, the Court of Appeals is poorly suited and equipped for factual development of new claims. The Court of Appeals' primary function is revisionary; it reviews claims and defenses and assesses their merits well after the parties have had the opportunity fully to develop the facts in the lower courts. As such, the Court

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[3] *Id.*, § 32 ("Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.").

[4] The Michigan Constitution expressly provides that the circuit court is Michigan's trial court. Const 1963, art 6, § 1 ("The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, *one trial court of general jurisdiction known as the circuit court* . . . ." [Emphasis added.]).

of Appeals is ill-equipped to evaluate the claims and defenses in a complex and fact-intensive original action without the assistance of the parties in developing the factual bases for their claims and defenses.

Justice WEAVER's criticisms fail to recognize how the practical difficulties associated with the Court of Appeals' exercise of original jurisdiction over Headlee claims have affected the very same claimants whose cause she purports to trumpet. This Court and the Court of Appeals have experienced repeated frustration with evaluating complaints that only assert generalized claims based on the Headlee Amendment. Pursuant to MCR 7.206(A), plaintiffs filed complaints asserting only generalized factual allegations.[5] As with other fact-intensive claims,[6] generalized pleading proved problematic because of the complex and fact-intensive nature of Headlee claims. As a result, the Court of Appeals dismissed several complaints for a failure to state a claim on which relief could be granted.[7] Following those dismissals, this Court was in no better position than the Court of Appeals to evaluate the generalized pleadings.[8]

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[5] See MCR 2.111(B)(1).

[6] See MCR 2.112(B) (requiring that claims of fraud and mistake "must be stated with particularity").

[7] See, e.g., *Duverney v Big Creek Mentor Utility Auth*, unpublished order of the Court of Appeals, entered January 10, 2003 (Docket No. 243866); *Ben Drew Co v Ontwa Twp*, unpublished order of the Court of Appeals, entered June 9, 2003 (Docket No. 248286); see also *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 169-170 (2002) (dismissing claims with prejudice on motion for summary disposition when the plaintiff failed to substantiate claims of Headlee violations).

[8] See, e.g., *Duverney v Big Creek-Mentor Utility Auth*, 469 Mich 1042 (2004) (vacating and remanding for the plaintiffs to "amend their complaint so as to more specifically allege a violation of Const 1963, art 9, § 31."); *Ben Drew Co, LLC v Ontwa Twp*, 472 Mich 886 (2005) (denying leave to appeal).

Justice WEAVER argues that the amendments are "unfair and overly burdensome"[9] because they "require legal reasoning by the average nonlawyer taxpayer . . . ."[10] Complexity, however, pervades Headlee claims. This Court has, by necessity, recognized two distinct claims that may be pursued under article 9, § 29.[11] Each claim under § 29 involves separate and distinct factual support.[12] It would indeed be an injustice if a complaint were dismissed due to a misunderstanding of which claim the plaintiff intended to advance. The amendments to MCR 2.112 and 7.206 are designed to prevent such an unfortunate result.

The amendments do nothing to increase either the complexity of the issues or the facts necessary to ultimately prove or disprove either type of claim under § 29. Rather, instead of leaving the Court of Appeals to guess about the basis of the claim and the factual support for it, the rules now require that the parties frame their claims and present their factual support at the outset of the proceeding.

Justice WEAVER also argues that the requirement of five copies of the complaint and the plaintiff's support-

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[9] *Post* at clxv.

[10] *Post* at clxvii-clxviii.

[11] See *Adair v Michigan*, 470 Mich 105, 111 (2004) (distinguishing the "maintenance of support" [MOS] provision and the "prohibition on unfunded mandates" [POUM] provision); Const 1963, art 9, § 29.

[12] For a MOS claim, a plaintiff must show " ' (1) that there is a continuing state mandate, (2) that the state actually funded the mandated activity at a certain proportion of necessary costs in the base year of 1978-1979, and (3) that the state funding of necessary costs has dipped below that proportion in a succeeding year.' " *Adair, supra* at 111 (citation omitted). For a POUM claim, a plaintiff must show "that the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted or, if properly funded initially, that the mandated local role was increased by the state without state funding for the necessary increased costs." *Id.*

ing documents will prove to be cost prohibitive for Headlee claimants. I simply note that the copying requirements (steps four, five, and six in Justice WEAVER's "six detailed legal procedural steps")[13] are consistent with the copying requirements for all other original actions in the Court of Appeals.

The amendments to MCR 2.112 and 7.206 that this Court adopts today serve to ensure that all parties involved in a Headlee claim—plaintiffs included—receive a full, fair, and accurate judicial assessment of the issues presented in their claims and defenses. The amendments are not a great disservice to the average taxpayer as Justice WEAVER contends. Rather, they serve to remedy the otherwise unavoidable practical issues involved in the Court of Appeals exercise of original jurisdiction over claims that involve complex factual questions. This approach ensures fairness to all parties.

CORRIGAN, J., concurred with YOUNG, J.

WEAVER, J. (*dissenting*). I dissent from the majority's adoption of the court rule amendments of MCR 2.112 and 7.206 because the court rule amendments require particularized fact pleading in Headlee Amendment claims and effectively reduce the right of any taxpayer of the state to bring a suit to enforce the provisions of the Headlee Amendment.[1]

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[13] *Post* at clxv.

[1] The Headlee Amendment was "part of a nationwide 'taxpayers revolt'. . . to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd of Ed*, 424 Mich 364, 378 (1985).

The Headlee Amendment, presented in an initiative petition, Proposal E, that Michigan voters ratified during the November 7, 1978, general election, added §§ 25 to 34 to article 9 of the Michigan Constitution. Appendix A sets forth the amendments of MCR 2.112 and 7.206 affecting actions concerning the Headlee Amendment provisions enacted by the voters.

The court rule amendments are another attempt by the majority to reduce the ability of the average taxpayer, who is unlikely to have legal experience, to seek enforcement of the Headlee Amendment because the court rule amendments make it more difficult for the average nonlawyer taxpayer to exercise his or her constitutional right to file a suit to seek enforcement of the Headlee Amendment provisions.

The court rule amendments are unfair and overly burdensome because they require the nonlawyer taxpayer to perform six detailed legal procedural steps whenever that taxpayer seeks enforcement of the Headlee Amendment. Specifically, in order to bring suit to enforce the Headlee Amendment, the nonlawyer taxpayer must:

> (1) "state with particularity the type and extent of the harm,"
>
> (2) identify whether the complaint is with respect to the state's reduction of "the state financed proportion of the necessary costs of any existing activity or service" required of local government or whether the complaint concerns a failure by the state to appropriate additional funds for any new activity or service beyond that required by existing law and, if the latter applies, state with particularity the activity or service involved, see Const 1963, art 9, § 29,
>
> (3) identify all pertinent statutes,
>
> (4) provide five copies of a complaint for an original action,
>
> (5) provide five "copies of all ordinances and municipal charter provisions involved," and
>
> (6) include "any available documentary evidence supportive of a claim or defense."

The creation of these six additional legal pleading requirements for bringing a claim under the Headlee Amendment will often result in a difficult obstacle and

an expensive burden for the average taxpayer. Such results are contrary to the intent of the Headlee Amendment.

In *Adair v Michigan,* 470 Mich 105, 144 (2004), I dissented from the majority's previous attempt to discourage the enforcement of the Headlee Amendment. In that case, I objected to the majority of four's evisceration of standing to bring suit under the Headlee Amendment when that majority, through its judicially created broad application of res judicata requirements, sought to preclude taxpayer claims. There I stated:

> Const 1963, art 9, § 29 provides in part:
>
> > "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the [level] of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."
> >
> > Standing to pursue violations of this section, as well as other sections of the *Headlee Amendment*, is given to all taxpayers in the state. *Const 1963, art 9, § 32* provides:
> >
> > "*Any taxpayer* of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of the Article, and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit. [Emphasis added.]"
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> * * *
>
> *Art 9, § 32* gives "*any taxpayer* of the state" standing to enforce the provisions of the *Headlee Amendment.* This grant of standing is consistent with the amendment's purpose, which, as explained by this Court, is to limit the

> expansion of legislative requirements placed on local governments . . . . Consequently, it is extremely doubtful that the people of this state would have expected their ability to enforce the *Headlee Amendment* to be hampered by the broad application of res judicata that the majority imposes. Rather, as explained below, a "common understanding" of the people would suggest the opposite conclusion—that the Constitution's grant of standing under *art 9, § 32* to "*any taxpayer*" is just that—a broad grant of standing that permits *any* taxpayer to pursue actions necessary to enforce the provisions of the *Headlee Amendment*. [*Id.* at 142-145 (some emphasis added).]

Under the new court rule amendments, the average nonlawyer taxpayer will be required to "state with particularity the type and extent of the harm" alleged and to identify (1) whether the complaint is with respect to the state's reduction of "the state financed proportion of the necessary costs of any existing activity or service" required of local units of government or (2) whether the complaint concerns a failure by the state to appropriate additional funds (to be disbursed to local units of government) for any new activity or service beyond that required by existing law. These unduly burdensome requirements will likely discourage taxpayers from attempting to seek enforcement of the Headlee Amendment because filing a claim will often be too difficult and too expensive for the average nonlawyer taxpayer.

A nonlawyer taxpayer who wants to bring an action to enforce the Headlee Amendment, but who cannot afford the assistance of legal counsel, will be unduly burdened by these court rule amendments, because the court rule amendments require legal reasoning by the average nonlawyer taxpayer and, further, because collecting the voluminous records that must be filed with the complaint will be difficult for the taxpayer to accomplish, given the likelihood that the average

nonlawyer taxpayer lacks both the legal experience and the funds required to properly file a complaint. Lawyers are trained professionally how to research statutes and ordinances and how to properly plead claims supported by relevant evidence. Under the new court rule amendments, the average taxpayer, untrained in the law, will have to complete these additional six procedural pleading requirements *just to file a complaint.* As such, the average taxpayer will essentially be required to "fill the shoes of an attorney," a nearly insurmountable task for some people, which will likely result in a reduction in the number of Headlee Amendment complaints filed.

This result is inconsistent with art 9, §§ 29 and 32 and contrary to the people's understanding that "*any* taxpayer" would have a fair opportunity to seek enforcement of the Headlee Amendment. The right to have a fair opportunity to bring a Headlee Amendment claim is a constitutionally guaranteed right available to all taxpayers, not just those who have attended law school or those who can afford to employ attorneys for their assistance.

I dissent from the adoption of the court rule amendments of MCR 2.112 and MCR 7.206. The court rule amendments are contrary to the intent of the Headlee Amendment, frustrate the broad grant of standing provided to taxpayers by § 32, and will essentially preclude the average taxpayer from seeking enforcement of the Headlee Amendment provisions.

CAVANAGH, J., concurred with WEAVER, J.

APPENDIX A

Note: the underscored text represents the newly adopted amendments affecting Headlee Amendment actions.

Michigan Court Rule 2.112 — Pleading Special Matters

(A)-(G) [Unchanged.]

(H) Statutes, Ordinances, or Charters. In pleading a statute, ordinance, or municipal charter, it is sufficient to identify it, without stating its substance, except as provided in subrule (M).

(I)-(L) [Unchanged.]

(M) Headlee Amendment Actions. In an action alleging a violation of Const 1963, art 9, §§ 25-34, the factual basis for the alleged violation or a defense must be stated with particularity. In an action involving Const 1963, art 9, § 29, the plaintiff must state with particularity the type and extent of the harm and whether there has been a violation of either the first or second sentence of that section. In an action involving the second sentence of Const 1963, art 9, §29, the plaintiff must state with particularity the activity or service involved. All statutes involved in the case must be identified, and copies of all ordinances and municipal charter provisions involved, and any available documentary evidence supportive of a claim or defense, must be attached to the pleading. The parties may supplement their pleadings with additional documentary evidence as it becomes available to them.

Michigan Court Rule 7.206—Extraordinary Writs, Original Actions, and Enforcement Actions.

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff shall file with the clerk:

(a) for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of a complaint (one signed) that

conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of a complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy;

(b)-(d) [Unchanged.]

(2) Answer. The defendant or any other interested party must file with the clerk within 21 days of service of the complaint and any supporting documents or affidavits:

(a) for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of an answer to the complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of an answer to the complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy.

(b)-(c) [Unchanged.]

(3) [Unchanged.]

Adopted January 8, 2008, effective immediately (File No. 2007-27)—REPORTER.

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

RULE 5.125. INTERESTED PERSONS DEFINED.

On order of the Court, the need for immediate action having been found, the notice requirements are dispensed with and the following amendments of Rules 5.125 of the Michigan Court Rules is adopted, effective

immediately. MCR 1.201(D). Comments will be received and may be sent to the Supreme Court Clerk in writing or electronically through January 23, 2008, to P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-27. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources /administrative/index.htm. The amendment will be considered at the Supreme Court's public hearing scheduled for January 23, 2008. The notices and agendas for public hearings are posted at www.courts.michigan.gov /supremecourt.

(A)-(B) [Unchanged.]

(C) Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(21) [Unchanged.]

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

(a) the alleged incapacitated individual,

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

(c) the alleged incapacitated individual's spouse,

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

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

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

(g) the nominated guardian.

(23)-(31) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 5.125 conforms the rule to language in MCL 700.5311 by clarifying that parents are interested persons entitled to notice in a petition for the appointment of a guardian of an alleged incapacitated individual, regardless of whether the alleged incapacitated individual has living adult children.

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

Adopted January 29, 2008, (File No. 2007-27)—REPORTER.

By order dated January 8, 2008, this Court adopted an amendment of Rule 5.125 of the Michigan Court Rules with immediate effect. 480 Mich cvi (2008). At the same time, the Court invited comment regarding the amendment. A public hearing in this matter was held on January 23, 2008, and the Court has determined that the comment period should be extended to April 1, 2008, to allow more time to receive public comments, and that this matter will again appear on a public hearing agenda after the new comment period has expired.

PROPOSED AMENDMENT OF RULE 3.928 OF THE MICHIGAN COURT RULES. On order of the Court, the need for immediate action having been found, the notice requirements are dispensed with and the following amendment of Rule 3.928 of the Michigan Court Rules is adopted, effective immediately. MCR 1.201(D). Comments will be received and may be sent to the Supreme Court Clerk in writing or electronically through August 31, 2008, to P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-19. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. The amendment will be considered at a future Supreme Court public administrative

hearing. The notices and agendas for public hearings are posted at www.courts. michigan.gov/supremecourt.

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

RULE 3.928. CONTEMPT OF COURT.

(A) [Unchanged.]

(B) [Unchanged.]

(C) Contempt by Juvenile. A juvenile under court jurisdiction who is convicted of criminal contempt of court, and who was at least 17 years of age when the contempt was committed, may be sentenced to up to ~~30~~ 93 days in the county jail as a disposition for the contempt. Juveniles sentenced under this subrule need not be lodged ~~separate~~ separately and apart from adult prisoners. Younger juveniles found in contempt of court are subject to a juvenile disposition under these rules.

Staff Comment: This amendment changes the current maximum penalty from 30 days in jail for contempt of court to 93 days in jail for contempt of court to conform to MCL 600.1715.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 31, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-19. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

AMENDMENTS OF LOCAL COURT RULES

FIFTY-FIFTH JUDICIAL DISTRICT

Adopted December 20, 2007, effective January 15, 2008 (File No. 2007-16)—REPORTER.

On order of the Court, the following Rule 4.201 of the Local Court Rules of the 55th District Court is adopted, effective January 15, 2008.

[The following is a new local court rule for the 55th District Court.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(C) Summons.

(1) The summons must comply with MCR 2.102, and shall command the defendant to appear in accord with MCL 600.5735(4) as follows:

(a) within 10 days after service of the summons upon the defendant, in proceedings under MCL 600.5726;

(b) within 5 days after service of the summons upon the defendant in all other proceedings.

Staff Comment: Local Court Rule 4.201(C) of the 55th Judicial District Court was adopted at the request of that court, to be effective January 15, 2008.

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

RESCISSION OF LOCAL COURT RULES

Entered March 7, 2008, effective immediately (File No. 2008-05)—REPORTER.

On order of the Court, Rules 2.119, 2.501, 6.000, and 6.001 of the Local Court Rules of the 9th Judicial Circuit Court are rescinded, effective immediately.

AMENDMENT OF STATE BAR RULES

Adopted December 19, 2007, effective January 1, 2008 (File No. 2005-41)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following new Rule 19 of the Rules Concerning the State Bar of Michigan is adopted, effective January 1, 2008.

RULE 19. CONFIDENTIALITY OF STATE BAR RECORDS.

Sec. 1. Except as provided below, in Rule 15, or as otherwise provided by law, records maintained by the state bar are open to the public pursuant to the State Bar of Michigan Access to Information Policy.

Sec. 2. Records and information of the Client Protection Fund, Ethics Program, Lawyers and Judges Assistance Program, Practice Management Resource Center Program, and Unauthorized Practice of Law Program that contain identifying information about a person who uses, is a participant in, is subject to, or who inquires about participation in, any of these programs, are confidential and are not subject to disclosure, discovery, or production, except as provided in section (3) and (4).

Sec. 3. Records and information made confidential under section (1) or (2) shall be disclosed:

(a) pursuant to a court order;

(b) to a law enforcement agency in response to a lawfully issued subpoena or search warrant, or;

(c) to the attorney grievance commission or attorney discipline board in connection with an investigation or hearing conducted by the commission or board, or sanction imposed by the board.

Sec. 4. Records and information made confidential under section (1) or (2) may be disclosed:

(a) upon request of the state bar and approval by the Michigan Supreme Court where the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, or

(b) at the discretion of the state bar, upon written permission of all persons who would be identified by the requested information.

Staff Comment: This new rule was submitted for consideration to the Supreme Court by the State Bar of Michigan to clarify and set out the rules regarding confidentiality of documents and records of the bar. This rule requires that internal information that contains identifying information, including information that relates to the Client Protection Fund, the Ethics Program, the Lawyers and Judges Assistance Program, the Practice Management Resource Center Program, and the Unauthorized Practice of Law Program, be confidential. However, records and documents must be disclosed pursuant to a court order, to a law enforcement agency that submits a warrant or subpoena, or to the Attorney Grievance Commission and Attorney Discipline Board. Confidential information may be disclosed if the public interest in disclosure outweighs the public interest in nondisclosure, or at the discretion of the SBM, with the approval of all persons who would be identified by the requested information.

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

SUPREME COURT CASES

PEOPLE v STAMPER

Docket No. 132887. Decided December 27, 2007.

A jury in the Wayne Circuit Court convicted Michael W. Stamper of felony murder, MCL 750.316(1)(b); second-degree murder, MCL 750.317; first-degree child abuse, MCL 750.136b(2); and first-degree criminal sexual conduct, MCL 750.520b(1)(a). The court, Annette J. Berry, J., vacated the second-degree murder and first-degree child abuse convictions and sentenced the defendant to life in prison without parole for the felony-murder conviction and to 225 months to 80 years in prison for the first-degree criminal sexual conduct conviction. The Court of Appeals, SERVITTO, P.J., and FITZGERALD and TALBOT, JJ., affirmed in an unpublished opinion per curiam, issued November 16, 2006 (Docket No. 263436). With regard to the issue of the trial court's admission of the four-year-old victim's statements as dying declarations, the Court of Appeals held that the trial court did not abuse its discretion. The defendant applied for leave to appeal.

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

A child may have the capacity to be conscious of his or her own impending death for purposes of the dying declaration exception to the hearsay rule, MRE 804(b)(2). Under that rule, a statement made by a declarant is admissible if the declarant is unavailable as a witness and made the statement "while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Whether a child was conscious of his or her impending death must be determined on a case-by-case basis. A declarant's age alone does not preclude the admission of a dying declaration. As with an adult, if the facts show that the child believed that he or she was about to die, statements made during that time may be proffered as dying declarations. In this case, the victim died of his injures. His statement, considered along with those injuries, clearly indicated his belief that his death was imminent, while his statements

that he received the injuries from the defendant clearly concerned the circumstances of what the victim believed to be his impending death.

Affirmed.

EVIDENCE — HEARSAY — DYING DECLARATIONS — CHILDREN.

A statement is admissible under the dying declaration exception to the hearsay rule if the declarant is unavailable as a witness and made the statement concerning the cause or circumstances of what he or she believed to be impending death while believing that his or her death was imminent; the declarant's age alone does not preclude the admission of a dying declaration, and a child may have the capacity to be conscious of his or her own impending death for purposes of the exception; whether a child was conscious of his or her impending death must be determined on a case-by-case basis (MRE 804[b][2]).

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

Michael W. Stamper *in propria persona*.

MEMORANDUM OPINION. At issue in this case is whether a four-year-old injured child can be sufficiently aware of his impending death so that a statement given when death was imminent qualifies for admission as evidence under the dying declaration exception to the hearsay rule, MRE 804(b)(2). In lieu of granting leave to appeal, we affirm defendant's convictions and hold that a child may have the capacity to be conscious of his own impending death for purposes of the dying declaration exception.

We adopt the facts as set forth by the Court of Appeals:

The victim in this case is Jake Logan, the son of defendant's girlfriend, Gloria Ann Logan, who is also the

> mother of defendant's child. During the late afternoon or evening of September 8, 2004, defendant gave the victim a bath. Gloria heard the victim crying during the bath. After the bath, the victim was "passing out," and defendant put him in the bathtub to revive him. The victim later lay on the bed with Gloria. When Gloria asked him to open his eyes, he responded, "Mom, I can't, I'm dead." Defendant's daughter, Jamie, indicated that the victim stated, "don't bother me, I'm already dead." Gloria called her father, who came over and eventually called 911.
>
> The victim was admitted to the hospital that evening with bruises on his neck, arms, chest, abdomen, groin, testicles, and legs. Nurse Hillary Hart asked the victim how he got his bruises, and the victim responded, "from 'Mike.' " Nurse Lisa Blanchette asked the victim who Mike was, and the victim responded, "Mom's wife." The victim died shortly thereafter.
>
> According to Dr. Leigh Hlavaty, an expert in forensic pathology, the victim had 88 bruises on his body as well as anal injuries. Hlavaty testified that the anal injuries were consistent with anal penetration. Hlavaty opined that all of the victim's bruises and injuries were sustained within twenty-four hours of his death and that the victim's internal injuries were likely sustained within the two to six hours preceding the victim's admission into the hospital. He stated that an adult male fist or being struck with a blunt object in the abdomen likely caused the victim's injuries. [Unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 263436), pp 1-2.]

The trial court admitted Jake's statements implicating defendant under the dying declaration exception. The Court of Appeals affirmed.

Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted. MRE 801(c). It is generally inadmissible unless it falls under one of the hearsay exceptions set forth in the Michigan Rules of Evidence. MRE 802. One of these

exceptions is MRE 804(b)(2), commonly known as the dying declaration exception, which provides that a statement by a declarant is admissible if the declarant is unavailable as a witness and the statement was made "while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." We review a trial court's admission of evidence under a hearsay exception to determine whether there has been an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

Before admitting a statement as a dying declaration, the trial court must make a preliminary investigation of the facts and circumstances surrounding the statement. *People v Johnson*, 334 Mich 169, 173-174; 54 NW2d 206 (1952); *People v Fritch*, 210 Mich 343, 346-347; 178 NW 59 (1920). The trial court, in advance of the proof of the declaration itself, may " 'allow evidence as to the circumstances under which the dying declaration was taken to show whether it was really taken when the declarant was under the conviction of approaching and inevitable death . . . .' " *Fritch*, *supra* at 347, quoting *People v Christmas*, 181 Mich 634, 646; 148 NW 369 (1914). If the surrounding circumstances clearly establish that the declarant was *in extremis* and believed that his death was impending, the court may admit statements concerning the cause or circumstances of the declarant's impending death as substantive evidence under MRE 804(b)(2). *Johnson*, *supra* at 173.

Here, we conclude that the requirements for admissibility have been met. Jake was clearly unavailable as a witness. MRE 804(a)(4). His statement to his mother, "Mom, I can't, I'm dead," when considered along with his injuries, clearly indicated his belief that his death was imminent. *Johnson*, *supra* at 173. And his state-

ments to the nurses that he received his injuries from "Mike" and that Mike was "Mom's wife" clearly concerned the circumstances of what Jake believed to be his impending death. MRE 804(b)(2).

We reject defendant's argument that a four-year-old child cannot be aware of impending death. Whether a child was conscious of his own impending death must be determined on a case-by-case basis. As with an adult, if the facts show, as they do here, that the child believed that he was about to die, statements he made may be proffered as dying declarations. A declarant's age alone does not preclude the admission of a dying declaration. Therefore, we affirm the Court of Appeals decision to uphold the trial court's admission of the victim's statements.

The remainder of defendant's application is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Affirmed.

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

TOLL NORTHVILLE LTD v NORTHVILLE TOWNSHIP

Docket No. 132466. Argued on October 4, 2007 (Calendar No. 9). Decided February 5, 2008.

Toll Northville Ltd and Biltmore Wineman LLC installed road access, streetlights, sewer service, water service, electrical service, natural gas service, telephone service, and sidewalks for a residential development project in Northville Township. The township increased the tax assessments on the property because of the enhanced value from these public-service improvements. Toll Northville and Biltmore contested the assessments before the Tax Tribunal, and Toll Northville brought an action for a declaratory judgment against the township in the Wayne Circuit Court, challenging the constitutionality of MCL 211.34d(1)(b)(*viii*), the statute on which the township based the assessment increases, arguing that the increases violated Const 1963, art 9, § 3. The Tax Tribunal stayed the proceeding before it pending a resolution of the lawsuit. Biltmore was joined in the declaratory–judgment action. The court, John A. Murphy, J., ruled that the statute was unconstitutional. The Court of Appeals, WHITBECK, C.J., and HOEKSTRA and WILDER, JJ., affirmed in an opinion per curiam, concluding that improvements that become part of the real property as structures or fixtures constitute taxable "additions" under the constitution and the statute, but that term does not include public-service improvements because title to the improvements will ultimately vest in the municipality or a utility company. 272 Mich App 352 (2006). The township applied for leave to appeal, which the Supreme Court granted. 478 Mich 863 (2007).

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

MCL 211.34d(1)(b)(*viii*) is unconstitutional because it is inconsistent with the meaning of the term "additions" as used in Const 1963, art 9, § 3.

1. Const 1963, art 9, § 3 was amended with the adoption of Proposal A in 1994. As amended, that constitutional provision caps general property tax increases while a person owns property, but

permits additional taxation based on increases in value arising from additions in the year they were added.

2. Following the adoption of Proposal A, the Legislature amended MCL 211.34d. Currently, MCL 211.34d(1)(b)(*viii*) defines "public services" as "additions" for the purposes of the amended constitutional provision and, therefore, would allow the taxation of value added by the installation of public-service improvements, such as those at issue in this case.

3. The object of interpreting constitutional provisions is to realize the intent of the people who ratified the provision. A technical legal term or phrase of art in the law contained in a constitutional provision must be given the meaning that those sophisticated in the law understood at the time of adoption unless it is clear from the provision's language that another meaning was intended. The Court of Appeals correctly concluded that the mere installation of public-service improvements on public property or on utility easements does not constitute a taxable "addition" as that term was understood when the voters adopted Proposal A. The definition of "additions" found in MCL 211.34d(1)(a), as amended by 1993 PA 145, reflected the meaning of the term as understood by those sophisticated in the law when the voters adopted Proposal A in 1994.

Justice CAVANAGH, concurring, agreed with the conclusion that MCL 211.34d(1)(b)(*viii*) is unconstitutional and that public-service improvements are not additions to property within the meaning of the constitutional provision. He wrote separately to disagree with the implication of the majority opinion that only one valid method exists for determining ambiguity. Many valid, time-tested methods of determining ambiguity exist and are valuable for statutory analysis in complex legal and factual circumstances. While the test for ambiguity used by the Court of Appeals was proper, that Court applied it improperly in this case.

Justice WEAVER, concurring in the result only, would affirm the judgment of the Court of Appeals for the reasons stated in that Court's opinion.

Affirmed in part and vacated in part.

TAXATION — REAL PROPERTY — TAXABLE VALUE — ADDITIONS — PUBLIC-SERVICE IMPROVEMENTS — PUBLIC UTILITIES.

Public-service improvements consisting of public infrastructure located on utility easements or land that ultimately becomes public do not constitute "additions" to property within the meaning of that term in the constitution as amended by Proposal A in 1994;

the statutory provision defining "additions" as including public-service improvements is unconstitutional (Const 1963, art 9, § 3; MCL 211.34d[1][b][*viii*]).

Hoffert & Associates, P.C. (by *Myles B. Hoffert* and *David B. Marmon*), for the plaintiffs.

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by *Robert E. Thall*), for the defendant.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Ross H. Bishop*, Assistant Attorney General, for the State Tax Commission.

James W. Porter, P.C. (by *James W. Porter*), for the Michigan Townships Association, the Michigan Municipal League, the Michigan Assessors Association, and the Michigan Association of School Boards.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Home Builders.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Realtors.

PER CURIAM. At issue are (1) whether MCL 211.34d(1)(b)(*viii*) is constitutional and (2) whether public-service improvements, such as water service, sewer service, or utility service, constitute "additions" to property within the meaning of Const 1963, art 9, § 3, as amended by Proposal A. We affirm in part the judgment of the Court of Appeals that held that MCL 211.34d(1)(b)(*viii*) is unconstitutional because it is inconsistent with the meaning of "additions" as used in Const 1963, art 9, § 3 and that public-service improve-

ments consisting of public infrastructure located on utility easements or land that ultimately becomes public do not constitute "additions" to property within the meaning of that constitutional provision. However, we vacate in part the judgment of the Court of Appeals that incorrectly defined the term "ambiguous" and mistakenly concluded that taxing property on the basis of value added from available public services and also taxing utility lines as personal property of the utility companies results in "double taxation."

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Toll Northville Ltd and Biltmore Wineman LLC are engaged in developing real property. During the tax years 2001 and 2002, plaintiffs invested millions of dollars to install infrastructure consisting of physical improvements, such as a primary access road, streetlights, sewer service, water service, electrical service, natural gas service, telephone service, and sidewalks for condominium and single-family residential lots located in Northville Township. This infrastructure development is required before a final plat for a subdivision can be approved. Relying on MCL 211.34d(1)(b)(*viii*), defendant Northville Township increased plaintiffs' property-tax assessments for the tax years 2001 and 2002 on the basis of the enhanced value resulting from the public-service improvements that were made to the land.

Plaintiffs challenged their assessments before the Michigan Tax Tribunal, claiming that the assessment increases violated Const 1963, art 9, § 3. The Michigan Tax Tribunal stayed its proceedings so that this declaratory action regarding the constitutionality of the statute could proceed in circuit court. The circuit court held that MCL 211.34d(1)(b)(*viii*) is unconstitutional be-

cause it taxes improvements of real property beyond the meaning of "additions" when Proposal A was passed. The circuit court determined that plaintiffs could not be taxed on the basis of the public-service improvements because the improvements were not attached to the separate lots and were either dedicated to the municipality or given to public utilities.

The Court of Appeals affirmed the trial court's judgment, concluding that the term "additions" as used in Const 1963, art 9, § 3 refers to improvements that become part of the real property as structures or fixtures, but not to public-service improvements. *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006). The Court of Appeals concluded that, although at the time of the installation of the public-service improvements, plaintiffs, as developers, owned the parcel of land "on which the public service improvements are installed," plaintiffs did not owe property tax on the improvements because title to these improvements would ultimately vest in the municipality or a utility company. *Id.* at 375. We granted defendant's application for leave to appeal. 478 Mich 863 (2007).[1]

II. STANDARD OF REVIEW

A trial court's ruling in a declaratory action is reviewed de novo. *Theatre Control Corp v Detroit*, 365 Mich 432, 436; 113 NW2d 783 (1962). Matters of constitutional and statutory interpretation and questions concerning the constitutionality of a statutory

[1] We directed the parties to 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."

provision are also reviewed de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558; 737 NW2d 476 (2007); *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004); *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004). When interpreting constitutional provisions, our primary objective " 'is to realize the intent of the people by whom and for whom the constitution was ratified.' " *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 652; 698 NW2d 350 (2005), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). In realizing this intent, we apply the plain meaning of terms used in the constitution unless technical legal terms were employed. *Phillips*, *supra* at 422.

> "[I]f a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended." [*WPW Acquisition Co v City of Troy*, 466 Mich 117, 123; 643 NW2d 564 (2002), quoting *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 223; 634 NW2d 692 (2001).]

Statutes are presumed constitutional unless the unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

III. ANALYSIS

This appeal addresses legislation enacted after Michigan voters adopted Proposal A in 1994, which amended article 9, § 3 of the Michigan Constitution. As amended by Proposal A, Const 1963, art 9, § 3 provides, in relevant part:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not

> exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. *For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred.* When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. [Emphasis added.]

The purpose of Proposal A was

> to generally limit increases in property taxes on a parcel of property, as long as it remains owned by the same party, by capping the amount that the "taxable value" of the property may increase each year, even if the "true cash value," that is, the actual market value, of the property rises at a greater rate. However, a qualification is made to allow adjustments for "additions." [*WPW Acquisition Co*, *supra* at 121-122.]

Thus, as amended, the constitution caps general property tax increases during the course of a property owner's ownership, but permits additional taxation based on increases in value arising from "additions" in the year they are added to the land.

> When Proposal A was adopted . . . , the General Property Tax Act defined "additions" to mean
>
> "all increases in value caused by new construction or a physical addition of equipment or furnishings, and the value of property that was exempt from taxes or not included on the assessment unit's immediately preceding

year's assessment role." [*Id.* at 122, quoting the text of MCL 211.34d(1)(a) in effect at the time of Proposal A's adoption.]

After Proposal A was adopted, the Legislature enacted several amendments of MCL 211.34d. As it now stands, MCL 211.34d provides, in pertinent part:

> (1) As used in this section or section 27a, or section 3 or 31 of article IX of the state constitution of 1963:
>
> (a) For taxes levied before 1995, "additions" means all increases in value caused by new construction or a physical addition of equipment or furnishings, and the value of property that was exempt from taxes or not included on the assessment unit's immediately preceding year's assessment roll.
>
> (b) For taxes levied after 1994, "additions" means, except as provided in subdivision (c), all of the following:
>
> * * *
>
> (*viii*) Public services. As used in this subparagraph, "public services" means water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting. For purposes of determining the taxable value of real property under section 27a, the value of public services is the amount of increase in true cash value of the property attributable to the available public services multiplied by 0.50 and shall be added in the calendar year following the calendar year when those public services are initially available.

The issue is the constitutionality of MCL 211.34d(1)(b)(*viii*), which, as written, defines "public services" as "additions" and, therefore, would allow for the taxation of the value added from the installation of public-service improvements, which are "water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or

street lighting." We agree with the analysis and the decision of the Court of Appeals, which declared MCL 211.34d(1)(b)(*viii*) unconstitutional. The Court of Appeals correctly concluded that the mere installation of public-service improvements on public property or on utility easements does not constitute a taxable "addition"—as that term was understood when the public adopted Proposal A—in this instance, involving infrastructure improvements made to land destined to become a residential subdivision.

Contrary to defendant's argument, the definition of "additions" provided by the enabling legislation for the Headlee Amendment is not pertinent to this case. The Headlee Amendment, adopted in 1978, limited local property taxation by controlling changes in the tax base, i.e., it generally placed an inflation-rate cap on the increase of taxes by the local taxing authorities with regard to all property combined within a unit of local government and without regard to any specific parcel of property, but it excluded the value of new construction and improvements. Const 1963, art 9, § 31. The enabling legislation for the Headlee Amendment defined "[n]ew construction and improvements" as "additions less losses." MCL 211.34d(1)(e), as added by 1978 PA 532. "Additions" was defined as "all increases in value caused by new construction, improvements caused by new construction or a physical addition of equipment or furnishings . . . ." MCL 211.34d(1)(a), as added by 1978 PA 532.

However, this does not reflect the meaning the term "additions" had when Proposal A was later adopted in 1994. In 1993, the Legislature enacted 1993 PA 145, which amended the definition of "additions" to include "all increases in value caused by new construction or a physical addition of equipment or furnishings," thus

discarding any reference to "improvements caused by new construction." MCL 211.34d(1)(a), as amended by 1993 PA 145. Thus, for purposes of resolving the instant case, this later definition superseded the 1978 definition. The Court of Appeals properly recognized that the 1993 definition reflected the meaning of the term "additions" as understood by those sophisticated in the law at the time Proposal A was adopted and correctly based its analysis on this later definition.

Moreover, because the objectives of the Headlee Amendment and Proposal A are different, the definition of "additions" under the Headlee Amendment is of limited relevance in determining the meaning of "additions" under Proposal A. The Headlee Amendment generally placed an inflation-rate cap on tax increases for all property located within a local government unit, without regard to any specific parcel, while Proposal A placed an inflation-rate cap on tax increases for specific parcels. Thus, in the context of the Headlee Amendment, public-service improvements necessarily are physically located on the property to be taxed. By contrast, in the context of Proposal A, public-service improvements are not physically located on the residential property to be taxed.

Therefore, we affirm the judgment of the Court of Appeals that MCL 211.34d(1)(b)(*viii*) is unconstitutional because it is inconsistent with the meaning of the term "additions" as used in Proposal A and that public-service improvements do not constitute "additions" to property within the meaning of Proposal A.[2]

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[2] However, we vacate two parts of the Court of Appeals judgment that we believe are in error. First, we believe that the Court significantly erred when it defined "ambiguous." *Toll Northville*, *supra* at 368. A term is ambiguous "when it is *equally* susceptible to more than a single meaning," *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its

IV. CONCLUSION

Because public-service improvements located on public easements or land that ultimately becomes public do not constitute "additions," as that term was understood when Proposal A was enacted, we affirm the judgment of the Court of Appeals that MCL 211.34d(1)(b)(*viii*) is unconstitutional.

Affirmed in part and vacated in part.

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

CAVANAGH, J. (*concurring*). I agree with this Court's conclusion that MCL 211.34d(1)(b)(*viii*) is unconstitutional and that public-service improvements are not "additions" to the property within the meaning of that term in Const 1963, art 9, § 3, as amended by Proposal A. I write to address this Court's comments on the method for determining ambiguity. The opinion states that a "term is ambiguous 'when [the term] is equally susceptible to more than a single meaning,' *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its meaning." *Ante* at 15-16 n 2. Inasmuch as this statement implies that there is one, and only one, valid method for determining ambiguity, I disagree.

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meaning. Second, we believe that the Court mistakenly concluded that taxing property on the basis of the value added by the availability of public services and also taxing utility lines as personal property of the utility companies results in "double taxation." *Toll Northville*, *supra* at 371-372. To the contrary, the value of physical lines, i.e., wires, pipes, etc., as tangible personal property is distinguishable from the market value added by the availability of utility services. The distinction is important because value added from access to services is taxable to the extent that such services increase market value. Although installation of a public utility line may not be taxed as an addition in a case such as this, the value of such services will be incorporated into the value of each individual home at the time it is built or sold. See *id*. at 375.

In *Perez v Keeler Brass Co*, 461 Mich 602, 610; 608 NW2d 45 (2000), this Court concluded that the single, unclear term "refuses" was ambiguous.[1] In *People v Denio*, 454 Mich 691, 702; 564 NW2d 13 (1997), this Court concluded that the term "penalty" was ambiguous. This Court stated that ambiguity exists if "a statute is susceptible to more than one interpretation . . . ."[2] *Id.* at 699. Further, this Court noted that "a statute that is unambiguous on its face can be ' "rendered ambiguous by its interaction with and its relation to other statutes." ' "[3] *Id*., quoting *People v Jahner*, 433 Mich 490, 496; 446 NW2d 151 (1989), quoting 2A Sands, Sutherland Statutory Construction, § 46.04, pp 86-87. In *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 150; 549 NW2d 837 (1996), this Court concluded that a statute was ambiguous when applied to the facts presented.[4]

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[1] See also *Lansing Mayor*, *supra* at 175-176 (CAVANAGH, J., dissenting); *Yellow Freight Sys, Inc v Michigan*, 464 Mich 21, 38; 627 NW2d 236 (2001) (CAVANAGH, J., dissenting).

[2] See also, e.g., *ASAP Storage, Inc v City of Sparks*, ___ Nev ___, ___; 173 P3d 734, 739 (2007) (finding ambiguity when there is a "meaning that it is susceptible to 'two or more reasonable but inconsistent interpretations' ") (citation omitted); *State v Fasteen*, 740 NW2d 60, 63 (ND, 2007) (stating that a "statute is ambiguous if it is susceptible to meanings that are different, but rational"); *State v Strode*, 232 SW3d 1, 12 (Tenn, 2007) (holding that a statute is ambiguous if it is "susceptible of two interpretations").

[3] See also, e.g., *FDA v Brown & Williamson Tobacco Corp*, 529 US 120, 132; 120 S Ct 1291; 146 L Ed 2d 121 (2000) (stating that ambiguity may only become apparent when words or phrases are placed in the context of the statutory framework); *Brown v Gardner*, 513 US 115, 118; 115 S Ct 552; 130 L Ed 2d 462 (1994) (stating that ambiguity is a "creature" of statutory context); *McLean v McLean*, 323 NC 543, 548; 374 SE2d 376 (1988) (determining that the ambiguity of the statute was revealed when compared to another statute).

[4] See also, e.g., *State v Peterson*, 247 Wis 2d 871, 885; 634 NW2d 893 (2001) (stating that a statute may be unambiguous in one factual setting and ambiguous in another).

These valid, time-tested methods are valuable for statutory analysis in the complex legal and factual circumstances presented to any court.[5] These methods promote precision and facility in faithfully discerning legislative intent. They are equal in validity to the test this Court applies today. "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Singer & Singer, Sutherland Statutes & Statutory Construction (7th ed), § 45:2, p 13.

The definition applied by the Court of Appeals is time-tested and proper. However, the operative concept is "reasonable." It does not matter if two parties argue vehemently for two different meanings of a word. It is an objective analysis. Therefore, though I believe that the test is proper, I believe the Court of Appeals applied it improperly in this case.

WEAVER, J. (*concurring in the result only*). I would affirm the Court of Appeals judgment for the reasons stated in the Court of Appeals opinion.[1]

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[5] "Accepted rules of statutory construction can provide helpful guidance in uncovering the most likely intent of the legislature." 2A Singer & Singer, Sutherland Statutes & Statutory Construction (7th ed), § 45:2, p 15.

[1] See *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006).

In re EGBERT R SMITH TRUST

Docket No. 133462. Argued December 4, 2007 (Calendar No. 5). Decided March 19, 2008.

Glen and Dale Phillips petitioned the Sanilac County Probate Court for specific performance of their right of first refusal contained in a lease between the petitioners and the original trustee of the Egbert R. Smith Trust. The respondent, Betty Homer, who is the successor trustee, had notified the petitioners of a third party's offer to purchase the land but then declined the offer, notified the petitioners that she had declined the offer, and refused to sell the property to the petitioners when they subsequently attempted to exercise their option to purchase the property. The petitioners and the respondent moved for summary disposition. The court, David L. Clabuesch, J., granted summary disposition for the respondent, concluding that, while the respondent's initial letter gave the petitioners the opportunity to exercise their option, the respondent's subsequent letter countermanding the notice precluded the petitioners from exercising their right of first refusal. The petitioners appealed. The Court of Appeals, HOEKSTRA, P.J., and METER and DONOFRIO, JJ., reversed. The Court of Appeals held that when the petitioners received notice of the third party's offer, their right of first refusal became an option that the respondent could not revoke during the time specified in the lease. 274 Mich App 283 (2007). The respondent applied for leave to appeal, which the Supreme Court granted. 479 Mich 853 (2007).

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

Under the plain language of the lease, the petitioners had an irrevocable option to purchase the leased property within the time specified in the lease after the respondent presented a third party's bona fide purchase offer. An option is an enforceable promise to not revoke an offer for a specified period. The respondent breached the lease agreement by not honoring the petitioners' option. Because land has a unique and peculiar value and the petitioners timely exercised their option to purchase the property, specific performance is the proper remedy in this case.

Justice CORRIGAN, concurring, agreed with the majority's result, given the language in the lease characterizing the petitioners' right to purchase as an option triggered by notification of a third party's offer, but wrote separately to clarify that a right of first refusal does not always become an irrevocable option following a third party's offer. The contract terms establishing a right of first refusal will control whether the right becomes an irrevocable offer or whether the owner may revoke the right by changing his or her mind in good faith and withdrawing the offer to sell before the holder of the right exercises the right of first refusal. The owner's willingness to sell to anyone is a condition precedent for the right of first refusal to mature into an option. A right of first refusal does not automatically grant the power to force a sale if the owner in good faith removes the condition precedent by deciding not to sell.

Affirmed.

Clark & Clark, P.C. (by *Donald J. Clark*), for the petitioners.

John S. Paterson for the respondent.

Amicus Curiae:

Berry Moorman P.C. (by *Randolph T. Barker*) for the Real Property Law Section of the State Bar of Michigan.

WEAVER, J. We granted leave to appeal to consider whether a right of first refusal is revocable once the holder of the right receives notice of a third party's offer and whether the petitioners-tenants are entitled to summary disposition and specific performance of the right of first refusal.

We affirm the judgment of the Court of Appeals and hold that, under the lease agreement in this case, the petitioners had an irrevocable option to buy the leased property after the respondent presented to the petitioners a bona fide purchase offer from a third party (giving the petitioners the right of first refusal) and that the respondent breached the lease agreement by failing to honor the option. Furthermore, because real property is

unique, and the petitioners timely exercised their option to purchase the property, specific performance is the proper remedy in this case.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of a residential lease agreement for a 75-acre tract of land between the respondent-successor trustee and the petitioners-tenants. In the early 1980s, Egbert Smith died owning a 75-acre tract of farmland. By the terms of his will, the property became an asset of Smith's testamentary trust. In May 1982, Donna Sutton qualified as the trustee of Smith's trust.

As trustee, Sutton entered into a lease agreement with Glen and Dale Phillips, the petitioners. The lease was for a period of five years, with an option to renew under the same terms for an additional five years. The petitioners timely renewed the lease for a second term. On March 27, 2001, the petitioners and Sutton executed an additional five-year extension of the lease. As extended, the lease was to expire by its terms in 2005.

Paragraph 15 of the lease contained the following right of first refusal:

> Landlord hereby grants to Tenant the option to purchase the leased premises upon the following terms:
>
> Tenant shall have the right of first refusal to match any bona fida [sic] offer to purchase made with regard to the subject property. In the event Tenant fails to exercise his option within 30 days following presentment of said bona fida [sic] offer to purchase the option herein granted shall terminate.
>
> This option to purchase shall continue through the primary term of this lease and any extensions thereof. Upon Tenant notifying Landlord in writing of his intent to exercise his option to purchase closing for said purchase

> shall be scheduled at a reasonable time mutually agreeable to the parties.
>
> Upon Tenant's exercising his offer to purchase, Tenant shall pay to Landlord in cash the purchase price less the deposit herein specified and less any and all rental payments made during the lease term.

The respondent, Betty Homer, was appointed successor trustee of the Egbert R. Smith Trust in 2001. In 2004, the respondent received an offer to purchase the property for $225,000. She asserts that she never accepted the offer. However, on July 28, 2004, the respondent's attorney sent a letter to the petitioners stating in pertinent part:

> Pursuant to the Lease, it is required that you have the right to match any bona fide offer presented. This letter is to inform you that Ms. Homer has a signed purchase agreement with the offer of $225,000 for the farm. You must notify our office of your decision to exercise your option within 30 days. The thirty days will expire on August 30, 2004. Your offer will be referred to Ms. Homer for her review and final decision. Upon the expiration of that time period, Ms. Homer will be selling the farm.

On August 9, 2004, the respondent's counsel wrote to the petitioners stating that Ms. Homer had declined the original offer and was not selling the farm at that time.

On August 13, 2004, within the 30-day period set forth in the lease and the July 24, 2004, letter, but after the August 9, 2004, letter informing the petitioners that the offer to sell had been rejected, the petitioners gave written notice that they were exercising their option to purchase the property.

The respondent refused to sell the property to the petitioners. The petitioners filed a petition in the Sanilac County Probate Court, seeking to compel the sale of the land pursuant to the lease agreement. The probate court

heard oral argument on the parties' cross-motions for summary disposition on December 16, 2005, and granted the respondent's motion for summary disposition. The probate court ruled that the respondent's July 28, 2004, letter triggered the petitioners' opportunity to exercise their option to purchase the property. However, the court determined that the respondent's August 9, 2004, letter had countermanded the July 28 notice before the petitioners exercised their right of first refusal and therefore precluded the petitioners from exercising their right of first refusal. As a result, the probate court held that no enforceable agreement existed. The probate court entered an order to that effect on January 12, 2006.

The petitioners appealed. On February 15, 2007, the Court of Appeals issued an opinion reversing the judgment of the probate court.[1] The Court of Appeals reasoned that after petitioners received notice of the original offer on the property from the respondent, the right of first refusal became an option contract that was not revocable by the respondent during the 30-day period specified in the lease.

The respondent filed an application for leave to appeal in this Court. This Court granted leave to appeal and ordered the parties to brief, among other issues, (1) whether a right of first refusal is revocable once the holder of the right receives notice of a third party's offer and (2) whether the petitioners are entitled to summary disposition and specific performance of the right of first refusal.[2]

II. STANDARD OF REVIEW

This Court reviews de novo rulings on summary disposition motions, viewing the evidence in the light

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[1] *In re Egbert R Smith Trust*, 274 Mich App 283; 731 NW2d 810 (2007).

[2] *In re Smith Trust* (*Phillips v Homer*), 479 Mich 853 (2007).

most favorable to the nonmoving party.[3] Additionally, this case involves an issue concerning the proper interpretation of contracts, which is a question of law that is subject to review de novo by this Court.[4]

III. ANALYSIS

The resolution of this case involves interpretation of the contractual lease agreement between the petitioners and the respondent. In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning.[5] If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law.[6] However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties.[7]

In this case, the plain language of the parties' lease agreement characterized the petitioners' right of first refusal as an option. The lease agreement stated:

> Landlord hereby grants to Tenant *the option to purchase* the leased premises upon the following terms:
>
> Tenant shall have the *right of first refusal* to match any bona fida [sic] offer to purchase made with regard to the subject property. In the event Tenant *fails to exercise his*

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[3] *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006).

[4] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[5] *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112; 595 NW2d 832 (1999).

[6] *Id.* at 111.

[7] *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965).

> *option* within 30 days following presentment of said bona fida [sic] offer to purchase the option herein granted shall terminate.
>
> *This option to purchase* shall continue through the primary term of this lease and any extensions thereof. Upon Tenant notifying Landlord in writing of *his intent to exercise his option* to purchase closing for said purchase shall be scheduled at a reasonable time mutually agreeable to the parties.
>
> Upon Tenant's exercising his offer to purchase, Tenant shall pay to Landlord in cash the purchase price less the deposit herein specified and less any and all rental payments made during the lease term. [Emphasis added.]

This section of the lease agreement expressly granted the petitioners an option to purchase the leased premises in the event that the respondent decided to sell the land. The plain language of the lease agreement demonstrates that the parties intended that when a third party made a bona fide offer to purchase the property and the respondent presented the offer to the petitioners, the petitioners had the irrevocable option to purchase the property for the purchase price within 30 days of the notice.

"An option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time."[8] As stated in 17 CJS, Contracts, § 55, p 502:

> An option contract is an enforceable promise not to revoke an offer. It is a continuing offer or agreement to keep an offer open and irrevocable for a specified period. It is a contract right, and the optionor must keep the offer open. Until an option is exercised, the optionor has the duty not to revoke the offer during the life of the option.

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[8] *Oshtemo Twp v City of Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977).

An option is an enforceable promise not to revoke an offer for a specified time, in this case 30 days.

The respondent's July 28, 2004, letter triggered the petitioners' right to exercise their option under the lease agreement to purchase the property. The letter expressly stated that the respondent had received a bona fide offer for the property and would be selling the property at the expiration of the petitioners' option period. Furthermore, the letter informed the petitioners that they "must notify [the office of the respondent's attorney] of your decision to exercise your option within 30 days" and that the "thirty days will expire on August 30, 2004."

Once the respondent notified the petitioners of a third party's offer to purchase the property, the option in the lease agreement became operative. As a result, the respondent did not have the right to revoke her offer to sell the property to petitioners until after the option period expired on August 30, 2004. Respondent's argument that her July 28, 2004, letter was nothing more than an offer to sell that could be withdrawn at any time before acceptance is incorrect.

Given that the respondent breached the lease agreement by not honoring the petitioners' option, we next consider the appropriate remedy for the breach. Land is presumed to have a unique and peculiar value, and contracts involving the sale of land are generally subject to specific performance.[9] In this case, the petitioners seek specific performance of their option to purchase the property after the respondent claimed to have revoked her tender of the third-party offer after she rejected it. However, since the respondent could not revoke the option in the lease once she presented the

[9] *Kent v Bell*, 374 Mich 646, 651; 132 NW2d 601 (1965).

bona fide offer to the petitioners, the respondent was contractually obligated to schedule a closing date to convey the property to the petitioners. Because real property is unique, and the petitioners timely exercised their option to purchase the property, specific performance is the proper remedy.

IV. CONCLUSION

We conclude that, under the lease agreement, the petitioners had an irrevocable option to buy the leased property after the respondent presented to the petitioners a bona fide purchase offer from a third party and that the respondent breached the lease agreement by failing to honor the option. Furthermore, since real property is unique, and the petitioners timely exercised their option to purchase the property, specific performance is the proper remedy in this case. Accordingly, we affirm the Court of Appeals judgment.

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

CORRIGAN, J. (*concurring*). I concur in the majority's result on the basis of the language of the parties' lease agreement. The agreement characterizes petitioners' right to purchase as an "option" that would be triggered by a notice from respondent that she had received a bona fide third-party offer to buy the property. Therefore, the lower courts did not err in holding that the right became an irrevocable option to buy once respondent notified petitioners that she intended to accept a third party's offer. I write separately to clarify that a right of first refusal does not always become an irrevocable option once triggered by a third-party offer. Rather, in any given case, the contract terms establish-

ing a right of first refusal will control whether the right either becomes an irrevocable option once triggered or, instead, may be revoked by the owner if he in good faith changes his mind—and withdraws his offer to sell—before the right is exercised.

This Court has long recognized that rights of first refusal and options to purchase are governed by the contract terms established by the parties.[1] Therefore, as the majority observes, *ante* at 24, the plain language of the contract determines the nature of those rights in a given case.[2] Accordingly, the Court of Appeals erred to the extent that it relied on a general proposition that, when an owner notifies the holder of a right of first refusal of a third party's bona fide offer to purchase, the right of first refusal *automatically* "transmute[s]" into an irrevocable option. *In re Egbert R Smith Trust,* 274 Mich App 283, 287-288; 731 NW2d 810 (2007), citing 17 CJS, Contracts, § 56, p 503.

Generally, the owner's willingness to sell *to anyone* is a condition precedent that must be present for a right of first refusal to mature into a present option to buy. 17 CJS, Contracts, § 56, p 503 ("A right of first refusal is a conditional option which is dependent upon the decision to sell the property by its owner.").[3] Parties *may* agree that, if the owner notifies the holder of the right of the

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[1] See, e.g., *Ridinger v Ryskamp,* 369 Mich 15; 118 NW2d 689 (1962); *LeBaron Homes, Inc v Pontiac Housing Fund, Inc,* 319 Mich 310, 313; 29 NW2d 704 (1947).

[2] *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003).

[3] See also *Miller v LeSea Broadcasting, Inc,* 87 F3d 224, 226 (CA 7, 1996) ("All [a right of first refusal] entitles the holder to do is to match an offer from a third party should the grantor of the option be minded to accept that offer."); *Chapman v Mut Life Ins Co of New York,* 800 P2d 1147, 1150 (Wyo, 1990) ("[W]hen the condition precedent of the owner's intention to sell is met the right of first refusal 'ripens' into an option . . . ."); *Riley v Campeau Homes (Texas), Inc,* 808 SW2d 184, 187

owner's intention to accept a bona fide purchase offer, the right matures into an option to purchase that the owner may not revoke during the acceptance period. But a right of first refusal does not automatically grant the holder of the right the power to force a sale if the owner in good faith removes the condition precedent by deciding not to sell at all. As stated in 17 CJS, Contracts, § 63, p 520: "A right of first refusal does not create an irrevocable right to purchase which survives after a proposed third-party transaction has been abandoned."[4]

(Tex App, 1991) ("[A] right of first refusal does not give the lessee the power to compel an unwilling owner to sell.").

[4] 17 CJS, Contracts, § 63, p 520 n 58, cited *Lin Broadcasting Corp v Metromedia, Inc,* 139 AD2d 124, 133; 531 NYS2d 514 (1988), aff'd 74 NY2d 54 (1989), which stated that "unless the language of the applicable contractual provisions state otherwise by expressly creating an irrevocable right, there is nothing to prohibit [an owner] from in good faith changing [his] mind about selling at any time prior to the invocation of the right of first refusal." The opinion of the New York Court of Appeals affirming *Lin Broadcasting* also helpfully observed that

> there is nothing to prevent the contracting parties, if they choose, from simply agreeing on a provision that a first refusal offer, once made, must remain open for a specified time, making it an option. Moreover, to read into a right of first refusal such an unspecified additional provision would be contrary to the general rule at common law that an offer may be withdrawn at any time before it is accepted. [*Lin Broadcasting Corp v Metromedia, Inc,* 74 NY2d 54, 62; 544 NYS2d 316; 542 NE2d 629 (1989) (citation omitted).]

Here, petitioners and respondent generally agree that *Lin Broadcasting* and similar authorities conflict with cases like *Henderson v Nitschke,* 470 SW2d 410 (Tex Civ App, 1971), on which the Court of Appeals relied. *Smith Trust,* 274 Mich App at 289-290. I find *Henderson* unpersuasive to the extent that it, like the Court of Appeals in this case, relied on a general proposition that, once an owner decides to sell, a right of first refusal automatically becomes an irrevocable option that prevents the owner from changing his mind. *Henderson,* 470 SW2d at 412-413. Otherwise, *Henderson* and *Lin Broadcasting* are distinguishable on the

In sum, the terms of the parties' contract will govern whether, when an owner expresses his intent to accept a third party's bona fide offer, a right of first refusal becomes an irrevocable option that allows the holder of the right to force a sale during the contractual acceptance period *even if* the owner in good faith changes his mind and decides not to sell the property to anyone. I encourage parties to explicitly establish in the terms of their contracts whether such an irrevocable option is created or, instead, whether the owner may withdraw his offer to sell at any time before the holder of a right of first refusal exercises that right to purchase.

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basis of their facts. In *Henderson,* as here, the contract referred to the lessee's right to exercise an "option" after the owner notified the lessee of its intent to accept a third party's offer. *Id.* at 411. In *Lin Broadcasting,* to the contrary, the right of first refusal was premised on the owner's continuing desire to sell. *Lin Broadcasting,* 139 AD2d at 132-134.

Further, cases commonly cited for the general proposition that a seller may not revoke a right to purchase after that right has matured into an option do not involve a seller's decision to simply retain his own property, as in *Henderson* and *Lin Broadcasting*. Rather, these cases most often address (1) sales made to a third party without ever notifying the holder of the right of first refusal or (2) an owner's attempt to cancel a sale to the holder of the right *after* the holder exercised his option without the seller having attempted to withdraw his offer before the holder did so. See, e.g., cases cited in 17 CJS, Contracts, § 56, p 503 nn 88 and 89, for the (overbroad) proposition that "[o]nce the holder of a right of first refusal receives notice of a third party's offer, the right of first refusal is transmuted into an option"; *Miller*, 87 F3d at 226-227 (addressing how precisely the holder of the right of first refusal must match the third party's offer in order to exercise his option and prevent a sale to the third party); *Hyperbaric Oxygen Therapy Sys, Inc v St Joseph Med Ctr of Fort Wayne, Inc,* 683 NE2d 243, 251 (Ind App, 1997) (holding that, once the holder of the right of first refusal fulfilled the contractual requirements to exercise his option, the seller could not impose additional requirements in order to justify the sale to the third party that it preferred).

KAISER v ALLEN

Docket No. 133031. Argued October 3, 2007 (Calendar No. 6). Decided March 26, 2008.

Roland Kaiser, as personal representative of the estate of Marion Kaiser, deceased, brought an action in the Bay Circuit Court against James Allen and Gary Keidel after Marion Kaiser was killed in an automobile accident involving an automobile owned by Keidel and driven by Allen. The plaintiff alleged negligence by Allen and vicarious liability on the part of Keidel under MCL 257.401(1), the owner-liability statute. Keidel settled for $300,000 and was dismissed from the case. Allen admitted liability, and a jury, considering damages only, awarded the plaintiff $100,000. Allen requested that the award against him be offset by the amount the plaintiff had received in the settlement with Keidel. The court, Lawrence M. Bielawski, J., granted the setoff request and entered a judgment reflecting a net sum of zero owed to the plaintiff. The plaintiff appealed the setoff of the judgment only. The Court of Appeals, WHITBECK, C.J., and SAAD and SCHUETTE, JJ., reversed and remanded for entry of a judgment for the plaintiff in the amount of the jury's verdict. The Court of Appeals reasoned that tort reform had converted joint and several liability to several liability and that common-law setoff had not survived the tort-reform scheme. Thus, Allen was liable only for his portion of fault, which resulted in damages of $100,000 separate from the damages for Keidel's portion of fault. Unpublished opinion per curiam, issued October 31, 2006 (Docket No. 264600). Allen applied for leave to appeal, which the Supreme Court granted. 477 Mich 1097 (2007).

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

The common-law setoff rule remains the law in Michigan for vehicle-owner vicarious-liability cases.

1. The tort-reform statutes abolished joint and several liability in most cases involving more than one tortfeasor, with each tortfeasor now being liable only for the portion of the total damages that reflects that tortfeasor's percentage of fault. The

tort-reform provisions concerning the allocation of fault, however, do not apply to vicarious-liability cases, because a vicariously liable tortfeasor is not at "fault" as defined by MCL 600.6304(8). The vicariously liable tortfeasor is entirely liable for the active tortfeasor's negligent actions through a legal obligation created by statute, and there can be no allocation of fault.

2. The common-law setoff rule is based on the principle that a plaintiff is only entitled to one full recovery for the same injury. Under the rule, an injured party has the right to pursue multiple tortfeasors jointly and severally and recover separate judgments, but a single injury can lead to only a single compensation.

3. The vicarious liability of an automobile owner under MCL 257.401(1) does not involve a percentage of fault by the owner or an amount of damages distinct from those for which the negligent operator is responsible. Because the owner's liability stems from the operator's fault, the owner and the negligent operator are equally responsible legally for the plaintiff's entire damages. The statutory purpose is to hold the owner 100 percent liable for the operator's negligence.

4. Because the plaintiff's jury verdict against Allen results in a double recovery and the common-law setoff rule applies, the judgment must be offset pro tanto by Keidel's settlement.

Justice KELLY, concurring, agreed with the majority's decision that the common-law setoff rule applies in this case, but wrote separately to offer another view of the issue. The rule is based on the premise that a plaintiff is entitled to no more than a full recovery for his or her injuries. Tort reform did not overrule the common-law setoff rule; it simply made it unnecessary to apply the rule in most situations because a tortfeasor ordinarily will be liable only for the percentage of damages attributable to his or her negligence. In a vehicle-owner vicarious-liability case, however, the vehicle owner's liability is imposed by statute rather than because the owner was negligent. Without a setoff in such a case, the injured party could receive more than full compensation if, as here, the owner settles and the suit against the driver goes to trial. Any judgment awarded against the driver represents the total amount of the injured party's damages, and setoff of the settlement amount is necessary to prevent overcompensation.

Reversed.

NEGLIGENCE — JOINT AND SEVERAL LIABILITY — SETOFF RULE — AUTOMOBILES — VICARIOUS LIABILITY OF VEHICLE OWNERS.

The common-law setoff rule, which permits an injured party to pursue multiple tortfeasors jointly and severally and recover

separate judgments but allows only a single compensation for a single injury, remains the law in Michigan for vehicle-owner vicarious-liability cases, in which an automobile owner is entirely liable for the negligence of a driver who uses the automobile with the owner's permission (MCL 257.401[1], 600.2957[1], 600.6304[1]).

Rieman & Reyes (by *Kevin J. Rieman*) for Roland Kaiser.

John A. Lydick for James R. Allen.

Amicus Curiae:

Debra A. Garlinghouse for the Michigan Association of Justice.

WEAVER, J. At issue in this case is whether the 1995 tort-reform amendments of MCL 600.2957(1) and MCL 600.6304(1) abrogated the common-law setoff rule in automobile accident cases in which the owner of the vehicle is vicariously liable for the operator's negligence.

We reverse the Court of Appeals holding that the common-law setoff rule does not apply. To the extent that joint and several liability principles have not been abrogated by statute, they remain intact, and the common-law setoff rule remains the law in Michigan for vehicle-owner vicarious-liability cases. As a result, plaintiff's jury verdict against defendant Allen must be offset pro tanto by the settlement paid by defendant Keidel.

I. FACTS AND PROCEEDINGS

The material facts in this case are not in dispute. Marion Kaiser was killed in an automobile accident on June 26, 2001. Defendant James Allen was the driver of the vehicle, and defendant Gary Keidel was the owner

of the vehicle. Roland Kaiser, the personal representative of the decedent's estate, filed a complaint in the Bay Circuit Court on October 3, 2003, alleging negligence by Allen, and by Keidel as the owner of the vehicle through vicarious liability.

On November 18, 2004, plaintiff settled with Keidel for $300,000. An order dismissing Keidel from the suit was entered on November 22, 2004.

The case proceeded to trial against Allen, the driver, only. Allen admitted liability, and a jury trial was conducted, limited to the issue of plaintiff's damages. On June 2, 2005, the jury returned a verdict awarding plaintiff $100,000 in damages. The verdict stated:

> We, the Jury, make the following answers to the questions submitted by the Court:
>
> What is *the total amount of damages* suffered by the Estate of Marion Rose Kaiser as a result of her death in this accident?
>
> Answer: $100,000.00 [Emphasis added.]

Allen requested, over plaintiff's objection, that the trial court set off the $100,000 jury award for the plaintiff against the $300,000 already paid to the plaintiff by the settling codefendant, Keidel. The trial court granted the setoff request, leaving the net sum owed to plaintiff by Allen at zero. The order of judgment entered on July 5, 2005. The trial court reasoned that setoff was proper in this case because the damages for the injury, in its entirety, were encompassed by Keidel's settlement sum.

Plaintiff filed a motion for reconsideration in the trial court, but the motion was denied. Plaintiff then appealed as of right in the Court of Appeals, challenging only the setoff of the judgment by the trial court. On October 31, 2006, the Court of Appeals issued an

unpublished decision that reversed the trial court's setoff and remanded the case for entry of a judgment for plaintiff in the amount of the jury's verdict. *Kaiser v Allen*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2006 (Docket No. 264600). The Court of Appeals reasoned that the vehicle's operator, Allen, and the vehicle's owner, Keidel, were "concurrent tortfeasors"; that statutory tort reform had converted joint and several liability into several liability; that Allen was liable only for his portion of fault, separate from Keidel's portion of fault; and that Allen's liability was $100,000. The Court of Appeals analysis focused solely on the tort-reform statutory allocation of fault, concluding that the common-law setoff provision had not survived the tort-reform statutory scheme. Allen moved for reconsideration, but the Court of Appeals denied the motion.

Allen applied for leave to appeal in this Court. We granted leave to appeal by order dated April 13, 2007. *Kaiser v Allen*, 477 Mich 1097 (2007).

II. STANDARD OF REVIEW

Whether the jury award in this case is subject to a setoff for the earlier settlement of a codefendant is a purely legal question that is reviewed de novo by this Court. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006). Questions of statutory interpretation are also reviewed de novo. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006).

III. ANALYSIS

To the extent that joint and several liability principles have not been abrogated by statute, they remain

the law in Michigan. In vicarious-liability cases, in which the latent tortfeasor's fault derives completely from that of the active tortfeasor, there can be no allocation of fault. The tort-reform statutes do not apply to allocation of fault in vehicle-owner vicarious-liability cases, because the fault is indivisible.[1] Therefore, the common-law setoff rule remains the law in Michigan for vehicle-owner vicarious-liability cases.

The tort-reform statutes applicable in this case are MCL 600.2957(1) and MCL 600.6304(1) and (8).

MCL 600.2957(1) states in relevant part:

> 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.

MCL 600.6304 states in relevant part:

> (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

[1] See MCL 257.401(1) and MCL 600.6304(8).

> 2925d, regardless of whether the person was or could have been named as a party to the action.
>
> * * *
>
> (8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

These statutory provisions, included among the provisions referred to as the "tort-reform statutes," are designed to allocate fault and responsibility for damages among multiple tortfeasors. The tort-reform statutes have abolished joint and several liability in cases in which there is more than one tortfeasor actively at fault. Traditionally, before tort reform, under established principles of joint and several liability, when the negligence of multiple tortfeasors produced a single indivisible injury, the tortfeasors were held jointly and severally liable. *Watts v Smith*, 375 Mich 120, 125; 134 NW2d 194 (1965); *Maddux v Donaldson*, 362 Mich 425, 433; 108 NW2d 33 (1961). The tort-reform statutes have replaced joint and several liability in most cases, with each tortfeasor now being liable only for the portion of the total damages that reflects that tortfeasor's percentage of fault.

However, the tort-reform allocation-of-fault provisions do not apply to vicarious-liability cases because a vicariously liable tortfeasor is not at "fault" as defined by MCL 600.6304(8). Under MCL 600.6304(8), "fault" is defined as "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." "[A] proximate cause" is

"a foreseeable, natural, and probable cause" of "the plaintiff's injury and damages." *Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004).

Owner liability for an automobile operator's negligence, on the other hand, is a statutorily created vicarious liability. In vicarious-liability cases, one tortfeasor is at fault, and the other tortfeasor, through legal obligation, is entirely liable for the active tortfeasor's negligent actions; that is, the actions of the vicariously liable tortfeasor are not a "natural" cause of the injury. Accordingly, the actions of a vicariously liable tortfeasor do not constitute a proximate cause of that injury.

The vehicle-owner liability statute, MCL 257.401(1), states in relevant part:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

MCL 257.401(1) establishes the vicarious liability of an automobile owner for the negligence of a driver who uses the automobile with the owner's permission. See *Phillips v Mirac, Inc,* 470 Mich 415; 685 NW2d 174 (2004).

There is neither a percentage of fault nor a distinct amount of damages that belongs to the vehicle owner

separate from those of the negligent operator. The owner of the vehicle does not need to negligently lend his car to the operator to incur legal liability—he or she merely needs to own the vehicle. As a result, under MCL 257.401(1), a vehicle owner can be held liable for a plaintiff's injuries without being a foreseeable and natural cause of the plaintiff's injuries, that is, without being a proximate cause of the plaintiff's injuries. The *purpose* behind the owner-liability statute is to hold the passive owner 100 percent liable for the operator's negligence. The basis for a vicariously liable tortfeasor's liability is entirely derivative and does not meet the statutory definition of "fault" because the owner of the vehicle does not need to be the proximate cause of the plaintiff's injuries to be held liable for them. As a result, MCL 600.2957(1) and MCL 600.6304 do not apply to vehicle-owner vicarious-liability cases.

Because MCL 600.2957(1) and MCL 600.6304 do not apply to vehicle-owner vicarious-liability cases, the common-law setoff rule remains the operable rule of law to determine the plaintiff's recovery of damages. The common-law setoff rule is based on the principle that a plaintiff is only entitled to one full recovery for the same injury. An injured party has the right to pursue multiple tortfeasors jointly and severally and recover separate judgments; however, a single injury can lead to only a single compensation. See *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928).

Plaintiff argues that the liability structure created by the tort-reform statutes means that the jury verdict against Allen represents only the amount due for his portion of the fault in the accident; as such, the jury award against Allen cannot be offset by the previous settlement amount because the settlement paid by Keidel represented payment only for Keidel's allocation of fault. This analysis is doubly flawed. First, the jury

verdict awarding damages to plaintiff explicitly states that the award is for "the total amount of damages" suffered by the plaintiff. Second, the damages in this case are *all* due to the fault of Allen because Keidel is only vicariously liable for Allen's actions—Keidel is liable for *everything* that Allen is liable for through vicarious liability conferred by the vehicle-owner liability statute. Allowing plaintiff to recover the entire verdict against Allen and to retain all the proceeds from the settlement with Keidel would allow the plaintiff to recover four times more than the jury determined plaintiff should be awarded for his injuries. The Legislature did not intend that a plaintiff be awarded damages greater than the actual loss in vicarious-liability cases, resulting in a double recovery. The common-law setoff rule should be applied to ensure that a plaintiff only recovers those damages to which he or she is entitled as compensation for the whole injury. Plaintiff's jury verdict against Allen must be offset pro tanto by the settlement paid by Keidel.

IV. CONCLUSION

To the extent that joint and several liability principles have not been abrogated by statute, they remain intact, and the common-law setoff rule remains the law in Michigan with regard to vehicle-owner vicarious-liability cases. Consequently, plaintiff's jury award against Allen must be reduced pro tanto by plaintiff's settlement proceeds from Keidel.

We reverse the judgment of the Court of Appeals and hold that plaintiff's jury verdict against Allen must be offset pro tanto by the settlement paid by Keidel.

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

KELLY, J. (*concurring*). The issue here is whether the common-law setoff rule applies in this vehicle-owner vicarious-liability case. The majority decides that it does. I agree. But I write separately to offer another view of the issue.

For many years, the rule in this state was that concurrent tortfeasors were jointly and severally liable.[1] As this Court explained:

> This meant that where multiple tortfeasors caused a single or indivisible injury, the injured party could either sue all tortfeasors jointly or he could sue any individual tortfeasor severally, and each individual tortfeasor was liable for the entire judgment, although the injured party was entitled to full compensation only once.[2]

A corollary of joint and several liability was that, if one of the tortfeasors settled, the judgment against the nonsettling defendant was reduced by the settlement amount. Thus, the injured party was limited to one full recovery.[3] This limitation became known as the common-law setoff rule.

Tort reform altered the general rule that liability was joint and several. Specifically, MCL 600.2956 reads: "Except as provided in [MCL 600.6304], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." Accordingly, after tort reform, liability is several, though there are specific exceptions for which joint and several liability survives.[4]

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[1] *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005).

[2] *Id.*

[3] *Thick v Lapeer Metal Products*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984).

[4] See MCL 600.6304(6)(a); MCL 600.6312.

This case involves the vehicle-owner liability statute.[5] It makes the owner of an automobile liable for the negligence of a driver who uses the automobile with the owner's permission.[6] Notably, though the statute imposes liability on the owner regardless of whether he or she was negligent, no statute specifically provides that vehicle-owner vicarious-liability is an exception to several liability.

Because there is no specific exception to several liability for vehicle-owner vicarious liability, the plaintiff contends that the setoff rule does not apply. The Court of Appeals accepted this argument, reasoning that, when liability is several, no need exists to reduce the award entered against the nonsettling tortfeasor by the amount the settling tortfeasor paid. Each defendant is liable for no more than the percentage of damages attributable to his or her own negligence.[7]

The reasoning employed by the Court of Appeals is generally accurate. When liability is several, each tortfeasor ordinarily will be liable for the percentage of damages attributable to his or her own negligence.[8] A setoff will be unnecessary because, even without it, the plaintiff will recover full compensation only once. But in cases like this one, in which liability is not based on a tortfeasor's own negligence but is imposed by a statute, the Court of Appeals reasoning falls apart.

Only the driver of the car is liable on the basis of negligence. The owner of the car is liable because a statute specifically imposes liability on him or her, not because the owner was negligent. Therefore, when the

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[5] MCL 257.401(1).

[6] *Id.*

[7] *Kaiser v Allen*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2006 (Docket No. 264600).

[8] See MCL 600.2957(1); MCL 600.6304(4) and (8).

vehicle-owner liability statute applies and there is no setoff, the injured party could recover more than full compensation. For example, when, as here, the owner settles and the driver goes to trial, the injured party will receive both the settlement amount and the judgment rendered against the driver. This will necessarily mean that the injured party will recover more than full compensation, given that the award against the driver represents the total amount of the injured party's damages.

The common-law setoff rule is based on the premise that a plaintiff is entitled to no more than full recovery for his or her injuries. Importantly, tort reform did nothing to overrule the common-law setoff rule. It simply makes it unnecessary to apply the rule in most situations. But in cases like this one, in which it is necessary to apply the rule to prevent overcompensation, its application is appropriate. Thus, I concur in the decision of the majority to reverse the judgment of the Court of Appeals and hold that the setoff was proper in this case.

LIBERTY HILL HOUSING CORPORATION v CITY OF LIVONIA

Docket No. 131531. Decided April 2, 2008.

Liberty Hill Housing Corporation filed a petition in the Tax Tribunal, challenging the city of Livonia's denial of a property-tax exemption under MCL 211.7o(1), which provides an exemption for property owned and occupied by a nonprofit charitable institution while the institution occupies the property solely for its charitable purposes. Liberty Hill is a Michigan nonprofit organization that provides housing for low-income individuals and families and disabled individuals. It rented the property for which it sought the exemption to qualified tenants under traditional landlord-tenant agreements. The tribunal upheld the denial of an exemption. Liberty Hill appealed, and the Court of Appeals, JANSEN, P.J., and NEFF and ZAHRA, JJ., affirmed in an unpublished opinion per curiam issued May 16, 2006 (Docket No. 258752), agreeing with the tribunal that the tenants rather than Liberty Hill occupied the property and that Liberty Hill accordingly did not qualify for the exemption. Liberty Hill applied for leave to appeal. While the application was pending, the Court of Appeals issued a published opinion, *Pheasant Ring v Waterford Twp*, 272 Mich App 436 (2006), involving a factual situation similar to the one in this case. *Pheasant Ring* held that the charitable organization in that case did occupy the property it leased to tenants and thus qualified for the exemption. The Supreme Court heard oral argument on whether to grant the application or take other peremptory action after directing the parties to address whether *Pheasant Ring* should be overruled. 477 Mich 1018 (2007).

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

To occupy property under MCL 211.7o(1), a charitable institution must at a minimum have a regular physical presence on the property. Liberty Hill did not occupy the housing under the plain language of MCL 211.7o(1) and prior caselaw because it leased the housing to others for their own personal use and had no regular physical presence in the housing. Liberty Hill's tenants occupied the property, and Liberty Hill is thus not entitled to the exemption during the tax years at issue. *Pheasant Ring* interpreted the term

"occupied" in a manner that is at odds with the language of the statute and must be overruled to the extent that it is inconsistent with the opinion in this case.

Justice WEAVER, concurring in the result only, would affirm the holding of the Court of Appeals in this case. A charitable institution that claims an exemption under MCL 211.7o(1) must, at a minimum, have occupancy rights to the property before it can qualify as having occupied that property. *Pheasant Ring* incorrectly interpreted the term "occupied" in the statute to mean "used", and Justice WEAVER would overrule *Pheasant Ring* to the extent that its holding is inconsistent with her concurring opinion. In this case, Liberty Hill did not occupy the property during the tax years at issue, because it contracted away its occupancy rights in the form of lease agreements. The tenants were the only occupants of the property during those tax years.

Affirmed.

Justice CAVANAGH, joined by Justice KELLY, dissenting, disagreed that the term "occupied" in the statute relates to residency, which is a concept that does not typically apply to institutions. Rather, as determined by applying caselaw and principles of statutory construction, "occupied" as used in the statute is synonymous with "used." Because Liberty Hill leased the housing and specifically arranged to provide services to assist its tenants—including services provided at the leased properties—and thus used the properties in fulfillment of its integral purpose, it qualified for the exemption. The judgment of the Court of Appeals should be reversed.

TAXATION — PROPERTY TAX — CHARITABLE EXEMPTION.

A nonprofit charitable institution that claims a tax exemption for property owned and occupied by the institution while occupied by that institution solely for charitable purposes for which the institution was incorporated must, at a minimum, have a regular physical presence on the property; an institution that leases the property to others for their own personal use and has no regular physical presence on the property does not occupy the property for purposes of the exemption (MCL 211.7o[1]).

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas*) for the petitioner.

Sean P. Kavanagh, City Attorney, and *Barbara J. Scherr*, Assistant City Attorney, for the respondent.

Amicus Curiae:

William J. Schramm and *Corey Beaubien* for Homes for Autism.

CORRIGAN, J. Petitioner, a nonprofit organization, leased housing to disabled and low-income individuals during the tax years at issue. In question is whether petitioner was entitled to a property-tax exemption for charitable institutions under MCL 211.7o(1), which requires that the charitable institution has "occupied" the property. We affirm the Court of Appeals holding that because petitioner did not occupy the property under the unambiguous language of MCL 211.7o, it was not entitled to the property-tax exemption. Petitioner did not maintain a regular physical presence on the property, but instead leased the housing on the property for tenants to use for their own personal purposes. Because the Court of Appeals reached the opposite result in *Pheasant Ring v Waterford Twp*, 272 Mich App 436; 726 NW2d 741 (2006), which involved similar facts, we overrule that decision.

I. FACTS AND PROCEDURAL HISTORY

Petitioner is a nonprofit corporation whose stated purpose is to "creat[e] integrated housing alternatives for low income individuals and families, and persons with disabilities, to interact with the general public, and to promote the establishment of safe, affordable and accessible as necessary housing for low-income individuals and families and persons with disabilities."[1] Petitioner owns 51 single-family homes in the Detroit

[1] Although petitioner's goal is to break even while providing necessary housing and services to its clients, petitioner had operated at a deficit for the three years preceding this suit.

area. It leases or rents these homes to qualified individuals who are referred by its parent corporation, Community Living Services.[2] Petitioner's clients are individuals whose low-income or disability status qualify them to receive federal Supplemental Security Income benefits. All of petitioner's tenants pay rent under traditional written leases. These lease agreements include provisions for security deposits, late-payment fees, and hold-over fees. Petitioner has no ongoing day-to-day presence in the homes.

At issue in this case are five houses that petitioner owned and leased to persons who qualified under petitioner's statement of purpose. Petitioner requested from respondent city of Livonia an exemption from property taxes under MCL 211.7o(1) for tax years 2003 and 2004, arguing that the five houses were exempt because petitioner "owned and occupied" the houses in furtherance of its charitable purpose. After respondent denied petitioner's request, petitioner appealed in the Michigan Tax Tribunal (MTT).

The MTT affirmed, concluding that petitioner was not entitled to the property-tax exemption because petitioner did not occupy the houses within the meaning of MCL 211.7o(1). The MTT observed that the caselaw interpreting the occupancy requirement of MCL 211.7o(1) had held that a charitable institution "occupied" the housing when its provision of housing was incidental to the overall corporate purpose. The MTT pointed out that, in this case, petitioner's tenants were not using the homes for charitable purposes. The MTT concluded that petitioner did not occupy the properties under MCL 211.7o for the following reasons:

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[2] Community Living Services provides the clients with additional services, such as transportation, meals, monitoring, medical assistance, repairs, maintenance, and social activities.

> To say that Liberty Hill occupies the properties in these instances where Liberty Hill lessees reside at the subject properties does not comport with the plain meaning of the statute. In a landlord-tenant relationship, the lessee is generally considered the occupant and the lessor does not generally have occupancy rights during the term of the lease. See *Frenchtown Villa v Meadors*, 117 Mich App 683 [324 NW2d 133] (1982).
>
> In this case, involving single family homes, it is a significant stretch to say that the non-profit [sic] corporate owner/lessor occupies the properties by virtue of leasing them to tenant occupants consistent with the non-profit's [sic] corporate purposes.
>
> In these consolidated cases, while Liberty Hill, a non-profit charitable institution, owns the properties, it does not occupy any of them. The exemption is apparently meant for instances where the offices and operations of the non-profit [sic] charitable institution exist.

The Court of Appeals affirmed in an unpublished opinion per curiam. The panel explained that it agreed with the MTT's reasoning and conclusion:

> The tribunal's opinion points out that in a landlord-tenant relationship, the lessee is the *occupant* while the lessor, here petitioner, does not have occupancy rights during the terms of the lease. Further, to find that the non-profit [sic] corporate owner/lessor *occupies* the properties by virtue of leasing them to tenant-occupants, even though the tenancy is consistent with the non-profit's [sic] corporate purposes, requires a "significant stretch". We agree. [*Liberty Hill Housing Corp v City of Livonia*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006 (Docket No. 258752), p 2 (emphasis in original).]

The panel concluded that petitioner did not occupy the properties that it leased to tenants for the tenants' personal housing needs.

While petitioner's application for leave to appeal the Court of Appeals decision was pending, the Court of

Appeals decided *Pheasant Ring,* in which it held that the petitioner charitable institution "occupied" property under MCL 211.7o(1) when it leased housing to tenants in furtherance of its charitable purpose of providing housing to individuals with autism. No appeal was taken from the Court of Appeals decision in *Pheasant Ring*.

To clarify whether a charitable institution that leases property to others in furtherance of its charitable purpose occupies the property for purposes of the property-tax exemption under MCL 211.7o(1), we ordered oral argument on the application in the instant case and directed the parties to address whether *Pheasant Ring* was correctly decided. 477 Mich 1018 (2007).

II. STANDARD OF REVIEW

In *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006), this Court described the standard of review for MTT decisions as follows:

> The standard of review for Tax Tribunal cases is multifaceted. Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). We deem the tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record." *Id.*, citing Const 1963, art 6, § 28 and *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988). But when statutory interpretation is involved, this Court reviews the tribunal's decision de novo. *Danse Corp v Madison Hts*, 466 Mich 175; 644 NW2d 721 (2002).

This Court has held that statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority. See, e.g., *id*. *supra* at 204.

III. LEGAL BACKGROUND

A. MCL 211.7o

The statute at issue, MCL 211.7o, creates an ad valorem property-tax exemption for charitable institutions. *Wexford Med Group*, *supra* at 199. At the relevant times, MCL 211.7o(1) provided: "Real or personal property *owned and occupied* by a nonprofit charitable institution while *occupied* by that nonprofit charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this act." (Emphasis added.)[3] As a consequence of the statutory requirements, courts should consider three factors when determining whether the tax exemption under MCL 211.7o(1) applies:

> (1) The real estate must be *owned and occupied* by the exemption claimant;
>
> (2) the exemption claimant must be a nonprofit charitable institution; and
>
> (3) the exemption exists only when the buildings and other property thereon are *occupied by the claimant solely for the purposes for which it was incorporated*. [*Wexford Med Group*, *supra* at 203 (emphasis added).]

Here, it is undisputed that petitioner owned the properties at issue. The main point of contention is whether petitioner "occupied" the properties.

B. CASELAW INTERPRETATIONS

Petitioner argues that this Court, in analyzing the exemption under MCL 211.7o(1) and its predecessors,

[3] MCL 211.7o(1) was last amended by 2006 PA 681. It now provides: "Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act."

has construed "occupation" to mean "charitable use" and has not required physical possession by the exemption claimant. In making this argument, petitioner relies on cases that interpreted the third element of MCL 211.7o(1), that the property be occupied *solely for a charitable purpose*, and not the first element, that the real estate must be *owned and occupied* by the claimant. A review of this Court's caselaw yields no support for petitioner's argument.

Our first case addressing the occupation requirement of Michigan's statutory tax exemption for nonprofit institutions was *Detroit Young Men's Society v Detroit*, 3 Mich 172 (1854).[4] In that case, the plaintiff was incorporated "for the purpose of moral and intellectual improvement" and owned a building in the city of Detroit that included a library. *Id.* at 180. The plaintiff offered for rent by third parties two stores on the first floor and two small offices on the second floor, but the "remainder of the building . . . was used entirely for the purposes of the society . . . . " *Id.* at 173 (opinion syllabus). Because the 1853 statute required "actual[]" occupation by the institution,[5] this Court held that the

[4] 1853 PA 86, § 5(8) exempted from taxation the "personal property of all library, benevolent, charitable and scientific institutions, incorporated within this State, and such real estate belonging to such institutions as shall actually be occupied by them, for the purposes for which they were incorporated[.]"

[5] The Legislature later amended the statute to remove the word "actually." See 1885 PA 153, § 3, providing a tax exemption for the personal property of "library, benevolent, charitable, and scientific institutions, incorporated under the laws of this State, and such real estate as shall be occupied by them for the purposes for which they were incorporated[.]" This statute was amended a few years later by 1893 PA 206 to provide a tax exemption for "[s]uch real estate as shall be owned and occupied by library, benevolent, charitable, educational and scientific institutions incorporated under the laws of this State, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated . . . ." Thus, although the

occupation must be exclusive and ruled that the property was subject to taxation, "subject to a deduction of the value of the tenements actually used and occupied by them for the purposes for which they were incorporated, from the entire value of the lot and building." *Id.* at 184.

In *Webb Academy v Grand Rapids*, 209 Mich 523, 525; 177 NW 290 (1920), the plaintiff, an incorporated educational institution, sought a property-tax exemption for educational institutions.[6] The plaintiff conducted school business on the property, but the founder of the school and his wife, a teacher at the school, lived on the property, along with a student who helped with upkeep in exchange for room and board. *Id.* at 532-533. This Court indicated that the "owned and occupied" element of the exemption statute was not at issue when it noted: "That plaintiff was in full possession and control of the premises, and maintained an academy there, is not questioned." *Id.* at 535. It then agreed with the trial court that the property was occupied by the educational institution solely for the purposes for which it was incorporated and that the other minor uses, such as housing incidental to the school uses, did not defeat that conclusion. *Id.* at 539. Thus, this Court's decision focused on whether the property was occupied *solely for*

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statute no longer stated that "actual[]" occupancy was required, it did require that the property be both "owned and occupied" by charitable institutions and "occupied by them solely for the purposes for which they were incorporated."

[6] *Webb Academy* involved another predecessor of MCL 211.7o, 1915 CL 4001, that, in language essentially identical to that of 1893 PA 206, exempted from taxation "[s]uch real estate as shall be owned and occupied by library, benevolent, charitable, educational and scientific institutions incorporated under the laws of this state, with the buildings and other property thereon while occupied by them solely for the purposes for which they were incorporated[.]"

the purposes for which the plaintiff was incorporated, not on whether actual occupancy was required to qualify for an exemption.

Likewise, in *Gull Lake Bible Conference Ass'n v Ross Twp*, 351 Mich 269, 273; 88 NW2d 264 (1958), this Court noted that there was no dispute about whether the plaintiff owned or occupied the property. In that case, the plaintiff's stated purpose was "[t]o promote and conduct gatherings at all seasons of the year for the study of the Bible and for inspirational and evangelistic addresses." *Id*. at 271. The plaintiff sought a property-tax exemption for charitable organizations.[7] Besides a tabernacle and youth chapel (for which the tax-exempt status was not contested), the property included an old hotel building used to house employees, a fellowship center building, a trailer campsite for persons attending the conference and living in trailers, cottages that were rented to persons attending the conference, a gravel pit, a picnic area, boat docks, a bathhouse, a beach, a playground, horseshoe and badminton courts, and parking areas. *Id*. at 272. This Court determined that the housing and recreational facilities on the property were necessary to fulfill the plaintiff's purpose. *Id*. at 275. Again interpreting the third element of the tax-exemption statute, this Court held that the property was occupied by the plaintiff solely for the purpose for which it was incorporated. *Id*. at 274-275.

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[7] *Gull Lake* involved another predecessor of MCL 211.7o that exempted from taxation

> [s]uch real estate as shall be owned and occupied by library, benevolent, charitable, educational or scientific institutions and memorial homes of world war veterans incorporated under the laws of this state with the buildings and other property thereon while occupied by them solely for the purposes for which they were incorporated. [MCL 211.7, as amended by 1955 PA 46.]

Finally, in *Oakwood Hosp Corp v State Tax Comm*, 374 Mich 524, 526; 132 NW2d 634 (1965) *(Oakwood Hosp I)*, the plaintiff was a nonprofit corporation that owned and operated a hospital. The plaintiff claimed a tax exemption for property on which its hospital facilities were located.[8] *Id.* Also on the property were six houses that provided housing near the hospital for the resident physicians and interns whose services and availability to the hospital at all times were essential to the operation of the hospital. *Id.* at 527. This Court held that the plaintiff was entitled to the tax exemption for the entire property, including the houses. This Court explained that housing the doctors and interns near the hospital was necessary to the proper functioning of the hospital. *Id.* at 530. Therefore, the houses were "occupied in furtherance of and for the purposes for which plaintiff was incorporated and for hospital and public health purposes." *Id.*[9] Thus, this Court was again called on to address the third element of the tax-exemption statute: whether the property was occupied for the purposes for which the claimant was incorporated. This Court simply did not address the first element: whether the property was "owned and occupied."[10]

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[8] At the time *Oakwood Hosp I* was decided, the pertinent statutory language was identical to that in effect when *Gull Lake* was decided. See MCL 211.7, as amended by 1961 PA 238.

[9] Later, in *Oakwood Hosp Corp v State Tax Comm*, 385 Mich 704; 190 NW2d 105 (1971) (*Oakwood Hosp II*), this Court reached the opposite conclusion because the Legislature had amended the statute to specifically exclude such physician housing from the property-tax exemption.

[10] Since *Oakwood Hosp II*, the Court of Appeals has addressed the tax exemption at issue several times. See, e.g., *Lake Louise Christian Community v Hudson Twp*, 10 Mich App 573, 580; 159 NW2d 849 (1968) (holding that the religious institution did not occupy 1,300 acres of mostly unused wooded property because the property was not frequently used for religious education), *Nat'l Music Camp v Green Lake Twp*, 76 Mich App 608, 612; 257 NW2d 188 (1977) (holding that the nonprofit

C. *PHEASANT RING v WATERFORD TWP*

Five months after the Court of Appeals issued its opinion in the instant case, the Court of Appeals decided *Pheasant Ring*. In *Pheasant Ring*, *supra* at 440, the petitioner was a nonprofit corporation organized to carry on educational and other charitable activities, including establishing and supporting a transitional community for persons with autism. The petitioner sought a property-tax exemption for a building that it owned and rented to persons with autism. *Id*. at 441-442. Nothing in the Court of Appeals opinion stated that any of the petitioner's employees resided in the building to supervise or monitor the tenants. Nonetheless, the Court of Appeals held that the petitioner "occupied" the home within the meaning of MCL 211.7o(1). The Court looked to the dictionary definition of "occupy" and then, without discussing *Detroit Young Men's Society*, *Webb Academy*, *Gull Lake*, or *Oakwood Hosp I*, held that the petitioner "occupied" the building because it used the building in furtherance of its charitable purpose. The panel held, in pertinent part:

> The Township asserts that Pheasant Ring does not occupy the property because the location of its offices is not physically on the property at issue and it rents the property

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educational institutions were entitled to a property-tax exemption for 92 acres of unspoiled sand dunes on Lake Michigan because "[t]he property was used in a manner consistent with the nature of the land in such a way that the purpose for which the owning institution is exempt, education, was plainly advanced"), *Kalamazoo Nature Ctr, Inc v Cooper Twp*, 104 Mich App 657, 665-667; 305 NW2d 283 (1981) (holding that the nonprofit institution "occupied" 31 acres of preserved wilderness land that it did not physically enter but used for observation and educational purposes), and *Holland Home v Grand Rapids*, 219 Mich App 384, 397-398; 557 NW2d 118 (1996) (holding that the nonprofit association did not occupy the property when a retirement home on the property was under construction on the relevant tax days). The validity of some of these opinions is questionable in light of our holding in the instant case.

> to tenants. This interpretation of the requirements for tax exemption is too narrow and restrictive. There is no dispute that Pheasant Ring owns the property. Although Pheasant Ring does not use the property for its own offices, the property is occupied by tenants of Pheasant Ring in furtherance of its charitable purposes. This Court, in determining whether a charitable organization "occupied" a property for purposes of qualifying for a tax exemption, has determined that "[t]he proper test is whether the entire property was used in a manner consistent with the purposes of the owning institution." *Holland Home v Grand Rapids*, 219 Mich App 384, 398; 557 NW2d 118 (1996). Under this criterion, Pheasant Ring occupied the residence. [*Pheasant Ring*, *supra* at 442.]

IV. ANALYSIS

We conclude that under the plain language of MCL 211.7o(1) and this Court's previous caselaw, the Court of Appeals correctly decided this case and incorrectly decided *Pheasant Ring*.

First, the Court of Appeals opinion in the instant case is consistent with the statutory language, whereas *Pheasant Ring* is not. *Webster's Universal College Dictionary* (1997) defines "occupy" as follows:[11]

> —*v.t.* 1. to have, hold, or take as a separate space; possess, reside in or on, or claim: *The orchard occupies half the farm*. 2. to be a resident or tenant of; dwell in. 3. to fill

[11] Justice CAVANAGH attacks our use of a dictionary in interpreting the statutory language. He states: "The practice of reaching for a dictionary to define common words in a statute risks serving to merely confirm the writer's assumed meaning of the word, rather than to actually advance the writer's legal analysis." *Post* at 68. We recognize that dictionaries are merely interpretive aids used by the court. *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 163 n 10; 596 NW2d 126 (1999). But in a previous opinion authored by Justice CAVANAGH, this Court held: "When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004).

> up, employ, or engage: *to occupy time reading*. 4. to engage or employ the mind, energy, or attention of: *We occupied the children with a game*. 5. to take possession and control of (a place), as by military invasion. —*v.i.* 6. to take or hold possession.

We conclude that the second meaning is the one the Legislature intended. The third, fourth, and fifth meanings in the definition are clearly not relevant here.[12] The first meaning defines "occupy" as "to have, hold, . . . possess, . . . or claim[.]" These parts of the definition are synonymous with ownership.[13] Because the statute uses the conjunctive term "owned *and* occupied," however, the Legislature must have intended different meanings for the words "owned" and "occupied." Otherwise, the word "occupied" would be mere surplusage. "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Thus, the Legislature must have intended the term "occupy" to mean the other aspect of the dictionary definition: to "reside in or on" or "to be a resident or tenant of; dwell in." This aspect of the

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[12] Although the dissent accuses us of cursorily dismissing three of the alternative meanings of "occupy," we see no need to discuss these definitions in detail because they clearly do not apply. The dissent seems to prefer the third meaning in the definition: "to fill up, employ, or engage; *to occupy time reading*." But the dictionary's example using this meaning clearly demonstrates that the third meaning does not make sense in the context of the statute. One cannot "fill up" property the way one can fill up time reading. The fourth meaning does not apply because one cannot "engage or employ the mind, energy, or attention of" an inanimate object such as real property. Finally, it is preposterous to suggest that the Legislature intended the exemption to apply only if a nonprofit charitable institution conducted a successful military invasion of the property.

[13] *Webster's Universal College Dictionary* (1997) defines "own" as "to have or hold as one's own; possess."

definition especially makes sense when viewed in its specific context;[14] it is "real or personal property" that must be "occupied." "Reside" means "1. to dwell permanently or for a considerable time; live. 2. (of things, qualities, etc.) to be present habitually; be inherent ([usually followed] by *in*)." *Webster's Universal College Dictionary* (1997). Thus, aided by this dictionary definition, we conclude that to occupy property under MCL 211.7o(1), the charitable institution must at a minimum have a regular physical presence on the property.[15]

Using this definition, the Court of Appeals in the instant case correctly held that petitioner did not occupy property that it leased to others and did not physically reside in.[16] In this situation, the tenants, not petitioner, actually "occupied" the property. We agree with the Court of Appeals that "to find that the nonprofit [sic] corporate owner/lessor *occupies* the properties by virtue of leasing them to tenant-occupants, even though the tenancy is consistent with the non-profit's [sic] corporate purposes, requires a 'significant stretch'." *Liberty Hill*, *supra* at 2 (emphasis in original.) The *Pheasant Ring* panel's holding that a nonprofit corporation occupies a property merely by virtue of the fact that the property is being used in a manner

[14] A word that is defined in various ways is given meaning by its context or setting. *Koontz*, *supra* at 318.

[15] A charitable institution does not automatically occupy property if it has occupancy rights to the property. The term "occupy" requires more than merely having the "right to occupy." As we have explained, the charitable institution must actually occupy the property, i.e., maintain a regular physical presence there.

[16] Petitioner is correct, however, that the fact that it charged the tenants rent does not disqualify it from the exemption. See *Wexford Med Group*, *supra* at 215 ("A 'charitable institution' can charge for its services as long as the charges are not more than what is needed for its successful maintenance.").

consistent with the corporation's purpose is at odds with the statute's plain language.

The Court of Appeals holding in the instant case is further supported by this Court's decisions in *Webb Academy, Gull Lake*, and *Oakwood Hosp I*. Although those decisions did not focus on the occupancy requirement of the statute, but focused instead on the part of the statute requiring that the property be occupied "solely for the purposes for which it was incorporated," the plaintiffs in those cases were actually physically present on the property when they engaged in activities that carried out their nonprofit goals. Here and in *Pheasant Ring*, on the other hand, the petitioners were not present on the properties.

V. RESPONSE TO THE DISSENT

The dissent and petitioner incorrectly conclude that the term "occupy" is synonymous with "use."[17] In arguing that "occupy" means "use," the dissent selectively quotes the fifth of five suggested meanings of "occupancy" in Black's Law Dictionary (8th ed).[18] The first definition of "occupancy" suggested, however,

[17] Similarly, the Court of Appeals in *Lake Louise Christian*, *supra* at 578, and *Kalamazoo Nature Ctr*, *supra* at 665-667, erred in concluding that "occupy" is synonymous with "use."

[18] Justice CAVANAGH's dissent states that it quotes Black's Law Dictionary merely "to draw attention to the inadequacy of a dictionary-driven approach to statutory interpretation." *Post* at 68. Yet Justice CAVANAGH does not explain what interpretive aid, other than his own personal vocabulary, he would prefer us to use to define the statutory term. Further, when it comes to actually interpreting the statutory language, Justice CAVANAGH, despite his criticism of our reliance on a dictionary, himself turns to the dictionary definition. The dissent states that the term " 'occupied' should be understood as synonymous with 'used,' because it is the most appropriate definition for that context." *Post* at 70. Justice CAVANAGH appears to derive this definition from Black's Law Dictionary, which he quotes earlier in his opinion.

reads: "The act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, [*especially*] *of a dwelling or land*." *Id*. (emphasis added). This definition is consistent with the first two meanings of "occupy" suggested in *Webster's Universal College Dictionary* (1997), one of which we adopt today.

We reject the dissent's argument that interpreting "occupied" to mean "reside[d] in or on" is incongruous with the Legislature's second use of "occupied" in MCL 211.7o(1). Contrary to the dissent's argument, a charitable institution may reside on property for charitable purposes, rather than simply dwelling on the property for no reason other than dwelling itself. For example, the doctors and interns in *Oakwood Hosp I* resided in physicians' housing "in furtherance of and for the purposes for which plaintiff was incorporated and for hospital and public health purposes." *Oakwood Hosp I*, *supra* at 530.

The dissent argues that charitable institutions do not typically reside in a place because they are inanimate. Clearly, just as inanimate things may not "use" property, they may not "reside" on property. Charitable institutions, however, are not merely inanimate bodies; they are made up of people. A charitable institution's members, employees, or volunteers may dwell on the property or at least be habitually present on the property, which is consistent with the meaning of "reside." The dissent contends that a charitable institution may not "reside in" certain property, such as a swimming pool. Although one obviously cannot dwell in a swimming pool, one can maintain a regular physical presence at the pool (e.g., by habitually swimming there) or on the property that contains the pool. Either would generally be sufficient to occupy the property.

In citing *Oakwood Hosp I* to support its argument that the term "occupied" means "used," the dissent conflates the following two factors for determining whether the tax exemption under MCL 211.7o(1) applies:

> (1) The real estate must be owned and occupied by the exemption claimant;
>
> * * *
>
> (3) the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated. [*Wexford Med Group*, *supra* at 203.]

As discussed, the *Oakwood Hosp I* Court addressed *only* the third factor. The Court held that the nonprofit corporation occupied physicians' housing for the purposes for which it was incorporated. The *Oakwood Hosp I* Court's mention of the nonprofit corporation's "use" of the property was a reference to this Court's holding in *Webb Academy* that housing is exempt only when it is incidental to the use of the entire property for charitable purposes. Further, the Court's discussion of the "use" of property is not inconsistent with our interpretation of the term "occupy." It is certainly consistent for a charitable institution to use property on which it maintains a regular physical presence. Use of property is just one part of occupying it. The two terms are not mutually exclusive; "use" is merely narrower than "occupy."

The dissent would hold that a charitable institution may occupy property by using it without maintaining a physical presence there. Such an interpretation leads to one of the following two unsatisfactory conclusions: (1) a charitable institution can occupy property without actually being physically present or (2) a charitable

institution need only use the property sporadically or perhaps even once to occupy it. Neither of these conclusions is consistent with proper meaning of the term "occupy." Rather, a charitable institution must maintain a regular physical presence on the property to occupy the property under MCL 211.7o.

VI. CONCLUSION

Petitioner did not occupy the real property to qualify for a property-tax exemption under MCL 211.7o(1). Although petitioner owned the housing, it leased the housing to others for their own personal use and had no regular physical presence in the housing. Thus, petitioner did not occupy the housing under the plain language of the statute and this Court's interpretations of the predecessors of MCL 211.7o. Because petitioner cannot satisfy all the requirements of MCL 211.7o(1), it is not entitled to an exemption from property taxes during the tax years at issue. Accordingly, we affirm the judgment of the Court of Appeals in the instant case and overrule *Pheasant Ring* to the extent that it is inconsistent with this opinion.

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

WEAVER, J. (*concurring in the result only*). The question before this Court is whether the petitioner is exempt under MCL 211.7o(1)[1] from paying property tax on property it uses for the charitable purpose of providing housing for low-income families, low-income indi-

[1] MCL 211.7o(1) states: "Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act."

viduals, and disabled individuals. Specifically, does the petitioner "occupy" the subject property, as the term "occup[y]" is contemplated as a requirement for exemption from property tax under MCL 211.7o(1)?

Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, I concur in affirming the Court of Appeals holding that petitioner did not occupy the subject property as contemplated under MCL 211.7o(1), and I agree with overruling *Pheasant Ring v Waterford Twp*, 272 Mich App 436; 726 NW2d 741 (2006), but would overrule it to the extent that its holding is inconsistent with my opinion.

I. FACTS

Petitioner Liberty Hill is a nonprofit organization incorporated under the laws of Michigan. Petitioner's charitable purpose is to provide housing for low-income or disabled individuals, in addition to low-income families. The tenants of the property at issue lease the housing under traditional landlord-tenant agreements. Petitioner collects rent from the tenants, charges late fees when the deadline for rent passes, and requires security deposits.

Petitioner requested a tax exemption from respondent city of Livonia for tax years 2003 and 2004, arguing that it qualified for exemption as a charitable organization occupying property in furtherance of its charitable purpose. The case was heard in the Michigan Tax Tribunal (MTT), which denied petitioner's request for an exemption. Petitioner appealed in the Court of Appeals, which affirmed the MTT's ruling in an unpublished opinion per curiam.[2] Petitioner then sought leave to appeal in this Court.

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[2] *Liberty Hill Housing Corp v City of Livonia*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006 (Docket No. 258752).

While the application for leave to appeal in the instant case was pending, the Court of Appeals issued a published opinion in *Pheasant Ring v Waterford Twp*. The petitioner in *Pheasant Ring* was a nonprofit organization, similar to petitioner in this case, that leased housing to persons with autism under traditional landlord-tenant agreements. The petitioner in *Pheasant Ring* requested a property-tax exemption under MCL 211.7o(1). In *Pheasant Ring*, the Court of Appeals held that the petitioner did "occupy" the property in a manner that qualified for the exemption. The decision was not appealed in this Court.

To clarify whether a charitable organization that leases property to others as part of its charitable purpose "occupies" the property under MCL 211.7o(1), this Court ordered oral argument on the application, directing the parties to address "whether *Pheasant Ring v Waterford Twp* . . . was correctly decided."[3]

II. STANDARD OF REVIEW

Questions of statutory construction are reviewed de novo. *Grimes v Dep't of Transportation,* 475 Mich 72, 76; 715 NW2d 275 (2006). " '[E]xemption statutes are to be strictly construed in favor of the taxing unit.' " *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 753; 298 NW2d 422 (1980) (citation omitted).

III. ANALYSIS

To qualify for an exemption under the text of MCL 211.7o(1), the claimant must satisfy a three-part test: (1) the real estate must be owned and *occupied* by the exemption claimant, (2) the exemption claimant must be a nonprofit charitable institution incorporated under

[3] *Liberty Hill Housing Corp v City of Livonia*, 477 Mich 1018 (2007).

the laws of this state, and (3) the buildings and other property thereon must be *occupied* by the claimant solely for the purposes for which it is incorporated. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 203; 713 NW2d 734 (2006). The issue in common between *Pheasant Ring* and the instant case is whether the petitioners "occupied" their respective properties in a manner that meets the first and third elements of the exemption test. In both cases, the properties were leased as housing to tenants with special needs.

With regard to the petitioner in this case, the Court of Appeals held that petitioner did not occupy the property because it had leased the property to tenants and had thus given up its right to occupy the property. The Court of Appeals in *Pheasant Ring*, on the other hand, criticized that argument as being "too narrow and restrictive." *Pheasant Ring*, 272 Mich App at 442. The *Pheasant Ring* panel then went on to hold that, because the petitioner had *used* the property in furtherance of its charitable purpose, it had occupied the property for the charitable purpose. *Id*.

I agree with the Court of Appeals in the instant case, and further conclude that the *Pheasant Ring* panel incorrectly interpreted the term "occupied" to mean "used." I note that long-established law requires this Court to give a narrow construction to statutes creating tax exemptions. *Ladies Literary Club*, 409 Mich at 753. I interpret the term "occupied" in the narrowest sense, looking only at the language used in MCL 211.7o(1). The statute requires a claimant to perform two actions before a charitable exemption can be granted: (1) the charitable organization must own the property and (2) the charitable organization must occupy the property.[4]

[4] The occupation must be in furtherance of the organization's charitable purpose.

The statute makes the occupancy requirement distinct from the ownership requirement, and it makes no mention of "using" the property. Thus, I reject the *Pheasant Ring* interpretation that "using" the property is equivalent to occupying the property because that interpretation goes beyond the text of the statute. Given the statute's use of the term "occupied," a claimant must, at a minimum, have occupancy rights to the property before it can qualify as having "occupied" that property.

By leasing the property to tenants, the petitioner in this case gave up its right to occupy the property during the term of the leases. Because petitioner could not occupy the property by reason of its own agreements, it cannot now claim that it "occupied" the property for purposes of MCL 211.7o(1). The tenants were the only occupants of the property during the tax years at issue.

IV. CONCLUSION

Petitioner did not occupy the property at issue during tax years 2003 and 2004 because petitioner had contracted away its occupancy rights in the form of lease agreements. Thus, petitioner cannot satisfy the requirements of MCL 211.7o(1) for exemption from property taxes for tax years 2003 and 2004.

Accordingly, I concur with the majority in affirming the Court of Appeals holding in the instant case and overruling the Court of Appeals opinion in *Pheasant Ring v Waterford Twp*, but would overrule it to the extent that it is inconsistent with my opinion.

CAVANAGH, J. (*dissenting*). I dissent from the majority opinion, which holds that Liberty Hill Housing Corporation, a nonprofit organization that leases housing to disabled or low-income individuals, did not qualify for

the charitable-institution property-tax exemption under MCL 211.7o(1) because it did not occupy the properties at issue. I disagree that the Legislature intended the term "occupy," as used in MCL 211.7o(1), to mean "reside in or on" or "to be a resident or tenant of; dwell in." This cannot be the meaning intended by the Legislature, because it is inconsistent with the statute's subsequent use of the term and the statute's purpose.

The key issue in this case is the meaning of the term "occupied" as it is used in MCL 211.7o(1), which exempts from taxation "[r]eal or personal property owned and occupied by a nonprofit charitable institution . . . ." The majority opinion rejects the definition of "occupied" that denotes ownership, "to have, hold, . . . possess, . . . or claim," reasoning that the term "occupied" must mean something other than ownership because MCL 211.7o(1) uses the conjunctive phrase "owned *and* occupied." *Ante* at 56-57. But there are several definitions for the term, so ruling out the meaning that denotes ownership only eliminates one alternative. The entire entry for the term "occupy" in the dictionary used by the majority opinion suggests six different meanings:

> —*v.t.* 1. to have, hold, or take as a separate space; possess, reside in or on, or claim: *The orchard occupies half the farm*. 2. to be a resident or tenant of; dwell in. 3. to fill up, employ, or engage: *to occupy time reading*. 4. to engage or employ the mind, energy, or attention of: *We occupied the children with a game*. 5. to take possession and control of (a place), as by military invasion. —*v.i.* 6. to take or hold possession. [*Webster's Universal College Dictionary* (1997).]

Moreover, consulting a different dictionary yields additional variations of the definition, illustrating a hazard of singularly employing dictionary definitions to discern legislative intent. For example, Black's Law Dictionary

(8th ed) articulates one definition of "occupancy" as "the use to which property is put," which bears some relation to the third *Webster's* definition: "to fill up, employ, or engage."[1] The majority cursorily dismisses three of the alternative *Webster's* definitions as "clearly not relevant," but accuses me of selectively quoting from Black's Law Dictionary. *Ante* at 57, 59. However, I have not presented alternative dictionary definitions to argue that "my" dictionary is more authoritative than the majority's dictionary; rather, I raise them to draw attention to the inadequacy of a dictionary-driven approach to statutory interpretation. The practice of reaching for a dictionary to define common words in a statute risks serving to merely confirm the writer's assumed meaning of the word, rather than to actually advance the writer's legal analysis.[2] While dictionaries are certainly useful tools of statutory interpretation, there are circumstances in which consulting a dictionary will not itself resolve the proper meaning of a statutory word or phrase.

This case presents such a circumstance—in which consulting dictionaries yields a number of possible meanings of the term "occupied." As a result, discerning the most appropriate meaning requires further

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[1] The other four alternative definitions include:

> 1. The act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, [especially] of a dwelling or land. . . . 2. The act of taking possession of something that has no owner (such as abandoned property) so as to acquire legal ownership. . . . 3. The period or term during which one owns, rents, or otherwise occupies property. 4. The state or condition of being occupied. [Black's Law Dictionary (8th ed).]

[2] See Hoffman, *Parse the sentence first: Curbing the urge to resort to the dictionary when interpreting legal texts*, 6 NYU J Legis & Pub Pol'y 401 (2003).

analysis. Several principles of statutory construction aid in determining how the term "occupied" should be understood in MCL 211.7o(1). A phrase must be construed in light of the phrases around it, not out of context. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002). Similarly, when construing a statute, a court must read it as a whole. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). Particularly relevant here is the commonsense principle that " ' "[i]dentical language should certainly receive identical construction when found in the same act." ' " *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 426 n 16; 565 NW2d 844 (1997), quoting *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 155; 545 NW2d 642 (1996) (RILEY, J., dissenting).

When a statute repeats terms, it is logical to infer that they have the same meaning in each instance. The statute at issue here uses the term "occupied" twice within the same sentence: "Real or personal property owned and *occupied* by a nonprofit charitable institution while *occupied* by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act." MCL 211.7o(1) (emphasis added). The statute's two uses of the term "occupied" should be consistent in meaning. But interpreting "occupied" to relate to residency, as the majority opinion suggests, is incongruous with the statute's second use of the term "occupied." That interpretation would require that an institution resided in property solely for a particular purpose. One's residency of property does not commonly have any purpose other than residency, or dwelling, itself. By contrast, the *use* of property might be for a particular purpose. It would be entirely appropriate to state that an institution used

property solely for a particular purpose, such as a medical, educational, or recreational purpose. The second instance of "occupied" should be understood as synonymous with "used," because it is the most appropriate definition for that context. Interpreting "occupied" to relate to use would also be appropriate for the first instance of the term, which confirms that the Legislature intended this meaning.

Additionally, interpreting "occupied" as synonymous with "used" comports with the function of the statute, whereas interpreting "occupied" to relate to residency does not. The exemption described in MCL 211.7o(1) applies only to nonprofit charitable institutions; it never applies to individuals. Applying the term "reside" to an institution is a strained and odd interpretation. Unlike people, institutions are inanimate and do not typically reside in a place. Notably, the majority articulates the following definition of "reside" from *Webster's*: "1. to dwell permanently or for a considerable time; live. 2. (of things, qualities, etc.) to be present habitually; be inherent ([usually followed] by *in*)." *Ante* at 58. The first definition of "reside" clearly does not apply to institutions, because institutions do not dwell or live anywhere. The second definition of "reside" does not apply because an institution would not be inherent in a particular piece of property.

Further, the statute applies broadly to "real or personal" property, not simply residential property. Not all property that is eligible for exemption is susceptible to being resided in. For example, if a nonprofit charitable institution owned land that contained a swimming pool, it would be inapt to state that the institution occupied the swimming pool in that it resided in the pool. But it would be entirely appropriate to state that the institution occupied the swimming pool in that it operated the

pool and, further, that it operated the pool in fulfillment of its charitable purpose.[3] Thus, the term "occupied" must be construed so that it applies to the broad range of property that could be exempt under MCL 211.7o(1).

Finally, Michigan caselaw supports interpreting the term "occupied" to mean "used" in the context of this exemption. In *Oakwood Hosp Corp v State Tax Comm*, 374 Mich 524; 132 NW2d 634 (1965), the predecessor of MCL 211.7o was at issue. The statute exempted from taxation property that was "owned and occupied" by "library, benevolent, charitable, educational or scientific institutions . . . while occupied by them solely for the purposes for which they were incorporated." *Id*. at 528. This Court held that houses owned by the plaintiff hospital, which were used for dwelling purposes for resident physicians and their families, were exempt under this provision. *Id*. at 530-532. The hospital charged the residents $100 a month to defray the cost of the housing, which was located at the edge of the hospital property and fronted a public street in a residential neighborhood. This Court reasoned that the houses were built to be necessary accessories to the hospital, because there was a shortage of housing close to the hospital and the resident physicians needed to be available to serve at the hospital on short notice. *Id*. at 527. It concluded that "[t]he houses are *used* as part of the hospital operation and are incidental thereto. Exemption under the statute applies." *Id*. at 532 (emphasis added).[4] Clearly, *Oakwood* interpreted the term

[3] Despite its devotion to the dictionary, the majority departs from its chosen definition when it is convenient or necessary to do so, such as in the swimming-pool hypothetical. The shortcomings of its chosen dictionary definition lead the majority to craft its own definition of "occupy"—to maintain a regular physical presence. *Ante* at 60.

[4] The majority's argument that *Oakwood* and the other cases addressing this exemption did not concern the "owned and occupied" element of

"occupied" to mean the use of the property. The focus in *Oakwood* was not simply who physically "resided in" the property, but whether the *use* of the property was within the hospital's scientific purpose. This Court viewed the resident physicians as an extension of the hospital because they were so integral to the hospital's purpose; accordingly, their tenancy and use of the housing was attributed to the hospital.

Therefore, if the term "occupied" is understood to relate to the use to which property is put, the question here is whether Liberty Hill occupied the properties when it leased them to these particular tenants. The relationship between Liberty Hill and its tenants is analogous to the relationship between the hospital and the medical residents in *Oakwood*. A hospital's narrow purpose is to provide medical care *at the hospital*, but *Oakwood* recognized that enabling medical residents to get to the hospital quickly was necessary to that purpose. Accordingly, even though actual medical care did not occur in the houses, the relationships between the medical residents, their housing, and the hospital were so intertwined that this Court regarded housing the medical residents as an operation of the hospital that was within its scientific purpose. The fundamental purpose of Liberty Hill is to enable low-income or disabled people to live independently, rather than in institutions or group homes. The physical manifestation of Liberty Hill's operations is not just its central office, but also in having Liberty Hill's tenants occupy the houses. If Liberty Hill's tenants do not live in the houses, Liberty Hill's purpose is not fulfilled.

Further, the tenancy arrangements demonstrate a unique relationship between Liberty Hill and its ten-

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the exemption statute is irrelevant because the term "occupied" should have the same meaning in both instances in the statute.

ants. All Liberty Hill tenants are referred by Community Living Services, Liberty Hill's parent corporation. Liberty Hill's sample lease appears to be a standard lease, except that it includes a provision that "Community Living Services shall assist the tenant in complying with the terms of this lease." Unlike a standard landlord-tenant relationship, Liberty Hill has specifically agreed to work with the tenant to fulfill the lease requirements. Further, Community Living Services contracts to provide a number of services to Liberty Hill tenants *at the properties*. Support services include transportation, personal-care assistance, support for work, recreation, community involvement, and healthcare service. The aid given in a particular tenant's home could amount to care being provided 24 hours a day, seven days a week, depending on the tenant's needs. Thus, between assisting the tenant with complying with the lease and providing support services, it is clear that Liberty Hill operates in the properties, even though the tenants physically reside in them.

In addition to the services that Liberty Hill provides through Community Living Services, the financial arrangements indicate that Liberty Hill does not have a standard landlord-tenant relationship with its tenants. All of Liberty Hill's tenants qualify for Supplemental Security Income, which amounts to approximately $600 a month and is usually the only source of income for each tenant. Tenants pay no more than one-third of their income to rent, usually about $200 a month. Liberty Hill receives governmental funds and donations that offset the remainder of the housing-related expenses, such as the mortgage, insurance, and maintenance. But in four of the last five years, Liberty Hill has operated at a deficit. The financial circumstances indicate that Liberty Hill is not leasing the houses as a typical landlord, but is leasing the houses as an integral

part of its mission. Just as the houses in *Oakwood* would not have been exempted from taxation if they had been rented to people unrelated to the hospital, the Liberty Hill houses would not be exempt if they were rented to tenants who were not referred by Community Living Services and who did not meet Liberty Hill's criteria.

Leasing the properties to particular low-income or disabled tenants and maintaining a relationship with them was integral to Liberty Hill's operation. Thus, Liberty Hill occupied the properties within the meaning of MCL 211.7o(1) because it used the properties as part of its institutional mission. Moreover, it occupied the properties solely for the purposes for which it was incorporated, as required by MCL 211.7o(1). I would reverse the judgment of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

WESCHE v MECOSTA COUNTY ROAD COMMISSION
KIK v SBRACCIA

Docket Nos. 129282 and 132849. Argued October 4, 2007 (Calendar Nos. 10 and 11). Decided April 3, 2008.

Daniel J. and Beverly Wesche brought an action in the Mecosta Circuit Court against the Mecosta County Road Commission. Daniel Wesche sought damages for personal injury after a Gradall hydraulic excavator driven by the road commission's employee struck Wesche's vehicle. Beverly Wesche claimed loss of consortium. The court, Richard I. Cooper, J., granted the road commission summary disposition on Beverly Wesche's loss-of-consortium claim, determining that governmental immunity barred it. The Court of Appeals, HOEKSTRA, P.J., and JANSEN and KELLY, JJ., affirmed, holding that the motor-vehicle exception to governmental immunity, MCL 691.1405, applies only to claims for bodily injury and property damage and does not waive governmental immunity for loss-of-consortium claims, which are not for bodily injury or property damage but derive from a spouse's injuries. *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274 (2005). The Wesches sought leave to appeal.

Rebecca and Robert Kik, individually and as personal corepresentatives of the estate of their deceased daughter, Sharon Kik, brought an action in the Chippewa Circuit Court against John-Christopher Sbraccia, Kinross Charter Township EMS, and Kinross Charter Township after a township ambulance driven by township EMS employee Sbraccia overturned while transporting Rebecca Kik, who was pregnant. Sharon Kik was born prematurely and died the same day. The damages that the Kiks sought included damages for the loss of society and companionship of their daughter and damages for Robert Kik's loss of consortium with Rebecca Kik. The defendants moved for partial summary disposition, contending that the Kiks' derivative claims for loss of consortium and the like were barred by governmental immunity. The court, Nicholas J. Lambros, J., denied the motion, and the defendants appealed. The Court of Appeals, O'CONNELL, P.J., and SAWYER and MURPHY, JJ., affirmed with regard to all claims against Sbraccia and with regard to the Kiks' claims for loss of society and

companionship, given that the action was a wrongful-death action. With regard to Robert Kik's loss-of-consortium type claims against the township and the township EMS, however, the panel reversed because it was required to follow the holding in *Wesche* that damages for loss of consortium are not recoverable in an action brought under MCL 691.1405. Had it not been obligated to follow *Wesche*, however, the panel would have concluded that MCL 691.1405 does not limit the right to recover damages for derivative claims, such as a claim for loss of consortium. 268 Mich App 590 (2005). The Court of Appeals convened a special panel to resolve the conflict between this case and *Wesche* and vacated part III of its prior opinion in the case. 268 Mich App 801 (2005). The special panel, CAVANAGH, SMOLENSKI, FORT HOOD, and BORRELLO, JJ., (WILDER, P.J., and ZAHRA and SCHUETTE, JJ., dissenting), held that MCL 691.1405 does not limit the right to recover damages for loss-of-consortium and similar claims arising from a bodily injury and overruled part III of the *Wesche* opinion. *Kik v Sbraccia*, 272 Mich App 388 (2006). The township defendants and Sbraccia sought leave to appeal.

The Supreme Court granted leave to appeal in *Wesche*, 478 Mich 860 (2007), and *Kik*, 478 Mich 861 (2007), and consolidated the appeals for oral argument.

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

The motor-vehicle exception to governmental immunity does not waive immunity from a loss-of-consortium claim. Because the motor-vehicle exception would not permit a plaintiff to pursue a loss-of-consortium claim if a death had not ensued, that plaintiff is also barred from pursuing the claim in a wrongful-death action. A governmental employee is not immune from liability for loss-of-consortium damages, however, if the plaintiff can satisfy all the requirements set forth in the gross-negligence exception to the governmental immunity of employees.

1. The language of MCL 691.1405 clearly imposes liability and waives governmental immunity only for bodily injury and property damage. "Bodily injury" means physical or corporeal injury to a body. Loss of consortium is a nonphysical injury and does not fall within the categories of damage for which the motor-vehicle exception waives immunity.

2. Loss of consortium is an independent cause of action derivative of the underlying bodily injury and is not merely an item of damages. MCL 691.1405 does not create a threshold for liability.

Thus, it does not provide that governmental agencies are liable for any damages once a plaintiff makes a showing of bodily injury or property damage.

3. The wrongful-death statute, MCL 600.2922(1), makes liability contingent on whether the party injured would have been entitled to maintain an action and recover damages if a death had not ensued. Because the Kiks would not have been entitled to pursue their loss-of-consortium claim for Sharon Kik if her death had not ensued, MCL 600.2922(1) does not authorize that claim in their wrongful-death action.

4. *Endykiewicz v State Hwy Comm*, 414 Mich 377 (1982), which held that the highway exception to governmental immunity, MCL 691.1402(1), is ambiguous and an expansive provision that permits recovery for loss of companionship and society in a wrongful-death action, is overruled to the extent that it is inconsistent with the decision in these cases.

5. Because he is a governmental employee, Sbraccia's liability is premised on MCL 691.1407(2)(c) rather than the motor-vehicle exception. MCL 691.1407(2)(c) provides that a governmental employee is immune from tort liability if his or her conduct does not amount to gross negligence that is the proximate cause of the injury or damage. The exception to governmental immunity for gross negligence does not limit the waiver of immunity to cases of bodily injury or property damage and does not shield an employee from liability for loss-of-consortium damages.

Wesche affirmed and remanded for further proceedings.

Kik affirmed in part, reversed in part, and remanded for further proceedings.

Justice WEAVER, joined by Justice CAVANAGH, concurring in part and dissenting in part, agreed that the immunity available to governmental employees is not available to an employee who is grossly negligent and that a plaintiff can seek recovery from that employee for loss-of-consortium damages. She disagreed, however, that the motor-vehicle exception prohibits a claim for loss of consortium and would allow recovery of damages for that claim as long as the injured party from whom the loss-of-consortium claim derived sustained some legally cognizable harm or injury. Under the exception, a governmental agency is liable for damages that flow from the bodily injury, and this includes damages for loss of consortium, just as it includes damages for medical expenses and lost wages. MCL 691.1405 does not expressly abrogate the common-law right to claim damages for loss of consortium, and the statute cannot be extended by implication to abrogate that right.

Justice KELLY, joined by Justice CAVANAGH, concurring in part and dissenting in part, agreed that governmental employees can be held liable for loss of consortium under the gross-negligence exception. She would also hold, however, that governmental agencies may be liable for those damages under the motor-vehicle exception when the loss-of-consortium claim arises directly out of bodily injury suffered in a collision. MCL 691.1405 refers to liability for bodily injury or property damage, but is silent with regard to damages. Once liability for bodily injury is established by showing the negligent operation of a government-owned vehicle, a plaintiff can recover all damages arising from the bodily injury. The loss of consortium and the loss of society and companionship that the plaintiffs alleged in these cases derive from bodily injuries suffered in the accidents. The majority's interpretation of the motor-vehicle exception will lead to absurd results by excluding recovery for loss-of-consortium damages that derive from the bodily injury suffered, while allowing recovery for other damages such as emotional distress and lost wages, that could also derive from the bodily injury.

1. GOVERNMENTAL IMMUNITY — MOTOR-VEHICLE EXCEPTION — LOSS OF CONSORTIUM.

The motor-vehicle exception to governmental immunity does not waive immunity from a claim of loss of consortium (MCL 691.1405).

2. GOVERNMENTAL IMMUNITY — MOTOR-VEHICLE EXCEPTION — WRONGFUL-DEATH ACTIONS — LOSS OF CONSORTIUM.

The wrongful-death statute does not expand the waiver of immunity set forth in the motor-vehicle exception to governmental immunity to include liability for loss-of-consortium claims (MCL 600.2922[1], 691.1405).

3. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — GROSS NEGLIGENCE — LOSS OF CONSORTIUM.

A governmental employee whose gross negligence while acting in the course of employment causes personal injury may be liable for loss-of-consortium damages if the plaintiff can satisfy all the requirements set forth in the gross-negligence exception to the governmental immunity of employees (MCL 691.1407[2][c]).

Warba Law Offices, P.C. (by *Mark J. Warba*), for Daniel J. and Beverly Wesche.

Smith Haughey Rice & Roegge (by *William L. Henn*, *Charles F. Behler*, and *Thomas R. TerMaat*) for the Mecosta County Road Commission.

Petrucelli & Petrucelli, P.C. (by *Jonny L. Waara*), for Rebecca and Robert Kik.

Smith Haughey Rice & Roegge (by *William L. Henn* and *Mark P. Bickel*) for John-Christopher Sbraccia, Kinross Charter Township EMS, and Kinross Charter Township.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Mark E. Donnelly* and *Ann M. Sherman*, Assistant Attorneys General, for the Attorney General.

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Dullinger*) for Michigan Defense Trial Counsel.

Thomas A. Biscup for the Michigan Association for Justice.

CORRIGAN, J. We granted leave to appeal in these two cases to determine whether the motor-vehicle exception to governmental immunity, MCL 691.1405, authorizes a claim for loss of consortium against a governmental agency. The motor-vehicle exception permits recovery of damages only for "bodily injury" and "property damage." A loss of consortium is not a physical injury to the body. Moreover, a claim for loss of consortium is an independent, albeit derivative, cause of action. Therefore, the motor-vehicle exception does not waive immunity from such a claim.

In *Kik*, we also must determine whether the wrongful-death act, MCL 600.2922, permits a loss-of-consortium claim against a governmental agency. The availability of a wrongful-death action hinges on whether the injured party would have been entitled to

maintain an action and recover damages had a death not ensued. Because the motor-vehicle exception would not have permitted plaintiffs to pursue a loss-of-consortium claim if their daughter's death had not ensued, plaintiffs are also barred from pursuing such a claim in their wrongful-death action.

Finally, in *Kik*, we must also resolve whether a governmental employee is immune from liability for loss-of-consortium damages. We hold that a governmental employee is not immune if the plaintiff can satisfy all the requirements set forth in the gross-negligence exception to the governmental immunity of employees.

Accordingly, we affirm the judgment of the Court of Appeals in *Wesche*, affirm in part and reverse in part the judgment of the Court of Appeals in *Kik*, and remand both cases for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. *WESCHE*

Plaintiff Daniel Wesche was seated in his automobile at a red light when defendant Mecosta County Road Commission's vehicle, a Gradall hydraulic excavator,[1] rear-ended him. Plaintiffs alleged that the accident injured Daniel's cervical spine. Plaintiff Beverly Wesche, Daniel's wife, was not present at the accident scene and suffered no bodily injury. She claimed a loss of consortium as a result of Daniel's injury.[2]

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[1] The Court of Appeals held that defendant's Gradall is a motor vehicle for the purposes of MCL 691.1405. Defendant challenged this aspect of the Court of Appeals decision in a separate application for leave to appeal, which we denied. 477 Mich 1030 (2007). Thus, this issue is no longer before us.

[2] Specifically, Beverly alleged that she had "been damaged by being denied the normal marital companionship and services from the date of

The trial court granted summary disposition under MCR 2.116(C)(7) for defendant regarding Beverly's loss-of-consortium claim. The Court of Appeals affirmed, holding that the motor-vehicle exception does not waive governmental immunity from loss-of-consortium claims.[3] We granted plaintiffs' application for leave to appeal and directed that this case be argued and submitted with *Kik*.[4]

B. *KIK*

Plaintiff Rebecca Kik, who was pregnant, was being transported in an ambulance owned by defendant Kinross Charter Township and operated by defendant John-Christopher Sbraccia, a township employee. Sbraccia lost control of the ambulance, which overturned in a ditch. Rebecca suffered injuries and went into premature labor, delivering the baby, Sharon Kik, who allegedly died the same day.[5]

Rebecca and her husband, plaintiff Robert Kik, filed this action individually and as personal corepresentatives of Sharon's estate. Their complaint alleged: (1) Rebecca's personal-injury claim, (2) Robert's claim for loss of consortium arising from Rebecca's injuries, and

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Daniel's physical injuries up to the present, with their [sic] being a reasonable likelihood/probability that some element of same will be permanent."

[3] *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274; 705 NW2d 136 (2005).

[4] 478 Mich 860 (2007).

[5] The original Court of Appeals panel noted that the complaint was not entirely clear regarding whether Sharon was stillborn or born alive and thereafter died. Like the original Court of Appeals panel, we will assume for purposes of our analysis that Sharon was born alive, but our opinion should not be read as resolving that issue if a dispute on the subject arises below. See *Kik v Sbraccia*, 268 Mich App 690, 693 n 2; 708 NW2d 766 (2005) (*Kik I*), vacated in part 268 Mich App 801 (2005).

(3) a wrongful-death claim on behalf of Sharon's estate, including Robert and Rebecca's claims for loss of society and companionship.

Defendants moved for partial summary disposition under MCR 2.116(C)(7), arguing that they are immune from all claims other than for bodily injury and property damage. Kinross Charter Township and Kinross Charter Township EMS argued that (1) the motor-vehicle exception does not waive immunity from loss-of-consortium claims and (2) the limitations on the underlying motor-vehicle exception claim apply to the wrongful-death action. Sbraccia argued that he was immune because the governmental agency that employed him was immune. The trial court rejected defendants' arguments and denied the motion. The original Court of Appeals panel affirmed in part and reversed in part.[6] On Robert's loss-of-consortium claim based on Rebecca's injuries, the panel stated that it was bound by the decision in *Wesche* barring such a claim, but that it would have decided the issue differently if *Wesche* had not been controlling.[7] On the wrongful-death claim, the panel held that the wrongful-death act controlled the damages that could be recovered and that the claims for loss of society and companionship arising from the infant's death could proceed despite the language of the motor-vehicle exception. Finally, the panel held that MCL 691.1407(2)(c) permitted plaintiffs to pursue loss-of-consortium claims against Sbraccia if they could establish gross negligence.

A special panel of the Court of Appeals convened pursuant to MCR 7.215(J) to resolve the conflict be-

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[6] *Kik I*, *supra* at 711-712.

[7] The three-judge panel in *Kik I* was bound to follow *Wesche* because it was a prior published decision of the Court of Appeals issued on or after November 1, 1990, that had not been reversed or modified by this Court or by a special panel of the Court of Appeals. MCR 7.215(J)(1).

tween *Wesche* and the decision of the original panel in *Kik*.[8] The special panel's majority overruled *Wesche* and held that loss-of-consortium claims are permitted under the motor-vehicle exception. Three members of the special panel opined in dissent that the *Wesche* panel had correctly decided the issue.

Defendants applied for leave to appeal in this Court. We granted the application and directed that the case be argued and submitted with *Wesche*.[9]

II. STANDARD OF REVIEW

"This Court reviews de novo motions for summary disposition. Questions of statutory interpretation are questions of law that are also reviewed de novo by this Court." *Renny v Dep't of Transportation*, 478 Mich 490, 495; 734 NW2d 518 (2007). Our goal in interpreting a statute is to give effect to the Legislature's intent as reflected in the statutory language. *Id*. "When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005).

III. ANALYSIS

A. THE MOTOR-VEHICLE EXCEPTION DOES NOT WAIVE IMMUNITY FOR LOSS OF CONSORTIUM

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is en-

[8] *Kik v Sbraccia*, 272 Mich App 388; 726 NW2d 450 (2006) (*Kik II*).

[9] 478 Mich 861 (2007).

gaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This grant of immunity is subject to six statutory exceptions.[10]

These cases hinge on the proper interpretation of the motor-vehicle exception, MCL 691.1405, which provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

This language is clear: it imposes liability for "bodily injury" and "property damage" resulting from a governmental employee's negligent operation of a government-owned motor vehicle. The waiver of immunity is limited to two categories of damage: bodily injury and property damage.

Although the GTLA does not define "bodily injury," the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." *Random House Webster's College Dictionary* (2000). The word "injury" refers to "harm or damage done or sustained, [espe-

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

cially] bodily harm." *Id*. Thus, "bodily injury" simply means a physical or corporeal injury to the body. It is beyond dispute that a loss of consortium is not a physical injury to a body. "A claim for loss of consortium is simply one for loss of society and companionship." *Eide v Kelsey-Hayes Co*, 431 Mich 26, 29; 427 NW2d 488 (1988). Thus, because loss of consortium is a nonphysical injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity.

Moreover, loss of consortium is not merely an item of damages. Rather, this Court has long recognized that a claim for loss of consortium is an independent cause of action. *Id.*, at 29, citing *Montgomery v Stephan*, 359 Mich 33, 41; 101 NW2d 227 (1960), and Prosser & Keeton, Torts (5th ed), § 125, pp 931-934. Although a loss-of-consortium claim is derivative of the underlying bodily injury, it is nonetheless regarded as a separate cause of action and not merely an item of damages. *Eide*, *supra* at 37. The motor-vehicle exception does not waive immunity from this independent cause of action; the waiver of immunity is limited to claims for bodily injury and property damage.[11]

We reject the *Kik II* panel's conclusion that the motor-vehicle exception creates a threshold for liability that, once met, permits the recovery of damages for loss of consortium. MCL 691.1405 plainly states that governmental agencies "shall be liable for bodily injury and property damage" resulting from the negligent operation of a motor vehicle. It does not state or suggest that

[11] Justice KELLY asserts that our application of the statutory text will lead to absurd results, but we respectfully disagree, particularly in light of the independent nature of a loss-of-consortium claim. We simply are not convinced that the Legislature's decision to waive immunity only from bodily-injury and property-damage claims, but not for independent loss-of-consortium claims, is absurd.

governmental agencies are liable for *any* damages once a plaintiff makes a threshold showing of bodily injury or property damage.

Moreover, the Legislature knows how to create a statutory threshold when it wishes to do so. For example, Michigan's no-fault act provides: "A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement." MCL 500.3135(1). The no-fault act thus retains "tort liability for noneconomic loss" if one of the required categories of damage is established. By contrast, the motor-vehicle exception contains no such language. It merely provides that governmental agencies "shall be liable for bodily injury and property damage" and says nothing to suggest that a separate cause of action, such as one for loss of consortium, may be asserted once a threshold of "bodily injury" has been met.

The *Kik I* panel's reliance on *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982), was misplaced. In *Endykiewicz*, this Court found the language of the highway exception, MCL 691.1402(1), to be ambiguous and thus read it *broadly* to permit recovery for loss of companionship and society in a wrongful-death action. The *Endykiewicz* Court stated that the highway exception is "an *expansive* provision defining the liability of a governmental agency." *Id*. at 389 (emphasis added).

We reject the analysis in *Endykiewicz* because the statutory language at issue here is not ambiguous. As we have explained, the statutory text permits recovery of damages only for bodily injury and property damage, and loss of consortium does not fall within either of those categories.

For these reasons, we hold that a loss of consortium is not a "bodily injury" for which the motor-vehicle exception waives immunity. Because no statutory exception applies, the governmental agencies in these cases are entitled to governmental immunity on the plaintiffs' loss-of-consortium claims.[12]

B. THE WRONGFUL-DEATH ACT DOES NOT EXPAND THE WAIVER OF IMMUNITY

The wrongful-death act does not waive a governmental agency's immunity beyond the limits set forth in the underlying statutory exception. The three-judge panel in *Kik I* ruled that even if the motor-vehicle exception does not waive immunity, the wrongful-death act nonetheless allows a claim for loss of consortium. This conclusion contravenes both the language of the wrongful-death act and this Court's caselaw.

At the applicable time, MCL 600.2922(1) provided:

> Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and *the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages*, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages,

[12] Justice WEAVER concludes that the motor-vehicle exception to governmental immunity, MCL 691.1405, "does not expressly abrogate the right to claim damages for loss of consortium under Michigan's common law . . . ." *Post* at 96. However, she disregards MCL 691.1407(1), which states: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Because governmental agencies are immune from tort liability unless one of the statutory exceptions applies, and because the motor-vehicle exception applies only to liability for "bodily injury and property damage," governmental agencies are not liable for loss of consortium. Justice WEAVER's dissent entirely misapprehends the nature of the burden on a party seeking to avoid governmental immunity.

> notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony. [Emphasis added.]

Another provision of the wrongful-death act stated:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the *loss of the society and companionship* of the deceased. [MCL 600.2922(6) (emphasis added).]

The *Kik I* panel reasoned that even if the motor-vehicle exception does not waive immunity, the wrongful-death act expressly authorizes damages for loss of society and companionship. But that analysis fails to give effect to language in MCL 600.2922(1) making liability contingent on whether the party injured would have been entitled to maintain an action and recover damages if death had not ensued.

In *Kik*, the motor-vehicle exception would not have entitled plaintiffs to maintain an action and recover damages for loss of consortium if Sharon's death had not ensued. As discussed, the motor-vehicle exception does not waive immunity from loss of consortium because "bodily injury" does not encompass such claims. Thus, because plaintiffs would not have been entitled to pursue a loss-of-consortium claim if Sharon's death had not ensued, MCL 600.2922(1) does not authorize such a claim in this wrongful-death action.

Our textual analysis is supported by caselaw stating that the wrongful-death act is essentially a "filter" through which the underlying claim may proceed. In

Hardy v Maxheimer, 429 Mich 422, 439; 416 NW2d 299 (1987), this Court noted that the survival act, MCL 600.2921, provides: "All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to" the wrongful-death act. The *Hardy* Court explained:

> We, therefore, believe that since 1846 the law in Michigan has evolved to the point where it may now be held that the right to recovery for wrongful death "survives by law." *Consequently, a wrongful death action will no longer be regarded as one created at the time of death, but as one that "survives by law."* We believe this interpretation fosters the legislative purpose behind both our [MCL 600.5852] saving provision and the current wrongful death act, MCL 600.2922[.] [*Id.* at 440 (emphasis added).]

Because an underlying claim "survives by law" and must be prosecuted under the wrongful-death act, this Court has held that any statutory or common-law limitations on the underlying claim apply to a wrongful-death action. In *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), we held that the medical-malpractice cap on noneconomic damages applies in a wrongful-death action when the underlying claim is for medical malpractice. This Court explained:

> Clearly, the wrongful death act is not the only act that is pertinent in a wrongful death action. "The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act', [MCL 600.2922], does not change the character of such actions except to expand the elements of damage available." *Hawkins* [*v Regional Med Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982).] That is, a wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent. [*Id.* at 165-166.]

Although MCL 600.2922(6) sets forth the damages available in wrongful-death actions, we rejected the plaintiff's argument in *Jenkins* that the medical-malpractice noneconomic-damages cap does not apply to a wrongful-death action:

> Plaintiff argues that [MCL 600.2922(6)] governs damages in wrongful death claims, in such a manner that other provisions are rendered inapplicable. However, this Court has held that other statutory and common-law limitations on the amount of damages apply to wrongful death actions. For instance, comparative negligence principles and the collateral source setoff rule, MCL 600.6303(1), apply to wrongful death actions. *Solomon v Shuell*, 435 Mich 104; 457 NW2d 669 (1990); *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). [*Id.* at 171.]

Indeed, this Court has long held that a statutory or common-law limitation on the underlying claim applies to a wrongful-death action. In *Maiuri v Sinacola Constr Co*, 382 Mich 391; 170 NW2d 27 (1969), the plaintiffs' son was killed in the course of his employment. The plaintiffs filed a wrongful-death action against the employer. Quoting the language of MCL 600.2922(1), this Court explained: "As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries." *Id*. at 395. This Court concluded:

> Since the cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued, and since, in this case, the decedent would have been barred from an action for injuries resulting in death because of the exclusive remedy

> provisions of the workmen's compensation act, the trial court did not err in granting an accelerated judgment for the defendant. [*Id*. at 396.]

See also *Mehegan v Boyne City, G & A R Co*, 178 Mich 694; 141 NW 905 (1913) (holding that the decedent's execution of a release of liability barred his widow's recovery in a wrongful-death action).

The same reasoning applies in *Kik*. If Sharon had not died, the claims available under the motor-vehicle exception would have been limited to those for "bodily injury" and "property damage." Because a loss of consortium is not a "bodily injury," no such claim could have been pursued had her death not ensued. Thus, the limitation on damages in the motor-vehicle exception must apply in this wrongful-death action.

In reaching a contrary conclusion, the Court of Appeals in *Kik I* relied on *Endykiewicz*. But *Endykiewicz* reflects a repudiated understanding of the wrongful-death act. The *Endykiewicz* Court stated that a wrongful-death action "exists not as 'a cause of action which survives' the decedent, but as 'a new action * * * which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute.' " *Endykiewicz*, *supra* at 387 (citations omitted). In light of *Hardy* and *Jenkins*, however, it is now clear that the underlying claim survives by law and that the limitations in the underlying cause of action apply to the wrongful-death action. Because of this, we believe that *Hardy* silently overruled the analysis of the wrongful-death act in *Endykiewicz*. For this reason, we now explicitly hold that *Endykiewicz* is overruled to the extent that it is inconsistent with our decision.[13]

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[13] Our decision to overrule *Endykiewicz* is warranted under the doctrine of stare decisis, as set forth in *Robinson*, *supra* at 463-464. *Endykiewicz* was incorrectly decided because it erroneously treated a

Accordingly, we hold that the wrongful-death act does not expand the waiver of immunity set forth in the motor-vehicle exception to include loss-of-consortium claims.

C. MCL 691.1407(2)(c) DOES NOT SHIELD GOVERNMENTAL EMPLOYEES FROM LOSS-OF-CONSORTIUM CLAIMS

Finally, we agree with the *Kik I* panel that governmental employees are not immune from loss-of-consortium claims if the requirements of MCL 691.1407(2)(c) are met. Because he is a governmental employee, Sbraccia's liability is premised not on the motor-vehicle exception, but on MCL 691.1407(2)(c). That provision states that a governmental employee is immune from tort liability if his "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Unlike the motor-vehicle exception for governmental agencies, the gross-negligence exception for employees does not limit the waiver of immunity to cases of bodily injury or property damage.

Defendants argue that an employee cannot be subject to liability if the governmental agency itself is immune. But this argument has no basis in the text of the GTLA. The Legislature has prescribed different standards for determining whether immunity is afforded to governmental agencies and employees. It therefore follows that the extent of their respective immunities may not always be coextensive. As the *Kik I* panel explained:

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wrongful-death claim as a "new" cause of action rather than a continuation of the decedent's underlying claim. *Endykiewicz*, *supra* at 387. Moreover, overruling *Endykiewicz* will not lead to practical real-world dislocations. On the contrary, adhering to a decision that contravenes well-settled principles of our jurisprudence would undermine the interest in a stable and predictable body of law, as demonstrated by the *Kik I* panel's error in relying on *Endykiewicz*.

> The Legislature chose to use different standards to determine the immunity of the governmental entities and the governmental employee. Such a choice may have the effect in certain cases that the employee may not be immune when the governmental employer is immune. The Legislature could have avoided such a situation by providing in MCL 691.1407(2) that an individual employee is immune whenever the governmental entity is immune, but it did not. Whether it makes sense to hold the individual employee liable in a situation in which the governmental entity itself is immune is a question to be addressed by the Legislature, not this Court. The Legislature presumably had a reason to treat governmental employees and governmental entities differently, and it would be presumptuous of us to void that legislative determination. [*Kik I*, *supra* at 697.]

The *Kik I* panel's analysis of this issue is sound. Because MCL 691.1407(2)(c) does not limit its waiver of immunity to bodily injury and property damage, we reject defendants' argument on this issue.[14]

IV. CONCLUSION

For these reasons, we hold that loss of consortium is not a bodily injury for which governmental immunity is waived under the motor-vehicle exception. Moreover, the wrongful-death act does not authorize a loss-of-consortium claim when a plaintiff would not have been entitled to seek damages for that claim under the motor-vehicle exception if a death had not ensued. Finally, MCL 691.1407(2) does not shield governmental employees from liability for loss-of-consortium damages.

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[14] We do not address whether Sbraccia is entitled to summary disposition on other grounds, e.g., that plaintiffs have failed to establish that Sbraccia acted with gross negligence as defined in the applicable version of MCL 691.1407(2)(c) or that his gross negligence was "the proximate cause" of the injuries or death under the standard set forth in *Robinson*. Those issues are not before us.

Accordingly, we affirm the judgment of the Court of Appeals in *Wesche*, affirm in part and reverse in part the judgment of the Court of Appeals in *Kik*, and remand both cases to the trial courts for further proceedings not inconsistent with this opinion.

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

WEAVER, J. (*concurring in part and dissenting in part*). I concur only in the decision by the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) that, in a negligence action against a governmental employee, the immunity available to governmental employees under the motor-vehicle exception is not available to a governmental employee who was grossly negligent and that a plaintiff can seek recovery for loss-of-consortium damages.

I dissent from the majority of four's decision that the motor-vehicle exception to governmental immunity, MCL 691.1405, prohibits a claim for loss of consortium against a governmental agency. Because the statute does not bar a claim for loss of consortium as long as the plaintiff seeking damages for loss of consortium can show that the injured party sustained some legally cognizable harm or injury, I would hold that such damages may be awarded, and I dissent from that part of the majority opinion that holds otherwise.

Because the right of a plaintiff who was not physically injured to recover from a tortfeasor for loss of consortium as a result of injuries sustained by the injured plaintiff is well established in Michigan's common law, I dissent from the majority of four's decision that loss-of-consortium damages are not available in a claim brought under the motor-vehicle exception to governmental immunity.

A claim for loss of consortium is a separate legal claim for damages suffered not by the injured party, but by a spouse, parent, or child who claims damages for the loss of the injured party's society and companionship. It is a derivative claim in that it does not arise at all unless the injured party has sustained some legally cognizable harm or injury. The right of a person to recover from a tortfeasor for loss of consortium as a result of injuries sustained by his or her spouse is well established in Michigan's common law.[1]

A statute that expressly extinguishes a right established at common law is a proper exercise of legislative power; however, a statute in derogation of the common law must be strictly construed.[2] Importantly, such a statute will not be extended by implication to abrogate an established rule of common law.[3]

The motor-vehicle exception to governmental immunity, MCL 691.1405, provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

The statute does not define "bodily injury," nor does it expressly state that a plaintiff who was not physically injured may not recover derivative damages for loss of consortium. The majority mistakenly alleges, *ante* at 87 n 12, my supposed disregard of MCL 691.1407(1), which states: "*Except as otherwise provided in this act*, a

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[1] *Rusinek v Schultz, Snyder & Steele Lumber Co,* 411 Mich 502, 504; 309 NW2d 163 (1981).

[2] *Id.* at 507-508.

[3] *Id.* at 508.

governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." (Emphasis added.)

There is no such disregard. As indicated by the language emphasized in the statute, it appears that it is in fact the majority that "misapprehends" the statute, because MCL 691.1405 *is one of the exceptions to governmental immunity*. MCL 691.1405 explicitly states that governmental agencies "*shall be liable for bodily injury* and property damage arising from the negligent operation" of a governmental vehicle. Thus, as long as the physically injured party can establish a legally cognizable claim for bodily injury, a plaintiff is entitled to recovery for all damages flowing from that injury, *including damages for loss of consortium*. Evidently, the majority does not understand the actual and inseparable connection between "bodily injury" and the damages that flow from that injury. The governmental agency is liable for damages that flow from bodily injury, including loss-of-consortium damages, which flow from bodily injury just as damages for medical expenses and lost wages also flow from a bodily injury.

Because the statute does not expressly abrogate the right to claim damages for loss of consortium under Michigan's common law, the majority of four errs in abolishing this right by implication. The majority of four does so by creatively implying such a prohibition in its own definition of "bodily injury." There is nothing in the language of the statute justifying the majority of four's creative construction, and the majority's decision to construe the language of the statute in this manner is another example of the majority of four's judicial activism by unrestrained statutory interpretation.

CAVANAGH, J., concurred with WEAVER, J.

KELLY, J. (*concurring in part and dissenting in part*). These two cases require us to decide two issues. The first concerns the spouse or parent of an individual who sustains bodily injury in a motor vehicle collision. The issue is whether that person can recover damages from a governmental agency for loss of consortium under the motor vehicle exception to governmental immunity.[1] The majority decides that a person cannot recover these damages. I disagree. When a loss of consortium claim arises directly out of bodily injury suffered in a collision, I would hold that such damages are recoverable. Accordingly, I dissent from the part of the majority opinion that holds to the contrary.

The other issue is whether a claim for loss of consortium can be asserted against a governmental employee. The majority decides that the employee is liable for such damages "if the plaintiff can satisfy all the requirements set forth in the gross-negligence exception to the governmental immunity of employees."[2] Because I agree that governmental employees can be held liable for loss of consortium, I concur in the result reached in that part of the majority opinion.

FACTS

WESCHE v MECOSTA COUNTY ROAD COMMISSION[3]

Plaintiff Daniel Wesche stopped his vehicle at a red light. He was then struck from behind by a Gradall hydraulic excavator owned by defendant Mecosta

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[1] MCL 691.1405.

[2] *Ante* at 80.

[3] *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274; 705 NW2d 136 (2005).

County Road Commission. As a result of the collision, he suffered injury to his spine. Plaintiff Beverly Wesche, Daniel's wife, was not present when the incident occurred.

Plaintiffs brought suit against defendant, asserting numerous causes of action. Among their claims was one brought by Beverly for loss of consortium. Defendant moved for summary disposition on this claim. The trial court granted the motion, concluding that the claim was barred by governmental immunity. In a published opinion, the Court of Appeals affirmed the decision.

KIK v SBRACCIA[4]

A pregnant Rebecca Kik was being transported in an ambulance owned by defendant Kinross Charter Township. Defendant John-Christopher Sbraccia, an employee of defendant Kinross Charter Township Emergency Medical Services, was driving the ambulance. He lost control of it and overturned in a ditch. As a result of the crash, Rebecca sustained numerous injuries. She also went into premature labor, causing her to deliver her daughter, Sharon Kik. Sharon died the same day.

Plaintiffs Rebecca and Robert Kik, who is Rebecca's husband and Sharon's father, brought suit against the township, the emergency medical service, and Sbraccia. Included among the causes of action were claims for loss of consortium. One was filed on behalf of Robert seeking damages for the injuries suffered by his wife. And one was filed on behalf of Robert and Rebecca because of the death of their daughter.

Defendants moved for summary disposition, claiming that governmental immunity barred the loss of consortium claims. The trial court denied the motion. The

[4] *Kik v Sbraccia*, 268 Mich App 690; 708 NW2d 766 (2005) (*Kik I*).

Court of Appeals reversed with respect to the denial of summary disposition for the governmental agencies on Robert's loss of consortium claim arising out of the injuries suffered by his wife. The Court determined regarding this claim that it was bound by its prior decision in *Wesche* and had to reverse the denial of summary disposition to the governmental agencies.[5] But the panel also concluded that *Wesche* had been incorrectly decided and declared that it would have decided the issue differently were it not for *Wesche*.[6] The panel reasoned that *Wesche* had confused the concepts of liability and damages.[7] It concluded that the *Wesche* panel had erred because, once a plaintiff has shown bodily injury, liability is established and the plaintiff may recover whatever damages arise from the bodily injury.[8] And it would have found that loss of consortium is one such damage.[9]

After the *Kik I* panel determined that *Wesche* had been incorrectly decided, a special panel of the Court of Appeals was convened. A majority of the special panel concluded that *Wesche* had been incorrectly decided and overruled it.[10] In *Kik II,* the majority expressly adopted the *Kik I* panel's reasoning as its own.[11]

ANALYSIS

After the special panel issued its decision in *Kik II*, we granted leave to appeal in both *Kik* and *Wesche* and

[5] *Id.* at 711-712.

[6] *Id.* at 711.

[7] *Id.* at 709.

[8] *Id.* at 710.

[9] *Id.*

[10] *Kik v Sbraccia*, 272 Mich App 388, 391; 726 NW2d 450 (2006) (*Kik II*).

[11] *Id.*

directed that the two cases be argued together.[12] Now, the Court decides that loss of consortium is unavailable to the spouse or parent of an individual injured in a collision under the motor vehicle exception to government immunity. The majority also decides that a governmental employee whose gross negligence causes bodily injury is subject to personal liability for loss of consortium. I agree with the second decision, but I part company with the majority on the first.

The motor vehicle exception to governmental immunity provides: "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ."[13]

Contrary to the majority decision, this exception does not state that plaintiffs can recover damages only for bodily injury or property damage.[14] Instead, the exception provides that governmental agencies are "liable for bodily injury and property damage." Importantly, the statute speaks of liability, but it says nothing about damages. In *Kik I*, the Court of Appeals correctly recognized this point and aptly summarized its effect:

> [The motor vehicle exception] concerns the issue of liability and describes one of the conditions for which the government does not enjoy immunity: when the negligent operation of a motor vehicle owned by a governmental agency causes bodily injury or property damage. The statute does not limit or otherwise establish the types of damages that are recoverable from the government when

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[12] *Wesche v Mecosta Co Rd Comm*, 478 Mich 860 (2007); *Kik v Sbraccia*, 478 Mich 861 (2007).

[13] MCL 691.1405.

[14] This Court reviews issues of statutory interpretation de novo. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007).

> liability is established. For that matter, the statute does not address, in either terms of inclusion or exclusion, who may recover damages arising from such bodily injury. In other words, the appropriate reading of MCL 691.1405 is that the government is not immune from suit when the negligent operation of a government-owned motor vehicle results in bodily injury. Once such liability is established, the statute is silent regarding damages, meaning that the plaintiff may recover whatever damages arise from the bodily injury.[15]

Accordingly, under a proper interpretation of the motor vehicle exception, plaintiffs establish liability by showing that the negligent operation of a government-owned motor vehicle resulted in bodily injury. But once that liability has been established, plaintiffs can recover all damages that arise from the bodily injury. "Had the Legislature intended to prohibit the recovery of consequential or incidental damages which arise directly from the infliction of injury to person or property at the hands of the government, it would have affirmatively done so in specific language . . . ."[16]

Loss of consortium damages derive from "some other legally cognizable harm suffered by the individual whose consortium the plaintiff has lost as a result of that harm."[17] Michigan law has long allowed recovery of these damages for injuries to a spouse.[18] And the

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[15] *Kik I*, 268 Mich App at 709-710.

[16] *Endykiewicz v State Hwy Comm*, 414 Mich 377, 389; 324 NW2d 755 (1982). In *Endykiewicz,* a unanimous Court suggested that the exceptions to governmental immunity should be construed expansively in order to accomplish the legislative purpose of "provid[ing] an opportunity to obtain redress from the responsible governmental agency for those injured as a result of the negligence of the government . . . ." *Id.* at 388-389. This appears to me to be the appropriate rule when interpreting an exception to governmental immunity.

[17] 31 Michigan Law & Practice (2d ed), Torts, § 72, p 179.

[18] See *Montgomery v Stephan*, 359 Mich 33, 49; 101 NW2d 227 (1960).

wrongful death act allows parents to bring a claim for loss of companionship based on the death of their child.[19]

In these cases, the "other legally cognizable harm" from which plaintiffs' loss of consortium claims derive is the bodily injury suffered by the spouse or child in the motor vehicle collision. In *Wesche*, plaintiff Beverly Wesche's loss of consortium claim arose from the injuries suffered by her husband in the motor vehicle collision. In *Kik*, plaintiff Robert Kik's loss of consortium claims are based on the injuries to his wife and the death of his child, both of which were caused by the motor vehicle collision. And plaintiff Rebecca Kik's claim is based on the death of her child. Accordingly, each plaintiff can recover loss of consortium damages because the damages arose directly from the bodily injury suffered in a motor vehicle collision.

The correctness of finding that the motor vehicle exception allows recovery for loss of consortium is confirmed when one examines the motor vehicle exception in light of the highway defects exception. In relevant part, the highway defects exception provides:

> A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.[20]

This exception expressly limits recovery to the "person who sustains bodily injury or damage to his or her property." The Legislature used express limiting language in this exception, but did not use such language

[19] MCL 600.2922(6).

[20] MCL 691.1402(1).

in the motor vehicle exception. This is strong evidence that the Legislature did not intend to limit recovery under the motor vehicle exception to the individual who actually suffered bodily injury.[21]

Furthermore, the majority's interpretation of the exception will lead to absurd results. The damages recoverable for loss of consortium, like those for emotional distress and lost wages, can derive from the bodily injury suffered, as in this case, in a motor vehicle collision. Did the Legislature intend to single out loss of consortium damages, of all the damages recoverable for bodily injury from a collision, as excluded from the remedy that the statute confers? Absent any reason to believe that the Legislature intended such a result, this absurd interpretation must be rejected.[22]

CONCLUSION

I believe that the majority errs by deciding that loss of consortium damages cannot be recovered under the motor vehicle exception to governmental immunity. The exception establishes only a threshold for liability and does not limit the type of damages that may be recovered once liability is established. For that reason, I

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[21] It could be argued that the difference in the language used in the highway defects exception and the motor vehicle exception can be explained by this fact: The highway defects exception has been amended twice, whereas the motor vehicle exception has never been amended. However, this fact does not explain the difference in language, since each version of the highway defects exception has included language strictly limiting recovery to the person suffering bodily injury.

[22] See *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998); see also *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 78-79; 718 NW2d 784 (2006) (MARKMAN, J., concurring); *id*. at 103 n 12 (CAVANAGH, J., dissenting); *id*. at 104 n 1 (WEAVER, J., dissenting); *id.* at 109-130 (KELLY, J., dissenting).

would hold that loss of consortium damages can be recovered in these two cases.

CAVANAGH, J., concurred with KELLY, J.

LATHAM v BARTON MALOW COMPANY

Docket No. 132946. Decided April 14, 2008.

Douglas Latham, an employee of a subcontractor for a building project, brought an action in the Oakland Circuit Court against Barton Malow Company, the construction manager for the project, alleging negligent performance of a contract and negligence under the common-work-area doctrine after he fell from a height while moving drywall sheets without a fall-protection device. The court, Michael Warren, J., dismissed the negligent-performance count, but denied the defendant's motion for summary disposition on the common-work-area claim, concluding that questions of material fact existed regarding the number of workers using the area where the plaintiff fell. The Court of Appeals, FITZGERALD, P.J., and MARKEY and TALBOT, JJ., affirmed in an unpublished opinion per curiam, issued October 17, 2006 (Docket No. 264243). The defendant applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 477 Mich 1118 (2007).

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

The danger for which a duty attaches under the common-work-area doctrine is an avoidable danger to which a significant number of workers are exposed. The lower courts erred in ascertaining the relevant danger in this case, requiring a remand for further proceedings.

1. The elements of a claim for negligence under the common-work-area doctrine are that (1) a defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. The doctrine is an exception to the rule that, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee and that a construction worker's immediate employer is responsible for the worker's job safety.

2. The defendant was the general contractor in this case. The lower courts erred, however, by concluding that the elevated mezzanine on which the plaintiff worked, which at the time of the injury was necessarily without perimeter protection because the plaintiff was moving drywall onto it, itself created a high degree of risk to a significant number of workers. Working at heights is generally an unavoidable condition of construction work and cannot, by itself, be the sort of avoidable danger described in the elements of the common-work-area doctrine as set forth in *Funk v Gen Motors Corp*, 392 Mich 91 (1974). The proper danger to focus on in this case was working at dangerous heights without any protection from falls, and the proper analysis concerned whether a significant number of workers were exposed to this avoidable risk.

Reversed and remanded to the trial court for further proceedings.

Justice KELLY, joined by Justice CAVANAGH, dissenting, disagreed with the majority's definition of the danger presented in this case. In reaching its conclusion, the majority assumed that personal fall protection was the only reasonable way to avoid the danger of falling in this case and essentially presumed that the general contractor took reasonable steps to protect the workers from that danger by requiring the use of safety equipment and procedures. The majority's resolution of the issue will thus distort the law of negligence by making an injured worker's failure to wear a fall-protection device dispositive under the common-work-area doctrine. The majority also misread *Funk*, which involved a general contractor's failure to take reasonable steps to protect construction personnel who worked at dangerous elevations. *Funk* identified several reasonable steps the contractor could have taken. It did not reach the conclusion that personal fall protection is the only way to guard against the risk of falling, and it did not redefine the danger posed by working at heights as the danger of confronting heights without personal fall protection. Even assuming that the plaintiff could have used a personal fall-protection device, questions of material fact exist concerning whether the defendant took reasonable steps within its supervisory authority to require the use of that device and whether the defendant's construction supervisor should have been expected to enforce the defendant's safety policy by inquiring about the safety protection available. The judgments of the lower courts should be affirmed, and the case should be remanded to the trial court for further proceedings.

Jon R. Garrett, P.C. (by *Jon R. Garrett*), and *Gross, Nemeth & Silverman, P.L.C.* (by *Steven G. Silverman*), for the plaintiff.

Cardelli, Lanfear & Buikema, P.C. (by *Anthony F. Caffrey, III*), for the defendant.

TAYLOR, C.J. In this case, we analyze what comprises the element of "readily observable and avoidable dangers" in a lawsuit involving a "common work area" of a construction site. In *Funk v Gen Motors Corp*,[1] this Court established the common-work-area doctrine, which by its elements is not a strict-liability tort but is instead one that imposes liability only if the general contractor itself fails to prevent negligence.[2] Thus, the danger cannot be just the unavoidable, perilous nature of the site itself. Rather, the danger for which a duty attaches is an avoidable danger to which a significant number of workers are exposed, such as—in *Funk* and this case—failure to have fall-protection devices to protect workers from falling from a height on the project. The lower courts erred in ascertaining the relevant danger, basing their analyses on the conclusion that an elevated mezzanine, which at the time of the injury was necessarily without perimeter protection, itself created a high degree of risk to a significant number of workers. Instead, the proper danger to focus on was *working at dangerous heights without any protection from falls*, and the proper analysis concerned whether a significant number of workers were exposed to this avoidable risk.

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[1] *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29 (1982).

[2] *Funk*, supra at 108.

Because both lower courts misapprehended the appropriate danger to examine and decided the case on that erroneous basis, they also erred on the issue whether a significant number of workers would be exposed to the relevant peril. With the appropriate danger clarified, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I

Plaintiff was a carpenter employed by B & H Construction to work on the construction of a new school building. Defendant Barton Malow Company was the construction manager on the project.[3] On the day of plaintiff's injury, plaintiff and a coworker were moving sheets of drywall from a scissors lift to the mezzanine level of the project. They raised the lift to the height of the mezzanine and removed the cable barrier around the perimeter of the mezzanine, an action required to allow ingress. When they began carrying the first sheet of drywall from the lift to the mezzanine, plaintiff was not wearing a fall-protection harness, contrary to jobsite rules of which he was aware. As plaintiff was moving onto the mezzanine, the sheet of drywall cracked and plaintiff lost his balance, falling 13 to 17 feet to the floor. He was injured, but undisputedly would not have been had he been wearing the required protective harness.

Plaintiff sued defendant for negligent performance of a contract[4] and negligence under the common-work-area doctrine, under which a general contractor may be

[3] For purposes of its summary disposition motion, defendant conceded that it served as general contractor for the project. Accordingly, the trial court made no decision regarding that issue.

[4] This claim was dismissed by the trial court and is not at issue here.

held liable for injuries caused by dangers in common work areas. The elements of such a claim are: (1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area.[5] Plaintiff asserted that defendant had failed to ensure that plaintiff would use proper fall protection while working on the lift and the mezzanine, despite knowing that such protection was necessary when the perimeter cable was lowered.

Because numerous other workers from other trades would be required to use the lift to access the mezzanine and lower the cable to enter the mezzanine, plaintiff argued that the situation created a high degree of risk to a significant number of workers.

Defendant moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), arguing that plaintiff had not shown the existence of a high degree of risk to a significant number of workers because the area was not accessible to a significant number of workers at the time of the accident and because plaintiff's individual failure to use fall protection did not create a high degree of risk to a significant number of workers. Defendant also argued that because plaintiff's own employer was contractually responsible for its workers' observing proper safety procedures, plaintiff had not shown that defendant failed to act reasonably.

The trial court denied defendant's motion for summary disposition, concluding that plaintiff had sufficiently created a question of material fact regarding the number of workers using the area. The court did not

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[5] *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004); *Funk, supra* at 104.

discuss the nature of the danger or whether there existed a high degree of risk. The trial court determined that no dispute existed regarding whether a fall was readily avoidable if personal fall protection had been used and that defendant's safety supervisor knew this.[6] While acknowledging that defendant had presented a serious challenge to plaintiff's allegation of unreasonable action, the court held that this was properly a question for the jury.

The Court of Appeals affirmed.[7] It agreed with the trial court that "plaintiff faced the danger of working on an elevated platform that did not have any permanent perimeter protection to protect him from falling while loading materials onto the mezzanine."[8] It said that the trial court properly focused on the mezzanine's lack of perimeter protection, not plaintiff's failure to use personal fall protection, even though the Court acknowledged that such protection would have prevented plaintiff's injuries. The Court determined that a significant number of workers from other trades would be exposed to the same hazard of having to use the unprotected mezzanine opening when entering and leaving the lift and disagreed with defendant that the number of workers present at the specific time of the injury was relevant.[9] The Court concluded that defendant had supervisory and controlling authority over the jobsite and that the mezzanine was a common work area.[10] The

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[6] Notably, in its discussion of plaintiff's active-negligence claim, the trial court observed that "[p]laintiff had tools of the trade available to protect himself and [sic] which should have been provided by his employer, or which he should have been trained to use by his employer."

[7] *Latham v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2006 (Docket No. 264243).

[8] *Id.* at 3.

[9] *Id.*

[10] *Id.* at 4. Because defendant had conceded for purposes of the motion hearing that the mezzanine was a common work area, the trial court made no finding on the issue.

Court held that the four elements of the common-work-area doctrine were met because a question of material fact existed regarding whether defendant took reasonable steps to guard against the danger.

Defendant applied for leave to appeal, and we ordered oral argument on whether to grant the application or take other action, directing the parties to address (1) whether the proofs presented in the trial court were sufficient to satisfy the standard for general contractor liability set forth in *Ormsby v Capital Welding, Inc*[11] and (2) whether defendant's motion for summary disposition should have been granted.[12]

II

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition.[13] We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.[14] 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.[15]

III

In *Funk*, this Court, exercising its common-law authority, expanded the duties of those ultimately in control of a construction project worksite (most often

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[11] *Ormsby,* n 5 *supra*.

[12] *Latham v Barton Malow Co*, 477 Mich 1118 (2007).

[13] *Ormbsy, supra* at 52.

[14] *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

[15] *Id.*

the general contractor) by creating the common-work-area doctrine. This doctrine was described as follows:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.[16]

The doctrine is understood as an exception to the general rule that, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee[17] and that the immediate employer of a construction worker is responsible for the worker's job safety.[18]

Essentially, the rationale behind the *Funk* doctrine is that the law should be such as to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees. This Court explored the history of the doctrine in depth in *Ghaffari v Turner Constr Co*,[19] in which we observed that " 'in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors.' "[20] Subcontractors and their employees, even if they are aware of hazards, may be unable to rectify the situation themselves or to compel others to do so.[21] In cases in which normal safety precautions can reduce a hazardous con-

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[16] *Funk*, *supra* at 104.

[17] *Ormsby, supra* at 53.

[18] *Funk, supra* at 102.

[19] *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005).

[20] *Id*. at 20, quoting *Funk, supra* at 104.

[21] *Funk, supra* at 104.

dition so that it no longer creates a high degree of risk to workers, the general contractor's duty is to take reasonable steps to ensure that those safety precautions are taken.[22] In such cases, in order to state a cause of action against a general contractor under the common-work-area doctrine, the plaintiff must show that the general contractor's failure to reasonably ensure that workers were observing safety procedures resulted in a significant number of workers being exposed to a high degree of risk in a common work area.

The fundamental question presented in this case, in which the general contractor was in control of the worksite, is: What was the danger creating a high degree of risk that is the focus of the general contractor's responsibility? *Funk* itself provides assistance in answering this question. There, this Court analyzed a similar common-work-area fall. In *Funk*, as here, the plaintiff would not have been injured had he worn a fall-protection device or had netting been provided. This Court agreed with the *Funk* plaintiff that the defendants had

> exposed him to avoidable injury by allowing subcontractors to order the men to work at dangerous heights without any protection from falls in a job environment in which laborers were expected to complete their assigned tasks without regard to the absence of safety equipment guarding against injury in the event of a mishap.[23]

The Court in *Funk* was clear that the danger at issue was not the height itself, but the fact that the men were required to work "at dangerous heights *without any protection from falls*." To hold that the unavoidable height *itself* was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict

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[22] *Ormsby, supra* at 54, quoting *Funk, supra* at 106-107.

[23] *Funk, supra* at 100.

liability for any injury resulting from a fall from an elevated common work area. This has never been the law. Moreover, because working at heights is generally an *unavoidable* condition of construction work, it cannot, by itself, be the avoidable danger *Funk* described. Hazards, including dangerous heights, are commonplace in construction worksites. In some situations, a general contractor may be able to remove a particular hazard, but general contractors simply cannot remove all potential hazards from a construction workplace. If a hazard cannot be removed, the general contractor can take reasonable steps to require workers to use safety equipment and procedures, thereby largely reducing or eliminating the risk of harm in many situations.

Accordingly, in this case, as in *Funk*, the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment*. It is this danger to which a significant number of workers must be exposed in order for a claim to exist.[24]

IV

With the relevant danger correctly perceived, the error of the lower courts' analyses becomes apparent.

[24] The dissent's formulation of the common-work-area doctrine is hard to understand. As we grasp it, its central failing is that the dissent does not concede that *Funk* applies only to avoidable dangers. Heights on construction projects, we conclude, as did the *Funk* Court, are not avoidable. Thus, heights are not by themselves hazards addressed by *Funk*. We have never said what fall-protection gear is needed at heights. The question is whether fall protection was available and whether the general contractor took reasonable steps to see that it was used. The dissent appears to assert that the issue is, however, one of strict liability for the general contractor, not an issue of taking reasonable steps. In short, under the dissent's analysis, *Funk* would be not a negligence rule, as it was designed to be, but would instead be a strict-liability rule.

While defendant's motion for summary disposition identified the correct danger and further raised the issue that plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers, the trial court and the Court of Appeals erred by misidentifying the danger and inevitably erred in the subsequent analysis regarding how many other workers were exposed to the risk.[25] We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

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

KELLY, J. (*dissenting*). With its opinion in this case, the majority injects further confusion into the area of negligence law. It does so by defining the danger that was present in this case as "working at heights without fall-protection equipment."[1] This definition conflates the questions posed by the first two elements of the common-work-area doctrine: (1) whether the defendant contractor took reasonable steps within its supervisory and coordinating authority and (2) whether the danger was readily observable and avoidable.[2]

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[25] Although we focus here on only one of the common-work-area elements, we note that plaintiff must satisfy all the elements that give rise to a duty owed by a general contractor. *Funk* also requires plaintiff to show that the failure of a significant number of workers to take safety precautions was readily observable and that the failure was avoidable. Finally, the plaintiff must, of course, also show that the defendant failed to take reasonable steps to ensure compliance and that the danger existed in a common work area.

[1] *Ante* at 114.

[2] In *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004), the Court listed the four elements of the common-work-area doctrine: (1) the general contractor failed to take reasonable steps within

The majority quotes with approval defendant's argument that "plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers . . . ."[3] This presumes, without explanation, that wearing personal fall protection was the only reasonable way to avoid the danger of falling from the mezzanine. The majority makes the injured worker's failure to wear personal fall protection dispositive under the common-work-area doctrine. It does so even though, under our system of comparative negligence, a worker's negligence is separate from the negligence of the general contractor.[4]

The majority's resolution of this case may cause unexpected undesirable repercussions in future negligence cases. This is because it divides the question whether reasonable measures were taken to protect against a foreseeable risk into (1) whether a risk existed in the first place and (2) whether plaintiff failed to protect himself against it. The Court should avoid distorting the law of negligence in this fashion.

I

As a rule, general contractors are not liable for the negligence of independent subcontractors and the subcontractors' employees.[5] In *Funk v Gen Motors Corp*,[6]

its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area.

[3] *Ante* at 115.

[4] In *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29, 39; 323 NW2d 270 (1982), the Court held that a general contractor could not avoid liability " 'by pointing to the concurrent negligence of the injured worker . . . .' " (Citation omitted.)

[5] *Ormsby*, 471 Mich at 53.

[6] *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy*.

the Court set forth the common-work-area exception to this rule. The majority bases its rationale on a passage from *Funk* in which the Court summarized the *Funk* plaintiff's argument that the defendants had

> exposed him to avoidable injury by allowing subcontractors to order the men to work at dangerous heights without any protection from falls in a job environment in which laborers were expected to complete their assigned tasks without regard to the absence of safety equipment guarding against injury in the event of a mishap.[7]

Using this passage, the majority concludes:

> The Court in *Funk* was clear that the danger at issue was not the height itself, but the fact that the men were required to work "at dangerous heights without any protection from falls." To hold that the unavoidable height itself was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law. Moreover, because working at heights is generally an unavoidable condition of work, it cannot, by itself, be the avoidable danger *Funk* described. Hazards, including dangerous heights, are commonplace in construction worksites.[8]

The majority misreads the passage from *Funk* in several respects. First, the Court in *Funk* specifically referred to the heights as "dangerous heights." To say that elevations that create a foreseeable injury from falling are not inherently dangerous defies common sense. If such elevations were not inherently dangerous, there would be no duty to protect the people who work there.

Second, according to *Funk*, while dangerous heights on construction projects may be unavoidable, injury from a fall is avoidable if reasonable measures are taken

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[7] *Id.* at 100.

[8] *Ante* at 113-114 (emphasis deleted).

to prevent it. *Funk* recognized that reasonable measures can be taken to prevent injuries from falls. That recognition places the common-work-area doctrine in the negligence regime rather than the strict-liability regime.[9]

The passage on which the majority relies faulted the general contractor for *allowing* subcontractors to send their men to elevated locations "without *any* protection from falls" and in "*the absence of safety equipment* guarding against injury in the event of a mishap."[10] The passage essentially shows that the general contractor did not take reasonable steps to protect those who worked at elevations. The various reasonable steps identified in *Funk* were to make provisions for "suspending nets, scaffolding, bucket cranes, safety belts or har-

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[9] In her dissent in *Funk*, Justice COLEMAN reviewed Michigan law on inherently dangerous activities and came to the following conclusion:

> The Michigan cases are uniform in holding that generally an employer is not liable for the torts of an independent contractor. An exception has been developed for activities or tasks which reasonably can be foreseen as dangerous to third parties, with a few cases extending the exception to employees. These activities include those dangerous despite use of all reasonable care and those dangerous unless reasonable care is exercised . . . . It is clear that this doctrine imposes a form of strict liability upon the owner or employer of the independent contractor. However, such liability is not absolute. [*Funk*, 392 Mich at 135 (COLEMAN, J. dissenting).]

Justice COLEMAN correctly recognized that some dangerous activities cannot be made safe, whereas others can be if reasonable care is exercised. She incorrectly concluded, however, that either type of danger exposes a general contractor to strict liability. The majority in *Funk* held that working on elevations at construction sites can be made safe through reasonable precautions. In recognizing the various reasonable precautions that could be taken, the majority imposed on a general contractor a duty of reasonable care rather than an absolute duty to make safe.

In *Ormsby*, 471 Mich at 56, the Court noted that the common-work-area doctrine had not resulted in the imposition of strict liability on general contractors, despite Justice COLEMAN's prediction.

[10] *Funk*, 392 Mich at 100 (emphasis added).

6-foot-long safety cable blocking the opening onto the mezzanine had to be eased in order for them to bring up the drywall. With the safety cable lowered, a three-foot wide open space was left unprotected. On their first run, plaintiff's coworker stepped from the scissor lift onto the mezzanine holding one end of a sheet of drywall. Plaintiff came behind him. When plaintiff stepped onto the mezzanine, he lost his balance. The drywall that he was holding broke, and he fell through the unprotected space to the level below.

There should be no dispute that the mezzanine was dangerously high, given that as it was 12 to 17 feet above the lower level. Because it was more than 6 feet high, fall protection was required for the workers' safety. The lower courts correctly noted that workers from several trades had to work at the mezzanine level at the same time. Hence, an issue of fact was created concerning whether the mezzanine was a common area. Various subcontractors needed to get onto the mezzanine numerous times over several days in order to work and load materials and equipment. By a rough estimate, a dozen workers, including carpenters, electricians, plumbers, painters, and at least four people to load heating, ventilation, and cooling equipment needed to get onto the mezzanine. After the wooden frame for the drywall was put in, there were only two ways to reach the mezzanine: by ladder and by scissor lift. All these workers faced the danger of falling from the mezzanine while loading materials or equipment. Accordingly, an issue of material fact arose about whether a significant number of workers employed by various subcontractors were exposed to the same risk.

There is no dispute that the safety cable did not provide sufficient protection, given that it had to be lowered to enable access to the mezzanine. One of the

questions that plaintiff raised is whether any other type of perimeter protection was feasible. In response to defendant's "Safety Hazard Notification," plaintiff's employer indicated that a wood-framed structure with a removal gate should have been used. The structure could have protected people from falling through the open space left after the cable was lowered. It is unclear whether such protection was feasible. Thus, the Court of Appeals correctly decided that a question of material fact existed about the availability of adequate perimeter protection.

Defendant argues that the only feasible safety protection was the use of a personal fall-protection device, such as a double-lanyard harness system hooking the worker to an anchorage point. It is undisputed that plaintiff was not wearing such a device. Plaintiff's supervisor expressed doubt about a lanyard, saying that, if plaintiff had worn one, he could not have stepped off the scissor lift onto the mezzanine.

Assuming that a personal fall-protection device could have been used, the question arises whether defendant took reasonable steps within its supervisory authority to require such a device. The project-manual provisions for defendant's "On-Site Project Safety and Loss Control Program" state that each subcontractor "will supply the proper equipment, take the necessary precautions to maintain the equipment according to current regulations and specifications, and accept responsibility to ensure that the necessary safety equipment is supplied and used when required." The manual further states: "The use of safety belts/harnesses and lanyards securely attached to an approved anchorage point when working from unprotected high places is mandatory." Defendant's manual makes clear that defendant required that personal fall protection be used when no

other protection was available. It shifted to the subcontractors the responsibility for providing all such safety equipment and ensuring its use.

In *Funk*, the Court observed that, from an economic and practical standpoint, placing the responsibility for work safety in common areas on the general contractor will "render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas."[14] It is doubtful that, under *Funk*, a general contractor can entirely absolve itself of liability by shifting to its subcontractors all responsibility for implementing workplace safety and for providing safety equipment.

Furthermore, a question of material fact exists concerning whether, under his supervisory authority, defendant's construction supervisor should have been expected to enforce defendant's safety policy. The construction supervisor knew that plaintiff and his coworker planned to use the scissor lift to hoist drywall onto the mezzanine. He also knew that they needed to lower the safety cable to do so. The question is whether the construction supervisor should have inquired about the safety protection that the carpenters planned to use when the safety cable was down.

Defendant argues that its supervisor had no authority to tell the workers how to do their jobs. That is not the issue. Rather, the issue is whether the construction supervisor had authority to supervise the workers' safety and to enforce the general contractor's safety policy.

Defendant also argues that a general contractor cannot be expected to monitor whether each worker on

[14] *Funk*, 392 Mich at 104.

the jobsite wears individual safety protection. Were such monitoring at issue, defendant might be correct because of the burden it would place on the general contractor. But, on the facts of this case, defendant's construction supervisor was in direct personal contact with plaintiff and his coworker. He spoke with them personally as they prepared to ascend to the mezzanine. It might not be unreasonable to expect the supervisor to inquire after their safety under the circumstances.

More importantly, such an expectation is hardly unreasonable in light of defendant's safety policy. Its safety-and-loss-control program makes a difference only if it is enforced. Certainly, a safety policy can be enforced by issuing a citation to a subcontractor after an injury occurs, which is what defendant did here. But it is reasonable to expect that a general contractor will enforce its own policy to *prevent* noncompliance and to *avoid* injury before it occurs.

III

I would affirm the lower courts' judgments denying defendant's motion for summary disposition and would remand the case to the trial court for further proceedings. This resolution of the case would not be tantamount to imposing strict liability on the general contractor. On the contrary, it acknowledges that reasonable minds can differ about the sufficiency of the steps the general contractor took in this case. Certainly, a jury could find that the general contractor took reasonable steps, but I would not make that determination as a matter of law. It is properly an issue for the trier of fact to resolve.

CAVANAGH, J., concurred with KELLY, J.

PEOPLE v BARRETT

Docket No. 133128. Decided April 14, 2008.

David C. Barrett was charged in the 53rd District Court with domestic assault, second offense, and with felonious assault. In accordance with *People v Burton*, 433 Mich 268 (1989), the district court, Michael K. Hegarty, J., ruled that the victim's statements to her neighbor, a 911 operator, and a police officer were not admissible under the excited utterance exception to the hearsay rule, MRE 803(2), because there was no evidence of a startling event independent of the victim's statements. The district court dismissed the charges, and the Livingston Circuit Court, David J. Reader, J., affirmed. The prosecution appealed by leave granted, and the Court of Appeals, SERVITTO, P.J., and FITZGERALD and TALBOT, JJ., affirmed in an unpublished memorandum opinion, issued December 19, 2006 (Docket No. 261382). The Supreme Court ordered oral argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action and directed the parties to address whether *Burton* should be overruled. 478 Mich 875 (2007).

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

The plain language of MRE 803(2) does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted as an excited utterance. Rather, MRE 104(a) and MRE 1101(b)(1) allow a court making a determination under MRE 803(2) about the existence of a startling event or condition to consider the out-of-court statement itself, along with other evidence, in concluding whether the startling event or condition has been established. The *Burton* Court erred by applying an incorrect understanding of the requirements of MRE 802(2). *Burton* must be overruled to the extent that it held that a court could not consider the statement itself along with evidence independent of the statement to decide admissibility. The victim's statements in this case were admissible as excited utterances.

Justice WEAVER, concurring, agreed with the result of the majority opinion for the reasons stated in part V of that opinion and those stated in Justice BOYLE's dissent in *Burton*.

Reversed and remanded to the trial court.

Justice CAVANAGH, joined by Justice KELLY, dissenting, would not overrule *Burton* because it is a prudent decision that defends the integrity of the evidence admitted in courts. *Burton* was not decided incorrectly, but properly sought to effectuate the intent of the body that formulated MRE 803(2) by applying a reasonable construction that promoted the provision's purpose, using interpretations of its common-law predecessor and analogous common-law hearsay provisions. The foundational elements of the excited utterance exception are that the statement related to the startling event or condition and that the same event or condition to which the statement related caused the declarant's excitement. The requirement of independent proof of the startling event or condition ensures that these foundational elements are met and that admission of the statement furthers the exception's underlying rationale. If no evidence of the nature of the startling event or condition exists other than the statement itself, it is impossible to prove these requirements. There is no inconsistency between the independent-proof requirement and MRE 104(a), because MRE 803(2) fundamentally requires independent proof. A court could still consider other inadmissible evidence when deciding whether to admit a statement under MRE 803(2). The content of the statement itself would be excluded only from the court's determination concerning the need for independent proof of the startling event or condition. The majority's approach will permit a statement to bootstrap itself into admissibility and permit the admission of statements that do not carry the inherent trustworthiness sought by the exception. Furthermore, *Burton* bars admission only in the most extreme cases: those in which insufficient independent evidence of the underlying startling event or condition exists. The judgment of the Court of Appeals should be affirmed.

EVIDENCE — HEARSAY — EXCITED UTTERANCE EXCEPTION — INDEPENDENT PROOF OF STARTLING EVENT OR CONDITION.

The excited utterance exception to the hearsay rule does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement that relates to the startling event or condition may be admitted, and a court may consider the statement itself, along with other evidence, in determining whether the startling event or condition has been established (MRE 104[a], 803[2], 1101[b][1]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David L. Morse*, Prosecuting Attorney, and *William J. Vailliencourt, Jr.*, Assistant Prosecuting Attorney, for the people.

Patrick K. Ehlmann for the defendant.

Amicus Curiae:

Charles H. Koop, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

TAYLOR, C.J. At issue in this case is whether MRE 803(2),[1] the excited utterance exception to the hearsay rule, requires as a prerequisite to the admission of an out-of-court statement that a startling event or condition be established without considering the out-of-court statement itself. We conclude that the plain language of the rule, when applied as instructed by MRE 1101(b)(1)[2] and MRE 104(a),[3] allows the court to con-

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[1] MRE 803(2) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

[2] MRE 1101(b)(1) provides:

> (b) Rules inapplicable. The rules [of evidence] other than those with respect to privileges do not apply in the following situations and proceedings:
>
> (1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

[3] MRE 104(a) provides:

sider the statement along with other evidence to prove the existence of a startling event or condition. Accordingly, we overrule *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989), to the extent that it held that the statement itself could not be considered along with the independent evidence to decide admissibility. This exclusion of any consideration of the statement was an incorrect understanding of the requirements of MRE 803(2). For this reason, we reverse the judgment of the Court of Appeals and the order of the trial court that relied on *Burton*, and we remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On May 17, 2004, Suzanne Bartel, defendant's longtime, live-in girlfriend, pounded on her neighbors' door, said that defendant was chasing her with an ax, and asked to use their phone. She was hysterical and crying. Her hysteria continued as she reported to the 911 operator that defendant had kicked the door in, beaten her, tried to strangle her, and brandished a hatchet. At one point, the 911 operator advised her to calm down and gain control of her breathing. Bartel informed the 911 operator that defendant had told her never to call the police or he would kill her.

When the first responding officer arrived, Bartel similarly told him that defendant had punched a hole in the bedroom door, pinned her to the bed, and begun

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Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

hitting her face; shortly afterward, defendant had picked up a hatchet, grabbed her around the neck, raised the hatchet, and said he was going to kill her. The officer observed that Bartel was so agitated that she could not sit down and that it was apparent that Bartel had been crying. When he and other officers searched Bartel's house, they found the hatchet in the house and a 12-inch hole in one of the doors. The officers observed marks on Bartel's shoulders and one arm and a cut on the inside of her mouth.

Defendant was charged with domestic assault (second offense) and felonious assault. At the preliminary examination, Bartel refused to testify. Faced with the prospect of a dismissal of the charges because of insufficient proofs, the prosecuting attorney attempted to have admitted, as excited utterances under the hearsay[4] exception provided in MRE 803(2), the statements Bartel made to the 911 operator, one of the neighbors, and the police officer. The defense countered that *Burton* requires that the startling event be established by evidence solely apart from an excited utterance before the excited utterance can be admitted and that insufficient independent evidence had been offered in this case. The examining magistrate agreed with defendant that *Burton*'s requirements for independent evidence of the assault had not been met and thus dismissed the charges. The prosecution appealed in the circuit court, asserting that MRE 803(2), as written, does not require that the startling event be established only with evidence independent of the statement itself and that the *Burton* Court had unwarrantedly read the requirement into the rule. The circuit court affirmed on

[4] A hearsay statement is an out-of-court statement made by someone other than a declarant at trial and offered in evidence to prove the truth of the matter asserted. MRE 801(c).

the basis of *Burton*, and the prosecution then sought leave to file an appeal in the Court of Appeals, again arguing that *Burton* had been incorrectly decided. The Court of Appeals heard the case and concluded that, whatever the merits of the prosecution's argument, it had no authority to revise or alter in any fashion a decision of the Supreme Court.[5]

The prosecution sought leave to appeal in this Court, and we ordered oral argument on whether to grant the application and directed the parties to address whether *Burton* should be overruled. *People v Barrett*, 478 Mich 875 (2007).

II. STANDARD OF REVIEW

Whether MRE 803(2) contains a requirement that the startling event or condition be established without consideration of the statement itself is a question of law, which is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002) (stating that the meaning of a Michigan rule of evidence is examined in the same manner as a court rule or statute is examined: they all present questions of law, which are reviewed de novo).

III. ANALYSIS

Evidentiary rulings in Michigan courts are controlled by the Michigan Rules of Evidence, which this Court adopted in 1978. When we adopted the rules of evidence, they were closely patterned after the Federal Rules of Evidence, *People v Kreiner*, 415 Mich 372, 378; 329 NW2d 716 (1982), but we did not adopt all the federal rules verbatim. One that we adopted verbatim

[5] *People v Barrett*, unpublished memorandum opinion of the Court of Appeals, issued December 19, 2006 (Docket No. 261382).

was MRE 803(2), the excited utterance rule at issue in this case. Both the federal and state versions of the rule state simply that, although hearsay, a statement will not be excluded by the hearsay rule if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Thus, while both rules require that there be a startling event or condition, they indisputably do not preclude consideration of the statement itself for the purpose of establishing the startling event or condition. Nevertheless, in 1989, the *Burton* Court, over the dissent of Justice BOYLE and without invoking the rules-amendment process,[6] concluded that a proffered excited utterance could not be used to satisfy the

[6] The amendment process, as outlined in MCR 1.201, provides:

> (A) Notice of Proposed Amendment. Before amending the Michigan Court Rules or other sets of rules within its jurisdiction, the Supreme Court will notify the secretary of the State Bar of Michigan and the state court administrator of the proposed amendment, and the manner and date for submitting comments. The notice also will be posted on the Court's website, www.supremecourt.state.mi.us.
>
> (B) Notice to Bar. The state bar secretary shall notify the appropriate state bar committees or sections of the proposed amendment, and the manner and date for submitting comments. Unless otherwise directed by the Court, the proposed amendment shall be published in the Michigan Bar Journal.
>
> (C) Notice to Judges. The state court administrator shall notify the presidents of the Michigan Judges Association, the Michigan District Judges Association, and the Michigan Probate and Juvenile Court Judges Association of the proposed amendment, and the manner and date for submitting comments.
>
> (D) Exceptions. The Court may modify or dispense with the notice requirements of this rule if it determines that there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice.

conditions for its own admissibility. *Burton*, *supra* at 294. In reaching this conclusion, the *Burton* Court initially focused on the notion that there must be evidence independent of the statement itself to establish the existence of a startling event or condition before the statement could be admitted as an excited utterance.[7] We deal with a situation in this case for which there clearly was independent evidence to corroborate the existence of the startling event or condition.[8] Therefore, we do not need to reach the question whether the statement standing alone could supply the evidence of the startling event.[9]

(E) Administrative Public Hearings. The Court will conduct a public hearing pursuant to Supreme Court Administrative Order 1997-11 before acting on a proposed amendment that requires notice, unless there is a need for immediate action, in which event the amendment will be considered at a public hearing following adoption. Public hearing agendas will be posted on the Court's website.

[7] The *Burton* Court relied on a passage in *Rogers v Saginaw-Bay City R Co*, 187 Mich 490, 494-495; 153 NW 784 (1915), in which the *Rogers* Court held that a decedent's statement could not be used to establish its own spontaneity because the statement had not yet been admitted. *Burton*, *supra* at 280-281. Because *Rogers* was decided before MRE 104(a) was adopted, and MRE 104(a) effectively superseded the *Rogers* decision, this Court's adoption of MRE 104(a) essentially rejected the reasoning in *Rogers*. Thus, the *Burton* Court's reliance on *Rogers* 11 years after the adoption of MRE 104(a) was in error.

[8] There was a plethora of independent evidence indicating that Bartel had been exposed to a startling event or condition, namely, the neighbor's testimony that Bartel pounded frantically on the neighbors' door, Bartel's panicked state when speaking to the 911 operator, the responding officer's observation that Bartel was so hysterical when he arrived that she could not sit down, the hatchet inside the house, the 12-inch hole in one of the doors, the marks on Bartel's shoulders and arm, and the cut inside her mouth.

[9] Concerning that question, the 1972 advisory committee's notes to FRE 803(2) indicated in relevant part that "[w]hether *proof of the startling event* may be made by the statement itself is largely an academic

Instead, we focus on *Burton*'s wholesale preclusion of the use of the statement to establish the existence of the startling event or condition. The *Burton* Court, without any citation to authority and, in fact, ignoring the significance of the other rules of evidence we have cited here, stated: "[T]he excited utterance must not be used to substantiate the event from which the utterance must be shown to have arisen. In order to guard against this 'bootstrapping,' we must determine whether the nonexcited-utterance evidence independently furnishes proof of the underlying event." *Id*. at 295.

It is this unsupported notion that is the subject of controversy in the instant case, and it is with this notion that we take issue precisely because of the *Burton* Court's failure to recognize and follow established rules of evidence that had guided the prevailing practice of determining evidentiary admissibility for the 11 years preceding the *Burton* decision. Of particular importance in the context of excited utterances are MRE 1101(b)(1) and MRE 104(a). MRE 1101(b)(1) provides:

> (b) Rules inapplicable. The rules [of evidence] other than those with respect to privileges do not apply in the following situations and proceedings:
>
> (1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

Clearly, the existence of a startling event or condition is a question of fact that a trial court must decide before it may admit a statement under MRE 803(2) as an excited utterance. Thus, MRE 1101(b)(1) directs the

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question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred." (Emphasis in original.)

court to comply with MRE 104(a) when deciding whether a startling event or condition exists. And MRE 104(a), which, like MRE 803(2), is identical to its federal counterpart, FRE 104(a), provides:

> Questions of admissibility generally. *Preliminary questions concerning* the qualification of a person to be a witness, the existence of a privilege, or *the admissibility of evidence shall be determined by the court*, subject to the provisions of subdivision (b). *In making its determination it is not bound by the Rules of Evidence* except those with respect to privileges. [Emphasis added.]

Had the *Burton* Court read MRE 1101(b)(1) and MRE 104(a) together and applied those rules to its interpretation of MRE 803(2), as it was constrained to do, the Court would have come to the inescapable conclusion, as we do now, that a trial court may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible. In the context of an excited utterance, then, this means that even though an out-of-court statement may not be admitted at trial without adequate indicia of reliability, i.e., the existence of a startling event or condition, the trial court can consider the statement when determining whether the indicia of reliability have been met, i.e., that the startling event or condition has been established.

Although the *Burton* Court referred to MRE 104(a) when it stated that "a trial judge ruling on the admissibility of evidence need not confine his review to admissible evidence only" under this rule, *Burton*, *supra* at 295, the Court inexplicably declined to allow the consideration of an excited utterance itself on the ground that to do so would allow a hearsay statement to be lifted " ' "by its bootstraps to the level of competent

evidence," ' " *id.* at 281-282, quoting *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982), quoting *Glasser v United States,* 315 US 60, 75; 62 S Ct 457; 86 L Ed 680 (1942), even though such a result was permissible under MRE 104(a).[10]

The problem with relying on *Vega*, which relied on *Glasser* for the proposition that an inadmissible statement may not bootstrap its way into admissibility, is that just as *Rogers v Saginaw-Bay City R Co*, 187 Mich 490; 153 NW 784 (1915), was decided before the Michigan Rules of Evidence were adopted, *Glasser* was decided before the Federal Rules of Evidence were adopted. And the adoption of these rules changed the process governing a trial court's admissibility determinations.

In *Bourjaily v United States*, 483 US 171, 178; 107 S Ct 2775; 97 L Ed 2d 144 (1987), the United States Supreme Court considered the continued viability of *Glasser*'s bootstrapping analysis in light of the enactment of the Federal Rules of Evidence and concluded that to the extent that *Glasser* was inconsistent with

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[10] The dissent acknowledges that "[t]he court [is] free under MRE 104(a) to consider other inadmissible evidence when deciding whether to admit a statement under MRE 803(2)," but states that the court may not consider the statement itself. *Post* at 145. However, the dissent does not explain why MRE 104(a) allows the court to consider any evidence, including inadmissible evidence, but not the statement sought to be admitted. Similarly, the dissent contends that "while MRE 104(a) provides that the court is not bound by the rules of evidence while making determinations concerning admissibility, MRE 104(a) does not permit the court to disregard the criteria for admissibility inherent in the rule of evidence under consideration." *Post* at 145 . This statement makes no sense: MRE 104(a) provides that the court is *not* bound by the rules of evidence while making admissibility determinations, but the court *is* bound by MRE 803(2). Either the court is bound by the rules of evidence when making admissibility determinations or it is not. The dissent cannot have it both ways.

FRE 104, which is identical to MRE 104, *Glasser* was overruled. The Court specifically held that "a court, in making a preliminary factual determination under [FRE] 801(d)(2)(E), may examine the hearsay statements sought to be admitted." *Bourjaily*, *supra* at 181. In reaching this conclusion, the Court reasoned that FRE 104 on its face permits the trial court to "consider any evidence whatsoever, bound only by the rules of privilege." *Id.* at 178. Nevertheless, even though *Bourjaily* overruled the very same proposition that *Burton* relied on, and even though *Burton* was decided two years after *Bourjaily*, the *Burton* Court chose to follow overruled precedent rather than follow the guidance provided by the United States Supreme Court.[11]

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[11] *Vega, Glasser,* and *Bourjaily* all involved the admission of a coconspirator's statement against a defendant. At the time *Bourjaily* was decided, FRE 801(d)(2)(E) did not provide, as MRE 801(d)(2)(E) did, that the conspiracy must be established with independent proof. In 1997, 10 years after the *Bourjaily* decision, FRE 801(d)(2)(E) was amended to provide that "[t]he contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein . . . ." According to the relevant portion of the 1997 advisory committee's notes,

> [FRE] 801(d)(2) has been amended in order to respond to three issues raised by [*Bourjaily*]. First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, [FRE] 104(a) requires these preliminary questions to be established by a preponderance of the evidence.
>
> Second, the amendment resolves an issue on which the Court has reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of

Properly understood then, MRE 104(a) permits a trial court to consider any evidence, unless it implicates a privilege, when making preliminary determinations concerning the admissibility of proffered evidence, and MRE 803(2), when applied in accordance with MRE 104(a), does not premise the admissibility of an excited utterance on the proponent's ability to establish the existence of a startling event or condition without considering the utterance itself. In the instant case, Bartel's statement to her neighbor that defendant was chasing her with an ax; her statements to the 911 operator that defendant had kicked the door down, beaten her, tried to strangle her, and threatened her with a hatchet; and her similar statements to the responding police officer, as corroborated by the neighbor's observation that Bartel was hysterical and crying, the transcript of the 911 call in which the operator advised Bartel to calm down and gain control of her breathing, the first responding officer's observation

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the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. [Citations omitted.]

The dissent claims that "[t]he amendment . . . indicated a prevailing policy against allowing the type of bootstrapping that the majority's approach will permit in the context of MRE 803(2)." *Post* at 148. This is clearly incorrect, given that the amended version of FRE 801(d)(2) expressly states that "[t]he contents of the statement shall be considered . . . ." The dissent also suggests that we are permitting a statement to serve as the only proof of a startling event or condition. *Post* at 146. In doing so, the dissent asserts that "*Burton* provides a modest protection against admitting *unsupported* hearsay statements when there is *no other independent* evidence establishing that the underlying event occurred." *Post* at 150 (emphasis in the original). As explained on p 132 of this opinion, given the plethora of independent evidence in this case, "we do not need to reach the question whether the statement standing alone could supply the evidence of the startling event."

that Bartel was so agitated that she could not sit down and that she had been crying, the hatchet in the house, a 12-inch hole in one of the doors, the marks on her shoulders and arm, and the cut on the inside of her mouth, all support that hers were excited utterances pertaining to a startling event or condition. Thus, the out-of-court statements were admissible under the excited utterance exception to the rule against hearsay.

IV. STARE DECISIS

In assessing whether to overrule a prior decision, we must consider whether the earlier decision was incorrectly decided and whether overruling the decision would work an undue hardship because of reliance interests or expectations that have arisen. *Robinson v Detroit*, 462 Mich 439, 465-466; 613 NW2d 307 (2000). For the reasons previously discussed, we conclude that *Burton* was incorrectly decided. "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. The decision in *Burton* has not become so fundamental that overruling it will interfere with any legitimate reliance or expectation interests. "[T]o have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Id.* at 467. The *Burton* Court's decision cannot be said to have caused people to alter their conduct in any way. Therefore, overruling *Burton* will create no "practical real-world dislocations."

V. CONCLUSION

The plain language of MRE 803(2), the excited utterance exception to the hearsay rule, does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) and MRE 104(a) instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the startling event or condition has been established. Because *Burton* failed to consider MRE 1101(b)(1) and MRE 104(a) when interpreting MRE 803(2), it reached the wrong result and must be overruled with respect to this issue. Because the lower courts in this case relied on *Burton*, we reverse the judgment of the Court of Appeals and the order of the trial court, and we remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded to the trial court.

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

WEAVER, J. (*concurring*). I concur in the result of the majority opinion for the reasons stated in part V of the opinion and for the reasons stated in Justice BOYLE's dissent in *People v Burton*, 433 Mich 268, 305; 445 NW2d 133 (1989).

CAVANAGH, J. (*dissenting*). I respectfully dissent. I would not overrule *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989), because it is a prudent decision that defends the integrity of the evidence we admit in our courts.

Overruling precedent is a grave measure that should occur only after serious consideration. Before this Court overrules a deliberately made decision, it should be convinced not only that the case was incorrectly decided, but also that overruling it will cause less injury than following it. *McEvoy v Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904). In deciding whether to overrule established precedent, this Court must examine whether (1) the earlier case was incorrectly decided, (2) the earlier case defies practical workability, (3) reliance interests would work an undue hardship if the earlier case were overruled, and (4) changes in the law or facts no longer justify the earlier decision. *Robinson v Detroit,* 462 Mich 439, 464-465; 613 NW2d 307 (2000). In light of these factors, I am convinced that *Burton* should not be overruled. In particular, I believe that the first *Robinson* factor weighs strongly against overruling *Burton* and its rule that a startling event or condition must be established by independent proof before a statement emanating from the event or condition may be admitted under the excited utterance exception to the hearsay rule.

The Federal Rules of Evidence codified a number of exceptions to the hearsay rule that had been recognized at common law. The advisory committee's notes to FRE 803 described the rule as a synthesis of common-law hearsay exceptions, "with revision where modern developments and conditions are believed to make that course appropriate." In 1978, Michigan adopted the excited utterance exception to the hearsay rule, MRE 803(2), stating that it was identical with FRE 803(2). At the time we adopted the Michigan Rules of Evidence, whether MRE 803(2) and FRE 803(2) required independent proof of the startling event was an unsettled question. The advisory committee's notes to FRE 803(2) declined to resolve the issue "[w]hether proof of

the startling event may be made by the statement itself," dismissing it as "largely an academic question . . . ."

Accordingly, when this issue arose in *Burton*, this Court was addressing an unsettled question of law that was a matter of first impression in Michigan.[1] We stated that "the specific question in this case—whether [a proffered excited utterance] may establish the underlying startling event—has not been considered by Michigan courts . . . ." *Burton*, *supra* at 280. The *Burton* Court properly sought to effectuate the intent of the formulating body by applying a reasonable construction that promoted the purpose of the provision. In discerning the intent of the formulating body, we appropriately interpreted MRE 803(2) consistently with Michigan cases that had applied its common-law predecessor.

In particular, *Burton* consulted *Rogers v Saginaw-Bay City R Co*, 187 Mich 490; 153 NW 784 (1915), a case that predated the Michigan Rules of Evidence but addressed the common-law spontaneous exclamation exception to the hearsay rule, which was analogous to MRE 803(2). Statements were admissible under the spontaneous exclamation exception if they met three conditions:

> (1) that there is a startling occasion, startling enough to produce nervous excitement, and render the utterance

[1] Because the issue was one of first impression in Michigan and the advisory committee's notes to the Federal Rules of Evidence indicated that courts had come to different conclusions, this Court was well within its authority to adopt the position that MRE 803(2) requires independent proof of the underlying startling event or condition. I disagree with the majority's assertion that this Court was required to invoke the amendment process rather than holding in *Burton* that MRE 803(2) required independent proof of the startling event or condition. The independent-proof requirement is consistent with the language of MRE 803(2) and was not a departure from previous Michigan law.

> spontaneous and unreflecting; (2) that the statement must have been made before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it. [*Rogers*, *supra* at 494, citing 3 Wigmore, Evidence, § 1750 *et seq*.][2]

Rogers involved a wrongful-death action in which the decedent was allegedly injured by the negligent operation of a street car. *Rogers, supra* at 491. The only witness to the apparent incident was the decedent himself, so the case hinged on the admission of the decedent's statements to his son. The son witnessed his father limping home with a drawn face, so he asked his father what was the matter. *Id.* at 492. The son proffered testimony that the decedent told him that " 'while he was in the act of alighting from the car one foot was on the running board and the other foot was nearly on the ground, and the car started and threw him to the pavement on his right hip.' " *Id.* at 492-493. The issue presented was whether the decedent's statement fit within the hearsay exception that permitted the admission of spontaneous exclamations. *Id.* at 493.

This Court held that the proffered statement failed to meet the second condition—that the statement must have been made before there has been time to contrive and misrepresent. *Rogers* asked, "[H]ow can the second condition be met without direct and independent evidence of the time of the startling occasion with refer-

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[2] These conditions are virtually identical to the criteria for admissibility of statements under MRE 803(2), which are derived from the text of the exception:

> To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion. [*People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979) (citations omitted).]

ence to the making of the statement?" *Id*. at 494. In other words, the foundation of the spontaneous exclamation exception required independent evidence of the statement's temporal relationship to the event to show that the statement arose spontaneously from the event.

In rejecting the notion that a statement alone could establish its own spontaneity for the purpose of this hearsay exception, *Rogers* illustrates our historical prohibition of the admission of hearsay evidence and disinclination to permit the circular practice of relying solely on the content of the statement to establish its foundation for admissibility. Notably, *Rogers* actually required *independent proof* that the event and the statement were so closely related in time as to establish that the statement was a spontaneous reaction to the event. *Rogers* recognized that the independent-proof requirement was necessary to meet the foundational elements of the exception. The foundational elements of a hearsay exception ensure that admission of the statement would fulfill the fundamental rationale of the exception.

Using the same reasoning, *Burton* determined that the first and third conditions of the excited utterance exception—that a statement arose out of a startling event or condition and related to the circumstances of the startling occasion—require proof independent of the content of the statement itself. Just as in *Rogers*, the independent-proof requirement in *Burton* ensures that the foundational elements of the exception are met and that admission of the statement furthers the underlying rationale of the exception.

The foundational elements of the excited utterance exception embody its underlying rationale—the reason why, although it is hearsay, a statement is deemed trustworthy enough for admission. It is widely accepted

that the "premise underlying the exception for excited utterances is that a person under the influence of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication. Thus, any utterance made under such circumstances will be spontaneous and trustworthy." 5 Weinstein, Federal Evidence (2d ed), § 803.04[1], pp 803-18.1 to 803-19. The excited utterance exception is based on the principle that hearsay statements are only sufficiently reliable when they are spontaneous reactions to a startling event or condition. But the exception does not encompass *any* statement arising from *any* startling occasion. Only a statement "*relating* to a startling event or condition" is admissible under the exception. MRE 803(2) (emphasis added). "The statement need not elucidate or explain the occurrence in order to qualify as an excited utterance. It must, however, relate to the event in some manner." 5 Weinstein, § 803.04[5], p 803-29. In addition, at the time the statement is made, the declarant must be "under the stress of excitement caused by *the* event or condition." MRE 803(2) (emphasis added). The excited utterance exception, therefore, specifically requires that the statement *related* to the startling event or condition and that the *same* event or condition to which the statement related caused the declarant's excitement. These two foundational elements are precisely why *Burton*'s independent-proof requirement is invoked. The proponent of the evidence must show that the statement satisfies the foundational elements of the excited utterance exception. If there is no independent evidence of the nature of the startling event or condition, it is impossible to adequately prove that the statement related to the starting event or condition or to establish that the occasion caused the declarant's excitement.

The majority claims that *Burton*'s independent-proof requirement is inconsistent with MRE 104(a). I disagree. The independent-proof requirement can be applied along with MRE 104(a) because independently establishing the existence of the startling event or condition is fundamental to the elements of MRE 803(2). This Court determined in *Burton* that the independent-proof requirement is integral to the foundational elements of the exception; thus, the relevant preliminary factual question for purposes of determining admissibility is whether a statement arose out of and related to a startling occasion for which there is independent evidence. As such, there is no inconsistency between the independent-proof requirement and the latitude that MRE 104(a) gives a trial court to consider inadmissible evidence in resolving preliminary questions concerning the admissibility of evidence. The court would still be free under MRE 104(a) to consider other inadmissible evidence when deciding whether to admit a statement under MRE 803(2); the content of the statement itself would be excluded only from the court's determination of whether independent proof of the startling event or condition exists. In sum, while MRE 104(a) provides that the court is not bound by the rules of evidence while making determinations concerning admissibility, MRE 104(a) does not permit the court to disregard the criteria for admissibility inherent in the rule of evidence under consideration.

The majority's approach elevates MRE 104(a) over the other rules of evidence by concluding that MRE 104(a) grants the court unfettered authority to consider *any* evidence, aside from privileged evidence, while ignoring that the foundational requirements of the rule under consideration can direct what evidence the court may consider in making determinations concerning admissibility. The majority accuses me of trying to

"have it both ways" by asserting that the court is *not* bound by the rules of evidence while making admissibility determinations, but *is* bound by MRE 803(2). *Ante* at 135 n 10. But the majority fails to recognize that the fundamental duty that MRE 104(a) entails is *determining admissibility under the rules of evidence*. MRE 104(a) permits the court to consider inadmissible evidence in making determinations concerning admissibility, but it does not excuse the court from ensuring that, ultimately, the conditions for admissibility are met. In this case, the content of the statement is not excluded from consideration because it is inadmissible hearsay under the rules of evidence; it is excluded because independent proof of the startling event or condition is fundamentally required to establish admissibility under MRE 803(2).

The majority dismisses the suggestion that its opinion will permit a statement to bootstrap itself into admissibility by allowing the statement alone to establish a startling event or condition. Though declining to reach the question, the majority cannot conceal that the natural extension of its construction of MRE 104(a) and MRE 803(2) would allow such bootstrapping. The majority suggests that if this Court had interpreted MRE 104(a) and MRE 803(2) properly in *Burton*, it would have followed *Bourjaily v United States*, 483 US 171; 107 S Ct 2775; 97 L Ed 2d 144 (1987), which held that the adoption of the Federal Rules of Evidence abrogated the prohibition against bootstrapping in the context of admissions by coconspirators. *Ante* at 135-136. Given that the majority opinion endorses applying *Bourjaily* to MRE 803(2), it is notable that both the majority and *Bourjaily* shy away from addressing the disturbing consequence of their rulings. The majority states that "we do not need to reach the question whether the statement standing alone could supply the evidence of

the startling event." *Ante* at 132. Similarly, in *Bourjaily*, the United States Supreme Court concluded that a court may consider an alleged coconspirator's statements in determining whether the statements are admissible as a party admission under FRE 801(d)(2)(E). *Bourjaily*, *supra* at 178-179. However, the Court declined to resolve whether an alleged coconspirator's statements could, by themselves, satisfy the proponent's burden, stating that "[w]e need not decide in this case whether the courts below could have relied solely upon [the declarant's] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence." *Id*. at 181. Thus, the Court left open the issue whether some independent proof of the conspiracy was required.

But it is apparent from their reaction to *Bourjaily* that the United States Judicial Conference, the Court, and Congress understood that *Bourjaily*'s ruling would logically permit bootstrapping under FRE 801(d)(2)(E). Significantly, in response to *Bourjaily*, these bodies proposed and approved an amendment of FRE 801(d)(2)(E).[3] The rule was amended to provide that the "contents of the statement shall be considered *but are not alone sufficient* to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . ." (Emphasis added.) The advisory committee's notes observed that the amendment accorded with existing practice, because every court of appeals that had addressed the issue required some evidence in addition to the contents of the statement. The amendment of FRE 801(d)(2)(E) in response to *Bourjaily*

[3] The advisory committee's notes to the 1997 amendment of FRE 801(d)(2)(E) stated: "Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987)."

reflected the recognition that *Bourjaily*'s reasoning—on which the majority's opinion relies—opened the door to bootstrapping; otherwise, it would not have been necessary to add an explicit protection against bootstrapping to FRE 801(d)(2). The amendment also indicated a prevailing policy against allowing the type of bootstrapping that the majority's approach will permit in the context of MRE 803(2).

Moreover, the amendment makes clear that FRE 104(a) does not permit the court to overlook the foundational requirements of the particular rule of evidence under consideration. In other words, if the foundational elements of a rule of evidence prohibit the court from relying on a particular piece of evidence, FRE 104(a) does not override the rule and grant the court authority to rely on the prohibited evidence. Accordingly, there is no contradiction between MRE 104(a) and *Burton*'s independent-proof rule because MRE 803(2) fundamentally requires independent proof of the startling event or condition.

The majority's rule will undoubtedly permit the admission of statements under this exception that do not meet its criteria and, consequently, do not carry the inherent trustworthiness sought by the exception. Without independent evidence of the startling event or condition, there will be inadequate proof that the statement related to the startling event or condition and that the declarant's excitement was caused by the same event or condition referred to in the statement.

Burton illustrates the peril of operating without independent proof of the event, thereby neglecting these criteria. In *Burton*, a police officer encountered a woman "running down the street wearing a twisted dress and no shoes, looking over her shoulder as if someone might be pursuing her." *Burton*, *supra* at 272.

The officer stopped and let her into his squad car, where she reported that she had been sexually assaulted by defendant Burton when she had gone with an acquaintance to Burton's house. *Id.* at 272-273. She stated that she had escaped by asking permission to use the bathroom, then using the opportunity to pull her dress on and run out of the house. *Id.* at 274. The woman's trial testimony provided an entirely different account of events. She testified that she had accompanied an acquaintance to Burton's house, where she expected to be paid for having sex with Burton. After she disrobed, she requested money from Burton, but he refused and accused her of having taken money from him. They got into a heated argument, prompting Burton to slap her. She got angry, cried, and ran out, expecting Burton to come after her and try to talk to her. *Id.* She testified that she decided to tell the police that Burton had raped her in order to get back at him for having slapped her. *Id.* at 275. At trial, Burton objected to the admission of the woman's original statements to the police officer under the excited utterance exception. We held that the statements were inadmissible without independent proof that the purported startling event—a sexual assault—took place. *Id.* at 294. We found that the independent evidence—the woman's demeanor, physical condition, and appearance at the time of the statement; Burton's attempt to remove the woman's shoes and panties from his house; the discovery of the woman's brassiere in the house; and the testimony of the other eyewitness—only established at most a stressful event with sexual overtones. *Id.* at 297-298.

Burton provides an excellent illustration of the necessity of proving with independent evidence the existence of a startling event or condition. *Burton* presented two potentially startling events according to two different versions of facts: either a sexual assault or an act of

prostitution turned assault. Either event could explain the declarant's demeanor, disarray, and presence at the defendant's home, but only one version of events supported the content of the declarant's statements. The concern addressed by *Burton* was not that a declarant might wholly invent a startling event and feign agitation; it was that a declarant who had been legitimately agitated by an event could make a statement reflecting an entirely different event. Without independent evidence of the underlying event, the statement could not adequately prove two of the conditions for admissibility under the excited utterance exception: that the statement related to the event and that the declarant's excitement was caused by that very event. The declarant's agitation could have been caused by an actual startling event, but if the declarant's statement reflected a different startling event, the statement did not "relate to" the actual startling event, and thus failed a necessary condition for admissibility. Further, in such a case, the declarant's excitement would not have been caused by the same event that was reflected in the statement, which is also a condition for admissibility. It is rarely disputed that some kind of startling event or condition has occurred in cases like *Burton* and the instant case. Independent evidence of some startling event or condition will usually be apparent from the declarant's demeanor. But the criteria for the excited utterance exception demand more than just any startling occasion—they require that the statement had a certain relationship with the particular event or condition that caused the excitement. And given that the hearsay statement is presumptively unreliable before it meets the criteria, it cannot alone establish the other criteria.

In practice, *Burton* provides a modest protection against admitting *unsupported* hearsay statements when there is *no other independent evidence* establishing that the underlying event occurred. *Burton* bars

admission only in the most extreme cases, when there is insufficient independent evidence of the underlying startling event or condition. In such cases, these proffered statements might be considered particularly valuable evidence, as they perhaps comprise the only proof of a criminal act; but, for the same reason, they are the most dangerous evidence if they are allowed to supply their own foundation for admissibility. As a rule that guards against the admission of untrustworthy evidence in rare cases, *Burton* should not be overruled.

In sum, *Burton* was not incorrectly decided. *Burton*'s independent-proof requirement is compelled by the plain language of MRE 803(2) and the rationale of the excited utterance exception. It was consistent with our treatment of the analogous common-law spontaneous exclamation exception to the hearsay rule. Moreover, the independent-proof requirement does not contradict MRE 104(a); it simply requires a court to abide by the foundational elements of MRE 803(2).

I believe that *Burton* should not be overruled, given the strength of the first *Robinson* factor: *Burton* was not incorrectly decided. To complete the *Robinson* analysis, *Burton*'s independent-proof requirement does not defy practical workability; it simply requires a trial court to make a specific evidentiary finding. Reliance interests do not appear to be significantly involved here, except inasmuch as overruling established precedent disrupts the certainty of the law. I would also argue that there has been no change in the law or facts that would vitiate *Burton*'s rule. It seems to me a squandering of resources to be rearguing the intricacies of a decision made nearly 20 years ago, a debate that excludes the original parties and nearly all the members of the Court at the time.

This case presented a direct challenge to *Burton* on facts similar to those in that case. The prosecution did not appeal on the ground that the district court's evidentiary ruling was an abuse of discretion, but asked this Court to overrule *Burton*. Because I would not overrule *Burton*, I would affirm the judgment of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

ROSS v BLUE CARE NETWORK OF MICHIGAN

Docket No. 131711. Decided April 23, 2008.

Blue Care Network of Michigan (BCN) denied a claim for coverage for Douglas G. Ross's out-of-network cancer treatment. After Ross died, his wife, Desiree E. Ross, as personal representative of his estate, requested the Commissioner of the Office of Financial and Insurance Services, now the Office of Financial and Insurance Regulation, to review the denial under the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq*. The commissioner assigned the case to an independent review organization (IRO), which concluded that the decedent's care constituted emergency care covered under BCN's certificate and that BCN's denial of coverage should be reversed. Despite this recommendation, the commissioner partially upheld the denial of coverage. The Wayne Circuit Court, Michael J. Callahan, J., on a petition for judicial review filed by Desiree Ross, reversed the commissioner's decision with regard to the denial. The Court of Appeals, SCHUETTE, P.J., and BANDSTRA and COOPER, JJ., affirmed in part and reversed in part, concluding that the commissioner's authority under PRIRA extended only to determining whether the IRO's recommendations were contrary to the terms of coverage under the benefit plan and that the commissioner was not authorized to reach independent conclusions regarding the IRO's medical or clinical findings. Thus, the commissioner's decision, which substituted her independent conclusions for those of the IRO, was not authorized by law. 271 Mich App 358 (2006). BCN sought leave to appeal, and the Supreme Court ordered and heard oral argument on the application. 477 Mich 960 (2006).

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

An independent review organization's recommendation concerning whether the commissioner should uphold or reverse a health carrier's adverse decision concerning coverage is not binding on the commissioner.

1. To make a "recommendation," the term used repeatedly in the PRIRA provision concerning external review of an adverse decision by a health carrier, MCL 550.1911, means to suggest or

propose something. "Recommendation" is not a word that connotes mandatory compliance, and MCL 550.1911(16)(b) expressly allows the commissioner to decline to follow the IRO's recommendation as long as the commissioner explains his or her reasons for doing so.

2. The Court of Appeals erred by characterizing as dictum the statement in *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 464 (2004), that an IRO's recommendation is not binding on the commissioner. That conclusion was not dictum because it was necessary to determine an issue in *English*.

3. The Court of Appeals decision in this case created a bifurcated system of review under PRIRA in which the IRO would be the final authority on issues of medical or clinical-review criteria, while the commissioner would be the ultimate authority on purely contractual issues. The Legislature, however, did not intend a bifurcated review, having authorized the commissioner to review issues of medical necessity pertaining to the terms of coverage in the course of ensuring that the IRO's recommendation was consistent with those terms.

Reversed and remanded to the trial court.

Justice KELLY, dissenting, disagreed that the commissioner is never bound by the recommendations of an IRO on issues of medical necessity and clinical review. Under PRIRA, the commissioner's review is limited to ensuring that an IRO's recommendations are not contrary to the terms of coverage under the health-benefit plan of the person covered. The IRO's recommendation in this case was consistent with the terms of the plan's coverage. Therefore, the commissioner's decision to ignore that recommendation was not authorized by law. Moreover, the commissioner is not a physician. As a result, her decision to reject the recommendation of the IRO and its well-qualified physician on issues that require the exercise of medical judgment and to substitute her own opinion was arbitrary and capricious. The judgment of the Court of Appeals should be affirmed.

Justice CAVANAGH would deny leave to appeal.

INSURANCE — MEDICAL COVERAGE — PATIENT'S RIGHT TO INDEPENDENT REVIEW ACT — COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES.

An independent review organization's recommendation under the Patient's Right to Independent Review Act concerning whether the Commissioner of the Office of Financial and Insurance Ser-

vices should uphold or reverse a health carrier's adverse determination concerning coverage is not binding on the commissioner (MCL 550.1911).

Wachler & Associates, P.C. (by *Andrew B. Wachler* and *Adrienne Dresevic*), for Desiree E. Ross.

Dickinson Wright PLLC (by *Joseph A. Fink, Phillip J. DeRosier*, and *Trent B. Collier*) and *Colleen C. Cohan* for Blue Care Network of Michigan.

Amicus Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *William A. Chenoweth*, Assistant Attorney General, for the Commissioner of the Office of Financial and Insurance Services.

TAYLOR, C.J. At issue in this action brought pursuant to the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.*, is whether the Commissioner of the Office of Financial and Insurance Services (OFIS)[1] is bound by the recommendations of an independent review organization (IRO) on issues of medical necessity and clinical review. We conclude that the act provides that the commissioner is not bound by such recommendations. Accordingly, we reverse the judgment of the Court of Appeals and the order of the trial court that held to the contrary and remand this matter to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Douglas Ross was covered under the health maintenance organization (HMO) health plan of respondent

[1] OFIS is now the Office of Financial and Insurance Regulation, effective April 6, 2008. Executive Order No. 2008-2.

Blue Care Network of Michigan (BCN). The certificate of coverage excluded out-of-network services that were not preauthorized.[2] However, it did provide coverage for medically necessary services without prior authorization in cases of immediate and unforeseen medical emergency, but only until such time as it became medically feasible to transfer the person covered under the health plan to an in-network provider.[3]

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[2] Section 2.01 of the certificate provided:

> The Health Plan is not an insurance company but a health maintenance organization which operates on a direct service basis. Health, medical, hospital, and other services obtained by a Member outside of the Health Plan and not pre-authorized by a Plan Physician are not a covered benefit under this Certificate and cannot be reimbursed to the Member or paid for by the Health Plan.

[3] Section 1.05 of the certificate provided:

> A. . . . Coverage is provided for medically necessary emergency services when they are needed immediately because of an accidental injury or sudden illness, and the time required to contact your Primary Care Physician could result in permanent damage to your health. All benefits under this Certificate must be provided or authorized by your Primary Care Physician or BCN, except in the case of an immediate and unforeseen medical emergency.
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> * * *
>
> 2. Medical Emergency means a sudden and immediate medical condition which could be expected to result in permanent damage to your health if not treated immediately.
>
> * * *
>
> C. All follow-up care to initial emergency treatment . . . is covered only when provided or approved by BCN or by your Primary Care Physician.
>
> D. If a Member is hospitalized for emergency care in a non-affiliated hospital or outside of the BCN service area, BCN may

In March 2002, Ross contracted an acute form of multiple myeloma. Ross was referred to the University of Michigan Medical Center, an in-network provider, which in a May 28, 2002, letter recommended to Dr. Stephen Goldfarb, one of Ross's oncologists, that Ross receive a stem-cell transplant and advised that it had given Ross information on bone-marrow transplants and instructed Ross to discuss this option with Dr. Goldfarb. According to Desiree Ross (petitioner), who is Ross's wife and the personal representative of his estate, Ross's condition began to spiral out of control toward the end of June 2002, Ross's oncologist told him that he was no longer eligible for treatment at the University of Michigan Medical Center because the cancer had spread to his soft tissue, and Ross was consigned to palliative treatment. She also claimed that Dr. Ronald Lutsic, a radiation oncologist, told her in June 2002 that Ross's prognosis was dismal and that if he were Ross, he would go to the Myeloma Institute in Little Rock, Arkansas (the facility), one of two facilities in the world at the forefront of treating multiple myeloma.

Petitioner called Ross's primary care physician (PCP), Dr. Michael Silverstone, to ask for a referral to the facility, which was not a BCN in-network provider. BCN advised that it needed to review the facility's treatment plan and that it would take 10 to 14 days to review the request. The facility said that it could not provide a treatment plan without first evaluating Ross.

On July 2, 2002, Ross went to Arkansas and began an evaluation at the facility without BCN's approval. On July 8, 2002, Dr. Frits van Rhee, the evaluating doctor, admitted Ross to the hospital, noting that without

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require that the Member be transferred to an affiliated hospital or other facility within the service area *as soon as medically feasible*. [Emphasis added.]

aggressive intervention, Ross had only about seven days to live. Ross was hospitalized from July 8, 2002, to July 23, 2002. The July 23, 2002, discharge summary indicated that Ross was "stable for discharge and outpatient followup . . . ." In the meantime, Ross had received notices from BCN on July 9, July 15, and July 16 denying coverage for treatment at the facility because either the services were available in-network or there was no referral from his PCP, and advising Ross to contact his PCP for a referral to an in-network provider.

Although petitioner claimed that BCN never informed her of any in-network providers that could treat Ross's condition, she did not indicate that she had contacted Ross's PCP as advised by BCN for such a referral, and she did not present any evidence that the University of Michigan Medical Center was unable to administer the same treatment Ross received at the facility. Ross continued with both outpatient and inpatient treatment at the facility without BCN's authorization until March 2003. He died on April 6, 2003. BCN refused to cover any evaluation or treatment at the facility.

On December 18, 2002, pursuant to BCN's internal procedures, petitioner initiated a "step one" appeal of the denial of coverage for Ross's treatment at the facility that had begun on June 30, 2002. BCN denied the appeal on January 9, 2003, because (1) the PCP had not referred Ross, (2) BCN had not authorized the services and there was no indication that the services were not available in-network, and (3) BCN considered the facility's services to be experimental. On February 6, 2003, petitioner filed a "step two" internal appeal, which BCN denied. On April 28, 2003, petitioner appealed to OFIS under PRIRA. The commissioner accepted the request and assigned the case to an IRO.

The IRO's initial report, dated May 16, 2003, indicated that "this must be considered an emergency evaluation and admission in the mind of a prudent patient," that attempts were made to use in-network providers, that Ross was not offered a reasonable alternative plan of care that would address his condition, and that the treatment he received at the facility should not have been considered experimental. After receiving the initial report, the commissioner repeatedly sought to compel the IRO to apply the contractual and statutory standards rather than the IRO-imposed prudent-patient standard for evaluating an emergency,[4] sending

[4] We quote here one of the questions in the commissioner's October 2004 request for clarification of the IRO's recommendation and the IRO's November 2004 response to that question as just one example of how the commissioner repeatedly sought to compel the IRO to apply the statutory standards and how the IRO unwarrantedly declined to do so:

> [*Q*.] Michigan law requires coverage for emergency treatment up to the point of stabilization. At what point after Mr. Ross' admission on July 8, 2002 was he stabilized. Dr. VanRhee, the admitting and treating physician stated Mr. Ross began DT PACE chemotherapy on July 10, 2002 and within 7 days Myeloma was back under control. Can it be assumed that Mr. Ross was stable by July 18, 2002?
>
> [*A*.] The patient subsequently developed severe and life-threatening complications of his disease process, requiring admission to the University of Arkansas Medical Center July 8, 2002.
>
> Blue Care Network's policy on Emergency Care Section 1.04 D. [sic] states, "If a Member is hospitalized for emergency care in a nonaffiliated hospital or outside of the BCN service area, BCN may require that the member be transferred to an affiliated hospital or other facility within the services area as soon as medically feasible.["] It is the opinion of this reviewer that it was not medically feasible or appropriate to transfer the enrollee to another facility, which was not involved with the patient's course of treatment. It would have been inappropriate to attempt to transfer the patient across the country for treatment at a network facility at any time during his July 8 – July 23, 2002 inpatient admission episode.

the IRO three requests for clarification whether the June 30, 2002, outpatient consultation, the July 8, 2002, to July 23, 2002, inpatient admission, the August 1, 2002, to August 2, 2002, inpatient admission, and the

> He required treatment for his condition at a center that was familiar with his condition under the supervision of his treating physician.
>
> This reviewer does not have adequate clinical information about the August 1 – August 2, 2002 inpatient admission; therefore, no decision can be rendered regarding this episode.
>
> The follow-up testing was to evaluate the health of the patient and the effectiveness of the treatment given to this patient. This reviewer does not have the specifics as to the care provided, but it would be inappropriate to "transfer" this responsibility to another facility, which was not involved with this patient's course of treatment. It is the opinion of this reviewer that it is inappropriate to unbundle the care provided to this patient for his refractory myeloma and that it is appropriate to look at the global care provided for this illness. Given the sense of emergency and life-threatening nature of the patient's condition without effective therapy, the care, provided at the University of Arkansas Medical Center, was appropriate treatment.

When viewing the question and the answer in its entirety, it is clear that the IRO's statement that "it was not medically feasible or appropriate to transfer [Ross] to another facility" referred to the July 8, 2002, to July 23, 2002, admission, while the remainder of the IRO's answer addressed the subsequent periods of treatment. The IRO did not indicate with respect to these subsequent periods that transfer would have been medically infeasible; rather, the IRO indicated only that it would have been inappropriate to transfer Ross to another facility. Justice KELLY argues, *post* at 188 n 23: "Given that the IRO is made up of doctors, not lawyers, it is not surprising that [the IRO] did not use the legalistic language that the majority is looking for." In response, we note that the term "medically feasible" used in the certificate of coverage was not defined in such a manner that a doctor, who has extensive education, would be unable to understand or apply the term. Moreover, the IRO demonstrated in its November 2004 response that the IRO's physician reviewer was perfectly capable of using the term "medically feasible" and applying, even citing, the language in BCN's certificate when the reviewer deemed it appropriate to do so.

September 9, 2002, to November 17, 2002, follow-up testing constituted emergency care, which would be covered under the certificate of coverage, as well as under MCL 500.3406k,[5] and whether Ross became stabilized at any point so as to make it medically feasible to transfer him to an in-network facility.

The IRO responded that Ross was admitted to the facility on an emergency basis and that it was not appropriate to transfer him to an in-network facility for treatment or follow-up because the in-network facility was not involved in Ross's treatment. In the IRO's last two responses, it stated that it was not medically feasible to transfer Ross from July 8, 2002, to July 23,

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[5] MCL 500.3406k of the Insurance Code provides that an HMO must, if it provides a certificate of medical coverage, cover emergency medical services until the insured is stabilized and defines "stabilization":

> (1) . . . [A] health maintenance organization contract shall provide coverage for medically necessary services provided to an insured for the sudden onset of a medical condition that manifests itself by signs and symptoms of sufficient severity . . . such that the absence of immediate medical attention could reasonably be expected to result in serious jeopardy to the individual's health . . . , serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. An insurer shall not require a physician to transfer a patient before the physician determines that the patient has reached the point of stabilization. An insurer shall not deny payment for emergency health services up to the point of stabilization provided to an insured under this subsection because of either of the following:
>
> (a) The final diagnosis.
>
> (b) Prior authorization was not given by the insurer before emergency health services were provided.
>
> (2) As used in this section, "stabilization" means the point at which no material deterioration of a condition is likely, within reasonable medical probability, to result from or occur during transfer of the patient.

2002, and that it was inappropriate to unbundle the remaining care provided. The only time the IRO stated that it was not medically feasible to transfer Ross was in response to the commissioner's question regarding the July 8, 2002, to July 23, 2002, admission. The IRO recommended on three separate occasions that BCN's denial of petitioner's claim be overturned.

The commissioner found that only the inpatient admission to the facility from July 8, 2002, to July 23, 2002, was a medical emergency under the definition of "emergency care" in BCN's health plan. She upheld the denial regarding the remainder of the services on the grounds that (1) out-of-network services were not covered, (2) BCN did not approve the out-of-network services, (3) there was no evidence that treatment was unavailable within the network, given that Ross's PCP had referred him to the University of Michigan Medical Center, a multidisciplinary cancer treatment center, and (4) other than the July 8, 2002, to July 23, 2002, hospitalization, the care was not emergency care under the policy or Michigan law.

Petitioner appealed the commissioner's decision in the circuit court, arguing alternatively (1) that it was not medically feasible to transfer Ross to an in-network facility because of the emergency nature of his condition, (2) that Ross had a referral from his PCP, so the services did not need to constitute emergency medical care, and (3) that the services were not available in-network. Focusing on the argument that the services were emergency services, the circuit court reversed the part of the commissioner's decision that upheld BCN's denial of coverage, reasoning that the commissioner's conclusion—that some but not all of the facility's services were emergency services—was not authorized by law.

The Court of Appeals granted BCN's application for leave to appeal and affirmed with respect to the services provided through November 17, 2002. *Ross v Blue Care Network of Michigan*, 271 Mich App 358; 722 NW2d 223 (2006). It reasoned that the commissioner had failed to comply with the requirements of PRIRA and exceeded her authority when she discounted the IRO's medical recommendations and replaced them with her own independent determinations. *Id.* at 371. The panel concluded that the statement in *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 464; 688 NW2d 523 (2004)—that an IRO's recommendation was not binding on the commissioner—was merely dictum because the *English* panel was never actually presented with the question whether an IRO's recommendation is binding on the commissioner. *Ross*, *supra* at 373-375.

Alternatively, the Court concluded that even if the statement in *English* were binding on the Court, the *English* panel had recognized that the commissioner's independent review of the IRO's recommendation under MCL 550.1911(15) was limited to confirming that the recommendation did not contradict the health-plan provisions. *Id*. at 375. However, the *Ross* panel agreed with BCN that the circuit court erroneously required it to pay for evaluation and treatment after November 17, 2002, because the commissioner had not considered the care Ross received after that date. *Id.* at 380-381.

BCN applied for leave to appeal in this Court. We ordered oral argument on the application and specifically directed the parties to address whether the Court of Appeals paid sufficient attention to the provisions of PRIRA that require an IRO to provide a "recommendation" to the commissioner, and whether the Court of Appeals properly characterized as dictum the statement

in *English* that indicated that the IRO's recommendation was not binding on the commissioner. 477 Mich 960 (2006). The commissioner has filed an amicus curiae brief in support of BCN's application.

II. STANDARD OF REVIEW

The interpretation of statutes presents an issue of law, which is reviewed de novo. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). Decisions of an administrative agency or officer, in cases in which no hearing is required, are reviewed to determine whether the decisions are authorized by law. Const 1963, art 6, § 28.

III. ANALYSIS

PRIRA is a relatively recent addition to our state's laws. Enacted in 2000 as part of the Legislature's across-the-board attempt to regulate HMOs and other insurance providers consistently,[6] PRIRA was intended

[6] PRIRA was introduced as HB 5576, enacted as 2000 PA 251, and amended by 2000 PA 398. HB 5576 was considered in conjunction with HB 5573, HB 5574, and HB 5575. At the same time that the House bills were being considered, SB 1211 and SB 1209 were also being considered. 2000 PA 252 (SB 1209) repealed part 210 of the Public Health Code (MCL 333.21001 through 333.21098), which had previously regulated HMOs; brought HMOs under the authority of the OFIS commissioner by adding chapter 35, entitled "Health Maintenance Organizations" to the Insurance Code; and amended MCL 500.2213 to provide that HMOs must establish an internal review procedure and that insurers must notify insureds of the right to independent review under PRIRA. 2000 PA 253 (SB 1211) amended MCL 333.20106, MCL 333.20124, MCL 333.20161, and MCL 333.22205 of the Public Health Code to make technical changes regarding HMOs in light of the transfer of the regulatory framework pertaining to HMOs from the Public Health Code to the Insurance Code. 2000 PA 250 (HB 5573) amended MCL 550.1404 of the Nonprofit Health Care Corporation Reform Act to provide for independent external review under PRIRA.

to standardize the external review process designed to resolve disputes over covered benefits, establish IRO qualifications, and provide for penalties in cases of wrongful denial of benefits.

Under PRIRA, the external review process for adverse determinations made by health carriers is governed by MCL 550.1911, which provides:

> (1) Not later than 60 days after the date of receipt of a notice of an adverse determination . . . , a covered person . . . may file a request for an external review with the commissioner. . . .
>
> (2) Not later than 5 business days after the date of receipt of a request for an external review, the commissioner shall complete a preliminary review of the request to determine all of the following:
>
> (a) Whether the individual is or was a covered person in the health benefit plan . . . .
>
> (b) Whether the health care service . . . reasonably appears to be a covered service under the covered person's health benefit plan.
>
> (c) Whether the covered person has exhausted the health carrier's internal grievance process . . . .
>
> (d) The covered person has provided all the information and forms required . . . .
>
> (e) Whether the health care service . . . appears to involve issues of medical necessity or clinical review criteria.
>
> (3) Upon completion of the preliminary review under subsection (2), the commissioner immediately shall provide a written notice . . . as to whether the request is complete and whether it has been accepted for external review.
>
> (4) If a request is accepted for external review, the commissioner shall do both of the following:
>
> (a) Include in the written notice under subsection (3) a statement that the covered person . . . may submit to the commissioner . . . additional information and supporting

documentation that the reviewing entity shall consider when conducting the external review.

(b) Immediately notify the health carrier in writing of the acceptance of the request for external review.

(5) If a request is not accepted for external review because the request is not complete, the commissioner shall inform the covered person . . . what information or materials are needed to make the request complete. If a request is not accepted for external review, the commissioner shall provide written notice . . . to the covered person . . . and the health carrier of the reasons for its nonacceptance.

(6) If a request is accepted for external review and appears to involve issues of medical necessity or clinical review criteria, the commissioner shall assign an independent review organization . . . . The assigned independent review organization shall be approved . . . to conduct external reviews and shall provide a written *recommendation* to the commissioner on whether to uphold or reverse the adverse determination . . . .

(7) If a request is accepted for external review, does not appear to involve issues of medical necessity or clinical review criteria, and appears to only involve purely contractual provisions of a health benefit plan, such as covered benefits or accuracy of coding, the commissioner may keep the request and conduct his or her own external review or may assign an independent review organization as provided in subsection (6) . . . . Except as otherwise provided in subsection (16), if the commissioner keeps a request, he or she shall review the request and issue a decision . . . within the same time limits and subject to all other requirements of this act for requests assigned to an independent review organization. If at any time during the commissioner's review of a request it is determined that a request does appear to involve issues of medical necessity or clinical review criteria, the commissioner shall immediately assign the request to an independent review organization . . . .

(8) In reaching a *recommendation*, the reviewing entity is not bound by any decisions or conclusions reached during the health carrier's utilization review process or the health carrier's internal grievance process.

(9) Not later than 7 business days after the date of the notice under subsection (4)(b), the health carrier . . . shall provide . . . the documents and any information considered in making the adverse determination . . . .

(10) Upon . . . notice from the assigned independent review organization that the health carrier . . . has failed to provide the documents and information within 7 business days, the commissioner may terminate the external review and make a decision to reverse the adverse determination . . . .

(11) The reviewing entity shall review all of the information and documents received under subsection (9) and any other information submitted . . . .

* * *

(13) In addition to the documents and information provided under subsection (9), the reviewing entity . . . shall consider the following in reaching a *recommendation*:

(a) The covered person's pertinent medical records.

(b) The attending health care professional's recommendation.

(c) Consulting reports from appropriate health care professionals and other documents submitted by the health carrier, the covered person, the covered person's authorized representative, or the covered person's treating provider.

(d) The terms of coverage under the covered person's health benefit plan with the health carrier.

(e) The most appropriate practice guidelines, which may include generally accepted practice guidelines, evidence-based practice guidelines, or any other practice guidelines developed by the federal government or national or professional medical societies, boards, and associations.

(f) Any applicable clinical review criteria developed and used by the health carrier or its designee utilization review organization.

(14) The assigned independent review organization shall provide its *recommendation* to the commissioner not later than 14 days after the assignment by the commissioner of the request for an external review. The independent review organization shall include in its *recommendation* all of the following:

(a) A general description of the reason for the request for external review.

(b) The date the independent review organization received the assignment from the commissioner to conduct the external review.

(c) The date the external review was conducted.

(d) The date of its *recommendation*.

(e) The principal reason or reasons for its *recommendation*.

(f) The rationale for its *recommendation*.

(g) References to the evidence or documentation, including the practice guidelines, considered in reaching its *recommendation*.

(15) Upon receipt of the assigned independent review organization's *recommendation* under subsection (14), the commissioner immediately shall review the *recommendation* to ensure that it is not contrary to the terms of coverage under the covered person's health benefit plan with the health carrier.

(16) The commissioner shall provide written notice . . . to the covered person . . . and the health carrier of the decision to uphold or reverse the adverse determination . . . not later than 7 business days after the date of receipt of the selected independent review organization's *recommendation*. . . . The commissioner shall include in a notice under this subsection all of the following:

(a) The principal . . . reasons for the decision . . . .

> (b) If appropriate, the principal . . . reasons why the commissioner did not follow the assigned independent review organization's *recommendation*. [Emphasis added.]

To summarize, under MCL 550.1911, the commissioner has discretion to accept or reject a request for an external review, MCL 550.1911(3). If a request is accepted, the covered person is permitted to submit "additional information and supporting documentation," MCL 550.1911(4)(a), and the health carrier is required to submit "the documents and any information considered in making the adverse determination," MCL 550.1911(9).

If an accepted request "involve[s] purely contractual provisions," the commissioner has discretion to conduct his or her own external review, MCL 550.1911(7). If, however, an accepted request "involve[s] issues of medical necessity or clinical review criteria,"[7] the commissioner must assign an IRO to conduct the external review, MCL 550.1911(6). IROs conduct their external reviews through clinical peer reviewers, who must be physicians or meet the requirements found in MCL 550.1919(2)[8] for health-care professionals. In reaching a recommendation, the IRO is not bound by any prior

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[7] "Clinical review criteria" is defined as "the written screening procedures, decision abstracts, clinical protocols, and practice guidelines used by a health carrier to determine the necessity and appropriateness of health care services." MCL 550.1903(f).

[8] MCL 550.1919(2) provides in relevant part:

> A clinical peer reviewer . . . shall be a physician or other appropriate health care professional who meets all of the following minimum qualifications:
>
> (a) Is an expert in the treatment of the covered person's medical condition that is the subject of the external review.
>
> (b) Is knowledgeable about the recommended health care . . . treatment because he or she devoted in the immediately preceding

decision or conclusion, MCL 550.1911(8). After reviewing all information, the IRO makes a recommendation concerning whether the commissioner should uphold or reverse the health carrier's decision, MCL 550.1911(6). This recommendation must be provided within 14 days of receiving the assignment, MCL 550.1911(14).

The commissioner, who is not required to have any medical knowledge, then reviews the recommendation to ensure that it is not contrary to the terms of coverage under the covered person's health benefit plan with the health carrier, MCL 550.1911(15). The commissioner has seven days to decide whether to uphold or reverse the health carrier's decision, MCL 550.1911(16). The commissioner must provide the reasons for his or her decision, including the reasons why he or she decided not to follow the IRO's recommendation, MCL 550.1911(16)(b). Finally, a party aggrieved by the commissioner's decision may seek judicial review, MCL 550.1915(1).[9]

As can be seen from this statutory scheme, it is hard to imagine a more comprehensive review process. And

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year a majority of his or her time in an active clinical practice within the medical specialty most relevant to the subject of the review.

(c) Holds a nonrestricted license . . . and, for physicians, a current certification by a recognized American medical specialty board in the . . . areas appropriate to . . . the external review.

(d) Has no history of disciplinary actions . . . that raise a substantial question as to the clinical peer reviewer's physical, mental, or professional competence or moral character.

[9] MCL 550.1915(1) provides in relevant part: "An external review decision and an expedited external review decision are the final administrative remedies available under this act. A person aggrieved by [such a] decision may seek judicial review . . . ."

this comprehensive scheme in MCL 550.1911 refers 13 times to an IRO's recommendation.[10]

In its opinion, the Court of Appeals neither defined the term "recommendation" nor considered the significance of its use by the Legislature. "Recommendation" is defined as "the act of recommending." *Random House Webster's College Dictionary* (2005). "Recommending" is the gerund form of "recommend," which is defined as "to urge or suggest as appropriate . . . ." *Id.* "Suggest" is defined as "to mention, introduce, or propose (an idea, plan, person, etc.) for consideration, possible action, or some purpose or use." *Id.* Clearly, to make a "recommendation" means to suggest or propose something; "recommendation" is not a word that connotes mandatory compliance. Nowhere in the statute does it say that the IRO's recommendation is binding in any way, so there is nothing that would require us to impute a meaning other than the plain meaning of the term "recommendation." Moreover, the nature of the term "recommendation" as connoting a suggestion is reinforced by MCL 550.1911(16)(b), which expressly allows the commissioner to decline to follow the IRO's recommendation as long as the commissioner explains his or her reasons for doing so.[11]

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[10] In response to Justice KELLY's analysis using the doctrine of *expressio unius est exclusio alterius*, we point out that MCL 550.1911(16) *expressly* gives the commissioner authority to uphold or reverse an insurer's adverse determination. Nowhere in the statute is there a similar provision that grants an IRO comparable authority. Thus, Justice KELLY's application of the doctrine of *expressio unius est exclusio alterius* is unpersuasive because it leads to an interpretation that is contrary to the unambiguous language of the statute. See *Luttrell v Dep't of Corrections*, 421 Mich 93, 107; 365 NW2d 74 (1984).

[11] According to Justice KELLY, the commissioner acted in an arbitrary and capricious manner when she rejected the IRO's conclusions about medical necessity. In reaching this conclusion, Justice KELLY claims: "The IRO determined that (1) the initial treatment was a medical emergency,

In the only Michigan case before this one to address PRIRA, *English*, the Court of Appeals likewise noted that an IRO's recommendation was not binding on the commissioner. *English*, *supra* at 464. In *English*, the commissioner partially reversed Blue Cross Blue Shield of Michigan's denial of coverage for various blood tests because she found, consistently with the IRO's recommendation, that the tests were medically necessary. *Id.* at 453. In response to Blue Cross's argument that it was denied due process because it did not know the identity, and could not challenge the recommendation, of the IRO, the Court of Appeals distinguished the authority

(2) it was not appropriate to transfer Ross to an in-network facility, and (3) Ross was not stabilized before November 17, 2002." *Post* at 187. We disagree that the IRO concluded that Ross was not stabilized. The term "stabilization," as defined by MCL 500.3406k(2), means "the point at which no material deterioration of a condition is likely, within reasonable medical probability, to *result from or occur during transfer of the patient*." (Emphasis added.) On July 23, 2002, Ross was *discharged* from the facility, and the discharge summary indicated Ross was "stable for discharge." It is axiomatic that if a patient is stable for discharge, the patient may be transferred without the likelihood of a material deterioration in the patient's condition resulting from or occurring during transfer. We emphasize that the *only* period for which the IRO specifically indicated that it was not medically feasible to transfer Ross was from July 8, 2002, to July 23, 2002, *even when specifically asked at what point Ross was stabilized for transfer*. With respect to the subsequent periods, the IRO merely characterized the possibility of a transfer as improper. The IRO's rationale for finding that transfer was improper was not because Ross's medical condition would likely have deteriorated during transfer (the standard required under MCL 500.3406k), but because it would have been inappropriate to "unbundle" the remaining care. Thus, Justice KELLY's characterization of the IRO's finding—that Ross was not stabilized before November 17—is faulty. Nevertheless, had the IRO found on these facts that Ross was not stabilized before November 17, i.e., that his condition was likely to deteriorate if he were transferred, such a finding would itself have been arbitrary and capricious, and, if the commissioner had blindly accepted such a finding, the commissioner's actions would likewise have been arbitrary and capricious. However, according to Justice KELLY's reasoning, this is exactly what the commissioner would be required to do.

cited by Blue Cross because in those cases, which held that due process had been denied, the evidence was unknown to the parties, while in *English*, the IRO's recommendation was not evidence, but was merely a tool to aid the commissioner, and the recommendation was not binding on the commissioner. *Id.* at 464.

The Court of Appeals in the instant case declared that this statement in *English* did not bind the Court because whether an IRO's recommendation was binding on the commissioner was not at issue in *English*, given that the commissioner agreed with the IRO's recommendation. *Ross*, *supra* at 374. In reaching this conclusion, the Court of Appeals failed to recognize or address the significance of the reason the *English* panel made the statement in the first place, which was to distinguish the cases cited by Blue Cross in support of its argument on denial of due process, an issue that most certainly was before the Court. The *English* panel held in part that PRIRA did not violate the parties' due process rights *because* the IRO's recommendation is not binding on the commissioner. Thus, its conclusion that an IRO's recommendation is not binding on the commissioner is clearly not dictum. Instead, it was one of the reasons that the panel held that PRIRA did not violate the parties' due process rights. When necessary to determine an issue in a case, a statement of law cannot be dictum. *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006).

In sum, by failing to recognize the significance of the use of the term "recommendation" and declining to follow *English*, the Court of Appeals applied a flawed construction of the statute to conclude that

> while the Legislature intended that the OFIS Commissioner would review the IRO's recommendation for consis-

> tency and compliance with the health plan itself, the Legislature did not intend that the OFIS Commissioner would review or reevaluate the IRO reviewer's specific medical or clinical findings. Instead, the language of PRIRA indicates that the Legislature intended the OFIS Commissioner to defer to the IRO's recommendation on medical issues that do not implicate the language of the health plan itself. [*Ross*, *supra* at 377-378.]

This construction essentially created a judicially defined bifurcated system of review in which the IRO would be the final authority on issues of medical or clinical-review criteria, while the commissioner would be the ultimate authority on purely contractual issues. Such a construction was not supported by the plain and unambiguous language of the act itself. Given the all-encompassing, comprehensive scheme set forth in PRIRA, the absence of such a bifurcated review process in the statute convincingly demonstrates that the Legislature did not intend that the review authority be bifurcated. In fact, as previously noted, the opposite intent is demonstrated by the frequent use of the term "recommendation," as well as by MCL 550.1911(16)(b), which provides that the commissioner must give the principal reasons why he or she did not follow the IRO's recommendation.

Furthermore, the Legislature has contemplated in MCL 550.1911(7) that there may be situations involving purely contractual issues over which the commissioner has sole authority. Similarly, the Legislature has treated medical issues as implicating contractual matters also and has not established that the commissioner's authority is different. That is, the commissioner has identical authority over both contractual and medical issues. The Court of Appeals failed to recognize this and erred in concluding that "medical issues" were to

be treated differently. The act provides for no such bifurcation. Rather, when the Legislature charged the commissioner with ensuring that the IRO's recommendation was consistent with the terms of coverage, it necessarily authorized the commissioner to review issues of medical necessity pertaining to those terms of coverage.

In any event, the commissioner's determination *was* consistent with the IRO's recommendation to the extent that the recommendation did not contradict the policy provisions or MCL 500.3406k.[12] The *only* period for which the IRO stated that it was not medically

[12] Justice KELLY asserts that the only reasonable way to read the IRO's response to the commissioner's last request for clarification is that the IRO concluded that "Ross was necessarily not 'stabiliz[ed]' for transfer as that term is defined by MCL 500.3406k(2)." *Post* at 188 n 23. From this response, Justice KELLY claims that the IRO concluded that Ross was not stabilized before November 17, 2002. Again, this requires us to include the relevant question from the commissioner's January 26, 2005, request for clarification and the IRO's March 9, 2005, response to that question in their entirety:

> [*Q*.] The Michigan statute governing emergency health services, MCL 500.3406k, requires coverage for "medically necessary services" to the insured "for the sudden onset of a medical condition that manifests itself by signs and symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in serious jeopardy to the individual's health . . . serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." The statute further provides that "an insurer shall not require a physician to transfer a patient before the physician determines that the patient has reached the point of stabilization." Stabilization is defined as "the point at which no material deterioration of a condition is likely, within reasonable medical probability, to result from or occur during transfer of the patient". Based on the available records, at which point after [Ross] was hospitalized on July 8, 2002 would no material deterioration of his condition likely result from or occur during transfer of [Ross] to a network hospital? What medical services were necessary to stabilize [Ross] under the statute's definition of stabilization?

feasible—the standard required in the policy—to move Ross to an in-network facility was the period from July 8, 2002, to July 23, 2002, and it was for services provided during this period that the commissioner reversed BCN's denial of coverage.[13] The IRO's finding that it was "inappropriate" to move Ross to another

> [*A*.] This issue was addressed in a conference call on Wednesday, February 9, 2005 by Dr. David Sand, Medical Director, Permidion. [Ross] had methicillin-resistant Staphylococcus aureus septicemia following his DT-PACE chemotherapy. The University Hospital of Arkansas discharge summary dictated September 15, 2002 documents [Ross's] clinical status from August 16, 2002 through September 9, 2002. [Ross] could not have been transferred or released prior to his discharge date.

Notwithstanding the fact that the period of August 16, 2002, through September 9, 2002, was not a period the IRO was *ever* asked to address, we include this question and answer for two reasons. First, it is an excellent illustration of the IRO's unresponsive answers to the commissioner's increasingly more specific questions, which prompted the commissioner to seek clarification of the IRO's recommendation on three separate occasions. Second, it illustrates how unreasonable it is to assert that the IRO concluded that Ross was not stabilized before November 17, 2002, when the IRO's answer, which relied on a September 15, 2002, discharge summary, is completely silent with respect to any time after September 9, 2002. Although we agree with Justice KELLY that the IRO repeatedly responded that BCN should be required to pay for the services, we disagree that the only way to read the IRO's reports is to conclude that the treatment at issue fell within the terms of coverage. Rather, given that the IRO demonstrated it was capable of understanding and applying the standards with respect to the July 8, 2002, to July 23, 2002, hospitalization, and that it repeatedly refused to apply the standards with respect to the remaining periods of care, we think it clear that the IRO thought BCN should pay for the services *regardless* of whether they fell within the terms of coverage.

[13] The Court of Appeals determination—that the IRO specifically concluded it was not medically feasible to transfer Ross before November 17, 2002, *Ross*, *supra* at 379—was clearly in error because it contradicted the IRO's own statements as well as the facility's July 23, 2002, discharge summary, which indicated that Ross was "stable for discharge and outpatient followup . . . ."

facility after July 23, 2002, was not based on a standard set forth in either the policy or the statute. Those standards were that it be medically feasible to move the patient or that the patient be stabilized before being moved, respectively. Thus, the IRO's error was one that involved contractual and statutory construction—error that the commissioner correctly rectified.

IV. CONCLUSION

Under the PRIRA provisions for an independent external review of an adverse determination regarding coverage, an IRO's recommendation concerning whether to uphold or reverse a health carrier's adverse determination is merely a recommendation and is not binding on the commissioner. We reverse the judgments of the trial court and the Court of Appeals, which held otherwise, and remand the case to the trial court for further proceedings.

Reversed and remanded to the trial court.

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

KELLY, J. (*dissenting*). The majority correctly frames the issue. It is "whether the Commissioner of the Office of Financial and Insurance Services (OFIS) is bound by the recommendations of an independent review organization (IRO) on issues of medical necessity and clinical review."[1] But the majority errs by deciding that the commissioner is never bound by such recommendations.

I conclude that the commissioner's review is limited to ensuring that an IRO's recommendations are not

[1] *Ante* at 155.

contrary to the terms of coverage under the covered person's health-benefit plan.[2] In this case, the IRO's recommendation that respondent Blue Care Network of Michigan be required to pay for services provided before November 17, 2002, was consistent with the terms of coverage. Therefore, I would affirm the well-reasoned decision of the Court of Appeals.

FACTS

Respondent insured petitioner's decedent, Douglas Ross. In February 2002, Ross began experiencing back and leg pain. By April, he could no longer walk or stand. He was diagnosed as suffering from numerous conditions, the most serious being a severe form of multiple myeloma.[3]

Ross underwent a variety of treatments, including chemotherapy, to combat the disease. In May 2002, he was advised to seek treatment from the Bone Marrow Transplant Clinic at the University of Michigan (U of M). Unfortunately, he was unable to begin treatment at the U of M immediately because his blood-sugar level was elevated.

By early June, Ross's multiple myeloma had become increasingly severe and resulted in tumors in his leg, neck, and eye. Ross was advised by his treating physicians that he had an extremely aggressive strain of the disease. Dr. Lutsic, his radiation oncologist, characterized his condition as the most severe form of the disease he had ever seen. As a result of his deterioration, Ross was told that he was no longer a candidate for a

[2] MCL 550.1911(15).

[3] Multiple myeloma is a cancer of the plasma cell. See Multiple Myeloma Research Foundation, About Myeloma <http://www.multiplemyeloma.org/about_myeloma> (last visited January 7, 2008).

bone-marrow transplant and that the U of M would no longer treat him. He was advised that the only remaining course of treatment was medication to handle the pain as he died.

In a final effort to prolong Ross's life, petitioner contacted the University of Arkansas for Medical Sciences (UAMS), a leader in the treatment of myeloma. Dr. Lutsic had told petitioner that he would pursue this option if he were in the same position as Ross. UAMS advised petitioner that it had successfully treated the condition Ross had, but, if he were to have any chance of survival, he would have to start treatment promptly. Ross immediately requested a referral to UAMS, which was not an in-network provider. Respondent told Ross that it needed time to review UAMS's treatment plan before it took action. However, UAMS stated that it could not provide a treatment plan without first evaluating Ross.

On June 30, 2002, Ross traveled to UAMS for an evaluation. The doctors at UAMS found Ross to be close to death and decided that, without aggressive treatment, he would die very soon. On July 9, 2002, Dr. van Rhee of UAMS provided respondent with an explanation of Ross's condition and the proposed treatment. Dr. van Rhee informed respondent that, without treatment, Ross had only days to live. Ross's certificate of coverage included medically necessary services without prior authorization in cases of immediate and unforeseen medical emergency. This coverage was available until it became medically feasible to transfer the covered person to an in-network provider. Nonetheless, respondent informed UAMS that it intended to deny coverage. And, ultimately, it did refuse to pay for any services provided by UAMS.

The treatment administered at UAMS immediately showed marked success. On July 23, 2002, Ross was

discharged. Ross continued outpatient treatment with UAMS, and he was also readmitted on numerous occasions. On December 23, 2002, Ross was admitted to UAMS for the last time. He remained an inpatient until March 2003. He died on April 6, 2003, at 46 years of age.

In regard to Ross's insurance claims, respondent categorized UAMS's services into four periods: (1) outpatient facility services commencing on June 30, 2002, (2) inpatient admission from July 8 through July 23, 2002, (3) inpatient admission on August 1 and 2, 2002, and (4) follow-up testing from September 9 to November 17, 2002. On December 18, 2002, Ross initiated an internal appeal with respondent. When respondent denied the appeal, Ross took the second step in the internal appeal process. Respondent upheld its denial. On April 28, 2003, petitioner filed a request for external review with the Office of Financial and Insurance Services (OFIS)[4] under the Patient's Right to Independent Review Act (PRIRA).[5]

The Commissioner of OFIS[6] accepted the request and assigned the case to Permidion, an independent review organization. The IRO submitted its initial decision on May 16, 2003. It concluded that Ross's evaluation and admission to UAMS was an emergency and that it would have been inappropriate for Ross to have received care elsewhere. The IRO also concluded that the treatment provided was not experimental or investigational.

The commissioner asked the IRO for clarification in July 2003. She asked the IRO to consider four periods of care: (1) the June 30, 2002, outpatient consultation, (2)

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[4] OFIS is now the Office of Financial and Insurance Regulation, effective April 6, 2008. Executive Order No. 2008-2.

[5] MCL 550.1901 *et seq*.

[6] The commissioner in this case was Linda A. Watters.

the July 8 to July 23, 2002, inpatient admission, (3) the August 1 to August 2, 2002, inpatient admission, and (4) the September 9 to November 17, 2002, follow-up testing. The IRO recognized that the commissioner had specifically asked it to review "whether each of the . . . four episodes meet[s] the criteria for emergency care under the insured's policy, and at what point, if any, would the patient have been stabilized to make it 'medically feasible' to transfer care to an in-network facility."

The IRO determined that it did not have the information required to offer an opinion about the August 1 and 2 treatment. But the IRO concluded that, with respect to the other periods, the treatment was appropriate. The IRO concluded that the initial consultation was emergency care and that it would have been improper to have transferred Ross to another facility because the "patient required ongoing treatment for a period of time under the supervision of his treating physician and it would have been inappropriate for the patient to receive treatment elsewhere." Accordingly, the IRO recommended that respondent's denial be reversed.

The commissioner requested even more review in October 2004. The October 2004 request was almost identical to the July 2003 request, and the IRO responded in kind. Specifically, the IRO reiterated its conclusion that the initial treatment constituted emergency services due to lack of a reasonable alternative at an in-network facility. It also again concluded that Ross "required ongoing treatment for his condition at a center that was familiar with his condition under the supervision of his treating physician."

The commissioner made a final request for clarification in January 2005. She asked the IRO to again

consider whether Ross had been in an acute medical state in June 2002 and to clarify when Ross had been stabilized for transfer. The IRO responded by noting that Ross was one week away from death when he arrived at UAMS. The IRO also attached its response to the October 2004 request for review, in which it had concluded that it would have been inappropriate to have transferred Ross to another facility. Ultimately, the IRO again recommended that respondent's denial of coverage be overturned for the periods at issue.

On March 30, 2005, nearly two years after petitioner requested external review, the commissioner issued her decision. She disregarded the IRO's conclusions and found that only Ross's July 8 through July 23, 2002, inpatient admission was covered treatment. She decided that this treatment alone constituted emergency care. Accordingly, the commissioner upheld respondent's denial of coverage with respect to the remainder of UAMS's services.

Petitioner filed an appeal in the Wayne Circuit Court. The circuit court reversed the commissioner's decision and ordered respondent to pay for all the services rendered by UAMS. The circuit court reasoned that, because the commissioner had concluded that the July 8 to July 23 hospitalization constituted emergency services, all the services that UAMS provided were emergency services.

Respondent filed an application for leave to appeal in the Court of Appeals. The Court granted leave to appeal and, in a published opinion, affirmed in part and reversed in part the circuit court's order.[7] The Court of Appeals reversed the decision requiring respondent to pay for services rendered after November 17, 2002,

[7] *Ross v Blue Care Network of Michigan*, 271 Mich App 358; 722 NW2d 223 (2006).

because the commissioner had not addressed these services.[8] But the Court affirmed with respect to services provided before November 17, 2002.[9] It held that the commissioner had erred by discounting the IRO's medical recommendations and replacing them with her own independent conclusions.[10]

THE PATIENT'S RIGHT TO INDEPENDENT REVIEW ACT

This case requires us to consider the final decision of an administrative agency and the correct interpretation of a statute. Issues of statutory interpretation are reviewed de novo.[11] In cases where no hearing is required, final decisions of administrative agencies are reviewed to determine whether the decision was authorized by law.[12] "[A]n agency's decision that 'is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious,' is a decision that is not authorized by law."[13]

We have been asked to interpret the Patient's Right to Independent Review Act. Under PRIRA, when an individual believes that a health-care coverage determination is incorrect, he or she has the right to request an independent review.[14] When the commissioner accepts a

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[8] *Id.* at 381.

[9] *Id.* at 371.

[10] *Id.*

[11] *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006).

[12] Const 1963, art 6, § 28.

[13] *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 488; 586 NW2d 563 (1998), quoting *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991).

[14] MCL 550.1911(1).

request for external review and the review involves questions of medical necessity or clinical review, the commissioner is required to appoint an IRO to assess the services.[15] The IRO is directed to consider the relevant materials and recommend either upholding or reversing the earlier determination.[16] Upon receipt of the recommendation, the commissioner is authorized to review the IRO's recommendation "to ensure that it is not contrary to the terms of coverage under the covered person's health benefit plan with the health carrier."[17]

Accordingly, under PRIRA, if a case accepted for external review involves an issue of medical necessity, an IRO must be appointed to make a recommendation. The commissioner, however, has the power to review the IRO's recommendation. But that power is not unlimited. The issue here is whether the commissioner exceeds her power when she substitutes her opinion for the conclusion of the IRO on issues that require the exercise of medical judgment.

For many years, this Court has recognized the maxim *expressio unius est exclusio alterius*.[18] This maxim says that the "express mention in a statute of one thing implies the exclusion of other similar things."[19] So well established is this maxim that it can be assumed that legislators are fully aware the courts will utilize it when construing their words. Accordingly, by expressly giving the commissioner the authority to review the recommendation to "ensure that it is not contrary to the

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[15] MCL 550.1911(6).

[16] MCL 550.1911(6), (11), and (13).

[17] MCL 550.1911(15).

[18] E.g., *Peter v Chicago & W M R Co*, 121 Mich 324, 329; 80 NW 295 (1899).

[19] *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997).

terms of coverage," the Legislature implicitly barred the commissioner from reviewing the recommendation for any other purpose. As explained by the Court of Appeals:

> [W]hile the Legislature intended that the OFIS Commissioner would review the IRO's recommendation for consistency and compliance with the health plan itself, the Legislature did not intend that the OFIS Commissioner would review or reevaluate the IRO reviewer's specific medical or clinical findings. Instead, the language of PRIRA indicates that the Legislature intended the OFIS Commissioner to defer to the IRO's recommendation on medical issues that do not implicate the language of the health plan itself.[20]

Thus, the commissioner is specifically authorized to review the IRO's recommendation to ensure that it is not contrary to the "terms of coverage." In this respect, the recommendation is not binding. But the commissioner is not allowed to substitute her lay opinion for the medical conclusions of the IRO.[21] Therefore, in

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[20] *Ross*, 271 Mich App at 377-378.

[21] The majority argues that my analysis using *expressio unius est exclusio alterius* leads to an interpretation that is contrary to the language of the statute. The majority claims that I fail to recognize that the commissioner is given the power to uphold or reverse an adverse determination, whereas the IRO is not. What the majority overlooks is that the commissioner's power to review the IRO's recommendation is limited to "ensur[ing] that it is not contrary to the terms of coverage . . . ." Thus, the commissioner is authorized to reject the IRO's recommendation only if it is contrary to the terms of coverage. It necessarily follows that the commissioner must adopt the IRO's recommendation when it is not contrary to the terms of coverage. I recognize this point. The majority does not. Hence, it is the majority's interpretation that is contrary to the language of the statute, not mine.

The interpretation of the statute advanced by the members of the majority is another example of their belief that the answer to all questions of statutory interpretation lies in a dictionary. As a result of this belief, they focus on the dictionary definition of the word "recom-

order to determine whether the commissioner exceeded the scope of her powers in this case, it is necessary to examine the "terms of coverage."

Here, the IRO's recommendation was consistent with the terms of coverage. Ross's health-benefit plan covered services in cases of immediate and unforeseen medical emergency until such time as it was medically feasible to transfer him to an in-network provider. The IRO concluded that Ross's initial treatment was a medical emergency. It also found that Ross "required ongoing treatment for a period of time under the supervision of his treating physician and it would have been inappropriate for [Ross] to receive treatment elsewhere."

Also, as recognized by the Court of Appeals,

> [respondent's] schedule of benefits provides that respondent will provide treatment for "medical emergenc[ies]." The schedule of benefits also provides coverage for related medically necessary services and related ancillary services. The IRO specifically concluded that Ross's initial evaluation from June 30, 2002, until July 7, 2002, and his hospitalization of July 8 to 23, 2002, both constituted emergency services.
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> Further, as recognized by the OFIS Commissioner in her final opinion and order, Michigan law requires a health maintenance organization certificate, which otherwise provides coverage for emergency health services, to
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> "provide coverage for medically necessary services provided to an insured for the sudden onset of a medical condition that manifests itself by signs and symptoms of

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mendation" to resolve the case. But the majority ignores the fact that the commissioner's power of review is limited. Regardless of how the majority defines the word "recommendation," the commissioner exceeds the scope of her power when she performs an act that she is not empowered to do. As I have explained, PRIRA gives the commissioner the power to review the recommendation solely to ensure that it is not contrary to the terms of coverage.

> sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in serious jeopardy to the individual's health[,] . . . serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. An insurer shall not require a physician to transfer a patient before the physician determines that the patient has reached the point of stabilization. An insurer shall not deny payment for emergency health services up to the point of stabilization provided to an insured under this subsection because of either of the following:
>
> "(a) The final diagnosis.
>
> "(b) Prior authorization was not given by the insurer before emergency health services were provided. [MCL 500.3406k(1).]"
>
> MCL 500.3406k(1) goes on to define "stabilization" as "the point at which no material deterioration of a condition is likely, within reasonable medical probability, to result from or occur during transfer of the patient." The IRO reviewer in this case specifically concluded that it would not have been medically feasible to transfer Ross at any time before November 17, 2002, because his condition had not been sufficiently stabilized and because his follow-up treatments at the Arkansas facilities were medically necessary.[22]

In summary, the plan covered medical emergencies up to the point where it was medically feasible to transfer the patient to an in-network facility. Michigan law also requires coverage for emergency health services until stabilization. The IRO determined that (1) the initial treatment was a medical emergency, (2) it was not appropriate to transfer Ross to an in-network facility, and (3) Ross was not stabilized before November 17, 2002.[23] Therefore, the IRO's recommendation that respondent be ordered to pay for the services was

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[22] *Ross*, 271 Mich App at 378-379 (citations omitted).

[23] The majority claims that the IRO never concluded that Ross was not "stabiliz[ed]" as defined by MCL 500.3406k(2). I disagree. In her final

consistent with the terms of coverage.[24] For this reason, the commissioner's decision to ignore the IRO's recommendation was not authorized by law.

Aside from this inconsistency with the statutory language, an additional reason exists for not allowing the commissioner to substitute her opinion for the

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request for clarification, the commissioner specifically asked the IRO to consider whether Ross was stabilized as provided in MCL 500.3406k(2). In light of the commissioner's specific request, there is only one reasonable way to read the IRO's conclusion that respondent should be required to pay for the services: Ross was necessarily not "stabiliz[ed]" for transfer as that term is defined by MCL 500.3406k(2).

It seems to me that the majority's problem with the IRO's recommendation can be boiled down to two points. The first lies in the language that the IRO used in its reports. The majority goes so far as accusing the IRO of responding to the commissioner's requests with "unresponsive answers." *Ante* at 176 n 12. Given that the IRO is made up of doctors, not lawyers, it is not surprising that it did not use the legalistic language that the majority is looking for. But we have a duty to look beyond the language that is used to understand what the IRO was really saying. The commissioner repeatedly cited the relevant standards and asked the IRO to reevaluate its conclusion that respondent be required to pay for the services. Repeatedly, the IRO concluded that respondent should be required to pay for the services at issue. The commissioner made repeated requests citing the relevant standards and the IRO repeatedly replied that respondent should be required to pay for the services. Everything considered, the only way to read the IRO's reports is to find that the IRO concluded that the treatment at issue fell within the terms of coverage.

The second point is that the majority apparently believes that the IRO decided that it was going to recommend that respondent be required to "pay for the services *regardless* of whether they fell within the terms of coverage." *Ante* at 176 n 12. I find nothing to indicate bias on the part of the IRO. Accordingly, I find it inappropriate for the majority to make this assumption. This faulty assumption lies at the heart of the majority's decision.

[24] An example of a recommendation that would be contrary to the terms of coverage would be an IRO's determination that mental-health services were medically necessary when the plan excluded coverage for mental-health services. In such a situation, the commissioner could reject the recommendation because the plan did not cover mental-health services.

conclusions of the IRO on issues requiring medical judgment. The commissioner is not a physician.[25] Her expertise is banking. By contrast, for an IRO to be approved, the IRO and its physicians must meet certain standards designed to ensure quality and credentials.[26] The commissioner is not a doctor, whereas the IRO is made up of very well-qualified doctors. I do not see how the commissioner's decision to reject the IRO's medical conclusions in favor of her own uneducated opinion is anything other than arbitrary and capricious. And a decision that is arbitrary and capricious is not authorized by law.[27]

In this case, the IRO's physician, who is board-certified in internal medicine, medical oncology, and hematology, concluded that Ross's initial evaluation constituted emergency services. The physician also concluded that it was not appropriate to transfer Ross to another facility before November 17, 2002. And Ross's condition had not stabilized to the point where he could have been transferred to an in-network facility. Ross's health plan covered medical emergencies until it was medically feasible to transfer him to an in-network provider. Michigan law also provides that "[a]n insurer shall not deny payment for emergency health services up to the point of stabilization . . . ."[28] It follows that respondent was required to pay for the services provided through November 17, 2002.[29]

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[25] MCL 500.202 sets forth the qualifications of the commissioner. Notably absent is any requirement that the commissioner have any medical degree or license.

[26] MCL 550.1919.

[27] *Northwestern Nat'l Cas*, 231 Mich App at 488.

[28] MCL 500.3406k(1).

[29] The majority claims that "the commissioner's determination *was* consistent with the IRO's recommendation to the extent that the recommendation did not contradict the policy provisions or MCL 500.3406k." *Ante* at 175. As I have explained, this simply is not true.

Yet the commissioner found that only the July 8 to July 23, 2002, services were covered. In so doing, she necessarily rejected the medical findings of the IRO in favor of her own uneducated opinion. Not only was there no medical evidence supporting her decision, she is completely unqualified to offer a medical opinion. There could be no clearer example of an arbitrary and capricious decision.[30]

CONCLUSION

As the Court of Appeals recognized, the commissioner exceeds the scope of her power when she substitutes her opinion for the conclusion of an IRO on issues that require the exercise of medical judgment. This result is not only mandated by the statutory language, it is also necessary to avoid allowing the commissioner, a banker, to make medical decisions. Accordingly, I dissent. I would affirm the judgment of the Court of Appeals.

CAVANAGH, J. I would deny leave to appeal.

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[30] The majority takes the position that a conclusion that Ross was not stabilized for transfer is arbitrary and capricious, given that UAMS discharged Ross on July 23, 2002. But the fact that Ross was discharged does not mean that it would have been appropriate to have transferred him to another facility. In fact, in its discharge summary UAMS specifically indicated that Ross required "outpatient followup." The IRO's physician, who is a medical expert, reviewed the relevant materials and reached the medical conclusion that it would have been inappropriate to have transferred Ross to another facility. As the IRO uses physicians medically trained to reach such conclusions, the majority's suggestion that the IRO's conclusion was arbitrary and capricious is preposterous.

In addition, there is no evidence that the services Ross required were offered by an in-network provider. Without proof that an in-network provider offered the requisite services, it is impossible to conclude that transfer would have been appropriate.

McDONALD v FARM BUREAU INSURANCE COMPANY

Docket No. 132218. Argued October 2, 2007 (Calendar No. 1). Decided April 23, 2008.

Mary E. McDonald brought an action in the Genesee Circuit Court against Farm Bureau Insurance Company after it denied her claim for underinsured motorist benefits. Although McDonald's attorney and Farm Bureau had exchanged a series of letters concerning the underinsured motorist coverage and permission to settle the case, Farm Bureau denied the claim after the policy's one-year limitations period for bringing a legal action expired. The court, Robert M. Ransom, J., denied Farm Bureau's summary disposition motion and granted McDonald summary disposition, concluding in part that, under *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588 (1976), the limitations period was tolled from the time the attorney's letter notified Farm Bureau of the claim until Farm Bureau denied the claim. Farm Bureau sought leave to appeal, and the Court of Appeals initially held the application in abeyance pending the Supreme Court's decision in *Rory v Continental Ins Co*, 473 Mich 457 (2005). After the *Rory* decision, the Court of Appeals, SMOLENSKI, P.J., and HOEKSTRA and MURRAY, JJ., affirmed in an unpublished opinion per curiam, issued August 24, 2006 (Docket No. 259168). The Court of Appeals concluded that *Rory* should be applied prospectively only and relied on the decision in *West v Farm Bureau Gen Ins Co (On Remand)*, 272 Mich App 58 (2006), to apply the doctrine of judicial tolling to this case. The Supreme Court granted Farm Bureau's application for leave to appeal. 477 Mich 996 (2007).

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

An express limitations period in an optional insurance contract is not automatically tolled by the filing of a claim unless the contract so provides.

1. *Rory* expressly overruled *Tom Thomas*, which had applied a judicial tolling doctrine to insurance contracts. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005), precluded the automatic tolling of statutory limitations periods. Contrary to the Court of Appeals decisions in *West* and this case, the reasoning in *Devillers*

applies equally to similar contractual limitations periods. The express limitations period in this optional insurance contract for underinsured motorist coverage was not automatically tolled as a matter of law by McDonald's filing of a claim.

2. The trial court erred by ruling that the phrase "a legal action" in the contract's limitations provision was ambiguous. The phrase undisputedly means "a lawsuit."

3. The trial court also erred by holding that the one-year time limit was unreasonable. The facts of *Rory*, which also involved a one-year limitations period, are squarely on point with this case, and, for the reasons given in *Rory*, the parties' contract in this case should not be rewritten.

4. Traditional contract doctrines such as waiver and estoppel can apply to contractual limitations periods when the facts support them. Farm Bureau, however, did not voluntarily relinquish its right to enforce the limitations period, which is a requirement for a waiver, and McDonald did not establish the requirements for equitable estoppel to apply. Specifically, there was no evidence that McDonald relied on Farm Bureau's conduct or statements.

Reversed and remanded for entry of summary disposition in Farm Bureau's favor.

Justice WEAVER, dissenting, concurred fully with and joined Justice KELLY's opinion and also stated that the judgment of the Court of Appeals should be affirmed. Judicial tolling of limitations periods found in insurance contracts, a long-established doctrine, should not be abolished, *Tom Thomas* should not be further overruled, and the holdings of *Rory* and *Devillers* should not be extended. Insurance contracts, which the parties do not typically negotiate, require specialized rules of construction and specialized rules of equity, such as judicial tolling, that account for the difference in bargaining power between an insured and an insurer. The holding in this case will eliminate a doctrine that has allowed for fairness in insurance-claim negotiation and leave nothing in place to ensure prompt action by insurers to afford their insureds reasonable time to make decisions regarding legal action or settlement.

Justice KELLY, joined by Justices WEAVER and CAVANAGH, dissenting, disagreed with the majority's decision to abolish the use of the judicial tolling doctrine adopted in *Tom Thomas*. The doctrine is a pragmatic one that is fair to both insurers and insureds. It promotes fairness, efficiency, and certainty in the claims-adjustment process. The doctrine encourages insureds to give prompt notice of their claims to insurers, and it eliminates any

incentive insurers might have to wait until the contractual limitations period expires before denying claims. An insured should not be forced to choose between filing a premature lawsuit and trusting that the insurance company will consider the claim after the contractual limitations period has expired. Neither *Rory* nor *Devillers* directly overruled judicial tolling of a contractually shortened limitations period, the circumstance found in this case. Because the trial court properly applied the judicial tolling doctrine, the judgments of the trial court and the Court of Appeals should be affirmed. Moreover, even if the doctrine cannot be applied to save the plaintiff's claim, she has shown the facts necessary to establish that the defendant is estopped from relying on the contractually shortened limitations period.

INSURANCE — LIMITATION OF ACTIONS — CONTRACTUAL LIMITATIONS PERIODS — TOLLING — ESTOPPEL AND WAIVER — UNDERINSURED MOTORIST BENEFITS.

An express contractual limitations period in an optional insurance contract, such as a policy for underinsured motorist coverage, is not automatically tolled by the filing of a claim unless the contract so provides, but traditional contract doctrines such as waiver and estoppel can apply when the facts support them.

Donald M. Fulkerson for Mary E. McDonald.

Willingham & Coté, P.C. (by *John Yeager, Anthony S. Kogut, Curtis R. Hadley*, and *Matthew K. Payok*), for Farm Bureau Insurance Company.

TAYLOR, C.J. In this case, we must decide whether a contractual limitations period in an insurance policy is tolled from the time a claim is made until the insurance company denies the claim and, if it is not, whether the limitations period may be avoided under the doctrines of waiver or estoppel. Consistently with long-established contract law, we hold that there is no automatic tolling when a claim is filed unless the contract so provides. Traditional contract doctrines such as waiver and estoppel can apply when the facts support them. However, in the present case plaintiff has not shown that she relied on any misconduct by defendant; therefore, defendant cannot be estopped from

applying the limitations period to plaintiff's claim. Because the Court of Appeals held to the contrary, we reverse the Court of Appeals and remand for entry of summary disposition in favor of defendant.

I. FACTS AND PROCEEDINGS

The policy at issue in this case is one for underinsured motorist (UIM) coverage. These policies are not mandated by statute; individuals contract for such coverage voluntarily. When an insured is injured by a tortfeasor motorist whose own policy is insufficient to cover all of the insured's damages, the insured can seek coverage from his or her UIM policy for damages that exceed the tortfeasor's policy limits. Thus, the insured generally must first determine how much of his or her damages will be covered by the tortfeasor and enter into a settlement with the tortfeasor, and then seek further payment from his or her UIM provider for the balance.

In this case, plaintiff was injured in an automobile accident on November 29, 2001. The policy under which she was covered included UIM coverage. However, it contained an endorsement that provided: "No claimant may bring a legal action against the company more than one year after the date of the accident." The policy also had a clause prohibiting the insured from settling without defendant's written consent and stating that defendant "shall be obligated" to respond within 30 days to the insured's request to settle.

On May 10, 2002, plaintiff's attorney notified defendant by mail that plaintiff had an underinsured motorist claim, acknowledging that the policy had a limitations period that would expire on November 29, 2002. Defendant responded that it needed answers to interrogatories (concerning collectibility of the underinsured motorist) before it could give permission to settle and

that defendant's claims representative needed to review the medical records. The claims representative's letter indicated that after the medical records were reviewed, "I will be getting back in touch with you."

On August 2, 2002, plaintiff's attorney sent another letter, asking for a decision regarding consent to settle "so that I can determine if I need to sue Farm Bureau or not." On August 16, he sent a third letter stating that he intended to "commence the process of negotiating the UIM claim" as soon as he received written permission to settle. The claims representative sent written permission to settle for $20,000.[1] The record indicates no further action by either party before November 29, 2002, when the period of limitations expired. On December 10, 2002, defendant sent plaintiff a letter indicating that the one-year limitations period had expired and that defendant would no longer consider the UIM claim.

Plaintiff filed this action five months later. Defendant moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and 2.116(C)(10) (no material question of fact). The trial court denied defendant's motion and granted summary disposition to plaintiff, holding that (1) the one-year period was unreasonable and thus unenforceable as a matter of law, (2) defendant was estopped from asserting the limitation because of its dilatory conduct, (3) pursuant to *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976), the limitations period was

[1] In her brief and in her opposition to defendant's trial court motion for summary disposition, plaintiff argued that the written permission, dated August 14, 2002, was later revoked in a telephone conversation on August 16, 2002. However, plaintiff's counsel in oral argument before this Court conceded that the August 14 date on the letter was incorrect. The record indicates that the date was a clerical error; the letter should have been dated August 24, 2002. Thus, there is no dispute that written permission to settle was given and not revoked.

tolled by plaintiff's May 10, 2002, letter until defendant denied the claim, and (4) the limitations period was too ambiguous to enforce.

On appeal in the Court of Appeals, the application for leave was first held in abeyance for this Court's decision in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). After the *Rory* decision, the Court of Appeals affirmed, holding that the trial court had correctly ruled that the contractual limitations period was tolled by plaintiff's May 10, 2002, letter to defendant until the denial of plaintiff's claim on December 10, 2002. *McDonald v Farm Bureau Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2006 (Docket No. 259168). In so holding, the panel relied on the decision in *West v Farm Bureau Gen Ins Co of Michigan (On Remand)*, 272 Mich App 58, 65-67; 723 NW2d 589 (2006), which held that multiple recent decisions of this Court limiting the doctrine of judicial tolling were inapplicable to insurance contract claims and that *Rory* should be applied prospectively only. *McDonald*, *supra* at 2. Because this single issue was dispositive, the panel did not address the issues of reasonableness, contractual ambiguity, or estoppel. *Id.*

This Court granted defendant's application for leave to appeal, directing the parties to include among the issues to be briefed (1) whether a contractual limitations period may be avoided on the basis of the doctrines of waiver or estoppel and (2) whether the one-year limitations period contained in the insurance policy is tolled from the time a claim is made until the insurance company denies the claim. 477 Mich 996 (2007).

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision to grant or deny summary disposition. *Rory*, *supra* at

464. Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo. *Id*. When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

III. JUDICIAL TOLLING

This Court has addressed the issue of tolling the limitations periods of insurance policies several times in the recent past. In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 564; 702 NW2d 539 (2005), this Court held that the "one-year-back" limitation provided for in MCL 500.3145(1) for recovering no-fault personal protection insurance benefits could not be automatically tolled because that was contrary to the express language of the statute. In so holding, we overruled *Lewis v Detroit Automobile Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986), which had applied to the statutory limitations period the "judicial tolling" doctrine that *Tom Thomas* had used in the context of optional insurance contracts. *Devillers*, *supra* at 564. We noted in *Devillers* that *Tom Thomas* departed from the well-established legal principle that courts cannot rewrite the parties' contracts if the terms are expressly stated. *Id.* at 567. The *Tom Thomas* Court declined to apply traditional contract doctrines such as waiver and estoppel because it concluded that "[w]aiver and estoppel analysis results in considerable uncertainty concerning the 'reasonableness' of the time remaining for suit." *Tom Thomas*, *supra* at 597 n 10 (citation omitted). Without explaining why this would create a problem,

the Court simply disregarded the one-year contractual provision because some of that time would undoubtedly be taken up in processing the claim. Instead, it declared that the "appropriate resolution" was "to toll the running of the limitation from the time the insured gives notice until the insurer formally denies liability." *Id*. at 596-597. Because the action had been filed less than 12 months after the insurer denied liability, the Court held that it was timely, even though more than one year had passed since notice of the claim was given. *Id*. The dissent noted that the insured "was guilty of sleeping on its bargained-for rights" for more than six months of the elapsed time and that, under standard contract law, a one-year period was a one-year period. *Id*. at 601 (LINDEMER, J. dissenting).

Devillers set forth this reasoning and explained how the *Tom Thomas* tolling doctrine was expanded from contractual limitations periods to the statutory limitations period provided by MCL 500.3145(1) in the context of automobile no-fault statutes. Reversing caselaw that had adopted the doctrine, the Court noted that it was "unable to perceive any sound policy basis for the adoption of a tolling mechanism with respect to the one-year-back rule." *Devillers*, *supra* at 583. The Court expressly agreed with the dissents in the cases reversed and in *Tom Thomas*, stating: "Statutory—or contractual—language must be enforced according to its plain meaning, and cannot be revised or amended to harmonize with the prevailing policy whims of members of this Court." *Id.* at 582. The Court concluded by holding that the statutory limitations period should be enforced as written by the Legislature.

Similarly, in *Rory*, *supra* at 468, this Court emphasized that "unambiguous contracts are not open to judicial construction and must be enforced as written."

Judicial conclusions regarding the "reasonableness" of unambiguous contractual provisions cannot be used to evade enforcement of the contract as written. *Rory* expressly overruled *Tom Thomas* and its progeny. *Id*. at 470. *Rory* also concluded that the one-year limitation was not contrary to public policy, noting that "the Legislature has assigned the responsibility of evaluating the 'reasonableness' of an insurance contract to . . . the Commissioner of Insurance" and that because the commissioner had approved the policy at issue in that case, which included a one-year limitation, the courts were not free to determine de novo whether the policy was reasonable. *Id*. at 475-476.

In the present case, the Court of Appeals affirmed the trial court's grant of summary disposition in favor of plaintiff solely on the basis of its conclusion that the limitations period was tolled pursuant to *Tom Thomas*. In so doing, the Court cited, but then expressly ignored, language in *Devillers*, *supra* at 582. Instead, the Court preferred to follow its own precedent, *West*, which stated that *Devillers* concerned "statutory claims brought pursuant to the no-fault act" and so was "not instructive" in a case that did not involve that act, even while the *West* panel acknowledged that *Devillers* had held that *Tom Thomas* was incorrectly decided. *McDonald*, *supra* at 2; *West*, *supra* at 64-65. The Court of Appeals also followed *West*'s determination that *Rory* applies prospectively only and ignored the substance of *Rory*'s analysis that concluded that *Tom Thomas* was incorrectly decided. *McDonald*, *supra* at 2.

The Court of Appeals correctly noted that our caselaw has already declared that *Tom Thomas* was incorrectly decided. Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express

terms of contracts. See, e.g., *Mann v Pere Marquette R Co*, 135 Mich 210, 219; 97 NW 721 (1903), citing *Baltimore & O S R Co v Voigt*, 176 US 498, 504; 20 S Ct 385; 44 L Ed 560 (1900) ("[T]he usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy . . . ."). Rather than blindly following *West*'s questionable disregard for *Devillers*'s clear statement, the Court of Appeals should have, at least, sought conflict-panel resolution of the question. MCR 7.215(J).

As was made clear in *Devillers*, *supra* at 567, and *Rory*, *supra* at 470, *Tom Thomas* disregarded long-established caselaw requiring that we read unambiguous contract provisions as they are written. By allowing automatic tolling, it made a nullity of express contract language, and parties were unable to rely on unambiguous contract provisions. The reasoning we applied in *Devillers*, precluding automatic tolling of statutory limitations periods, applies equally to similar contractual limitations periods.

Moreover, we are not as convinced as Justice KELLY that judicial tolling of these claims "promotes the quick resolution of insurance claims outside the courts." *Post* at 213. Tolling removes from both sides the incentive to speedily resolve the claim: until a decision is made to deny a claim, the plaintiff may have little basis for a claim. Certainly, tolling muddies what rights and responsibilities exist under the contract, given that the express terms of the contract no longer control in that situation. We believe the better position is for parties to determine their own contractual provisions and then bear the responsibility of enforcing them as written.

We reiterate that *Rory* overruled *Tom Thomas* and its progeny and conclude that express limitations peri-

ods in optional insurance contracts are not automatically tolled as a matter of law by filing a claim. Under the plain language of the contract, plaintiff was required to bring an action against defendant by November 29, 2002, unless she can point to a legally supported reason why that deadline was not effective.

Plaintiff argues that, since our decision in *Rory*, public policy has changed to preclude limitations provisions shorter than three years and, therefore, that this provision should not be enforced because it is against public policy. Specifically, plaintiff points to a "Notice and Order of Prohibition" issued by the Office of Financial and Insurance Services (OFIS)[2] on December 16, 2005, prohibiting uninsured motorist benefits policies with limitations periods of less than three years. However, the "Notice and Order" also expressly states that it does not prohibit insurers from continuing to use policies that were legally in use before December 16, 2005.[3] Moreover, the general rule is that contracts are interpreted in accordance with the law in effect at the time of their formation. See, e.g., *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949). Thus, the one-year limitation was valid at the time the parties entered into the contract. Accordingly, we hold that the trial court erred in granting summary disposition to plaintiff on this basis.

In her dissent, Justice KELLY asserts that the OFIS order should persuade us to invalidate unambiguous contracts like the one at issue here on the ground that they are against good public policy. However, we are of the view that our role is fundamentally different from

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[2] OFIS is now the Office of Financial and Insurance Regulation, effective April 6, 2008. Executive Order No. 2008-2.

[3] OFIS issued a similar order specifically addressing underinsured motorist benefits on April 4, 2006.

that of OFIS. OFIS determines whether an insurance contract is valid. If it is, it is then the responsibility of this Court to enforce the valid contract as written. The OFIS order expressly left in force contracts already in effect. While the Court is, of course, free to adopt a policy that would apply a blanket invalidation to countless existing insurance contracts, the majority of this Court is of the view that we follow the law established by the lawgiver. That is, when a statute is at issue, the law is established by the Legislature, and we are compelled to follow it as written. Similarly, when a contract is at issue, the law we must follow is the unambiguous terms established by the parties to the contract. Justice KELLY consistently has preferred a more aggressive and invasive role for the Court, particularly when construing contracts and statutes. The rule that she wishes is for the Court to serve as an ombudsman, rewriting contracts and statutes in the name of "public policy" whenever it appears that the plain terms of the text work some perceived inequity. See, e.g., *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14; 564 NW2d 857 (1997), overruled by *Rory*, *supra* at 488-489; *Husted v Auto-Owners Ins Co*, 459 Mich 500, 517; 591 NW2d 642 (1999) (KELLY, J., dissenting); *Van v Zahorik*, 460 Mich 320, 342; 597 NW2d 15 (1999) (KELLY, J., dissenting); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 186; 615 NW2d 702 (2000) (KELLY, J., concurring in part and dissenting in part); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 325; 645 NW2d 34 (2002) (KELLY, J., dissenting); *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 46; 732 NW2d 56 (2007) (KELLY, J., dissenting). Yet this approach replaces the rule of law by the rule of men, which is the very peril we believe that courts are expected to stand against. We will continue to do so.

IV. TERMS OF THE CONTRACT

In the interests of judicial efficiency, because we hold that the one-year contractual limitations period was not automatically tolled by filing a claim, we address the trial court's other bases for granting summary disposition. The trial court held that the contract was ambiguous because it did not define "legal action," and the trial court was persuaded by plaintiff's assertion that she thought contacting an attorney, who then sent a letter to defendant, constituted "legal action." We disagree. The phrase "a legal action" undisputedly means "a lawsuit." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554-555; 640 NW2d 256 (2002); see also *United States v El-Ghazali*, 142 Fed Appendix 44, 46 (CA 3, 2005) (citing numerous cases and dictionaries and concluding that "[t]he widespread use of the word 'action' in both the civil and criminal context refutes [the defendant's] argument that there is disagreement among reasonable people as to the meaning of 'legal actions' "); Black's Law Dictionary (6th ed) (defining "action" by noting that the "[t]erm in its usual legal sense means a lawsuit brought in a court"). Even if plaintiff herself thought that contacting an attorney was a "legal action," her attorney, once contacted, would have understood that "legal action" is synonymous with "lawsuit." See, e.g., *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568; 519 NW2d 864 (1994), overruled in part on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003). Therefore, we conclude that the trial court erred in ruling that the phrase "legal action" was ambiguous.

The trial court also held that the one-year time limit was unreasonable, concluding that the present case was directly analogous to *Rory*. We agree that the facts of *Rory* are squarely on point with this case, and for the

same reason that we reversed the Court of Appeals decision in *Rory*, we decline to rewrite the parties' contract here.

V. EQUITABLE RELIEF

The trial court also held that defendant was estopped from seeking enforcement of the one-year limitations provision because of its "conduct in the case at bar which resulted in numerous delays." Defendant concedes that the traditional contract doctrines of waiver and estoppel are still viable and that nothing in *Rory* or *Devillers* changed basic contract law. Equitable tolling, unlike judicial tolling, has a legal basis arising out of our common law, and it may be invoked when traditional equitable reasons compel such a result.[4] However, defendant argues that neither doctrine should be applied under the present facts. We agree with defendant.

"A waiver is a voluntary relinquishment of a known right." *Dahrooge v Rochester German Ins Co*, 177 Mich 442, 451-452; 143 NW 608 (1913). Neither party disputes that waiver is inapplicable here because defendant did not voluntarily relinquish its right to enforce the one-year time limit. For equitable estoppel to apply, plaintiff must establish that (1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that

[4] Justice KELLY asserts that a claim of waiver or estoppel requires " 'wider ranging investigation and proof' " than a claim that judicial tolling applies. *Post* at 213, quoting 17 Couch, Insurance, 3d, § 238:1, pp 238-8 to 238-9. However, the difficulty of proving waiver or estoppel is immaterial to the question whether the law, as agreed to by the parties themselves, requires enforcement of the one-year provision. It is not for this Court to conjure up new laws whenever we believe that such might be more favorable to one party or another.

the clause would not be enforced. See *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 204, 224; 702 NW2d 106 (2005) (opinions by CAVANAGH, J., and YOUNG, J.); *Dahrooge*, *supra* at 452. The trial court's factual finding that defendant caused delays is insufficient to grant estoppel because there is no evidence that plaintiff relied on anything defendant did or said. To the contrary, plaintiff's attorney clearly expressed an awareness of the cutoff date, acknowledging it in his May 10, 2002, letter. He also pursued the claim in August when, not having heard from the claims representative for some time, he sent a letter stating that he needed to know what the settlement decision was so he could "determine if I need to sue Farm Bureau or not." Defendant responded by sending written confirmation of the settlement decision.

Finally, plaintiff's assertion that she relied on *Tom Thomas* and delayed bringing suit because she thought the one-year limitation was tolled is not a reason to estop defendant, because defendant's "acts or representations" did not induce plaintiff's delay. *Grosse Pointe Park*, *supra* at 204, 224. Therefore, we find that waiver or estoppel did not operate to entitle plaintiff to summary disposition.

VI. RETROACTIVITY

Plaintiff asserts that if *Tom Thomas* is overruled, we should apply our holding prospectively only because her counsel, relying on *Tom Thomas*, believed that the limitations period was tolled by his filing the claim. We need not reach the issue in this case, however. Although the general rule is that our decisions are given full retroactive effect, this Court has indicated that prospective application may be warranted if "injustice might result from full retroactivity." *Pohutski v City of Allen*

Park, 465 Mich 675, 696; 641 NW2d 219 (2002). In this case, when plaintiff's counsel notified defendant of the claim, he expressly acknowledged that the limitations period would expire on November 29, 2002. Therefore, counsel's post hoc assertions of reliance are belied by his own communications to defendant that indicated he did not expect tolling to occur. Because plaintiff's attorney did not rely on *Tom Thomas*, no injustice would result from applying our decision to plaintiff. Accordingly, even if reliance on *Tom Thomas* justified prospective application in general, the facts specifically presented in this case do not warrant that application.

VII. CONCLUSION

When interpreting insurance contracts, standard contract laws apply. *Tom Thomas* erroneously refused to read the parties' unambiguous contract as written and, for this reason, has been overruled. Because the contract in this case unambiguously and not unreasonably required suit to be filed within one year of the accident, defendant properly denied the claim when plaintiff failed to meet that deadline. Standard contract doctrines remain, and waiver or estoppel may be applied if the facts support it. Plaintiff has not shown any reliance on the conduct of or statements by defendant, however, so estoppel does not relieve plaintiff of the duty to timely file suit. We reverse the judgment of the Court of Appeals and remand this matter to the trial court for entry of summary disposition in favor of defendant.

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

WEAVER, J. (*dissenting*). I dissent from the erroneous decision of the majority of four (Chief Justice TAYLOR

and Justices CORRIGAN, YOUNG, and MARKMAN) to extend its unjust and unfair holdings in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), to the facts of this case. Rather than join the injustice of the majority opinion, I concur fully with, and join in, Justice KELLY's thoughtful dissenting opinion. I vote to affirm the Court of Appeals judgment, which affirmed the trial court's decision to deny defendant's motion for summary disposition and grant the plaintiff's motion for summary disposition.

As it did in *Rory*[1] and *Devillers*,[2] the majority of four continues to overrule and undermine years of this Court's well-developed and sound jurisprudence that has guided lower courts in cases involving disputes about insurance coverage. Under the guise of enforcing contracts as written, the majority abolishes judicial tolling of limitations periods in insurance contracts, a doctrine of fairness that has been in place since 1976, when this Court decided *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976). The majority of four now overrules *Tom Thomas*, explaining that insurance contracts are not open to judicial construction.

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[1] In *Rory*, the majority of four first held that insurance contracts are to be enforced using the same legal principles that are applied to any other contract. The *Rory* holding overruled at least 50 years of this Court's precedent outlining how lower courts were to construe insurance-contract provisions using specialized interpretive rules.

[2] In *Devillers*, the majority of four overruled *Lewis v Detroit Automobile Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986), a case that had allowed judicial tolling of the no-fault one-year-back provision of MCL 500.3145(1). Despite the practical hardships that the majority's decision would inflict upon the insureds who had relied on the judicial tolling doctrine under *Lewis*, the majority gave its decision retroactive effect.

However, as I explained in my dissent in *Rory*,[3] an insurance contract is a unique form of contract that requires specialized rules of construction because the individual terms and clauses of an insurance contract are not typically subject to negotiation. In *Rory*, I stated:

> These specialized rules recognize that an insured is not able to bargain over the terms of an insurance policy; indeed, it is common practice for the insured to receive the actual terms of the contract, the insurance policy itself, only *after* having purchased the insurance. Further, in most cases the average consumer will not read the policy; the consumer will rely on the agent's representations of what is covered in the policy. Even if the insured were to read the policy, insurance policies are not easy to understand and contain obscure provisions, the meaning of which requires legal education to grasp.[4]

The doctrine of judicial tolling in insurance contracts is one of the specialized rules of equity that acknowledge and account for the difference in bargaining power, or lack thereof, between an insured and an insurer. As Justice KELLY aptly states, "it is a pragmatic doctrine that is fair to both insurers and insureds."[5] By extending its decision from *Devillers*[6] to overrule *Tom Thom-*

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[3] *Rory*, 473 Mich at 516.

[4] *Id*. at 516-517.

[5] *Post* at 210.

[6] I note that the majority is extending its decision from *Devillers* and not, as the majority alludes, *ante* at 200, simply restating its position from *Devillers*. The resolution of *Devillers* hinged on statutory interpretation. The instant case involves contractual interpretation. Thus, any statements made in *Devillers* regarding contractual interpretation were dicta and not binding on this case. If the majority in *Devillers* intended to create a one-size-fits-all rule of law to apply no matter what set of facts is before a court, then the majority was legislating from the bench. Courts interpret laws and apply the laws to the facts before them. The Court of Appeals correctly applied the law from *Tom Thomas* to the facts of this

as, the majority of four does away with a doctrine that allowed for fairness in the insurance-claim negotiation process and leaves nothing in its place to ensure that insurers promptly take action to afford their insureds reasonable time to make decisions regarding legal action or the settlement of claims.

In this case, the latest example of the majority of four's judicial activism in no-fault insurance cases, the majority of four abolishes judicial tolling of contractual limitations periods for insurance contracts. In doing so, the majority of four overrules more than 30 years of this Court's precedent. Or, to borrow the majority's rhetoric, the majority of four has replaced the "rule of law"[7] with the "rule of four justices." Accordingly, I dissent.

KELLY, J. (*dissenting*). I dissent from the majority's decision to abolish the use of the judicial tolling[1] doc-

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case because this case involves an insurance contract, for which *Tom Thomas* was binding precedent. The Court of Appeals followed the precedent of *Tom Thomas* and Court of Appeals precedent distinguishing *Devillers*'s statutory interpretation from cases involving the interpretation of contracts, such as *West v Farm Bureau Gen Ins Co of Michigan (On Remand)*, 272 Mich App 58; 723 NW2d 589 (2006). When the majority criticizes the Court of Appeals for "blindly following *West*'s questionable disregard for *Devillers*'s clear statement," *ante* at 200, the majority shows a complete disregard for the basic proposition that different sets of facts necessitate different analyses of laws.

[7] *Ante* at 202.

[1] What I call "judicial tolling" is often also referred to as "equitable tolling" and "intervening tolling." See *In re Certified Question* (*Ford Motor Co v Lumbermens Mut Cas Co*), 413 Mich 22, 30; 319 NW2d 320 (1982); Feldman, Zariski & Eaton, *The equitable tolling doctrine in first party insurance coverage matters: Analysis, benefits, and an illustrative case study*, 41 Tort Trial & Ins Prac L J 61 (2005).

Insurance policies often include a limitation-of-suit provision that bars the insured from bringing an action for coverage unless the suit is filed within a certain period. These provisions may shorten the time an insured would otherwise have to file suit under state law. Judicial tolling

trine adopted by this Court more than 30 years ago in *Tom Thomas*.[2] Michigan courts have applied judicial tolling without serious contention for more than three decades because it is a pragmatic doctrine that is fair to both insurers and insureds. It does not create insurance coverage where none exists. Nor does it deprive insurers of other defenses they might have. Rather, it encourages insureds to give prompt notice of their claims to their insurers. And it eliminates any incentive insurers might have to wait until the contractual limitations period expires before denying claims.

THE JUDICIAL TOLLING DOCTRINE

Thirty-two years ago, in the *Tom Thomas* case, this Court construed an inland marine insurance policy that contained a 12-month limitations period.[3] We noted that, although a 12-month period might "represent a reasonable balance between the insurer's interest in prompt commencement of action and the insured's need for adequate time to bring an action, the insured usually does not have the full 12 months within which to commence an action."[4] In fact, because of delays built into standard insurance policies, an insured usually has substantially less time to decide whether to commence an action against an insurer. These delays include the time dedicated to filing a proof of loss and the period allowed for payment or settlement of the claim.[5]

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suspends the elapse of time under the limitation-of-suit provision from the date the insured gives notice of the loss until the insurer formally denies liability. Feldman, Zariski & Eaton, 41 Tort Trial & Ins Prac L J at 61-63.

[2] *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976).

[3] *Id.* at 591.

[4] *Id*. at 592.

[5] *Id*.

To reconcile the proof-of-loss and payment-of-claims provisions with the limitations provision, this Court adopted the approach of the New Jersey Supreme Court. It allows the contractual period of limitations in which to bring a lawsuit against an insurance company to run until the insured gives notice of a claim to the insurer. Then, the limitations period is tolled until the insurer formally denies liability.[6] The New Jersey court found that this was the best way to give effect to "the literal language of the limitation provision . . . ."[7]

For good reason, Michigan and New Jersey are not alone in having adopted the tolling doctrine.[8] As the leading treatise on insurance law, Couch on Insurance, states, those courts' adoption of the tolling doctrine

> stems from the pragmatic knowledge that there simply is no reason to bring suit until the insurer has either formally denied the claim or delayed so long that the delay itself becomes the basis for a suit. This rule also avoids the possibility that the insurer may drag out negotiations while the period passes, leading either to insureds losing their rights in a questionable manner or to costly evidentiary battles over whether the insureds' actions should be deemed to be a waiver of the defense, or to estop the insurer from raising it.[9]

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[6] *Id.* at 593-597, citing *Peloso v Hartford Fire Ins Co*, 56 NJ 514; 267 A2d 498 (1970).

[7] *Peloso*, 56 NJ at 521.

[8] See *Guam Housing & Urban Renewal Auth v Dongbu Ins Co, Ltd*, 2001 Guam 24; 2001 WL 1555206 (2001); *Prudential-LMI Commercial Ins v Superior Court*, 51 Cal 3d 674; 274 Cal Rptr 387; 798 P2d 1230 (1990); *Fed S&L Ins Corp v Aetna Cas & Surety Co*, 701 F Supp 1357, 1362 (ED Tenn, 1988); *Nicholson v Nationwide Mut Fire Ins Co*, 517 F Supp 1046, 1051 (ND Ga, 1981); *Christiansen v First Ins Co of Hawaii, Ltd*, 88 Hawaii 442; 967 P2d 639 (Hawaii App, 1998), aff'd in part, rev'd in part on other grounds, 88 Hawaii 136 (Hawaii, 1998); *Clark v Truck Ins Exch*, 95 Nev 544, 546-547; 598 P2d 628 (1979).

[9] 17 Couch, Insurance, 3d, § 237:39, p 237-45.

The majority's decision to abolish the judicial tolling doctrine inserts insureds between Scylla and Charybdis. If they bring a claim too soon, the court may dismiss it as unripe. If they wait for the insurer to decide the claim, they risk a technical forfeiture under a limitation-of-suit provision.

An insured should not be forced to choose between filing a premature lawsuit and trusting that the insurance company will consider the claim after the contractual limitations period has expired. Choosing the first option may unnecessarily poison the relationship between the parties. It may create unnecessary litigation that serves only to burden our overtaxed judicial system. Such a result has been accurately called both "anomalous and inefficient."[10] Yet choosing the second option gives insurance companies the opportunity to avoid coverage on timeliness grounds.

Under the majority's decision, the insured must not only file a timely claim, he or she may have to make the hard decision to sue rather than await a reply. Absent judicial tolling, the burden on the insured is greatly increased.

On the contrary, use of the judicial tolling doctrine guarantees that the insurer shares the burden. The insurer must pay or deny the claim. The doctrine has other merits. Under it, the insured has no reason to delay filing a claim because the limitations period will not run uninterrupted. And the insurer can take the necessary time to investigate the claim and decide on coverage while relevant information is fresh. Removed is any incentive the insurer would have in the absence of tolling to prolong the investigation period "in order to invoke a technical forfeiture of the policy's ben-

[10] *Guam Housing*, 2001 Guam 24 at 11.

efits."[11] Thus, use of the judicial tolling doctrine promotes the quick resolution of insurance claims outside the courts.

It has been argued that the judicial tolling doctrine is unnecessary, given the availability of waiver and estoppel. It is asserted that these doctrines can alleviate the harsh result that may occur when an insured allows the insurer to adjust the claim after the limitations period expires. However, Couch on Insurance opines that assertion of a claim of waiver or estoppel

> may require a discovery and evidentiary side trip from the substance of the underlying dispute between the parties to establish who said and did what, when, and to whom. While this may be the plaintiff's last hope of being able to bring the underlying action, in which case the added effort and expense may still make it worthwhile, it generally calls for a wider ranging investigation and proof than would be required for a claim that the same actions effectively "tolled" the period for some time.[12]

Moreover, as *Tom Thomas* recognized, reliance on the application of waiver or estoppel results in considerable uncertainty about how much time is reasonable to allow the insurer to bring suit.[13] Conversely, under the judicial tolling doctrine, the insurance company "can conclusively determine exactly when the tolling period will terminate simply by denying the claim after it completes its investigation."[14]

The majority's attempt to return the parties to the certainty of the contractual language actually leaves them in a state of greater uncertainty. As stated more than 30 years ago by the New Jersey Supreme Court in

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[11] *Id*. at 12.

[12] 17 Couch, Insurance, 3d, § 238:1, pp 238-8 to 238-9.

[13] *Tom Thomas*, 396 Mich at 597 n 10.

[14] Feldman, Zariski & Eaton, 41 Tort Trial & Ins Prac L J at 77 (2005).

Peloso, judicial tolling "is more satisfactory, and more easily applied, than the pursuit of the concepts of waiver and estoppel in each of the many factual patterns which may arise."[15]

RORY[16] AND *DEVILLERS*[17]

Tom Thomas, the case in which this Court first adopted the judicial tolling doctrine, was recently discussed in *Rory* and *Devillers*. In *Rory*, the same Supreme Court majority as the one in this case held that judicial assessments of reasonableness cannot be relied on to invalidate a shortened period of limitations contractually agreed to.[18] In so holding, the majority overruled *Tom Thomas* to the extent that *Tom Thomas* allowed a standard of reasonableness to abrogate unambiguous contractual terms.[19] However, the *Rory* majority specifically recognized that the judicial tolling doctrine was the basis for the *Tom Thomas* decision, not whether the contractual limitations period in which to bring suit was reasonable.[20] Thus, although *Rory* rejected *Tom Thomas* to the extent that it relied on the "reasonableness" rule, it did not specifically overrule the judicial tolling doctrine.

Devillers concerned the tolling of a statutory one-year period in which to bring claims, MCL 500.3145(1).[21] The same majority as the one in this case reasoned that no authority permitted the judiciary to

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[15] *Peloso*, 56 NJ at 521.

[16] *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

[17] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).

[18] *Rory*, 473 Mich at 470.

[19] *Id.*

[20] *Id.* at 466.

[21] *Devillers*, 473 Mich at 564.

provide for a tolling of the statutory period.[22] According to the majority, judicial tolling, as applied to the *Devillers* case, represented "an unconstitutional usurpation of legislative authority."[23] In the case at bar, a contractual rather than a statutory period of limitations is at issue. Application of the doctrine of judicial tolling cannot be said to present an issue of usurpation of legislative authority. Consequently, neither *Rory* nor *Devillers* controls this case.

It is interesting to note that one of the explanations given in *Devillers* for rejecting judicial tolling was the alleged lack of a sound policy reason for its use there. However, such a reason exists in this case. The Michigan Office of Financial and Insurance Services (OFIS)[24] has now prohibited the use of contractual one-year limitations periods in insurance contracts that provide for uninsured motorist benefits.[25] OFIS found the Court of Appeals analysis in *Rory* compelling, although it was overturned by a majority of this Court.[26] The Court of Appeals had found that a one-year limitations period is unreasonable because it does not provide claimants with sufficient time to investigate potential claims.[27] As noted by the majority, OFIS has allowed insurance companies to continue using policy provisions that

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[22] *Id.* at 581-583.

[23] *Id.* at 593.

[24] OFIS is now the Office of Financial and Insurance Regulation, effective April 6, 2008. Executive Order No. 2008-2.

[25] OFIS Order No. 05-060-M, entered December 16, 2005. On April 4, 2006, OFIS issued a similar order addressing underinsured motorist benefits. And, in May 2007, OFIS added an administrative rule voiding shortened limitation-of-action clauses in new and revised policies. Mich Admin Code, R 500.2212.

[26] OFIS Order No. 05-060-M, pp 2-4, citing *Rory v Continental Ins Co*, 262 Mich App 679; 687 NW2d 304 (2004), rev'd *Rory*, 473 Mich at 491.

[27] *Rory*, 262 Mich App at 685-687.

became part of contracts with insureds before the OFIS order of prohibition entered. However, the reasoning adopted in the order of prohibition still persuasively suggests that application of the one-year period in this case is against public policy.

The majority believes that courts must stand against the peril of rule by men instead of law. I agree. Yet I also believe that courts must stand against the peril of injustice, because injustice undermines the rule of law. If the process we adopt for determining liability allows absurdity to reign and inequity to prevail, people will look outside the rule of law for the "justice" they demand.

All too often, the same Supreme Court majority as that in this case dismisses legitimate legal arguments by labeling them contrary to the "plain language" of a statute or contract. But no matter how it is labeled, a rose is still a rose. In this case, the law in effect when the parties entered into their contract required judicial tolling. The one-year limitation-of-suit provision was not valid. To take from either party the benefit of that rule of law undermines the rule of the law.

The majority appears to conclude that, because *Rory* and *Devillers* criticized *Tom Thomas*, the decision in this case overturns no precedent. It takes the position that the judicial tolling doctrine is no longer good law. For the reasons stated earlier, I disagree.

Judicial tolling of a contractually shortened period of limitations was not directly overruled in *Rory* or in *Devillers*. It promotes the efficient and effective resolution of insurance claims, and it is fair to insurers and their insureds. Therefore, I would affirm the Court of Appeals decision that the limitations period in plaintiff's contract with defendant was tolled by plaintiff's

May 10, 2002, letter to defendant until defendant denied plaintiff's claim on December 10, 2002.[28]

PROSPECTIVE APPLICATION

It is presumably because the majority believes that *Tom Thomas* has already been overruled that it fails to articulate its reasons to not adhere to stare decisis in this case. It recognizes that the question whether today's decision should apply only prospectively is a legitimate issue. But it declines to address the question because plaintiff's counsel acknowledged that plaintiff was aware of the contractual limitations period before it expired.

I disagree with the majority's conclusion that acknowledgement of the existence of the contractual provision is equivalent to an admission that counsel did not expect tolling to occur. The acknowledgement was most likely intended to accelerate the processing of the claim. In any event, when he wrote it, counsel had good reason to expect that the judicial tolling doctrine this Court had endorsed for many years would continue to be applied. He was entitled to rely on the doctrine when deciding to allow the insurance company to adjust plaintiff's claim without regard to the limitation-of-suit contractual provision. Thus, I conclude that the majority errs when it refuses to address whether today's decision should be given prospective application only.

ESTOPPEL

Finally, plaintiff asserts that her claim should go forward even if this Court rejects the continued viabil-

[28] To the extent that the Court of Appeals concluded in this case and in *West v Farm Bureau Gen Ins Co of Michigan* (*On Remand*), 272 Mich App 58; 723 NW2d 589 (2006), that *Rory* and *Devillers* effectively abrogated the judicial tolling doctrine of *Tom Thomas*, I disagree.

ity of judicial tolling and gives that decision retroactive effect. She contends that defendant should be estopped from asserting the one-year limitations period. She points out that the trial court found that defendant engaged in dilatory conduct in processing her claim. The trial court relied on the facts that defendant (1) required plaintiff to send interrogatories to the tortfeasor to determine if he was collectible before defendant would respond to the claim, (2) required that plaintiff not settle with the tortfeasor until defendant approved the settlement, and (3) after approving the settlement, purposefully failed to communicate with plaintiff to negotiate her claim in good faith.

With regard to the last allegation, defendant's claims representative noted in an internal status report approximately one month before the limitations period expired: "1 yr runs 11-29-02." Then, the claims representative took no further action on the file until after that date had passed. The next action taken was to notify plaintiff's attorney that the claim was being rejected because the one-year period of limitations had expired. Notably, defendant's claims representative admitted that she had access to the information necessary to determine the value of plaintiff's claim before the limitations period expired, but neglected to act on it.

> "It is a familiar rule of law that an estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."[29]

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[29] *Hetchler v American Life Ins Co*, 266 Mich 608, 613; 254 NW 221 (1934), quoting *Kole v Lampen*, 191 Mich 156, 157-158; 157 NW 392 (1916).

The facts of this case are an example of exactly what the judicial tolling doctrine was adopted to prevent. Plaintiff had every reason to expect that her claim would be processed once she had taken all the steps requested by defendant. Instead, defendant refrained from processing the claim and making a decision about it until after the one-year limitations period had expired. By sitting on plaintiff's claim, defendant invoked a technical forfeiture of the policy's benefits. A majority of the justices of this Court has allowed itself to be made a willing after-the-fact accomplice to defendant's wrongdoing.

In August 2002, plaintiff's counsel inquired of the claims representative whether she had heard if the tortfeasor's 401(k) plan was protected from creditors. The information was relevant to whether defendant would grant permission to plaintiff to settle with the tortfeasor. Plaintiff's counsel requested that he be informed of the answer so he could decide whether to sue defendant. In response, defendant advised plaintiff that it was granting permission to settle the claim against the tortfeasor. This was the last communication between the parties until defendant notified plaintiff's counsel that the one-year period had expired.

Granting permission to plaintiff to settle with the tortfeasor could easily have led plaintiff's counsel to believe that defendant was still adjusting the claim. It likely lulled him into believing that defendant would not enforce the limitations period. Defendant's silence, knowing that this was likely plaintiff's belief, caused plaintiff to reasonably believe something that was not true.

Given the state of the law at the time, plaintiff relied on this belief: judicial tolling prevented plaintiff's claim from being lost due to the passage of time. For estoppel

to apply, it was not necessary that plaintiff take any affirmative action in reliance on the beliefs that defendant induced in plaintiff. "Nonaction in reliance [on the representations made], resulting in injury, is sufficient."[30] Obviously, under the majority's position that judicial tolling is impermissible, plaintiff was prejudiced as a result of her reliance on the false belief induced by defendant's silence. Thus, plaintiff has shown the facts necessary to establish estoppel.[31] Contrary to the decision of the majority, the trial court correctly held that defendant should be "estopped from seeking shelter in the one-year limitation given their conduct in the case at bar . . . ." Accordingly, I conclude in the alternative that equitable estoppel entitled plaintiff to summary disposition.

CONCLUSION

Judicial tolling is a pragmatic doctrine that promotes fairness, efficiency, and certainty in the claims-adjustment process. It has been used in this and other states for more than 30 years. The majority's decision to abolish the doctrine in Michigan should be lamented by both insurers and their insureds. Because neither *Rory* nor *Devillers* expressly overruled the use of judicial tolling in the circumstances presented in this case, I would hold that the trial court properly applied the judicial tolling doctrine. Moreover, even if the doctrine cannot be used to save plaintiff's claim, I would hold

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[30] *Hetchler*, 266 Mich at 614.

[31] *Id.* at 613; *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 204; 702 NW2d 106 (2005); see also *Barbour v Slaughter*, 36 Ill App 3d 857, 862-863; 345 NE2d 113 (1976) (holding that, by arbitrarily withholding consent to the insured's personal-injury suit, the insurer waived the policy requirement that no judgment be taken against the tortfeasor without the insurer's consent).

that defendant is estopped from relying on the contractually shortened period of limitations.

I would affirm the decisions of the lower courts in favor of plaintiff.

CAVANAGH and WEAVER, JJ., concurred with KELLY, J.

PEOPLE v HOLLEY

Docket No. 133264. Decided April 23, 2008.

Julias Holley was tried in the Wayne Circuit Court, Thomas E. Jackson, J., on charges of felonious assault, MCL 750.82, and preventing or attempting to prevent the report of a crime, MCL 750.483a(1)(b). The basis of the charges was the defendant's threats to his girlfriend while armed with a knife and his cutting the telephone cord when she told the defendant that she was going to call the police. The court found the defendant not guilty of felonious assault, but convicted him of preventing the report of a felonious assault, concluding that the prosecution did not need to prove the felonious assault beyond a reasonable doubt. The defendant appealed, and the Court of Appeals, ZAHRA, P.J., and CAVANAGH, J. (SCHUETTE, J., dissenting), reversed in an unpublished opinion per curiam, issued January 25, 2007 (Docket No. 264584), essentially concluding that MCL 750.483a(1)(b) requires proof beyond a reasonable doubt that a person committed or attempted to commit the crime sought to be reported. The Court of Appeals remanded the case for the trial court to determine whether an actual crime was committed or attempted. The prosecution applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 478 Mich 863 (2007).

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

The prosecution is not required to prove beyond a reasonable doubt that the crime sought to be reported was committed or attempted by another person in order to obtain a conviction under MCL 750.483a(1)(b).

1. MCL 750.483a(1)(b) states that it is a crime to "[p]revent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person." The Legislature's concern in enacting the statute was to prevent interference with the report of a crime, not with whether the crime sought to be reported was actually committed or attempted. Given the placement of this crime in the statutory scheme and the grammatical context in which the phrase "crime

committed or attempted" is used, the prosecution is not required to prove beyond a reasonable doubt that another person committed or attempted to commit the crime sought to be reported.

2. The elements of a violation of MCL 750.483a(1), which the prosecution must prove beyond a reasonable doubt, are (1) that a defendant prevented or attempted to prevent (2) through the unlawful use of physical force (3) someone from reporting a crime committed or attempted by another person.

3. A report of a crime necessarily entails the subjective perception of the person who is reporting. It is the perception of the person seeking to report the crime or attempt that is significant, not whether the crime was actually committed or attempted.

Reversed; conviction reinstated.

Justice KELLY, joined by Justices CAVANAGH and MARKMAN, dissenting, would affirm the judgment of the Court of Appeals. The prosecution is required to prove beyond a reasonable doubt each element of a crime. MCL 750.483a(1)(b) prohibits a person from unlawfully using physical force to prevent or attempt to prevent another person from reporting a crime committed or attempted by another person. Thus, the third element of the offense is that another person sought to report a crime that had been committed or attempted by another person. The statute does not prohibit preventing or attempting to prevent another person from reporting a possible or alleged crime or a crime that the person perceived as having been committed. If another person has not committed or attempted a crime, a defendant cannot be convicted under the statute. Because it is not clear that the prosecution proved the third element beyond a reasonable doubt in this case, the Court of Appeals correctly reversed the defendant's conviction and remanded the case to the trial court for further proceedings.

CRIMINAL LAW — REPORTS OF CRIMES — INTERFERENCE WITH REPORTS OF CRIMES — PROSECUTING ATTORNEYS — BURDEN OF PROOF.

The prosecution is not required to prove beyond a reasonable doubt that the crime sought to be reported was attempted or committed in order to obtain a conviction for the offense of preventing or attempting to prevent through the unlawful use of physical force a person from reporting a crime attempted or committed (MCL 750.483a[1][b]).

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

State Appellate Defender (by *Christine A. Pagac*) for the defendant.

TAYLOR, C.J. At issue is whether MCL 750.483a(1)(b), which provides that a "person shall not . . . [p]revent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person," requires the prosecution to prove beyond a reasonable doubt that someone committed or attempted to commit the crime that was sought to be reported, in this case felonious assault, in order to secure a conviction. Because we conclude that neither the placement of subsection 1(b) in the statutory scheme of MCL 750.483a nor the grammatical construction of subsection 1(b) requires such proof, we reverse the judgment of the Court of Appeals that held to the contrary and reinstate defendant's conviction.

I. FACTS AND PROCEDURAL HISTORY

On March 7, 2005, defendant arrived at the house of his child's mother, Peggy Gordon. Defendant had been drinking, and he and Gordon began to argue. After Gordon asked defendant to leave, defendant went to the kitchen and returned with a knife. While approaching Gordon with the knife, defendant said, "I'll hurt you." Gordon replied, "No you won't." When Gordon reached for the telephone and told defendant that she was going to call the police, defendant grabbed the telephone and cut the telephone cords with the knife. Defendant then threw the knife on the stool where the telephone was located. Although defendant never pointed the knife directly at Gordon, she testified that defendant was within arm's reach of her with the knife in his hand and

that she believed that he was going to hurt her. After defendant left Gordon's home, she summoned the police.

Defendant was charged with felonious assault and the offense of preventing or attempting to prevent the report of a crime. Following a bench trial, the trial court found defendant not guilty of felonious assault. However, with regard to the charge of preventing or attempting to prevent the report of a crime, the court concluded that the prosecution did not need to prove felonious assault beyond a reasonable doubt.

On appeal, in a 2-1 decision, the Court of Appeals reversed the conviction. In analyzing MCL 750.483a(1)(b), the Court, focusing only on the phrase "a crime committed or attempted" in isolation and not recognizing the structure of the entire statute or the specific criminal act prohibited by subsection 1(b), essentially concluded that MCL 750.483a(1)(b) requires proof beyond a reasonable doubt that a person committed or attempted to commit the crime sought to be reported.[1] It remanded the case with instructions to the trial court to determine whether an actual crime was committed or attempted. The dissenting judge would have affirmed the conviction.

The prosecution applied for leave to appeal in this Court. After directing the parties to address whether MCL 750.483a(1)(b) requires proof beyond a reasonable doubt that a person committed or attempted to commit a crime, we heard oral argument on whether to grant the application or take other peremptory action, as permitted by MCR 7.302(G)(1).[2]

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[1] Unpublished opinion per curiam, issued January 25, 2007 (Docket No. 264584).

[2] 478 Mich 863 (2007).

II. STANDARD OF REVIEW

Whether MCL 750.483a(1)(b) requires proof beyond a reasonable doubt that a person committed or attempted to commit a crime is a question of statutory interpretation, which we review de novo.[3] When interpreting statutory language, a court must keep in mind the plain meaning of the language employed, as well as its placement in the statutory scheme and the grammatical context in which it is used.[4]

III. ANALYSIS

The statutory scheme at issue in this case involves MCL 750.483a, which broadly criminalizes attempts to interfere with the reporting, investigating, or prosecution of crimes. MCL 750.483a(1)(a)[5] forbids, generally, the withholding of testimony, information, or documents. Next, MCL 750.483a(1)(b)[6] forbids, generally, interference with a person seeking to report a crime. MCL 750.483a(1)(c)[7] forbids, generally, retaliation against a person who reported a crime. The statute

[3] *People v Nyx,* 479 Mich 112, 116; 734 NW2d 548 (2007).

[4] *People v Gillis*, 474 Mich 105, 114-115; 712 NW2d 419 (2006).

[5] MCL 750.483a(1)(a) provides that a person shall not "[w]ithhold or refuse to produce any testimony, information, document, or thing after the court has ordered it to be produced following a hearing."

[6] MCL 750.483a(1)(b) provides that a person shall not "[p]revent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person."

[7] MCL 750.483a(1)(c) provides that a person shall not

> [r]etaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person. As used in this subsection, "retaliate" means to do any of the following:
>
> (*i*) Commit or attempt to commit a crime against any person.

continues with MCL 750.483a(3),[8] which criminalizes the bribing, threatening, or influencing of those who give information to the police. Finally, MCL 750.483a(5)[9] concerns tampering with and destroying evidence.

As is evident, all the offenses described attempt to prevent interference, of one sort or another, with the investigation of a crime or the administration of justice. By including MCL 750.483a(1)(b) and its criminalization of the interference with the report of a crime within this statutory scheme, the Legislature has made clear that its concern was to prevent *interference* with the report of a crime and not with whether the crime being reported was actually committed or attempted.

(*ii*) Threaten to kill or injure any person or threaten to cause property damage.

[8] MCL 750.483a(3) provides:

A person shall not do any of the following:

(a) Give, offer to give, or promise anything of value to any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime.

(b) Threaten or intimidate any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime.

[9] MCL 750.483a(5) provides:

A person shall not do any of the following:

(a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.

(b) Offer evidence at an official proceeding that he or she recklessly disregards as false.

This conclusion is harmonious with the proper construction of the statute, MCL 750.483a(1)(b), which lays out the elements of the offense of preventing the reporting of a crime. As defined by the Legislature in MCL 750.483a(1)(b), the elements that the prosecution must prove beyond a reasonable doubt are (1) that a defendant prevented or attempted to prevent, (2) through the unlawful use of physical force, (3) someone from reporting a crime committed or attempted by another person.

The criminal action that MCL 750.483a(1)(b) prohibits is found in the phrase "[p]revent or attempt to prevent." As used in the statute, the verb "prevent" is transitive in nature,[10] which means that there must be something that is prevented or sought to be prevented.[11] In MCL 750.483a(1)(b), what is actually prevented or sought to be prevented is a report of a crime by another person and not "a crime committed or attempted by another person."

This is significant because a report will necessarily entail the subjective perception of the person who is reporting. "Report" is relevantly defined as "a detailed account of an event, situation, etc., [usually] based on observation or inquiry."[12] And "observation" is defined as "an act or instance of noticing or *perceiving*."[13] Therefore, although the term "perceived" is not expressly stated in MCL 750.483a(1)(b), it is inherently implied by the use of the term "report," which is the

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[10] *Random House Webster's College Dictionary* (2001).

[11] Sabin, *The Gregg Reference Manual, Ninth Edition* (New York: Glencoe McGraw-Hill, 2001), pp 556, 561; Weinhold, *The Tongue Untied, A guide to grammar, punctuation, and style* <http://grammar.uoregon.edu/verbs/transitive.html> (accessed December 5, 2007).

[12] *Random House Webster's College Dictionary* (2001).

[13] *Id.* (emphasis added).

focus of the criminal act proscribed by the statute, and it is the perception of the person reporting that "a crime [has been] committed or attempted by another person" that is significant, not whether the crime was actually committed or attempted.[14]

Finally, defendant argues that, because the statute specifically refers to a crime "committed or attempted," it must require proof of the actual commission or attempted commission of a crime and that any other interpretation would render this phrase superfluous.[15]

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[14] Although the dissent accuses the majority of reading words into the statute, the dissenting justice cannot challenge the unmistakable fact that the verb "prevent" is transitive in nature and that it focuses on the action of reporting. And she cannot meaningfully challenge the meaning of the term "report." Nor has she explained why the language "committed or attempted" is included in MCL 750.483a(1)(b) when the word "crime," by itself, implicates a completed act. See MCL 750.5 (" 'Crime' means an act or omission forbidden by law . . . ."). Instead, the dissenting justice adds her own words to the construction of the statute by adding an additional verb: "crime . . . *was* committed or attempted." It is only through this unwarranted addition that the dissenting justice is able to effectively create the additional element that she would like the prosecution to prove.

[15] To support this argument, defendant relies on this Court's interpretation in *People v Burgess,* 419 Mich 305; 353 NW2d 444 (1984), of a phrase found in the felony-firearm statute, MCL 750.227b. The current version of the phrase is "[a] person who carries or has in his or her possession a firearm when he or she *commits or attempts* to commit a felony." Apparently defendant's argument is fairly effective, because it convinced not only the Court of Appeals majority but also the dissenting justice in this Court. It is fallacious to conclude as the dissent does that *Burgess* has any relevance to the interpretation of the statute before us, MCL 750.483a(1)(b), for several reasons. First, to reach such a conclusion, we would have to assume that the Legislature, in enacting MCL 450.483a(1)(b), was aware of this Court's judicial construction of MCL 750.227b, an entirely unrelated statute. Such an assumption would impose on the Legislature the unreasonable burden of keeping abreast of *all* judicial pronouncements involving the construction of *all* statutes, even those that are unrelated. Cf. *People v Hawkins*, 468 Mich 488, 509 n 20; 668 NW2d 602 (2003). Second, the context in which the words "commits or attempts" are used in the felony-firearm statute, specifically

This assertion cannot be correct because although defendant here was the one who was accused of committing the crime that was being reported, the statute does not *require* that the person accused of interfering with the report of a crime be the person who also committed the crime being reported. Rather, the statute's plain language criminalizes preventing or attempting to prevent the reporting of "a crime committed or attempted *by another person*." The statute does not state that it criminalizes preventing or attempting to prevent the reporting of a crime committed or attempted by *the person who is preventing the reporting*. This distinction is significant because whether another person—who is not on trial for the offense of interfering with the report of a crime—committed or attempted to commit the crime being or sought to be reported is irrelevant to whether the person who is on trial for interfering with the report of a crime actually interfered or attempted to interfere with the report of a crime. For example, if person A commits a crime, and person B tries to report the crime, but person C prevents person B from making the report, whether person C is guilty of interfering with the report has nothing to do with whether the prosecution can prove beyond a reasonable doubt that person A committed the crime being reported. In other

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in conjunction with the term "when," makes it clear that a defendant must actually be committing the underlying felony at the time he or she possesses the firearm; as previously discussed, the context in which "committed or attempted" is used in MCL 450.483a(1)(b) does not require a similar conclusion. Third, the felony-firearm statute requires that the person who possessed the firearm also be the person who committed or attempted to commit the crime; as will be discussed, MCL 450.483a(1)(b) does not require that the person who interfered with the report of a crime also be the person who committed or attempted to commit the crime being or sought to be reported, and the culpability of the person who interfered with the report cannot hinge on the guilt of another person.

words, the culpability of the person accused of interfering with the report of a crime cannot hinge on the guilt of another person. Contrary to defendant's argument, the phrase "committed or attempted" is necessary to establish that the reporter need not be attempting to report an *accomplished* crime; interference with the report of an *attempted* crime is enough. The statute would not achieve its purpose if it merely referred to a report of "a crime" because this implies a completed crime. It therefore follows that the prosecution is not required to prove beyond a reasonable doubt that the crime being reported was committed or attempted.

IV. CONCLUSION

In sum, we conclude that the prosecution is not required to prove beyond a reasonable doubt that the crime sought to be reported was attempted or committed by another person in order to obtain a conviction under MCL 750.483a(1)(b) because the placement of § 483a(1)(b) in the statutory scheme and the grammatical context in which the phrase "crime committed or attempted" is used do not require such an interpretation and the plain language of the statute can be interpreted to reach a result that is consistent with the statutory scheme. Accordingly, we reverse the judgment of the Court of Appeals that held otherwise and reinstate defendant's conviction.

Reversed.

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

KELLY, J. (*dissenting*). After a bench trial, defendant was convicted of interfering with the report of a crime.[1]

[1] MCL 750.483a(1)(b).

The Court of Appeals reversed the conviction. Now the majority reinstates it, and I dissent from that decision. Prosecutors are still required to prove each element of a crime beyond a reasonable doubt. Because it is not clear that the third element of the crime was proved in this case, the judgment of the Court of Appeals should stand.

THE FACTS

The alleged facts are as follows. Defendant and the complainant, Peggy Gordon, had a child together. On March 7, 2005, defendant arrived at Gordon's home. An argument ensued. At one point in the argument, defendant retrieved a knife from the kitchen and told Gordon that he was going to hurt her. Gordon told him, "No you won't." As Gordon moved to pick up the phone to call the police, defendant cut the telephone cord. He then stated, "That's not me," put down the knife, and left the home. Gordon substituted a different phone cord and called the police.

Defendant was arrested and charged with assault with a dangerous weapon and interfering with the report of a crime. He opted for a bench trial before Judge Thomas E. Jackson of the Wayne Circuit Court. Judge Jackson found that the prosecution had not met its burden to prove assault with a dangerous weapon, and he acquitted defendant of this charge. On the charge of interfering with the report of a crime, the judge entered a provisional verdict of guilty. But he asked the parties to address whether the statute prohibiting interference with the report of a crime requires that a crime actually had been committed or attempted. Specifically, the judge stated:

> [I]f, in fact, [Gordon] only has to perceive a crime being committed and that is in her mind . . . if, it's enough that she

> perceived it, then that's enough for that charge to stand. If, in fact, it has to be an actual crime for that particular one to stand, then I would find that that doesn't stand.

After considering the parties' arguments, Judge Jackson accepted the prosecution's position that the statute requires only that the person reporting the crime perceive that a crime had been committed or attempted. Relying on this interpretation, he found defendant guilty of interfering with the report of a crime.

On appeal, the Court of Appeals reversed defendant's conviction in a split, unpublished opinion.[2] The majority held that the offense of interfering with the report of a crime does not require the defendant to have been convicted of the underlying crime. But it does require the prosecution to prove beyond a reasonable doubt that a crime had been committed or attempted. Because the trial judge thought that the complainant's perception that a crime had been committed or attempted was sufficient to convict, the majority reversed defendant's conviction and remanded the case. Judge SCHUETTE dissented.

Following the Court of Appeals decision, the prosecution applied for leave to appeal in this Court. We heard argument on the application to consider whether MCL 750.483a(1)(b) requires proof beyond a reasonable doubt that a person committed or attempted to commit a crime.[3]

ADEQUATE PROOF OF THE THIRD ELEMENT MAY BE LACKING

The most basic rule of criminal procedure is that a defendant cannot be convicted of a crime unless the

[2] Unpublished opinion per curiam, issued January 25, 2007 (Docket No. 264584).

[3] 478 Mich 863 (2007).

prosecution has proved each element of it beyond a reasonable doubt.[4] The issue in this case is whether the offense of interfering with the report of a crime requires the prosecution to prove that another person committed or attempted to commit a crime.

MCL 750.483a(1)(b) provides:

> (1) A person shall not do any of the following:
>
> * * *
>
> (b) Prevent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person.

Under the statutory definition of this crime, the prosecution must prove the following facts beyond a reasonable doubt in order to secure a conviction: (1) the defendant used unlawful physical force, (2) the unlawful physical force prevented or attempted to prevent another person from reporting a crime, and (3) the crime sought to be reported was committed or attempted by another person.[5] It follows, therefore, that a

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[4] See, e.g., *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001) ("Together, the Sixth and Fourteenth Amendments 'indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." ' ") (citations omitted).

[5] The majority claims that my construction adds a word to the third element of the statute. It is true that I use the word "was." However, I use the word for the sake of clarity, not to alter the meaning of the statutory language. This is illustrated by the fact that I can omit the word and reach the same result. There is another way to phrase the elements of the crime that does not use the word "was": (1) the defendant used unlawful physical force (2) to prevent or attempt to prevent another person from

defendant cannot be convicted of interfering with the report of a crime unless the prosecution proves beyond a reasonable doubt the third element of that crime: (a) that another person sought to report a crime and (b) that the crime had been committed or attempted by another person.[6]

Here, the finder of fact, the trial judge, assumed that the statute requires only that the person seeking to report a crime perceived that a crime had been committed or attempted. Because this is an incorrect interpretation of the statute, defendant's conviction cannot stand. Accordingly, I would affirm the judgment of the Court of Appeals that reversed defendant's conviction. The Court of Appeals was correct in remanding the case to the trial court. That court should consider whether the prosecution proved beyond a reasonable doubt that defendant or another person committed or attempted to commit the crime sought to be reported.[7]

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reporting a crime (3) committed or attempted by another person. Under this rephrasing of the elements, the prosecution still must prove beyond a reasonable doubt that another person committed or attempted to commit the crime sought to be reported.

The majority also claims that my interpretation does not give effect to the phrase "committed or attempted." I disagree. This language is included to make clear that one violates the provision by interfering with the reporting of a committed crime *or an attempted crime*. My interpretation recognizes this fact.

[6] The statute specifies "a crime committed or attempted by another person." It does not require that defendant or another person be convicted of the underlying crime. Therefore, the prosecution need prove beyond a reasonable doubt only that the crime sought to be reported was committed or attempted by another person. It need not prove that defendant or another person was convicted of the underlying crime.

[7] In making this determination, the trial court normally would consider whether the behavior of defendant that prompted the alleged victim to call the police constituted a crime. But the judge was the trier of fact here. And a judge, unlike a jury, is not allowed to reach inconsistent verdicts. Hence, the judge cannot find defendant guilty of interfering with the

The majority concludes that the prosecution need not prove that an actual crime was committed or attempted because "[i]n MCL 750.483a(1)(b), what is actually being prevented or sought to be prevented is a report of a crime by another person and not 'a crime committed or attempted by another person.' "[8] It is accurate to state that the statute prohibits preventing or attempting to prevent another person from reporting a crime. However, the statute also requires that the crime sought to be reported was committed or attempted by another person. If any one of the statutory requirements is not satisfied, there can be no conviction. Thus, if no crime has been committed or attempted by another person, the statute cannot be violated. It is that simple.

THE MAJORITY'S ERROR

The glaring weakness in the majority's interpretation is that, in order to justify its conclusion, it reads language into the statute. The majority essentially interprets the statute as providing that a person is guilty of interfering with the report of a crime if the person "prevents or attempts to prevent through the unlawful use of physical force another person from reporting a crime *that the reporter perceives to have been* committed or attempted by another person."

Contrary to the majority's interpretation, the statute does not prohibit preventing or attempting to prevent another from reporting a "perceived" crime, or a "pos-

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report of a crime using the crime of assault with a dangerous weapon as the underlying crime. The judge has already acquitted defendant of that charge. See *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003). The judge could consider, however, whether defendant committed a crime that is a lesser-included offense of assault with a dangerous weapon.

[8] *Ante* at 228.

sible" crime, or an "alleged" crime. It prohibits preventing or attempting to prevent another person "from reporting a crime committed or attempted by another person." The majority's opinion is defective because it fails to read the statute as it is actually written.[9]

Holding that the prosecution must prove beyond a reasonable doubt that the crime sought to be reported was committed or attempted by another person is consistent with this Court's decision in *People v Burgess*.[10] In *Burgess*, the defendant's underlying conviction of felonious assault had been reversed. The issue was whether, in light of the reversal, his conviction for the offense of possessing a firearm during the commission of a felony could stand.

At the time, the felony-firearm statute[11] provided in relevant part: "(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years."

The *Burgess* Court held that an element of felony-firearm was that a defendant committed or attempted to commit a felony.[12] The language used in the felony-

[9] It is possible that some may find the majority opinion compelling because of the facts alleged and the verdict of not guilty of assault with a dangerous weapon. As alleged, the facts could well have supported a guilty verdict for this charge. But that is not the issue before this Court. Rather, our task is limited to ascertaining the elements of interfering with the report of a crime and deciding whether the prosecution proved those elements beyond a reasonable doubt. As I have demonstrated, a remand is required. It is not clear that the prosecution satisfied its burden, given the trial court's verdict of not guilty of the crime of assault with a dangerous weapon.

[10] *People v Burgess,* 419 Mich 305; 353 NW2d 444 (1984).

[11] MCL 750.227b.

[12] *Burgess,* 419 Mich at 310.

firearm statute and the language used in the statute prohibiting interference with the report of a crime are similar. The felony-firearm statute prohibits a person from carrying a firearm when he or she "commits or attempts to commit a felony . . . ." The statute prohibiting interference with the report of a crime prohibits an individual from preventing or attempting to prevent another person from reporting "a crime committed or attempted . . . ."

The *Burgess* Court concluded that the felony-firearm statue requires proof beyond a reasonable doubt that a defendant committed or attempted to commit a felony. This logic supports holding that the statute under consideration here requires proof beyond a reasonable doubt that the crime sought to be reported was committed or attempted by another person.[13]

CONCLUSION

The statute prohibiting interference with the report of a crime prohibits a person from unlawfully using physical force to prevent or attempt to prevent "another person from reporting a crime committed or

[13] Contrary to the implications of the majority opinion, I do not claim that *Burgess* is controlling. The language of the statute at issue is controlling. My interpretation is consistent with that language. The majority's is not. While *Burgess* is not controlling, I believe that it is relevant to highlight a weakness in the majority's position. My interpretation is consistent with decisions of this Court interpreting similar language, whereas the majority's is not.

The majority argues that we should not assume that the Legislature was aware of the interpretation that the *Burgess* Court gave the felony-firearm statute when it enacted the instant statute. But I do not need to make such an assumption to find *Burgess* relevant. Even if the majority were correct that we should not assume this fact, this Court is obligated to be aware of its own judicial construction of the similarly worded felony-firearm statute. And the Court should take guidance from that interpretation in this case.

attempted by another person." It necessarily follows that, if no crime has been committed or attempted by another person, a defendant cannot be convicted under this statute. Because the majority opinion holds to the contrary, I dissent.

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

PEOPLE v COUZENS

Docket No. 135248. Decided April 23, 2008.

James Couzens III was convicted by a jury in the Macomb Circuit Court, Diane M. Druzinski, J., of embezzlement of $20,000 or more, MCL 750.174(5)(a), for removing and retaining assets that he had transferred into an account created in his son's name under the Uniform Transfer to Minors Act (UTMA), MCL 554.521 *et seq*. The Court of Appeals, BANDSTRA, P.J., and ZAHRA and FORT HOOD, JJ., affirmed the conviction, holding in part that transfers made pursuant to the UTMA are irrevocable and that custodial property placed in such an account is indefeasibly vested in the minor. Unpublished opinion per curiam, issued July 24, 2007 (Docket No. 269379). The defendant sought leave to appeal.

In a unanimous opinion per curiam, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Transfers made pursuant to the UTMA are irrevocable, and the custodial property placed in such an account is indefeasibly vested in the minor.

1. The defendant's argument that following the formalities of the UTMA created only the presumption of a gift is not supported by the plain language of the statute, which makes no mention of a rebuttable presumption of donative intent. Further, even if such a presumption existed, the defendant presented no evidence that would have rebutted it.

2. A reasonable trier of fact could have determined that the defendant's access to and control over the assets in question after the transfer was only by virtue of his role as custodian of the account. Although the defendant owned the stocks before he transferred them to the UTMA account, once they were transferred, the plain language of the UTMA indicates that they became an irrevocable gift.

3. The UTMA provision authorizing a custodian to retain custodial property received from a transferor did not entitle the defendant to retain property that had been transferred to the account in light of the provisions requiring custodians to hold and

invest the property and to observe the standard of care that is appropriate when dealing with the property of another.

4. Because the defendant retained all proceeds of the UTMA account, retransferred the assets from the account to his own personal account, and left nothing in the account for his son, a reasonable trier of fact could conclude that he converted the assets to his own use rather than using them as a reimbursement for expenses he incurred as custodian of the UTMA account, particularly in light of the fact that the provision allowing such expenses to be reimbursed specifically prohibits reimbursement to the person who transferred the assets. This evidence was also sufficient to support a finding that, at the time the defendant converted the assets, he intended to defraud or cheat the account principal.

Affirmed.

STATUTES — UNIFORM TRANSFER TO MINORS ACT — IRREVOCABILITY.

Transfers made pursuant to the Uniform Transfer to Minors Act are irrevocable, and the custodial property placed in such an account is indefeasibly vested in the minor (MCL 554.521 *et seq*.).

Gary L. Kohut for the defendant.

PER CURIAM. At issue in this case is whether assets deposited by the custodian in an account established under the Uniform Transfer to Minors Act, MCL 554.521 *et seq*., become the property of the principal or whether they may be withdrawn by the account's custodian for his own use. The Court of Appeals concluded that transfers made pursuant to the act are irrevocable and the custodial property placed in such an account is indefeasibly vested in the minor. We agree, and accordingly affirm the Court of Appeals decision on this issue. Defendant's application for leave to appeal on the remaining issues is denied, because we are not persuaded that the questions presented should be reviewed by this Court. In affirming the Court of Appeals, we adopt as our own the relevant part of its unpublished opinion per curiam, issued July 24, 2007 (Docket No. 269379):

Defendant appeals as of right his jury trial conviction of embezzlement of $20,000 or more, MCL 750.174(5)(a), for which he was sentenced to two years' probation. We affirm.

I. BASIC FACTS AND PROCEDURE

Defendant's conviction arises out of his embezzlement of funds deposited into an account created pursuant to the Uniform Transfers to Minors Act ("UTMA"), MCL 554.521 *et seq*.[1] Barbara Couzens, defendant's ex-wife, testified that she and defendant married in 1971 and divorced in 1990. They had two children during their marriage, Kelly Couzens and James Couzens IV, or "T.J." Barbara had sole physical custody of T.J. after the divorce. The last time that defendant visited T.J. following the divorce was in the summer of 1990.

On March 16, 1999, defendant opened an account with Brown & Company, a financial institution, pursuant to the UTMA in T.J.'s name, naming himself as the custodian of the account. T.J. was living with Barbara at that time and both were unaware of the account until T.J. filed his first income tax return [and] the IRS contacted him regarding the assets.

At the time that defendant opened the UTMA account, he had a preexisting Brown & Company account in his name only. The UTMA account statement covering the period during which the UTMA account was opened indicated that on March 31, 1999, certain shares of stock were transferred into the account from defendant's personal account, including 300 shares of Bemis stock, 2,000 shares of Reynolds [and] Reynolds Company stock, 200 shares of DTE stock, 1,243 shares of Comerica stock, and 100 shares of Exxon Mobil stock. Likewise, the statement of defendant's personal account covering the same time period indicated that these stocks had been transferred to the UTMA account.

In June 1999, Brown & Company issued a check in the amount of $11,989.60 payable to "James Couzens III custodian for James Couzens IV." Neither Barbara nor T.J. received proceeds from that check. In the same month,

Brown & Company issued a check in the amount of $8,789.70 payable to "James Couzens III custodian for James Couzens IV." Neither Barbara nor T.J. received any portion of those funds. Defendant endorsed both checks as "James Couzens III Cust James Couzens IV." The statement of the UTMA account covering April 30, 1999, through June 25, 1999, indicates that the amounts of the checks represented sales of Bemis and DTE stock. At some point, similar checks were issued in the amounts of $6,330.50 and $539.62, none of which funds T.J. received.

The value of defendant's personal account on February 25, 2000, was $153,021.95. At some point thereafter, defendant wrote a letter authorizing the transfer of certain shares of Comerica, Exxon Mobil, and Reynolds and Reynolds Company stock from the UTMA account back to his personal account. A statement of the UTMA account covering the dates July 28, 2000, through August 25, 2000, indicated that the approximate value of the account was $187,019.31 at that time. A statement of the account for the following period, August 25, 2000, through September 29, 2000, however, indicated an approximate value of $5,750.72. In addition, a statement of defendant's personal account covering the same period indicated that shares of Comerica, Exxon Mobil, and Reynolds and Reynolds Company stock were transferred to that account from the UTMA account as indicated in defendant's letter. The statement also indicated that defendant's personal account had grown to $641,449.49 by September 29, 2000.

T.J. received approximately $20,000 from accounts that he discovered in his name at Comerica Bank and Wells Fargo, but received nothing from the Brown & Company UTMA account. Further, Barbara never received any money from the UTMA account to use for T.J.'s benefit. At one point, defendant issued a check in the amount of $12,911.00 to "T.J. and Bonnie,"[2] only $6,455.50 of which was intended for T.J. He did not cash the check because it did not account for all the money that had been in the UTMA account. According to T.J., the remaining assets in the UTMA account were transferred back to defendant's personal account before T.J. turned 18, and nothing re-

mained in the UTMA account when T.J. turned 18. At the time of trial, T.J. was still involved with the IRS, which viewed the assets deducted from the UTMA account as income and required T.J. to pay taxes on it.

Robert Kish testified that he worked with defendant for 15 years before Kish retired. Kish signed two demand notes as a witness to defendant's signature on the notes. The demand notes list "James Couzens IV" as the borrower and defendant as the lender and purport to lend certain shares of stock to the borrower. "Custodian for James Couzens IV" is listed as the signature of the borrower. Kish testified that although he signed the demand notes, he did not read them in detail. Defendant's theory of defense at trial was that he did not intend to give T.J. the stocks, but rather, in accordance with the demand notes, the stocks were intended only as a loan for the purpose of tax planning.

The jury found defendant guilty of the charged offense. Thereafter, he moved for a directed verdict of acquittal or, in the alternative, for a new trial, both of which the trial court denied. Defendant also moved to disallow restitution, and the trial court denied that motion as well. This appeal followed.

II. ANALYSIS

1. DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT

Defendant first argues that the trial court erred by denying his motions for a directed verdict made during and after trial. We disagree. When reviewing a trial court's decision denying a motion for a directed verdict, made either during trial or after conviction, we review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Burgenmeyer*, 461 Mich 431, 434; 606 NW2d 645 (2000).

At the time that defendant committed the offense, MCL 750.174[3] provided, in pertinent part:

"(1) A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use without the consent of his or her principal, any money or other personal property of his or her principal that has come to that person's possession or that is under his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement.

* * *

"(5) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00 or 3 times the value of the money or property embezzled, whichever is greater, or both imprisonment and a fine:

"(a) The money or personal property embezzled has a value of $20,000.00 or more."

In *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002), this Court articulated the elements of embezzlement by an agent pursuant to the statute as follows:

"(1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal."

An additional element of the crime charged in this case is that the property embezzled be worth $20,000 or more. MCL 750.174(5)(a). Defendant argues that the prosecutor failed to establish elements (1), (3), (4), and (6).

Regarding the first element, defendant contends that stocks used to fund the UTMA account did not belong to the principal, his son T.J., because there was no valid common-law gift of the stocks and no valid account was created pursuant to the UTMA. The prosecutor's theory was not that there existed a valid common-law gift of the stocks, but rather, that defendant conveyed the stocks to T.J. via a lawful UTMA account. The prosecutor presented as evidence the account documents showing that defendant opened the account in T.J.'s name and that defendant identified himself as the custodian of the account. The prosecutor also presented as evidence the statements of both the UTMA account and defendant's personal account, showing that, to fund the account, defendant transferred certain shares of stock from his personal account into the UTMA account.

Defendant argues that no valid UTMA account existed because following the formalities of the UTMA created only the presumption of a gift, which may be rebutted by clear and convincing evidence showing a lack of donative intent. In support of his argument, defendant relies on case law from other jurisdictions.[4] The plain language of the UTMA, however, makes no mention of a rebuttable presumption of donative intent. Rather, it states that custodial property is created and a transfer is made pursuant to procedures enumerated in MCL 554.533. Defendant does not argue that he did not satisfy those procedures. In addition, Robert Huth, the prosecutor's expert witness, testified that deposits made into a UTMA account are irrevocable. Because the language of the UTMA cannot be read as creating a rebuttable presumption of donative intent regarding transfers under the act, and the prosecutor presented evidence as such at trial, defendant's argument that such a presumption exists lacks merit.

Even if a rebuttable presumption of donative intent did exist, however, defendant did not present evidence that, viewed in the light most favorable to the prosecution, rebutted such a presumption. Defendant relies on two demand notes, which he argues shows that the stocks were intended merely as loans and not as gifts. Robert Kish,

defendant's former coworker and friend, testified that he signed the demand notes as a witness, but did not read them in detail. He further testified that he thought that he signed the demand notes on the same day, although he was not sure. Because the demand notes cover transfers that were made several months apart, Kish's testimony tended to support the prosecutor's argument that the demand notes were a sham.

Further supporting the prosecutor's argument is that, according to the demand notes, "the borrower," or T.J., is entitled to dividend income, but both T.J. and his mother, defendant's ex-wife, testified that they received nothing from the UTMA account. In addition, it is questionable whether the demand notes are dated and, if they are dated, whether they are dated correctly. The demand note purportedly dated December 1, 1999, pertains to a transfer that was completed sometime before September 19, 1999, the date on which the stocks were transferred from the UTMA account back into defendant's personal account. Thus, the shares of stock at issue in the demand note could not have been loaned to the UTMA account pursuant to the demand note if it did not yet exist.[*] Alternatively, if the demand note's reference to "12/1/99" was not meant to reflect the date of the demand note, then it was simply not dated. Either alternative tends to support the prosecutor's argument that the notes were a sham. Accordingly, even if following the procedures outlined in the UTMA created only a rebuttable presumption of donative intent, as defendant argues, viewing the evidence in a light most favorable to the prosecution, defendant did not overcome the presumption. Therefore, a rational trier of fact could have determined that a valid UTMA account was created and that the assets placed in the account belonged to T.J., the principal, and not to defendant.

Defendant also argues that the prosecutor failed to establish the third element, i.e., that the money came into

* While defendant claims that the UTMA assets were retransferred to his personal account on September 19, 2000 (not September 19, 1999), the timing of the transfer does not affect the primary issue in this case.

defendant's possession because of a relationship of trust. Defendant asserts that he did not gain access to the assets because of a relationship of trust because he owned the stocks before he transferred them to the UTMA account. Once the assets were transferred, however, the transfer was irrevocable under MCL 554.528, which provides that "[a] person may make a transfer by *irrevocable* gift . . . ." (Emphasis added.) In addition, MCL 554.536(2) states that transfers are irrevocable, "and the custodial property is indefeasibly vested in the minor . . . ." The prosecutor presented evidence of the irrevocability of transfers when Huth testified as such. Therefore, a reasonable trier of fact could have determined that defendant's access to and control over the assets after the transfer was only by virtue of his capacity as custodian.

Defendant also asserts that he was permitted[,] pursuant to his broad authority granted under MCL 554.538 of the UTMA, to fund the UTMA account with demand notes that he was able to then permissibly retransfer to his own account. MCL 554.538 provides:

"A custodian, acting in a custodial capacity, has the rights, powers, and authority over custodial property that an unmarried adult owner has over his or her own property, but a custodian may exercise those rights, powers, and authority in that capacity only. This section does not relieve a custodian from liability for breach of section 17."

As previously stated, a rational trier of fact could have determined that the demand notes were a mere sham. Thus, regardless of whether MCL 554.538 granted defendant broad authority with respect to funding the UTMA account, a trier of fact could have determined that defendant's access to the stocks after they were transferred to the UTMA account was only by virtue of his capacity as custodian and that the assets came into defendant's possession because of a relationship of trust.

Defendant also argues that the prosecutor failed to establish the fourth element of embezzlement by an agent of $20,000 or more, i.e., that he dishonestly disposed of or converted the money to his own use or secreted the money.

The prosecutor's evidence, however, showed that certain shares of stock from the UTMA account were sold and T.J. received none of the sale proceeds. Moreover, the evidence showed that defendant retransferred all assets from the UTMA account back into his own personal account, leaving nothing in the UTMA account.

Defendant relies on MCL 554.537(2), which he argues allowed him to retain any property that he transferred to the UTMA account. Although defendant relies only on the italicized language below, subsections (1) and (2) of MCL 554.537 state, in pertinent part:

"(1) A custodian shall do all of the following:

"(a) Take control of custodial property.

"(b) Register or record title to custodial property if appropriate.

"(c) Collect, hold, manage, invest, and reinvest custodial property.

"(2) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, *in the custodian's discretion and without liability to the minor or the minor's estate, a custodian may retain any custodial property received from a transferor*. [Emphasis added.]"

When interpreting statutory language, courts must ascertain the legislative intent that may reasonably be inferred from the words in a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute. *Id*. Moreover, words and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710

(2003). Likewise, under the doctrine of *noscitur a sociis*, a word or phrase should be given meaning by its context or setting. *Id*. at 420; *Koontz*, *supra* at 318.

Applying these principles and reading the provisions of subsections (1) and (2) of MCL 554.537 together, defendant's contention that the above-italicized language permitted him to retain any property transferred to the UTMA account lacks merit. Under subsection (1), defendant was required to take control of any custodial property, register or record the property if appropriate, and hold and invest the property. The use of the word "shall" in subsection (1) rendered these duties mandatory. In addition, under subsection (2), defendant was required to observe the standard of care appropriate when "dealing with [the] property of another." These provisions are inconsistent with defendant's contention that he was authorized to retain any custodial property for his own personal use. Thus, harmonizing the statutory provisions and applying the doctrine of *noscitur a sociis*, defendant's argument is unavailing. Further, defendant's contention conflicts with the language of MCL 554.528 and MCL 554.536(2), providing that transfers are irrevocable.

Defendant also argues that pursuant to MCL 554.540(1), he was permitted to be reimbursed from the custodial property for reasonable expenses incurred in the performance of his duties as custodian. MCL 554.540(1) provides:

"A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties. *Except for a person who is a transferor under section 8*, a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year. [Emphasis added.]"

Because defendant retained all proceeds of the UTMA account, retransferred the assets from the account to his own personal account, and left nothing in the account for T.J., a reasonable trier of fact could conclude that he converted the assets to his own use rather than reimbursed

himself for reasonable expenses incurred as custodian of the UTMA account. At best, defendant offered T.J. only $6,455.50 of the assets in the account, but T.J. did not cash defendant's check because it did not account for all the funds that were deposited into the UTMA account. Moreover, the language of the italicized provision above specifically states that defendant was not entitled to reimbursement because he was the transferor of the assets deposited into the account. Therefore, defendant's reliance on MCL 554.540(1) is misplaced. Given the facts and circumstances of this case, a rational trier of fact could have concluded that defendant dishonestly disposed of or converted the money to his own use.

Finally, defendant contends that the prosecutor failed to prove the sixth element, i.e., that, at the time of conversion, defendant intended to defraud or cheat the principal. For the foregoing reasons, a reasonable trier of fact could have concluded that defendant intended to defraud or cheat T.J., the principal. Although defendant argues that any action with respect to his duties as custodian should have been pursued in the probate court, he provides no authority that the probate court provided the only remedy for his conduct and that he could not also be subject to criminal charges. Viewed in a light most favorable to the prosecution, sufficient evidence existed from which a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *Gillis*, *supra* at 113; *Burgenmeyer*, *supra* at 434. Accordingly, the trial court properly denied defendant's motions for a directed verdict made during and after trial.

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[1] The Uniform Gifts to Minors Act preceded the UTMA and was repealed by 1998 PA 433.

[2] Identified in defendant's brief on appeal as a relative.

[3] MCL 750.174 was amended by 2006 PA 573, effective March 30, 2007, but the amendment does not affect this appeal. Pursuant to the amendment, the act now provides for different punishments based on whether the amount of

money embezzled was at least $20,000 but less than $50,000, at least $50,000 but less than $100,000, or over $100,000.

[4] Specifically, defendant relies on *In re Marriage of Agostinelli*, 250 Ill App 3d 492; 620 NE2d 1215 (1993), *Heath v Heath*, 143 Ill App 3d 390; 493 NE2d 97 (1986), and *Gordon v Gordon*, 70 AD2d 86; 419 NYS 2d 684 (1979).

Affirmed.

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

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Summary Dispositions September 10, 2007:

ROBERTSON v ASCHERL, No. 132247. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals, which ordered dismissal of the complaint *with* prejudice, and we remand this case to the Bay Circuit Court for entry of an order dismissing the complaint *without* prejudice. See *Kirkaldy v Rim*, 478 Mich 581 (2007). 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. 269752.

PEOPLE v BEVERLY, No. 132643. The motion for reconsideration of this Court's May 2, 2007, order is considered, and it is granted. We vacate our order dated May 2, 2007. On reconsideration, the application for leave to appeal the October 6, 2006, order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the 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, within six months of 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. We do not retain jurisdiction. Court of Appeals No. 270130.

PEOPLE v GROSS, No. 132736. By order of April 11, 2007, the prosecuting attorney was directed to answer the application for leave to appeal the November 15, 2006, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. The defendant pleaded guilty pursuant to a plea bargain that included a prosecutorial recommendation for a sentence at the "low to middle end of the guidelines." No such recommendation was made at sentencing, and the trial court imposed a sentence at the very top of the guidelines range, without giving the defendant an opportunity to withdraw his plea. The prosecution has now agreed that the trial court erred and that a remand is appropriate. Accordingly, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court. On remand, the court shall determine whether it would be appropriate to impose a sentence consistent with the agreed-upon sentence recommendation. If the court does not follow the recom-

mendation, it shall give the defendant the opportunity to withdraw his plea of guilty. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 272031.

PEOPLE V AMOS, No. 133065. By order of June 20, 2007, the prosecuting attorney was directed to answer the application for leave to appeal the December 14, 2006, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of sentence and remand this case to the Calhoun Circuit Court for the resentencing of the defendant on all of his criminal sexual conduct convictions. The circuit court erred by assessing the defendant 50 points under offense variable 11 for penetrations that did not arise out of the particular sentencing offenses. *People v Johnson*, 474 Mich 96 (2006). If the defendant is scored points for OV 11, the trial court must indicate that the acts of sexual penetration "arose out of" the sentencing offenses. MCL 777.41(2)(a). 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. 274182.

NEWSOME V BONO, No. 133228. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portion of the judgment of the Court of Appeals affirming the dismissal of the complaint *with* prejudice, because the dismissal should have been *without* prejudice. See *Kirkaldy v Rim*, 478 Mich 581 (2007). Accordingly, we remand this case to the Oakland Circuit Court for entry of an appropriate order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 270237.

ORAM V ORAM, No. 133885. 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. 273162.

PEOPLE V SLOTKOWSKI, No. 133981. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand these cases to the Oakland Circuit Court for correction of the judgments of sentence to reflect that the restitution ordered shall be joint and several with the codefendant. 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. 274884.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissent in *People v Conway*, 474 Mich 1140 (2006).

CITY OF GRAND RAPIDS V GRAND RAPIDS EMPLOYEES INDEPENDENT UNION, No. 134013. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for plenary consideration because the Court of Appeals erred in treating the respon-

dent's appeal as an application for leave to appeal rather than as an appeal as a matter of right. MCL 423.216(e). Court of Appeals No. 274188.

PEOPLE v PARISH, No. 134234. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether, when resentencing after the imposition of a sentence that is invalid under MCL 769.9(2), a court may increase a defendant's minimum sentence on the basis of facts that formed the basis for the original sentence. Court of Appeals No. 277867.

PEOPLE v AARON TODD BROWN, No. 134348. 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 was properly assessed 5 points under offense variable 10, for "exploit[ing] a victim by his or her difference in size or strength[,]" MCL 777.40(1)(c), where no such physical differences were documented in the record, but the defendant is male and the victim is female, and (2) whether the defendant was properly assessed 15 points under offense variable 19 for the use of "force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice[,]" MCL 777.49(b), where the defendant ran from and struggled with ordinary citizens, rather than law enforcement personnel. 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. 276405.

Leave to Appeal Denied September 10, 2007:

MCELHANEY v HARPER-HUTZEL HOSPITAL, No. 130916; reported below: 269 Mich App 488.

STATE AUTOMOBILE INSURANCE COMPANY v SHERMAN, No. 132008; Court of Appeals No. 265689.

SCHWARZE v DILWORTH, Nos. 132025, 132026; Court of Appeals Nos. 257467, 257511.

PEOPLE v GLENN FISHER, No. 132619; Court of Appeals No. 264764.

PEOPLE v MARTEN, No. 132745. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270124.

CAMARDA v CITY OF EATON RAPIDS, No. 132760; Court of Appeals No. 269046.

CITY OF DETROIT v BAGDASARIAN, No. 132853; Court of Appeals No. 269375.

PEOPLE v RICHARD REED, No. 132855; Court of Appeals No. 272501.

PEOPLE v FAY, No. 132862; Court of Appeals No. 271763.

PEOPLE v JONATHAN JONES, No. 132926. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271221.

KELLY, J. I would grant leave to appeal.

PEOPLE v RANDALL GRIFFIN, No. 132935. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 271238.

PEOPLE v BOBBY SMITH, No. 132973. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270486.

PEOPLE v NICHOLAS WALKER, No. 133156; Court of Appeals No. 265366.

PEOPLE v GRUMBLEY, No. 133168; Court of Appeals No. 261275.

PEOPLE v SPEARS, Nos. 133266, 134124; Court of Appeals Nos. 274986, 267572.

PEOPLE v WILLIAM SMITH, No. 133301. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270911.

PEOPLE v BELCOURT, No. 133516; Court of Appeals No. 265275.

PEOPLE v BATES, No. 133550; Court of Appeals No. 265578.

PEOPLE v CRABTREE, No. 133573; Court of Appeals No. 275279.

HARTER v DEPARTMENT OF CORRECTIONS, No. 133580; Court of Appeals No. 273278.

PEOPLE v MICHAEL HALL, No. 133607; Court of Appeals No. 265458.

PEOPLE v KEWAYNE CARTER, No. 133614; Court of Appeals No. 266550.

PEOPLE v PARKER, No. 133638; Court of Appeals No. 263276.

PEOPLE v TOBIN, No. 133664; Court of Appeals No. 275988.

PEOPLE v WINBUSH, No. 133667; Court of Appeals No. 264012.

PEOPLE v ANTWAIN TERRY, No. 133674; Court of Appeals No. 275814.

PEOPLE v NIXON, No. 133678; Court of Appeals No. 266033.

PEOPLE v VERNICE ROBINSON, No. 133681; Court of Appeals No. 265197.

PEOPLE v NATHANIEL LEE, No. 133683. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272315.

PEOPLE v RAND GOULD, No. 133684; Court of Appeals No. 274982.

PEOPLE v YOWELL, No. 133702. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272166.

PEOPLE v STANLEY DAVIS, No. 133727; Court of Appeals No. 266809.

PEOPLE v MICHAEL CLARK, No. 133749; Court of Appeals No. 266088.

PEOPLE v RUMMINS, No. 133753. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272262.

PEOPLE v JERMAINE UNDERWOOD, No. 133754; Court of Appeals No. 265066.

PEOPLE v MUZYK, No. 133765; Court of Appeals No. 272342.

PEOPLE v HOLLAND, No. 133777. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275108.

NEWMAN v BLUE CROSS & BLUE SHIELD OF MICHIGAN, Nos. 133790, 133791; Court of Appeals Nos. 266627, 269983.

PEOPLE v MARKEY, No. 133806; Court of Appeals No. 264005.

WILSON v PLYLER, No. 133808; Court of Appeals No. 268577.

KELLY, J. I would grant leave to appeal to consider *Waltz v Wyse*, 469 Mich 642 (2004).

PEOPLE v PROPHET, No. 133811; Court of Appeals No. 272644.

PEOPLE v STANFORD THOMPSON, No. 133812. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276557.

MCALPINE v EINSTANDIG, No. 133818; Court of Appeals No. 266428.

PEOPLE v LAVONN BROWN, No. 133820; Court of Appeals No. 267044.

PEOPLE v TEDDY ALEXANDER, No. 133823; Court of Appeals No. 267478.

PEOPLE v GOODMAN, No. 133824; Court of Appeals No. 276303.

PEOPLE v DAWKINS, No. 133838; Court of Appeals No. 265579.

PEOPLE v DADO, No. 133845; Court of Appeals No. 266962.

PEOPLE v KALAJ, No. 133848; Court of Appeals No. 266514.

PEOPLE v HAPEMAN, No. 133851; Court of Appeals No. 267039.

PEOPLE v ORT, No. 133855; Court of Appeals No. 276163.

PEOPLE v MICHAEL JACKSON, No. 133861; Court of Appeals No. 266369.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissent in *People v Bell*, 473 Mich 275 (2005).

PEOPLE v OLIVER, No. 133875. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272224.

DELAY v BURNS INTERNATIONAL SECURITY SERVICES CORPORATION, No. 133879; Court of Appeals No. 273118.

PEOPLE v BURREL, No. 133882; Court of Appeals No. 275877.

PEOPLE v ALTON HUBBARD, No. 133886; Court of Appeals No. 263361.

PEOPLE v GREGORY GIBSON, No. 133888. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275512.

MITAN v REZNICK, No. 133890; Court of Appeals No. 271644.

PEOPLE v TRAKHTENBERG, No. 133891; Court of Appeals No. 268416.

PEOPLE v BAUMER, No. 133892; Court of Appeals No. 267373.

PEOPLE v DENNIS RHODES, No. 133894. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273152.

PEOPLE v CRON, No. 133896; Court of Appeals No. 265576.

DOUGLAS v DEPARTMENT OF CORRECTIONS, No. 133899; Court of Appeals No. 273659.

PEOPLE v JEFFREY HUMPHREY II, No. 133901; Court of Appeals No. 276305.

PEOPLE v ELY, No. 133903; Court of Appeals No. 266080.

PEOPLE v DOBSON, No. 133908; Court of Appeals No. 276489.

PEOPLE v HERHOLTZ, No. 133910; Court of Appeals No. 276735.

PEOPLE v RONALD DOUGLAS, No. 133913. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272950.

PEOPLE v MARVIN ROBINSON AND PEOPLE v NOBLE, Nos. 133917, 133966; Court of Appeals No. 273214.

PEOPLE v PLANES, No. 133918. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272814.

PEOPLE v PROPES, No. 133922; Court of Appeals No. 275596.

PEOPLE v CLAY, No. 133932; Court of Appeals No. 275610.

PEOPLE v KIM MOSS, No. 133936. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272802.

PEOPLE v RAY, No. 133938; Court of Appeals No. 268602.

PEOPLE v SMART, No. 133942. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272195.

PEOPLE v ANTONIO DAVIS, No. 133945. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272270.

PEOPLE v BINYARD, No. 133946; Court of Appeals No. 268956.

PEOPLE v WILDER, No. 133951. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272877.

PEOPLE v JEFFREY HARRIS, No. 133953. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273785.

PEOPLE v LAROME SMITH, No. 133954. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273648.

PEOPLE v LARI, No. 133957. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276252.

PEOPLE v KINT, No. 133958; Court of Appeals No. 276293.

ROGOW v COMERICA BANK, No. 133960; Court of Appeals No. 266430.

PEOPLE v SANDOVAL, No. 133964. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272230.

PEOPLE v KEYS, No. 133969; Court of Appeals No. 264387.

HIAR v STRONG, No. 133970; Court of Appeals No. 274247.

SCHULTZ v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 133973; Court of Appeals No. 271285.

BAZZETTA v DEPARTMENT OF CORRECTIONS, No. 133974; Court of Appeals No. 275989.

TOMASI v TOMASI, No. 133976; Court of Appeals No. 272889.

PEOPLE v BROYLES, No. 133977. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276333.

PEOPLE v LAMBERT, No. 133978; Court of Appeals No. 267765.

PEOPLE v MARK REED, No. 133980. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277091.

PEOPLE v CURTIS HOFFMAN, No. 133982. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273827.

PEOPLE v DISNEY, No. 133983; Court of Appeals No. 267082.

MERCER v CITY OF LANSING, No. 133987; reported below: 274 Mich App 329.

PEOPLE v STADTFELD, No. 133996; Court of Appeals No. 274198.

PEOPLE v PEOPLES, No. 133997; Court of Appeals No. 265481.

PEOPLE v MONTGOMERY, No. 133998; Court of Appeals No. 276494.

PEOPLE v BRIDGES, No. 134002. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274381.

PROVOST v DEPARTMENT OF CORRECTIONS, No. 134004; Court of Appeals No. 268856.

PEOPLE v TYLER, No. 134005; Court of Appeals No. 273886.

PEOPLE v ALPHONZO WRIGHT, No. 134006. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272948.

PEOPLE v ANDRE MATHIS, No. 134007; Court of Appeals No. 268149.

PEOPLE v ANNE SMITH, No. 134008; Court of Appeals No. 276500.

BRANFORD TOWNE HOUSES COOPERATIVE v CITY OF TAYLOR, No. 134015; Court of Appeals No. 265398.

PEOPLE v PHILLIPS, No. 134021; Court of Appeals No. 264889.

PEOPLE v LUGO, No. 134023; Court of Appeals No. 276490.

PEOPLE v HARLAN, No. 134026; Court of Appeals No. 265241.

PEOPLE v GALKA, No. 134028; Court of Appeals No. 276324.

AZAR v AZAR, No. 134029; Court of Appeals No. 265876.

PEOPLE v JOSEPH ROBINSON, No. 134031. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273666.

PEOPLE v WROBLEWSKI, No. 134032; Court of Appeals No. 267946.

PEOPLE v KORPI, No. 134034; Court of Appeals No. 266712.

PEOPLE v RONNIE THOMAS, No. 134036; Court of Appeals No. 267334.

WARREN v BROWN, No. 134037; Court of Appeals No. 269247.

PEOPLE v STERHAN, No. 134038; Court of Appeals No. 276248.

KELLY, J. I would grant leave to appeal for the reasons given in my dissent in *People v Conway*, 474 Mich 1140 (2006).

IDOLSKI v AMERICAN AXLE & MANUFACTURING OF MICHIGAN, INC, No. 134041; Court of Appeals No. 273029.

PEOPLE v GLASSBROOK, No. 134043; Court of Appeals No. 265845.

PEOPLE v RANIS HILL, No. 134045. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273202.

PEOPLE v MCCLELLAND, No. 134047; Court of Appeals No. 277181.

PEOPLE v ATKINS, No. 134048; Court of Appeals No. 268461.

PEOPLE v DOSS, No. 134050; Court of Appeals No. 266375.

PEOPLE v BROADNAX, No. 134051; Court of Appeals No. 277361.

PEOPLE v JACQUELINE COLE, No. 134052. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272559.

MILLER v AUTO ZONE, INC, No. 134054; Court of Appeals No. 267651.

PEOPLE v GOINS, No. 134057; Court of Appeals No. 266830.

PEOPLE v GRAY, No. 134058; Court of Appeals No. 267647.

PEOPLE v CANNON, No. 134060; Court of Appeals No. 276605.

PEOPLE v NORMAN ALLEN, No. 134063. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273478.

ROMEO v ALLSTATE INSURANCE COMPANY, No. 134066; Court of Appeals No. 274794.

PEOPLE v MASSEY, No. 134068; Court of Appeals No. 267115.

GIVANS v PAROLE BOARD, No. 134070; Court of Appeals No. 276852.

PEOPLE v MILBOURN, No. 134071; Court of Appeals No. 276975.

PEOPLE v SULLIVAN, No. 134073; Court of Appeals No. 276797.

PEOPLE v TIGNEY, No. 134078; Court of Appeals No. 267187.

KHURANA v KHURANA, No. 134082; Court of Appeals No. 268792.

PEOPLE v IDOLTHUS HUBBARD, No. 134083; Court of Appeals No. 263127.

PEOPLE v DETRICK DAVIS, No. 134085. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272468.

PEOPLE v ROBERT JACKSON, No. 134086. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273562.

PEOPLE v METRAS, No. 134088; Court of Appeals No. 275409.

KELLY, J. I would grant leave to appeal limited to the question whether defendant is entitled to sentencing credit for the time served awaiting sentence for the reasons stated in my dissent in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v CHARLES WILSON, No. 134090; Court of Appeals No. 268808.

PEOPLE v ERNEST HALL, No. 134091; Court of Appeals No. 260771.

PEOPLE v FAWAZ, No. 134100; Court of Appeals No. 264703.

PEOPLE v LIVINGSTON, No. 134106; Court of Appeals No. 267575.

PEOPLE v MIGUEL GONZALEZ, No. 134107; Court of Appeals No. 267568.

PEOPLE v BAYS, No. 134110; Court of Appeals No. 276627.

PEOPLE v LITTLE, No. 134114. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272387.

PEOPLE v JAMAL KING, No. 134115; Court of Appeals No. 267296.

PEOPLE v CONRAD SANDERS, No. 134116. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274116.

PEOPLE v KERSEY, No. 134122; Court of Appeals No. 267372.

PEOPLE v JOHN DAVID, No. 134127; Court of Appeals No. 276640.

JOHNSON v MILLENNIUM TREATMENT SERVICES, LLC, No. 134128; Court of Appeals No. 271705.

PEOPLE v BARNARD, No. 134132; Court of Appeals No. 265068.

PEOPLE v ROLLSTON, No. 134135; Court of Appeals No. 276652.

PEOPLE v KESTNER, No. 134138; Court of Appeals No. 263213.

PEOPLE v DERRICK COLLINS, No. 134140; Court of Appeals No. 268412.

PEOPLE v DONELLE LEE, No. 134157; Court of Appeals No. 269100.

PEOPLE v ORLANDO MORGAN, No. 134158; Court of Appeals No. 268080.

PEOPLE v DAMAINE GRIFFIN, No. 134164; Court of Appeals No. 267567.

PEOPLE v BRANDON JOHNSON, No. 134165; Court of Appeals No. 268413.

FAHEY v FAHEY, No. 134171; Court of Appeals No. 273700.

PEOPLE v LALONE, No. 134174; Court of Appeals No. 275950.

PEOPLE v ROBERT FISHER, No. 134176; Court of Appeals No. 276356.

PEOPLE v WILKE, No. 134181. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274248.

PEOPLE v HATCHETT, No. 134185; Court of Appeals No. 265238.

PEOPLE v GEORGE JOHNSON, No. 134186; Court of Appeals No. 267293.

PEOPLE v MARCIA WILSON, No. 134188; Court of Appeals No. 276920.

GARRELL v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 134190; Court of Appeals No. 275632.

PEOPLE v ORTIZ, No. 134192; Court of Appeals No. 269032.

PEOPLE v ADAMS, No. 134193; Court of Appeals No. 277046.

PEOPLE v MANNION, No. 134195; Court of Appeals No. 269293.

GOJCAJ v JENKINS CONSTRUCTION, INC, No. 134197; Court of Appeals No. 267929.

KENDALL v STATE BAR OF MICHIGAN, No. 134199; Court of Appeals No. 277779.

PEOPLE v FLUCKES, No. 134203; Court of Appeals No. 274203.

PEOPLE v JOSEPH GROESBECK, No. 134204; Court of Appeals No. 276966.

JACOBONI v ROYAL OAK TOWNSHIP, No. 134209; Court of Appeals No. 277285.

PEOPLE v BLOSSER, No. 134220; Court of Appeals No. 276433.

PEOPLE v TERRANCE HARRIS, No. 134224; Court of Appeals No. 267047.

PEOPLE v PIONTEK, No. 134226; Court of Appeals No. 268048.

PEOPLE v RASHAAN COLE, No. 134230; Court of Appeals No. 276355.

PEOPLE v RICK, No. 134231; Court of Appeals No. 270214.

PEOPLE v BRADLEY, No. 134233; Court of Appeals No. 269568.

PEOPLE v MAYBERRY, No. 134240; Court of Appeals No. 276922.

KELLY, J. I would grant leave to appeal for the reasons given in my dissent in *People v Conway*, 474 Mich 1140 (2006).

CARTER v H & M DEMOLITION COMPANY, No. 134248; Court of Appeals No. 274561.

PEOPLE v BURKES, No. 134252; Court of Appeals No. 268950.

PEOPLE v KNOWLES, No. 134254; Court of Appeals No. 267260.

PEOPLE v EARNEST WHITE, No. 134258; Court of Appeals No. 277489.

PEOPLE v DEVAUGHN WILSON, No. 134269; Court of Appeals No. 269033.

PEOPLE v DONALD PARKS, No. 134271; Court of Appeals No. 266713.

GIBBS v GIBBS, No. 134272; Court of Appeals No. 266718.

SHIELDS v DEPEW, No. 134273; Court of Appeals No. 273555.

PEOPLE v ALONZO NELSON, No. 134279; Court of Appeals No. 275367.

PEOPLE v CLEMMONS, No. 134283; Court of Appeals No. 266331.

SEMAN v GRAHAM, No. 134326; Court of Appeals No. 265969.

PEOPLE v BEACHAM, No. 134334; Court of Appeals No. 277940.

PEOPLE v FARRAJ, No. 134351; Court of Appeals No. 264235.

PEOPLE v ALFIERO, No. 134356. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275418.

PEOPLE v MADDOX, No. 134359; Court of Appeals No. 270344.

PEOPLE v DANIEL SPENCER, No. 134381; Court of Appeals No. 277759.

In re KEAST (DEPARTMENT OF HUMAN SERVICES v ATWOOD) (DEPARTMENT OF HUMAN SERVICES v COPPESS), No. 134443; Court of Appeals No. 277354.

PEOPLE v EDDIE LEWIS, No. 134504; Court of Appeals No. 273234.

Interlocutory Appeals

Leave to Appeal Denied September 10, 2007:

MILLER v RUBIN, No. 133656; Court of Appeals No. 273742.

HUGHES v JACKSON COUNTY ROAD COMMISSION, No. 134003; Court of Appeals No. 256652 (on remand).

Reconsideration Denied September 10, 2007:

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v FIEGER, No. 130456. Summary disposition entered at 477 Mich 1068. Court of Appeals No. 254461.

PEOPLE v LAFOUNTAIN, No. 131484. Leave to appeal denied at 477 Mich 1124. Court of Appeals No. 265709.

KELLY, J. I would grant reconsideration.

GAINES v KERN, No. 131726. Leave to appeal denied at 478 Mich 866. Court of Appeals No. 266049.

KELLY, J. I would grant reconsideration.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action.

SWEATT v GARDOCKI, No. 131969. Leave to appeal denied at 478 Mich 924. Court of Appeals No. 259272.

SICKLES v HOMETOWN AMERICA, LLC, No. 131984. Summary disposition entered at 477 Mich 1076. Court of Appeals No. 266722.

JONES v RIBBRON, No. 132165. Leave to appeal denied at 478 Mich 901. Court of Appeals No. 260040.

MARKMAN, J. I would grant the motion for reconsideration and grant leave to appeal.

PAPADELIS v CITY OF TROY, No. 132366. Summary disposition entered at 478 Mich 934. Court of Appeals No. 268920.

BEUS v BROAD, VOGT & CONANT, INC, No. 132413. Leave to appeal denied 477 Mich 1063. Court of Appeals No. 258995.

KELLY, J. I would grant reconsideration.

BROWN v AMERITECH CORPORATION, INC, Nos. 132574, 132575. Leave to appeal denied at 477 Mich 1087. Court of Appeals Nos. 262420, 263469.

PEOPLE v THEODORE LEE, No. 132677. Leave to appeal denied at 477 Mich 1087. Court of Appeals No. 273288.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY v DEPARTMENT OF TREASURY AND PRUDENTIAL INSURANCE COMPANY v DEPARTMENT OF TREASURY, Nos. 132698, 132699. Leave to appeal denied at 478 Mich 889. Reported below: 272 Mich App 269.

PEOPLE v BERG, No. 132719. Leave to appeal denied at 478 Mich 866. Court of Appeals No. 272715.

PEOPLE v LYLE, No. 132771. Leave to appeal denied at 478 Mich 924. Court of Appeals No. 273845.

PEOPLE v DERRICK COLEMAN, No. 132806. Leave to appeal denied at 478 Mich 867. Court of Appeals No. 270148.

DEPARTMENT OF TRANSPORTATION v ALIBRI, No. 132922. Leave to appeal denied at 477 Mich 1114. Court of Appeals No. 260821.

RONAN v HOFMANN, No. 132962. Leave to appeal denied at 477 Mich 1115. Court of Appeals No. 263106.

PEOPLE v CHESTER PATTERSON, No. 132974. Leave to appeal denied at 478 Mich 868. Court of Appeals No. 274219.

JOHNSON v FORD MOTOR COMPANY, No. 133026. Leave to appeal denied at 477 Mich 1115. Court of Appeals No. 271344.

PEOPLE v SORLIEN, No. 133062. Leave to appeal denied at 478 Mich 870. Court of Appeals No. 264593.

PEOPLE v HASTINGS, No. 133095. Leave to appeal denied at 478 Mich 914. Court of Appeals No. 262698.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons stated in Justice MARKMAN's previous statement in this case.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in my statement at *People v Hastings*, 478 Mich 914 (2007).

PEOPLE v DENNIS, No. 133111. Leave to appeal denied at 478 Mich 870. Court of Appeals No. 274277.

PEOPLE v HOUGHTALING, No. 133176. Leave to appeal denied at 478 Mich 910. Court of Appeals No. 274040.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the trial court for preparation of a corrected presentence report that omits the information that defendant challenged. MCR 6.425(E)(2).

PEOPLE v CARICO, No. 133186. Leave to appeal denied at 478 Mich 926. Court of Appeals No. 263155.

KELLY, J. I would grant reconsideration.

PEOPLE v LOREN GREENE, No. 133201. Leave to appeal denied at 478 Mich 926. Court of Appeals No. 262676.

PEOPLE v PAUL CLARK, No. 133345. Leave to appeal denied at 479 Mich 851. Court of Appeals No. 265776.

KAMMERAAD v AUTO SPORTS UNLIMITED, INC, No. 133363. Leave to appeal denied at 478 Mich 928. Court of Appeals No. 262166.

AMERICAN AXLE & MANUFACTURING, INC v MURDOCK, Nos. 133439, 133440. Leave to appeal denied at 478 Mich 929. Court of Appeals Nos. 262786, 265111.

CONN v ASPLUNDH TREE EXPERT COMPANY, No. 133483. Leave to appeal denied at 478 Mich 930. Court of Appeals No. 272563.

HODGES v RENAISSANCE CENTER, No. 133721. Leave to appeal denied at 478 Mich 931. Court of Appeals No. 272157.

NUCKOLS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 133955. Leave to appeal denied at 478 Mich 931. Court of Appeals No. 277137.

Leave to Appeal Granted September 12, 2007:

SIDUN v WAYNE COUNTY TREASURER, No. 131905. The parties shall include among the issues to be briefed whether the defendant's efforts to provide notice satisfied due process, in light of *Jones v Flowers*, 547 US 220 (2006). Court of Appeals No. 264581 (on remand).

Summary Dispositions September 12, 2007:

RAZZOOK'S PROPERTIES, LLC v YONO, No. 132831. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Genesee Circuit Court for further proceedings not inconsistent with this order. The defendant was evicted from the store when, on the plaintiffs' request, the Genesee Circuit Court issued the November 6, 2003, temporary restraining order that precluded defendant from operating a grocery store on the premises. The defendant was thereafter deprived of all beneficial use of the property by plaintiffs' actions, and, when defendant vacated the premises, any lease agreement then operating was terminated. Thus, when the fire occurred, plaintiffs had no obligations to defendant under the lease and defendant likewise had no obligations to plaintiffs under the lease. Court of Appeals No. 263010.

PEOPLE v STINNETT, No. 133531. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and the Genesee Circuit Court and we remand this case to the Genesee Circuit Court for further proceedings consistent with this order. The Court of Appeals committed plain error by finding that this Court's decision in *People v Williams*, 475 Mich 245 (2006), did not apply to this case. The prosecutor's appeal raised and preserved the question whether the trial court erred by finding a violation of MCL 780.131(1) and dismissing the information with prejudice. In light of the record and the Court of Appeals conclusion that "it is not clear when, or even if, the [D]epartment of [C]orrections provided to the prosecutor 'written notice of the placement of imprisonment of the inmate and a request for final disposition of the [criminal charge]' as envisioned by MCL 780.131(1)," defendant did not establish on the existing record 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). See *People v Holt*, 478 Mich 851 (2007). On remand, the Genesee Circuit Court is directed to conduct an evidentiary hearing to determine if and when the Department of Corrections caused to be delivered by certified mail to the prosecuting attorney the written notice, request, and statement required by MCL 780.131(1). We do not retain jurisdiction. Court of Appeals No. 265713.

PEOPLE v ANTHONY ANDERSON, No. 133561. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court to amend the judgment of sentence to reflect 259 days of sentence credit, as conceded by the prosecutor at the sentence hearing for the defendant's probation violation. Time incarcerated pursuant to a probationary sentence must be credited against a subsequent prison sentence imposed for the violation of probation. See *People v Sturdivant*, 412 Mich 92 (1981). Court of Appeals No. 276065.

PEOPLE v MELISSA FLETCHER, No. 133566. 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. 274838.

PEOPLE v PODLASZUK, No. 133670. 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 of the defendant's alternate ground for affirming the Wayne Circuit Court's order granting his motion to withdraw his plea. The defendant was not required to file a cross-appeal to urge that ineffective assistance of counsel caused his plea to be involuntary as an alternative ground for affirmance. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41 (1994); *Cacevic v Simplimatic Engineering Co*, 463 Mich 997 (2001). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The Court notes, however, that contrary to the Court of Appeals conclusion that the defendant's motion to withdraw his plea was untimely under MCR 6.310(C), and was therefore properly characterized as a motion for relief from judgment, the defendant's motion to withdraw his plea was timely. The amendment of MCR 6.310(C) reducing the time from 12 months to 6 months to file a motion to withdraw a plea is not applicable to cases in which the order appointing appellate counsel was entered on or before December 31, 2005. See Administrative Order No. 2005-2. In this case, appellate counsel was appointed before December 31, 2005, so the defendant had 12 months from the date of the order appointing appellate counsel to file a motion to withdraw his plea. Because the defendant's motion was filed within 12 months of the order appointing appellate counsel, the defendant's motion was timely, and should not have been characterized as a motion for relief from judgment. Court of Appeals No. 273554.

PEOPLE v HEAD, No. 133691. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that reversed the defendant's conviction for maintaining a drug house. MCL 333.7405(d). The evidence presented was sufficient to establish that the defendant exercised authority or control over the house. *People v Bartlett*, 231 Mich App 139 (1998). Articles of clothing belonging to the defendant were found in a dresser drawer in an upstairs bedroom. In an upstairs closet, police officers found a loaded handgun tucked into a mattress, as well as a money order receipt made out to the defendant. While the defendant told the officers that he did not live in the house, he was unable to provide an address on the road where he claimed to reside. A controlled drug buy involving a person fitting the codefendant's description was made at the house in question. When a search warrant was executed at the house only several hours later, over $500 in cash and the marked $20 bill that was used in the controlled buy were found in the defendant's pocket. As to the claim that the evidence was insufficient to establish that the house was used continuously for an appreciable period of time for the purpose of conducting drug-related activities, we remand this case to the Court of Appeals for reconsideration in light of *People v Thompson*, 477 Mich 146 (2007). If, upon reconsideration, the Court of Appeals affirms the defendant's conviction for maintaining a drug house, it shall address the defendant's final argument on direct appeal that was left unresolved in view of its reversal of the maintaining a drug house conviction. That argument was that the trial court imposed a sentence for the drug-house conviction that

departed from the statutory guidelines without articulating a substantial and compelling reason for the departure. We do not retain jurisdiction. Court of Appeals No. 265844.

PEOPLE v ROLAND, No. 133707. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing. The trial court improperly imposed the defendant's sentence for felon in possession of a firearm, MCL 750.224f, consecutively to his sentences for carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. On remand, the trial court shall impose the felony-firearm sentence to be served consecutively only to the sentence for felon in possession of a firearm and shall order concurrent sentences for the defendant's convictions of carrying a concealed weapon and felon in possession of a firearm. 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. 271058.

RUDD v BEDFORD PUBLIC SCHOOLS, No. 133817. 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 reinstate the decision of the Workers' Compensation Appellate Commission (WCAC). The Court of Appeals clearly erred by failing to affirm the decision of the WCAC, where that decision was supported by the record. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691 (2000). Court of Appeals No. 266633.

FERRARI v ARAMARK SERVICES MANAGEMENT OF MICHIGAN, INC, No. 134019. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and reinstate the decision of the Workers' Compensation Appellate Commission (WCAC) affirming the magistrate's award of benefits for a closed period. The Court of Appeals erred in adopting the opinion of the WCAC dissenting commissioner where there was support in the record for the decision of the WCAC. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691 (2000). We remand this case to the Court of Appeals to consider the plaintiff's application for leave to appeal on the issue of whether the defendants may recoup benefits they voluntarily paid. We do not retain jurisdiction. Court of Appeals No. 273557.

KELLY, J. I would deny leave to appeal.

HENLEY v HERSCHELMAN, No. 134629. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the proceedings in the Oakland Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 278285.

Leave to Appeal Denied September 12, 2007:

PEOPLE v EDWARD WOODS, No. 132844; Court of Appeals No. 262681. CAVANAGH and KELLY, JJ. We would grant leave to appeal.

RUSNAK v WALKER, No. 133052; reported below: 273 Mich App 299.

SUTTON v DIANE J, No. 133763; Court of Appeals No. 273519. CAVANAGH and KELLY, JJ. We would grant leave to appeal.

RUSSELL v RAMSEY HOLDING, LLC, No. 133849; Court of Appeals No. 273144.

PEOPLE v HOSKINS, No. 134064; Court of Appeals No. 277723.

KELLY, J. I would vacate the order of the Court of Appeals and remand this case to the Court of Appeals for reinstatement of the defendant's delayed application for leave to appeal.

Reconsideration Denied September 12, 2007:

METRO v AMWAY ASIA PACIFIC LTD, No. 132318. Leave to appeal denied at 477 Mich 1031. Court of Appeals No. 258902.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 14, 2007:

COMMUNITY RESOURCE CONSULTANTS, INC v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 133416. 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, for purposes of MCL 500.3145(1), a loss is incurred at the time the treatment or services are provided, rather than at the time a bill is submitted for the treatment or services in question. The parties should not submit mere restatements of their application papers. Court of Appeals No. 269726.

GEE v ARTHUR B MYR INDUSTRIES, INC, No. 133762. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Workers' Compensation Appellate Commission's (WCAC's) April 19, 2002, opinion and order denying plaintiff's claim for attendant care services under MCL 418.315(1) was a final decision; (2) whether plaintiff's second claim for attendant care services alleged a change in condition as a justification for an award of attendant care services; (3) whether the WCAC's April 12, 2005, opinion and order awarding attendant care services was based on a change in the plaintiff's condition; and (4) whether the WCAC's April 12, 2005, opinion and order awarded attendant care services based on the plaintiff's application or on the

applications filed by the attendant care providers. The parties should not submit mere restatements of their application papers. Court of Appeals No. 269351.

Leave to Appeal Granted September 14, 2007:

PEOPLE v SARGENT, No. 133474. The parties shall address whether the analysis of offense variable (OV) 6 scoring under the former judicial sentencing guidelines, set forth in *People v Chesebro*, 206 Mich App 468 (1994), should be applied to OV 9 scoring under the current legislative sentencing guidelines, MCL 777.39. We further order the Allegan 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 Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 263392.

Summary Dispositions September 14, 2007:

DEPARTMENT OF LABOR & ECONOMIC GROWTH v DYKSTRA, No. 132549. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that a similar issue is presented in *Dep't of Labor & Economic Growth v Jordan* (Docket No. 133017), which we remanded to the Court of Appeals for consideration as on leave granted by order dated September 14, 2007. Court of Appeals No. 271535.

MARKMAN, J. (*concurring*). I concur with the majority. However, I write to reconcile my position with that in *Dep't of Labor & Economic Growth v Jordan*, Docket No. 133017, in which I do not participate. In *Jordan*, I do not participate because my wife was a member of the Board of Review at the time of the decision being appealed, although she did not review that case, did not participate in its consideration, and took no position on its merits. In this case, I do participate because my wife was no longer a member of the Board of Review and had no involvement in the case.

DEPARTMENT OF LABOR & ECONOMIC GROWTH v JORDAN, No. 133017. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that a similar issue is presented in *Dep't of Labor & Economic Growth v Dykstra,* (Docket No. 132549), which we remanded to the Court of Appeals for consideration as on leave granted by order dated September 14, 2007. Court of Appeals No. 272634.

WEAVER, J. (*concurring*). I concur with the order to remand this case to the Court of Appeals but write separately to state again that a justice has a duty to supply the public, and thereby future litigants, with his or her

reasons for nonparticipation. Further, contrary to Justice MARKMAN's erroneous assertion, it is my right and duty to write separately to keep the public informed of what, when, and how justices conduct the Court's business.

It will be noteworthy when Justice MARKMAN agrees that this Court should be as forthcoming with information about a justice's reasons for deciding to participate, or not participate, in a case, just as he properly urges the Court should be with the disclosure of information about the Court's use of tax dollars. Specifically, Justice MARKMAN recently and properly stressed the importance of this Court's duty to provide the public with full access to how tax dollars are expended:

> [T]here is no information that must be more transparent than the use of tax dollars; the public is entitled to the fullest possible access to information concerning the expenditure of tax dollars and there is no obligation upon those seeking such information to make any specific showing of need.[1]

In the matter of disqualification, transparency, rather than secrecy, is vital and is as necessary as the information pertaining to the use of tax dollars. The public has an equally important right to know a justice's reason for participation or nonparticipation in a case.

Initially, Justice MARKMAN indicated that he was not participating in this case but he refused to provide reasons for his nonparticipation. Justice MARKMAN has now circulated a statement providing his reasons for nonparticipation and, therefore, has complied with his constitutional obligation to provide reasons for each decision.

As I wrote over two years ago (in 2005) in *Scalise v Boy Scouts of America*, 473 Mich 853, 854 (2005) (WEAVER, J., dissenting):

> Const 1963, art 6, § 6, which states that "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . ." requires that justices give written reasons for each decision.[2] There is no more fundamental purpose for the requirement that the decisions of the Court be in writing than for the decisions to be accessible to

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[1] Statement of Justice STEPHEN J. MARKMAN in a July 11, 2007, press release, Michigan Supreme Court website, <http://www.courts.michigan.gov/supremecourt/Press/SalaryInfo.pdf> (accessed August 2, 2007).

[2] Article 6, § 6 of the 1963 Michigan Constitution states, in full:

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

> the citizens of the state. Because a justice's decision to not participate in a case can, itself, change the outcome of a case, the decision is a matter of public significance and public access and understanding regarding a justice's participation or nonparticipation is vital to the public's ability to assess the performance of the Court and the performance of the Court's individual justices. Thus, the highest and best reading of art 6, § 6 requires that a justice's self-initiated decision not to participate, or a challenged justice's decision to participate or not participate, should be in writing and accessible to the public.

As summarized in my dissenting statement in the order denying the motion for stay in *Grievance Administrator v Fieger,* 477 Mich 1228, 1240 (2006), I first raised the issue of justice recusal (participation or nonparticipation) over four (4) years ago when, in *In re JK*, 468 Mich 202 (2003), I had reason to examine the rules governing my own participation in that case:

> During the consideration of *In re JK*, I was informed that unwritten "traditions" governed the decision and that MCR 2.003, the court rule concerning disqualification of all other Michigan judges, did not apply to justices of the Michigan Supreme Court. I was further informed that it was a "tradition" of the Court that the decision whether a justice would disqualify himself or herself was left to the individual justice and that no reasons for the decision whether to participate or not participate in a case were to be given.
>
> I concluded that these unwritten traditions and the unfettered discretion violate Michigan's Constitution, which requires justices to give written reasons for each decision, including a decision to participate in or be disqualified from a case.

My position on justice recusals has not been directed only toward any one justice. I also requested that Chief Justice TAYLOR provide reasons for his decision not to participate in *Neal v Dep't of Corrections,* 477 Mich 1049 (2007). Because Chief Justice TAYLOR refused to provide any reason for his decision not to participate, I wrote separately on this issue.[3] Also, I raised

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[3] Although I specifically requested Chief Justice TAYLOR's reasons for not participating in this case at the October 25, 2006, conference, he refused to provide them in writing or verbally.

My request that Chief Justice TAYLOR give reasons on the record for his nonparticipation is not trivial. Nor is it motivated by resentment or personal ill will. A justice has a duty to supply the parties, the public, and thereby future litigants, with his or her reasons for nonparticipation.

the issue of the importance of providing the reasons for nonparticipation to Justice CAVANAGH, in *White v Hahn*, 477 Mich 1037 (2007), a case in which Justice CAVANAGH's daughter represented one of the parties.[4] I also raised the issue in *People v Parsons*, 477 Mich 1065 (2007), after Justice CORRIGAN indicated she was not participating but did not, initially, provide reasons for her nonparticipation.[5]

A justice's decision to participate or not participate in a case implicates a bedrock principle of our judicial system—the impartiality of the judiciary. Without a record of a justice's reasons to not participate in a case, how can future litigants be guaranteed that the same reasons are not present in their cases? Moreover, how can the people of Michigan be sure that a justice is not simply refusing to work on a case to avoid some controversy that the case might involve—for example, a controversy that might call into question his or her impartiality on an issue or make reelection more difficult? The impartiality of the judiciary preserves the ethics of judicial administration, protects decision-making, and ensures the public's, and thereby future litigants', trust and confidence in the judiciary.

What are needed are clear, fair, enforceable, written, and published rules concerning the participation, nonparticipation, or disqualification of justices. Such rules would enhance the accountability of justices to the public. They would provide a way for the public to have some knowledge about how justices conduct the public's business so that the public could accurately assess the justices' performance of their duties.

Further while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself from a case to not give written reasons, it is a "tradition of secrecy" that must for *all*

> Where, as here, a justice decides on his own motion not to participate in a case, the justice should be accountable to the parties and the public for his decision. Chief Justice TAYLOR still has not given his reason for not participating in this case. While his reasons likely support his decision to not participate, his decisions need to be in writing, on the record, and available to the parties, the public, and thereby future litigants. [*Neal*, *supra* at 1049 (citation omitted).]

[4] In *Hahn*, *supra* at 1037, I noted that Justice CAVANAGH had not included his reason for recusal, but had informed me he would do so in future cases. And in fact, in *Murry v Yuchasz*, 478 Mich 851 (2007), Justice CAVANAGH included a statement with the order indicating he was "not participating, due to a familial relationship with counsel of record."

Further, Justice KELLY has also indicated to me that in the future, she will request that her reasons for not participating be included with her decisions on the orders.

[5] Ultimately, Justice CORRIGAN did provide a statement indicating her reasons for not participating, *Parsons*, *supra,* 728 NW2d 66 (2007).

justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[6]

MARKMAN, J. I do not participate in this case. However, I write to reconcile my position with that in *Dep't of Labor & Economic Growth v Dykstra*, Docket No. 132549, in which I do participate. Here, I do not participate because my wife was a member of the Board of Review at the time of the decision being appealed, although she did not review this case, did not participate in its consideration, and took no position on its merits. In *Dykstra*, I do participate because my wife was no longer a member of the Board of Review and had no involvement in the case.[1]

DEPARTMENT OF LABOR & ECONOMIC GROWTH v NASH, No. 134077. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *Dep't of Labor & Economic Growth v Jordan* (Court of Appeals Docket No. 272634) and *Dykstra v Dep't of Labor & Economic Growth* (Court of Appeals Docket No. 271535). After *Jordan* and *Dykstra* are decided, the Court of Appeals shall reconsider this case in light of those cases. Court of Appeals No. 275069.

DEPARTMENT OF LABOR & ECONOMIC GROWTH v KAMINSKI, No. 134079. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *Dep't of Labor & Economic Growth v Jordan* (Court of Appeals Docket No. 272634) and *Dykstra v Dep't of Labor & Economic Growth v Dykstra* (Court of Appeals Docket No. 271535). After *Jordan* and *Dykstra* are decided, the Court of Appeals shall reconsider this case in light of those cases. Court of Appeals No. 275070.

DEPARTMENT OF LABOR & ECONOMIC GROWTH v MORALEZ, No. 134081. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *Dep't of Labor & Economic Growth v Jordan* (Court of Appeals Docket No. 272634) and *Dykstra v Dep't of Labor & Economic Growth* (Court of Appeals Docket No. 271535). After *Jordan* and *Dykstra* are decided, the Court of Appeals shall reconsider this case in light of those cases. Court of Appeals No. 276164.

Leave to Appeal Denied September 14, 2007:

PEOPLE v ERNEST JACKSON, No. 133154. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant

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[6] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

[1] Once again, Justice WEAVER has chosen to breach the confidentiality of this Court's deliberative process—a confidentiality that has characterized every appellate court from time immemorial. The adverse consequences of her singular conduct on the candor and fullness of discussion occurring within this process have been considerable.

to MCR 6.500 *et seq*. Moreover, if defendant chooses to file such a motion, the trial court, and not the Attorney Grievance Commission, would be the appropriate forum to conduct an evidentiary hearing regarding defendant's claim that his counsel had a conflict of interest, should it determine that an evidentiary hearing is required. Court of Appeals No. 274819.

CAVANAGH and KELLY, JJ. We would remand this case to the trial court for treatment of the defendant's motions as a motion for relief from judgment pursuant to MCR 6.500 *et seq*. and, if necessary, for an evidentiary hearing regarding the defendant's claim that his counsel had a conflict of interest.

PEOPLE v THURMAN JONES, No. 133317; Court of Appeals No. 273193.

MARKMAN, J. (*dissenting*). Defendant indicated that he wished to speak to a police officer. When asked whether he understood that he had a right to an attorney, defendant responded, "Yes . . . can I have one now while we talk?" The officer then explained that defendant could either waive his right to an attorney and talk to the officer now or wait to talk to an attorney. Defendant then stated that he wished to waive his right to an attorney, signed a form waiving his right to an attorney, and spoke with the officer. Because defendant clearly indicated that he wished to waive his right to an attorney, defendant's statements to the officer should not have been suppressed. Therefore, I dissent from this Court's order denying leave to appeal; instead, I would reverse the judgment of the trial court.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

PEOPLE v ROBERT HOFFMAN, No. 133536; Court of Appeals No. 266560.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to determine (1) whether a criminal defendant, by pleading no contest, waives the ability to challenge an alleged violation of his Sixth Amendment right of self-representation; (2) whether the right of self-representation extends to a plea hearing; and (3) whether a denial of the right of self-representation renders a subsequent plea involuntary as a matter of law.

In re THOMAS (PEOPLE v MICHAEL THOMAS), No. 133801; Court of Appeals No. 264549.

WEAVER, CORRIGAN, and YOUNG, JJ. We would vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration of its analysis in light of the respondent's statements admitting that he touched the complainant. The prosecutor submitted evidence at trial that the respondent admitted to the police and to his mother that he accidentally touched the complainant's vaginal area when he picked her up to remove her from his home. The Court of Appeals did not discuss this evidence in its opinion when evaluating the effect of the evidentiary errors on the outcome of the respondent's trial.

FIEGER v COX, Nos. 133961; 133962; reported below: 274 Mich App 449.

In this case, petitioners seek a recusal of Chief Justice TAYLOR, and Justices CORRIGAN, MARKMAN, and YOUNG.

In the recent past, petitioner Fieger has filed numerous motions for the recusal of one or more Michigan Supreme Court justices, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions for recusal has involved various allegations of claimed bias, principally stemming from Michigan Supreme Court judicial campaigns. All of the previous motions for recusal have been denied. *Graves v Warner Bros*, 469 Mich 853 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Grievance Administrator v Fieger*, 472 Mich 1244 (2005); *McDowell v Detroit*, 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); and *Tate v City of Dearborn*, 477 Mich 1101 (2007).

The pending motion asserts no new basis for recusal. Rather, the motion is predicated entirely on allegations made in the previous 10 motions that have been considered and denied.

Chief Justice TAYLOR and Justices CORRIGAN and YOUNG state that, as we have each done in connection with these past motions, and as justices must do in connection with every motion for disqualification, we have each looked into our consciences in this case and concluded that we are able to accord fair, impartial, and equal treatment to petitioners.

Further, the motion is predicated on the erroneous notion that disqualification of a justice of the Michigan Supreme Court is governed by the disqualification procedure set forth in MCR 2.003. On the contrary, this procedure has never been held applicable to disqualification of justices. See, e.g., *Adair v Michigan*, 474 Mich 1027, 1043 (2006) (statement of CAVANAGH, J.), 1029 n 2, (statement of TAYLOR, C.J., and MARKMAN, J.); *In re JK*, 468 Mich 202, 220 (2003) (statement of WEAVER, J.). Throughout its history, the disqualification procedure followed in the Michigan Supreme Court is similar to the one followed in the United States Supreme Court. See Statement of Recusal Policy, United States Supreme Court, November 1, 1993; *Laird v Tatum*, 409 US 824, 833, 837 (1972); *Jewell Ridge Coal Corp v Local 6167*, 325 US 897 (1945) (Jackson, J., *concurring*).

There being no new asserted basis, the motion for recusal and for evidentiary hearing is denied.

CAVANAGH, J. I cannot participate in the decision regarding the motion for recusal and for an evidentiary hearing because current Court practices—with which I disagree—only allow the individual justice who is the subject of the motion to decide the motion. Thus, I can offer no opinion about the validity of the motion for recusal and for an evidentiary hearing that was filed.

WEAVER, J. (*dissenting*). I dissent from the participation of Chief Justice TAYLOR and Justices CORRIGAN and YOUNG in this case in which Mr. Geoffrey N. Fieger is a party.[1] For my reasons in detail, see my dissent in *Grievance Administrator v Fieger,* 476 Mich 231, 328-347 (2006) (WEAVER

[1] I note that Justice MARKMAN has properly decided not to participate in this case and has also complied with his constitutional duty to provide reasons for his nonparticipation. Const 1963, art 6, § 6.

J., dissenting), and my dissent to the denial of the motion for a stay in *Grievance Administrator v Fieger*, 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged[2] this Court to undertake for almost four years, without success, the disqualification of justices is nonetheless governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making the decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves,[3] and at times they have not.

For example, in *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN stated that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." Justice YOUNG concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005),

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[2] Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., my statements and opinions in *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Adair v Michigan,* 474 Mich 1027, 1044 (2006); *Heikkila v North Star Trucking, Inc,* 474 Mich 1080, 1081 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *People v Parsons,* 728 NW2d 62 (2007); *Ruiz v Clara's Parlor, Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections,* 477 Mich 1049 (2007); *State Automobile Mut Ins Co v Fieger,* 477 Mich 1068, 1070 (2007); *Ansari v Gold,* 477 Mich 1076, 1077 (2007); *Short v Antonini,* 729 NW2d 218, 219 (2007); *Flemister v Traveling Med Services, PC,* 729 NW2d 222, 223 (2007); *Johnson v Henry Ford Hosp,* 477 Mich 1098, 1099 (2007); *Tate v City of Dearborn,* 477 Mich 1101, 1102 (2007); and *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007).

[3] Most recently, in *People v Parsons*, *supra* at 66-67 and n 10, and after my urging, Justice CORRIGAN disclosed in her statement of nonparticipation that her son was working for the law firm retained by the defendant, that she was personally biased in favor of her son, and, further, that there was a "distinct likelihood" that she had "extrajudicial knowledge of this very case." Accordingly, under both MCR 2.003(B)(1) and (2), it was appropriate for Justice CORRIGAN to disqualify herself from hearing the case.

Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to the parties and their counsel without any independent check on the justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further, while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for *all* justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[4]

KELLY, J. I do not participate in the decision regarding the motion for recusal. The Court's established procedure is to leave the decision to the discretion of the challenged justice. However, I continue to urge the Court to establish and put in writing a better procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

MARKMAN, J. I will not participate in this case because it directly pertains to the Attorney General's investigation of petitioners' financial conduct undertaken in connection with my reelection campaign in 2004.

BAILEY v KHALID, No. 134809; Court of Appeals No. 278049.

Reconsideration Denied September 14, 2007:

ANSARI v GOLD, No. 131161. Leave to appeal denied at 477 Mich 1076. Court of Appeals No. 263920.

CAVANAGH and KELLY, JJ. We would grant the motion for reconsideration.

WEAVER, J. (*dissenting*). I dissent from the majority's order denying plaintiff's motion for reconsideration because the plaintiff is entitled to a stay pending the resolution of attorney Geoffrey Fieger's lawsuit in the United States District Court for the Eastern District of Michigan, see *Fieger v Ferry,* 471 F3d 637 (CA 6, 2006). I would grant the motion for stay.

I further object to the continued participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, in this

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[4] *Scott v Flowers*, 910 F2d 201, 213 (CA 5, 1990).

case in which Mr. Fieger's law firm represents the plaintiff. For my reasons in detail, see my dissent in *Ansari v Gold,* 477 Mich 1076 (2007), set forth in its entirety below.[1]

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[1] WEAVER, J. (*dissenting*). I dissent from the participation of the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case, where Mr. Geoffrey N. Fieger's law firm represents the plaintiff. For my reasons in detail, see my dissent in *Grievance Administrator v Fieger*, 476 Mich 231, 328-347 (2006) (WEAVER, J., dissenting), and my dissent to the denial of the motion for stay in *Grievance Administrator v Fieger*, 477 Mich 1228, 1231-1271 (2006) (WEAVER, J., dissenting).

I also dissent from the order denying plaintiff's motion for stay of proceedings pending Mr. Fieger's lawsuit in the United States District Court for the Eastern District of Michigan concerning Michigan's disqualification rules governing Supreme Court justices. See *Fieger v Ferry*, 471 F3d 637 (CA 6, 2006). I would grant the motion to stay.

Furthermore, although MCR 2.003 is inadequate and in need of reform, which reform I have urged,[1] without success for almost four years, this Court to undertake action and achieve, the disqualification of justices is governed by the disqualification procedure contained in MCR 2.003. Although the majority of four asserts the contrary, the past four years have exposed inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. At times the justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not.

For example in *Adair v Michigan*, 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN stated that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." Justice YOUNG concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188 (2005), then-Chief Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v Daimler-Chrysler Corp*, 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the

State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

Assertions that justices can continue to look into their consciences and conclude they are able to accord fair, impartial, and equal treatment to parties' counsel and clients without any independent check on justices' decisions are incorrect. This method is insufficient and inadequate to meet the due process rights of parties and their counsel. Further while it appears to continue to be for *some* justices a "tradition" of this Court for a justice who disqualifies himself or herself from a case to not give written reasons, and to sometimes apply MCR 2.003 to himself or herself, and to sometimes not, it is a "tradition of secrecy" and inadequacy that must for all justices end now. An impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts . . . ."[2]

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[1]Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., statements of WEAVER, J., in *In re JK*, 468 Mich 202 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit*, 474 Mich 999 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Adair v Michigan*, 474 Mich 1027 (2006); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor*, 477 Mich 1044 (2007); and *Neal v Dep't of Corrections*, 477 Mich 1049 (2007).

[2]*Scott v Flowers*, 910 F2d 201, 215 (CA 5, 1990).

[*Ansari*, *supra* at 1077-1079.]

CHAPIN v A & L PARTS, INC, Nos. 133178, 133410, 133412. Leave to appeal denied at 478 Mich 916. Reported below: 274 Mich App 122.

MARKMAN, J. (*dissenting*). For the reasons set forth in my dissenting statement at 478 Mich 916 (2007), I would grant appellants' motion for reconsideration and grant leave to appeal. Few recent appeals have raised issues of greater long-term consequence for the integrity of this state's legal system than the instant appeal. It is unfortunate—indeed it is

inexplicable—that the highest court of this state would not view this case as warranting its attention. The practical and legal reverberations of today's decision will be felt for years to come in Michigan.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal September 21, 2007:

DETROIT FIREFIGHTERS ASSOCIATION, IAFF, LOCAL 344 v CITY OF DETROIT, No. 131463. We direct the clerk to set this case for reargument in the November 2007 session. Arguments should address the issues identified in this Court's June 15, 2007, order, and the parties will be limited to 15 minutes per side. Following the arguments by the parties, *amici curiae* Michigan Municipal League/Michigan Association of Counties and Michigan State AFL-CIO shall be permitted oral argument of 10 minutes each. Reported below: 271 Mich App 457.

Leave to Appeal Granted September 21, 2007:

DAIMLERCHRYSLER CORPORATION v STATE TAX COMMISSION, FORD MOTOR COMPANY v STATE TAX COMMISSION, AND DETROIT DIESEL CORPORATION v STATE TAX COMMISSION, Nos. 133394, 133396, 133400-133406; reported below: 274 Mich App 108.

Summary Dispositions September 21, 2007:

PEOPLE v MCDANIEL, No. 132805. We direct the Oakland County Prosecuting Attorney to answer the defendant's application for leave to appeal within 28 days after the date of this order. In addition, we invite the Attorney General to respond on behalf of the Michigan Department of Corrections. We invite the prosecutor and the Attorney General to address the questions (1) whether the defendant began serving his sentence in this case no later than the date of his original sentencing proceeding on September 26, 2003, which sentence was later vacated as an unwarranted departure from the statutory sentencing guidelines, and (2) assuming the defendant began serving his sentence on September 26, 2003, whether the trial court was required to grant the defendant credit for time served on a void sentence, i.e., for time served between the date of the original sentencing and the date of the resentencing. MCL 769.11a. Court of Appeals No. 264706.

KELLY, J. I would have expected the prosecutor to answer the application for leave to appeal without an order from this Court.

LAMAR v RAMADA FRANCHISE SYSTEMS, INC, No. 133575. 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 reinstate the order of the Oakland Circuit Court granting summary disposition to the defendants. The Court of Appeals erred in concluding that any questions about when a fight started and how long it had been going on before the defendants' employees contacted the police created a genuine issue of material fact as

to whether the defendants took reasonable measures to respond to that fight. *MacDonald v PKT, Inc,* 464 Mich 322, 336 (2001). Court of Appeals No. 272966.

KELLY, J. I would deny leave to appeal.

PEOPLE v SWAFFORD, No. 133897. 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 of the Interstate Agreement on Detainers issue in light of the documentation that the defendant attached to his application for leave to appeal and motion in this Court. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. The motion for miscellaneous relief is denied. We further direct the Court of Appeals to first remand this case to the Wayne Circuit Court, in accordance with Administrative Order No. 2003-3, so that the circuit court can determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in the Court of Appeals. Court of Appeals No. 268499.

CORRIGAN, J. (*concurring*). I concur with the order remanding this case to the Court of Appeals for reconsideration of the issue concerning the Interstate Agreement on Detainers (IAD), MCL 780.601 *et seq*. I write separately to raise the following questions that the case presents: (1) Was the panel correct that *People v Monasterski*, 105 Mich App 645 (1981), and *People v Wilden (On Rehearing)*, 197 Mich App 533 (1992), hold that "a detainer filed against a jail inmate before he begins serving a prison sentence is insufficient to implicate the IAD," and, if so, (2) are the holdings in *Monasterski* and *Wilden* consistent with the language of article III of the IAD?

I

In *Monasterski*, *supra* at 653, the Court of Appeals, citing the purpose of the IAD, the language of article IV of the IAD, and Anno: *Validity, construction, and application of interstate agreement on detainers*, 98 ALR3d 160, 185, explained that in order to trigger the IAD, the prisoner must be "actually serving a term of imprisonment in the sending state." The panel held that the IAD did not apply in that case because the defendants were being held in jail in Indiana pending extradition and had not embarked on a program of rehabilitation when the detainer was lodged. *Monasterski*, *supra* at 653. Although the defendants were tried and sentenced after the detainer was lodged, it appears that the defendants were *never imprisoned* in Indiana before being sent to Michigan on the detainer; they were merely held in an Indiana jail pending extradition. Similarly in *Wilden*, *supra* at 539, the Court of Appeals held that the IAD did not apply because at the time the detainer was filed, the defendant had not "entered upon a term of imprisonment," but was merely a parolee awaiting a hearing on his parole revocation. The defendant *never entered upon a term of imprisonment* before his transfer to Michigan on the detainer.

Because the defendants in *Monasterski* and *Wilden* never began terms of imprisonment before being extradited on the detainers, it appears that those holdings apply only in cases in which the defendant was not imprisoned when he sent to the prosecutor written notice of his place of imprisonment and a request for final disposition of the indictment, information, or complaint. Article III(a) clearly requires that the defendant be imprisoned at the time he causes the notice to be delivered to the prosecutor. MCL 780.601 (The 180-day period of the IAD applies "[w]henever a person has entered upon a term of imprisonment . . . ."). See also *People v Butcher*, 46 Mich App 40, 44-45 (1973) ("[T]he interstate agreement requires that a person have entered on a term of imprisonment in a prison in a state a party to the agreement when the required notice is given . . . ."). In the instant case, defendant was imprisoned in the federal system after the alleged detainer was lodged. During his imprisonment, he caused written notice of the place of his imprisonment to be delivered to the prosecutor. Thus, *Monasterski* and *Wilden* may be distinguishable from the instant case.

II

If on remand the Court of Appeals again interprets *Monasterski* and *Wilden* to mean that the IAD is never implicated when the detainer was filed against a person before he begins his term of imprisonment, then the holdings of *Monasterski* and *Wilden* appear contrary to the language of article III of the IAD. Article III(a) of the IAD provides that the 180-day period applies "whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer *has been lodged* against the prisoner . . . ." (Emphasis added.) The use of the phrase "has been lodged" in article III seems to mean that the detainer could have been lodged before the defendant was imprisoned. In other words, under article III(a), the IAD applies when a defendant who enters into a term of imprisonment has had a detainer lodged against him, whether the detainer was lodged before or during the defendant's imprisonment. This interpretation is consistent with the language of articles I and IV of the IAD. Nothing in the IAD suggests that the detainer must have been lodged *while the defendant was imprisoned* before the IAD applies. Thus, application of the IAD appears broader under the plain language of article III than it is under the Court of Appeals interpretation of *Monasterski* and *Wilden*.

If the Court of Appeals determines that *Monasterski* and *Wilden* are applicable but were wrongly decided, then the panel must address whether the prosecutor properly relied on those cases, which were the governing law at the time. Even if the Court of Appeals determines that *Monasterski* and *Wilder* are distinguishable, any holding by the Court of Appeals that the IAD applies even when the detainer was lodged before the defendant's imprisonment would be a novel interpretation of article III. Such a holding would broaden the previous interpretation of the application of the IAD. Because prosecutors up to this point have reasonably relied on the narrower application of the IAD under *Monas-*

terski and *Wilder*, the panel should consider whether to give such a holding limited retroactive effect. See *People v Williams*, 475 Mich 245, 255 (2006).

GLISSON v GERRITY, No. 133991. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse part IV(A) of the judgment of the Court of Appeals, and we vacate parts III and IV(B) of the judgment as unnecessary in light of our reversal of part IV(A). The Court of Appeals held that the plaintiff's June 2, 2004, complaint should be dismissed with prejudice pursuant to *Geralds v Munson Healthcare*, 259 Mich App 225 (2003), and *Mouradian v Goldberg*, 256 Mich App 566 (2003). We overruled *Geralds* and *Mouradian* in *Kirkaldy v Rim*, 478 Mich 581 (2007). As *Kirkaldy* states, "[u]nder 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." *Kirkaldy*, 478 Mich 585. Even a defective affidavit of merit will "toll the period of limitations until the validity of the affidavit is successfully challenged in 'subsequent judicial proceedings.' " *Id*. at 586. In this case, the limitations period was tolled when the plaintiff filed and served the June 2, 2004, complaint and affidavit of merit. As a result, the limitations period had not expired when the plaintiff filed and served the August 9, 2005, amended complaint, accompanied by the June 3, 2005, amended affidavit of merit. Accordingly, we dismiss without prejudice those claims concerning Dianne Gerrity, M.D., in the June 2, 2004, complaint, and we remand this case to the Wayne Circuit Court for further proceedings with regard to the amended pleadings. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Reported below: 274 Mich App 525.

Leave to Appeal Denied September 21, 2007:

AMERISURE, INC v BRENNAN, No. 133061; Court of Appeals No. 270736.

AMMEX, INC v DEPARTMENT OF TREASURY, No. 133302; reported below: 273 Mich App 623.

PEOPLE v REDMOND, No. 133334; Court of Appeals No. 261458.

TAIG v GENERAL MOTORS CORPORATION, No. 133418; Court of Appeals No. 272144.

CORRIGAN, J. (*dissenting*). I dissent from the order denying leave to appeal. I would remand to the Court of Appeals for consideration as on leave granted because the Workers' Compensation Appellate Commission (WCAC) improperly applied *Miklik v Michigan Special Machine Co*, 415 Mich 364 (1982), for the governing standard of review. The WCAC's application of *Miklik* ignores the correct "substantial evidence" standard of review, which includes a "qualitative and quantitative" analysis of the evidence. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000).

I. FACTUAL AND PROCEDURAL HISTORY

The 47-year-old plaintiff worked as a repairman and assembler for defendant. Plaintiff apparently felt that he was being harassed by his supervisor, because he wrote a letter to management criticizing quality control. On his last day of work, after being notified of impending disciplinary proceedings, plaintiff locked himself in an empty office where he stabbed himself in the hand with a screwdriver.

Dr. Yatinder Singhal diagnosed plaintiff as having severe depression and anxiety and concluded that plaintiff was unable to return to work. Dr. Singhal concluded that the alleged harassment of plaintiff at work significantly contributed to his preexisting emotional difficulties. Dr. Michael Freedman agreed that plaintiff was unable to return to work, but concluded that plaintiff's mental problems were completely unrelated to his employment.

The magistrate held that plaintiff was disabled under *Sington v Chrysler Corp*, 467 Mich 144 (2002), and was entitled to an open award of benefits. The magistrate did not expressly state which doctor was more credible or which doctor's testimony she was relying on, but her conclusion that events at plaintiff's work significantly aggravated plaintiff's preexisting emotional problems indicates that the magistrate relied on Dr. Singhal's testimony.

The WCAC affirmed in a split opinion. The majority stated that the case involved a credibility contest between the doctors and that the magistrate had to choose which doctor to believe. The majority held that although the magistrate did not directly state why she relied on Dr. Singhal's testimony, she had a "reasonable basis" for doing so. The Court of Appeals thereafter denied the defendant employer's application for leave to appeal.

II. ANALYSIS

Defendant correctly argues that the WCAC majority erred as a matter of law when it used *Miklik*[1] to describe the standard of review of the magistrate's factual findings. While relying on *Miklik*, the WCAC majority merely cited *Mudel*, *supra* at 698-699, in which this Court held that the WCAC reviews the magistrate's findings of fact to determine if they are supported by competent, material, and substantial evidence on the whole record. "Substantial evidence" means such evidence as a reasonable mind will accept as adequate to justify the conclusion. *Id.* at 699, citing MCL 418.861a(3). This review must, according to MCL 418.861a(13), include both a "qualitative and quantitative analysis" of

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[1] In *Miklik*, *supra* at 367-368, this Court held: "The factfinder in a workers' compensation case ordinarily is free to accept the most persuasive medical testimony. However, should the medical testimony advance a theory which conflicts with the law, the factfinder would be precluded from adopting that testimony."

the evidence. In other words, the WCAC need not necessarily defer to all of the magistrate's findings of fact. *Mudel*, *supra* at 703. The WCAC has certain fact-finding powers that permit it in some circumstances to substitute its own findings of fact for those of the magistrate if the WCAC accords different weight to the quality or quantity of evidence presented. *Id.* at 699-700.

Although the WCAC's citations of *Mudel* were correct, the WCAC then made the following questionable statement in the standard of review section: "Ultimately, the analysis comes down to which doctor the magistrate chose to believe and, as long as there is a reasonable basis for the choice that she did make, *Miklik v Michigan Special Machine Co*, 415 Mich 364, 367-368 (1982), the inquiry is at an end." In applying the standard of review to the facts, the WCAC apparently relied on this "reasonable basis" standard when it stated *three times* that the magistrate's findings were "reasonable." The WCAC concluded that because there was a "reasonable basis" for the magistrate's findings, there was competent, material, and substantial evidence on the whole record to support the magistrate's decision.[2]

I question the WCAC's application of *Miklik*. First, *Miklik* was decided before the WCAC was even created. Thus, the *Miklik* Court was necessarily working under a different standard of review. Second, the WCAC's standard of review was later clarified in *Mudel*. *Mudel* does not instruct the WCAC to affirm the magistrate's factual findings when there is merely a "reasonable basis" for those findings. Under *Mudel*, the WCAC need not defer to the magistrate's findings, but has the authority and obligation to engage in a qualitative and quantitative analysis to determine whether to affirm those findings. Rather than engaging in a qualitative and quantitative review, the WCAC held that because there was a "reasonable basis" for the magistrate's decision, "the inquiry is at an end." By doing so, the WCAC effectively ignored the *Mudel* standards and misapplied an outdated standard purportedly based on *Miklik*. I would remand to the Court of Appeals for consideration as on leave granted to apply the correct standard of review or to direct the WCAC to do so.

PEOPLE v OTIS FRAZIER, No. 133441. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271346.

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[2] This is not the first time the WCAC has relied on *Miklik* for this proposition. See, e.g., *Lee v ACE Hardware & Lumber/MRHA-SIWCF*, 1993 Mich ACO 585, p 2 ("It is well within the Magistrate's discretion to accept the medical testimony he finds most persuasive and as long as there is a reasonable basis for his findings, . . . we will not displace them. *Miklik* v *Michigan Special Machine Co*, 415 Mich 364 (1982) . . . ."); *Weible v Bra Con Industries, Inc*, 1998 Mich ACO 357, p 6 ("[W]e recognize that the magistrate is free to select the medical testimony he finds most persuasive, when, as here, there is a reasonable basis for his choice. *Miklik*, *supra*, p 367.").

ERICKSON v EVANS, No. 133556; Court of Appeals No. 272328.
KELLY, J. I would grant leave to appeal.

PEOPLE v ZELLER, No. 133558; Court of Appeals No. 264137.

PEOPLE v ANTONIO BAILEY, No. 133562; Court of Appeals No. 274556.
KELLY, J. I would remand this case for resentencing.

PEOPLE v OTIS, No. 133569; Court of Appeals No. 275876.
KELLY and CORRIGAN, JJ. We would remand this case to the trial court to clarify the basis for the scoring of offense variable 19.

PEOPLE v GARY GROESBECK, No. 133590; Court of Appeals No. 272091.

PEOPLE v BURCH, No. 133652; Court of Appeals No. 275178.

MELBOURNE v LAWN WORKS AND MELBOURNE v WAYNE BOWLING AND RECREATION, INC, Nos. 133658, 133659; Court of Appeals Nos. 263783, 263819.

PEOPLE v CASCHERA, No. 133693; Court of Appeals No. 275833.
KELLY, J. I would remand this case to the trial court for correction of the presentence report.

PEOPLE v HAREMZA, No. 133700; Court of Appeals No. 274479.
KELLY, J. I would grant leave to appeal.

LEGG v DAIMLERCHRYSLER CORPORATION, No. 133744; Court of Appeals No. 272752.

PEOPLE v JOHNIGAN, No. 133755; Court of Appeals No. 267727.
KELLY, J. I would remand this case for resentencing.

PEOPLE v ANDRE MOORE, No. 133773; Court of Appeals No. 265069.

PEOPLE v WINTERS, No. 133798; Court of Appeals No. 275975.
KELLY, J. I would remand this case for resentencing.

VEUCASOVIC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 133815; Court of Appeals No. 271771.

PEOPLE v WINSTEAD, No. 133852; Court of Appeals No. 276412.

ALBER v BIG RAPIDS AUTOMOTIVE, INC, No. 133869; Court of Appeals No. 274872.

PEOPLE v DINOFFRIA, No. 133873. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272266.

PEOPLE v TODOROVSKI, No. 133933; Court of Appeals No. 276868.

HARDY v SAFEWAY FOOD CENTER, INC, No. 133989; Court of Appeals No. 272962.

In re MOON (DEPARTMENT OF HUMAN SERVICES v MOON), No. 134795; Court of Appeals No. 276349.

In re OLLIE (DEPARTMENT OF HUMAN SERVICES v OLLIE), No. 134796; Court of Appeals No. 269029.

Summary Dispositions September 24, 2007:

PEOPLE v VAN CLEVE, No. 133295. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court for resentencing. Because the penetrations in this case did not "arise out of" the sentencing offense, offense variable 11 should not have been scored at 50 points. *People v Johnson*, 474 Mich 96 (2006). Court of Appeals No. 274849.

PEOPLE v TAMERRA WASHINGTON, No. 134151. 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. 273808.

PEOPLE v RIDDLE, No. 134198. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Kalamazoo Circuit Court for amendment of the presentence report. The circuit judge stated at the sentencing hearing on December 11, 2006, that he would make a note in the presentence report that the defendant denies that his family fears him, but the presentence report was not amended in accordance with that statement. Therefore, the circuit court shall direct the probation officer to amend the presentence report to note that the defendant denies that his family fears him. MCR 6.425(E)(2). The circuit court is further ordered to ensure that the amended presentence report is transmitted to the Department of Corrections. 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. 277673.

SANBORN v DOCKETT'S MOBILE HOME SALES, No. 134245. 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. 275066.

Leave to Appeal Denied September 24, 2007:

PEOPLE v HAMMOND, No. 132141; Court of Appeals No. 260837.

WOOD v BEDIAKO, No. 132603; reported below: 272 Mich App 558.

PEOPLE v WHEETLEY, No. 132863. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270967.

PEOPLE v FLOYD, No. 133323; Court of Appeals No. 274642.

MCELROY v MICHIGAN STATE POLICE CRIMINAL JUSTICE INFORMATION CENTER, No. 133340; reported below: 274 Mich App 32.

PEOPLE v BUTLER, No. 133359; Court of Appeals No. 272857.

SCHILS v WASHTENAW COUNTY, WASHTENAW COUNTY v SCHILS, SCHILS v WASHTENAW COMMUNITY HEALTH ORGANIZATION, AND SCHILS v WASHTENAW COUNTY OFFICE OF THE SHERIFF, Nos. 133427, 133497, 133498, 134113, 134290, 134291; Court of Appeals Nos. 263938, 267650, 273104, 273428, 274231, 274664.

PEOPLE v RIKER, No. 133449; Court of Appeals No. 263726.

PEOPLE v DWAYNE WHITE, No. 133479; Court of Appeals No. 275044.

PEOPLE v PHILIP THOMPSON, No. 133494; Court of Appeals No. 262054.

DULIC v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 133526; Court of Appeals No. 271275.

PEOPLE v GARY ROGERS, No. 133611; Court of Appeals No. 275740.

PEOPLE v HILTON, No. 133648. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275572.

SVOBODA v CUNNINGHAM, No. 133677; Court of Appeals No. 271797.

PEOPLE v FRANKIE HALL, No. 133720. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275600.

PEOPLE v WHITLEY, No. 133724; Court of Appeals No. 265482.

PEOPLE v RUIZ, No. 133850; Court of Appeals No. 262699.

PEOPLE v SEAMAN, Nos. 133865, 133866; Court of Appeals Nos. 260816, 265572.

PEOPLE v CHARLES ROGERS, No. 133919; Court of Appeals No. 276336.

PEOPLE v ANTHONY HUBBARD, No. 133993. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273749.

PEOPLE v EVA WILLIAMS, No. 133994; Court of Appeals No. 267732.

PEOPLE v CARL SMITH, No. 134001. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272793.

PEOPLE v SOUSA, No. 134027. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272682.

PEOPLE v HOLMES, No. 134030. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273213.

PEOPLE v KRAJEWSKI, No. 134035; Court of Appeals No. 276915.

PEOPLE v RUFFIN, No. 134039. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273091.

PEOPLE v DELMAR GOWING, No. 134044. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277961.

PEOPLE v DONALD GOWING, No. 134046. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277962.

PEOPLE v KEVIN PHIPPS, No. 134055; Court of Appeals No. 265388.

PEOPLE v STEPHENS, No. 134061. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274379.

PEOPLE v DWAYNE BERRY, No. 134074. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272500.

RESPESS v IRWIN MORTGAGE CORPORATION, No. 134076; Court of Appeals No. 273902.

PEOPLE v WOODMAN, No. 134098; Court of Appeals No. 276752.

PEOPLE v PERDUE, No. 134103; Court of Appeals No. 276650.

PEOPLE v VANREYENDAM, No. 134104; Court of Appeals No. 266511.

PEOPLE v OUTLEY, No. 134105; Court of Appeals No. 277209.

PEOPLE v FREDERICK FIELDS, No. 134108. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274140.

PEOPLE v BURKE, No. 134111. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275110.

PEOPLE v DONNIE DAVIS, No. 134112. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273092.

PEOPLE v RAMIE LEWIS, No. 134117. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273610.

PEOPLE v GUTHRIE, No. 134121. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273296.

PEOPLE v RICHARDS, No. 134129. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272696.

PEOPLE v DILSWORTH, No. 134130. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273207.

PEOPLE v JULIAN BROOKS, No. 134134; Court of Appeals No. 266082.

PEOPLE v KENNETH PATTERSON, No. 134136; Court of Appeals No. 266945.

HUBBERT v DEPARTMENT OF CORRECTIONS, No. 134144; Court of Appeals No. 275949.

PEOPLE v ISCARO, No. 134152; Court of Appeals No. 273031.

SANDBERG v DEPARMENT OF CORRECTIONS, No. 134160; Court of Appeals No. 273073.

PEOPLE v FRANKLIN BALLARD, No. 134161. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273321.

PEOPLE v TERRELL, No. 134168. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275115.

PEOPLE v BELCHER, No. 134169. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273068.

PEOPLE v EAREGOOD, No. 134178; Court of Appeals No. 269300.

PEOPLE v TITLOW, No. 134183. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273274.

PEOPLE v SHEDRICK LEE, No. 134184. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275281.

PEOPLE v DENSON, No. 134187. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272584.

PEOPLE v AL-KHALIL, No. 134189; Court of Appeals No. 266096.

CAVANAGH, J. I would remand this case for an evidentiary hearing.

PEOPLE v OLATUNJI KEAN, No. 134191; Court of Appeals No. 264236.

PEOPLE v WOODALL, No. 134194. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274073.

PEOPLE v KIERZAK, No. 134196. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275563.

PEOPLE v KEITH STINSON, No. 134201. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274637.

PEOPLE v TONY BERRY, No. 134202. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275488.

PEOPLE v FLOOD, No. 134210. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277681.

PEOPLE v HARDIN, No. 134212. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274820.

KHEMMORO INC v DEPARTMENT OF COMMUNITY HEALTH, No. 134216; Court of Appeals No. 275286.

PEOPLE v ARTHUR ROBINSON, No. 134223; Court of Appeals No. 276155.

PEOPLE v MATEO-CASTELLANOS, No. 134232; Court of Appeals No. 267335.

PEOPLE v CARMICHAEL, No. 134235. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275489.

PEOPLE v STEPHEN ANDREWS, No. 134238. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273525.

PEOPLE v MAKI, No. 134243; Court of Appeals No. 268038.

NARDI v SATELLITE SERVICES, INC, No. 134246; Court of Appeals No. 269197.

PEOPLE v GIDRON, No. 134253; Court of Appeals No. 277205.

COMPEAU v CURRIER, No. 134278; Court of Appeals No. 274495.

POTTS v STIEVE, No. 134281; Court of Appeals No. 268581.

PEOPLE v JEFFREY MILLS, No. 134286; Court of Appeals No. 268528.

PEOPLE v GREGORY WASHINGTON, No. 134294; Court of Appeals No. 274768.

PEOPLE v MILES, No. 134301. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275648.

SMART v NATIONWIDE MUTUAL INSURANCE COMPANY, No. 134302; Court of Appeals No. 266797.

PEOPLE v CALHOUN, No. 134303. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274822.

PEOPLE v VALLADOLID, No. 134304. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273286.

BRONIAK v CLENDENING, No. 134305; Court of Appeals No. 274584.

PEOPLE v NORMAN, No. 134307. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274114.

PEOPLE v MARCUS MARTIN, No. 134310; Court of Appeals No. 277125.

PEOPLE v JAMES COOPER, No. 134312; Court of Appeals No. 277628.

PEOPLE v BOBBY PERRY, No. 134315; Court of Appeals No. 277593.

SALMON v SMITH, No. 134317; Court of Appeals No. 276573.

PEOPLE v MACK MCKINNEY, No. 134318. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274446.

BURTON v HELEN NEWBERRY JOY HOSPITAL, No. 134323; Court of Appeals No. 274440.

PEOPLE v OLA-TOKUMBO UNGER, No. 134324; Court of Appeals No. 275246.

PEOPLE v YAX, No. 134345; Court of Appeals No. 276861.

PEOPLE v HILLIARD, No. 134346. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273928.

VAN EMAN v CARS PROTECTION PLUS, INC, No. 134349; Court of Appeals No. 267473.

HENDRICK v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 134353; Court of Appeals No. 275318.

GRUBER v COLE'S CORNER RESTAURANT & CATERING, INC, No. 134355; Court of Appeals No. 273248.

PEOPLE v HULL, No. 134360; Court of Appeals No. 270190.

PEOPLE v HORNE, No. 134362; Court of Appeals No. 269788.

PEOPLE v ALPHONSO MILLS, No. 134364. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274880.

PEOPLE v DONALD PATTERSON, No. 134365. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275948.

CARTER v INGHAM COUNTY CONCEALED WEAPONS LICENSING BOARD, No. 134370; Court of Appeals No. 275024.

PEOPLE v KEITH BELL, No. 134371. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276503.

PEOPLE v LASSETTI, No. 134375. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275002.

PEOPLE v BRODIE, No. 134376. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274374.

PEOPLE v JAMES WHEELER, No. 134379; Court of Appeals No. 269790.

PEOPLE v MANSON, No. 134380; Court of Appeals No. 276064.

PEOPLE v TYSZKOWSKI, No. 134387; Court of Appeals No. 275328.

PEOPLE v WEST, No. 134401; Court of Appeals No. 269294.

PEOPLE v LOCKLEAR, No. 134404; Court of Appeals No. 267116.

PEOPLE v DALE SMITH, No. 134405; Court of Appeals No. 277410.

PEOPLE v CHRISTOPHER MORGAN, No. 134411; Court of Appeals No. 275990.

PEOPLE v ALPHONSO CLARK, No. 134423; Court of Appeals No. 267188.

PEOPLE v DUSTIN MILLER, No. 134425. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274881.

PEOPLE v TREMAIN JONES, No. 134428; Court of Appeals No. 277677.

PEOPLE v GWIZDALA, No. 134429; Court of Appeals No. 277030.

PEOPLE v TERRISE JOHNSON, No. 134430; Court of Appeals No. 278226.

PEOPLE v BRANDON MILLER, No. 134433; Court of Appeals No. 267083.

PEOPLE v WARE, No. 134438; Court of Appeals No. 270441.

PEOPLE v KITTKA, No. 134441; Court of Appeals No. 269425.

DETROIT LIONS, INC v CITY OF DEARBORN, No. 134447; Court of Appeals No. 266260.

KUCZMERA v SAPPI FINE PAPER NORTH AMERICA, No. 134463; Court of Appeals No. 275758.

PEOPLE v GLOSTER, No. 134466; Court of Appeals No. 277831.

PEOPLE v EDMUNDS, No. 134467; Court of Appeals No. 277850.

PEOPLE v LAPINE, No. 134498; Court of Appeals No. 273971.

PEOPLE v MOUGRABI, No. 134520; Court of Appeals No. 276294.

OTTOBRE v HOPE NETWORK NORTH MICHIGAN, No. 134528; Court of Appeals No. 276681.

PEOPLE v CEDRIC SMITH, No. 134532; Court of Appeals No. 267114.

PEOPLE v POSEY, No. 134535; Court of Appeals No. 270379.

SIMS v DELPHI AUTOMOTIVE SYSTEMS CORPORATION, No. 134544; Court of Appeals No. 275454.

PEOPLE v HILTON, No. 134556. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275572.

OSBORNE v WASHTENAW CIRCUIT JUDGE, No. 134741. The complaint for superintending control, treated as an application for leave to appeal the July 20, 2007, order of the Court of Appeals, is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 279204.

Reconsideration Denied September 24, 2007:

PEOPLE v GARRETT, No. 133325. Leave to appeal denied at 478 Mich 927. Court of Appeals No. 265913.

PRICE v DEPARTMENT OF TRANSPORTATION, No. 133358. Leave to appeal denied at 478 Mich 928. Court of Appeals No. 257577 (on remand).

CAVANAGH, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

KELLY, J. I would grant reconsideration.

PEOPLE v STALLWORTH, No. 133540. Leave to appeal denied at 479 Mich 852. Court of Appeals No. 266833.

KELLY, J. I would grant reconsideration.

PEOPLE v LIGE, No. 133610. Leave to appeal denied at 479 Mich 863. Court of Appeals No. 271757.

In re BELL (KING v DEPARTMENT OF HUMAN SERVICES), Nos. 133768-133770. Leave to appeal denied at 479 Mich 852. Court of Appeals Nos. 271845-271847.

Leave to Appeal Granted September 26, 2007:

ALLISON v AEW CAPITAL MANAGEMENT, LLP, No. 133771. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals violated MCR 7.215(J)(1) by not following the precedent of *Teufel v Watkins,* 267 Mich App 425, 429 n 1 (2005); (2) whether sidewalks and parking lots in leased residential areas are "common areas" under MCL 554.139(1)(a); and (3) whether natural accumulation of snow and ice is subject to the lessor's duty established in MCL 554.139(1)(a) and (b). The clerk of the Court is directed to place this case

on the January 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 16, 2007, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 17, 2007. Reported below: 274 Mich App 663.

BUCKNER ESTATE v CITY OF LANSING, No. 133772. The parties shall include among the issues to be briefed: (1) whether the children's decision to risk walking in the street prevents the plaintiffs from establishing proximate causation; (2) whether the city of Lansing is entitled to governmental immunity because the injuries did not occur on the sidewalk that the city allegedly failed to maintain, i.e., the injuries were not the direct result of the allegedly unmaintained condition; and (3) whether the statutory duty to "maintain the highway in reasonable repair," MCL 691.1402(1), imposes obligations relating only to structural-type defects, or whether it includes a duty not to place temporary obstacles on a highway that render it impassable. The clerk of the Court is directed to place this case on the January 2008 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 16, 2007, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 17, 2007. The Michigan Association of Justice, Michigan Defense Trial Counsel, Inc., and Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the question presented should be reviewed by this Court. Reported below: 274 Mich App 672.

STONE v WILLIAMSON, No. 133986. The application for leave to appeal the April 17, 2007, judgment of the Court of Appeals is granted limited to the following issues: (1) whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case; (2) if so, whether the "loss of an opportunity to survive or an opportunity to achieve a better result" should be determined by considering the aggregate increased risk posed by the alleged malpractice, including risks associated with injuries that the patient did not suffer and any increased risk of death, or whether the only consideration should be the increased risk of the specific injury or injuries suffered by the patient; (3) whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), was correctly decided, or whether a different approach is required to correctly implement the second sentence of § 2912a(2), such as that described in Roy W. Waddell, M.D.'s *A Doctor's View of Opportunity to Survive: Fulton's Assumptions and Math are Wrong*, published in the March 2007 edition of the Michigan Bar Journal at 32; and (4) whether the Court of Appeals erred when it determined that the plaintiffs met the requirements of § 2912a(2). The clerk of the Court is directed to place this case on the January 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 16, 2007, and

appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 17, 2007. Court of Appeals No. 265048.

BRAVERMAN v GARDEN CITY HOSPITAL, Nos. 134445, 134446. The parties are directed to include among the issues to be briefed: (1) whether there are any circumstances, other than the expiration of the three-year ceiling in MCL 600.5852, under which the appointment of a successor personal representative would not trigger the start of a new two-year saving period, despite *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29 (2003), and (2) whether a successor personal representative may rely on a notice of intent filed by a predecessor personal representative. The clerk of the Court is directed to place this case on the January 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 16, 2007, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 17, 2007. The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 275 Mich App 705.

Summary Dispositions September 26, 2007:

PEOPLE v BUTZ, No. 133704. 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 delayed application for leave to appeal under the standard applicable to such appeals. The Court of Appeals erred in denying the defendant's application for failure to persuade the Court of the need for immediate appellate review because this appeal was not interlocutory. Within 28 days of the date of this order, the Court of Appeals shall reconsider the defendant's delayed application under the appropriate standard and decide whether it should be granted. We do not retain jurisdiction. Court of Appeals No. 275792.

MARONEK v WAL-MART STORES, INC, No. 133709. 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. 274253.

KELLY, J. I would deny leave to appeal.

OVERALL v HOWARD, No. 134056. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and, for the reasons stated in the Court of Appeals dissenting opinion, we remand this case to the Washtenaw Circuit Court for entry of judgment in favor of defendant Lincoln Consolidated Schools. Court of Appeals No. 274588.

FRYE v CONSOLIDATED RAIL CORPORATION, No. 134277. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and we remand this case to the Court of Appeals for the consideration of the plaintiff's issues as an appeal of right. The plaintiff timely filed his motion for rehearing or reconsideration of the trial court's December 19, 2006, summary disposition order within the time provided in the trial court's order of January 8, 2007, and the plaintiff then timely filed his claim of appeal within 21 days of the trial court's February 22, 2007, order denying his motion for rehearing or reconsideration. MCR 7.204(A)(1)(b). Court of Appeals No. 276834.

Leave to Appeal Denied September 26, 2007:

SWEARINGER v DAIMLERCHRYSLER CORPORATION, No. 133341; Court of Appeals No. 272158.

KELLY, J. I would grant leave to appeal.

PEOPLE v MELODY HARRIS, No. 133355; Court of Appeals No. 273970.

PEOPLE v JEFFREY MILLER, No. 133377; Court of Appeals No. 275112.

PEOPLE v DOBEK, No. 133503; reported below: 274 Mich App 58.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v CURETON, Nos. 133619, 133621. The defendant claims that he is being wrongfully detained on a sentence for an offense that occurred in 1995, from which he was paroled and discharged. If the defendant is correct, the proper cause of action would be a complaint for a writ of habeas corpus against the Department of Corrections for the illegal detention. Court of Appeals Nos. 275698, 276097.

Summary Disposition September 28, 2007:

DETROIT BUILDING AUTHORITY v WAYNE COUNTY TREASURER, Nos. 129741, 129743, 129745; Court of Appeals No. 253479. 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 reinstate the order of the Wayne Circuit Court setting aside the foreclosure sale and quieting title to the property in the plaintiff. The foreclosure sale of publicly owned property is prohibited. MCL 211.78g(1). Contrary to the Court of Appeals majority's conclusion, the Wayne County Treasurer had reason to know that the property was publicly owned because there is no dispute that plaintiff Detroit Building Authority, which was incorporated by intervening plaintiff city of Detroit, MCL 123.951, was the owner of record and had filed both a deed and an affidavit of property transfer notifying the county that the property was tax-exempt.

MARKMAN, J. (*concurring*). I concur in the decision to reverse the Court of Appeals; however, I would do so on different grounds. It is undisputed that the city of Detroit was the taxpayer of record in the local assessor's office at the time of the foreclosure. Because the city's interest was

"identifiable by reference to . . . [t]ax records in the office of the local assessor," MCL 211.78i(6)(c), the Wayne County Treasurer was required to send notice by certified mail. MCL 211.78i(2). Moreover, because the city's interest was "reasonably identifiable" under the records of the local assessor, merely posting a foreclosure notice and publishing such notice in a newspaper was not constitutionally adequate. *Mennonite Bd of Missions v Adams*, 462 US 791, 798-799 (1983). Accordingly, the Court of Appeals erred by concluding that the treasurer "afforded the City the required due process."

Leave to Appeal Denied September 28, 2007:

PEOPLE v RODNEY HUBBARD, No. 133360; Court of Appeals No. 263300.

MARKMAN, J. (*concurring*). Because defendant has failed to make any showing that voiceprint evidence would demonstrate that the voice on the recording was not his own, I concur in the order denying leave to appeal. I write separately to observe that this Court, in an appropriate case, should revisit its conclusion in *People v Tobey*, 401 Mich 141, 148 (1977), that voiceprint evidence is inadmissible because it has not "achieved general scientific acceptance as a reliable identification device . . . ." Since *Tobey* was decided, 11 other states have addressed the admissibility of voiceprint evidence: five states have admitted such evidence, see, e.g., *People v Coon*, 974 P2d 386 (Alas, 1999), and six states have rejected such evidence, see, e.g., *State v Gortarez*, 141 Ariz 254 (1984). *Coon* is the only decision of a state supreme court that has addressed voiceprint evidence under the test of *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993), which is now the relevant standard in Michigan under MRE 702. In light of these legal developments, as well as potential technological improvements in voiceprint technology over the past three decades, this Court should revisit the admissibility of voiceprint evidence on an appropriate occasion.

DELENE v BARAGA CIRCUIT COURT, No. 133810; Court of Appeals No. 274706. Costs of $250 are assessed against the plaintiffs in favor of the defendants under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiffs are barred from submitting additional filings in this Court until they offer proof that they have paid all of their outstanding court-imposed sanctions.

PEOPLE v TERANCE HICKS, No. 133827; Court of Appeals No. 266510.

KELLY, J. I would hold this case in abeyance pending the outcome of any appeal that may be taken to the United States Supreme Court from this Court's decision in *People v McCuller*, 479 Mich 672 (2007).

Reconsideration Granted September 28, 2007:

TKACHIK v MANDEVILLE, No. 132710. Leave to appeal denied at 477 Mich 1057. Court of Appeals No. 270253. The motion for reconsideration of this Court's March 26, 2007, order is granted. We vacate our order dated March 26, 2007. On reconsideration, the application for leave to appeal the November 16, 2006, order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we

remand this case to the Court of Appeals for consideration, as on leave granted, of the legal question whether a contribution claim against the defendant, based on an unjust enrichment theory, is appropriate under the facts of the case. See, e.g., *Crawford v Crawford*, 293 Md 307 (1982); *Turner v Turner*, 147 Md App 350 (2002); *Cagan v Cagan*, 56 Misc 2d 1045 (1968). We do not retain jurisdiction.

Reconsideration Denied September 28, 2007:

In re PEOPLES (DEPARTMENT OF HUMAN SERVICES V PEOPLES), No. 134327. Leave to appeal denied at 479 Mich 854. Court of Appeals No. 272972.

In re GARCIA (DEPARTMENT OF HUMAN SERVICES V GARCIA), No. 134442. Leave to appeal denied at 479 Mich 869. Court of Appeals No. 273626.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 3, 2007:

DIMMITT & OWENS FINANCIAL INC V DELOITTE & TOUCHE (ISC), LLC, No. 134087. 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) assuming that the defendants breached their contract with the plaintiffs to review the plaintiffs' financial statements, what "original injury" did the plaintiffs suffer as a result of that breach, under MCL 600.1629(1), and where did the plaintiffs suffer that injury; and (2) whether the record below is sufficiently developed to make such a determination. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. The Michigan Association of Justice and the Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 274 Mich App 470.

Summary Dispositions October 3, 2007:

LONG V CHILDREN'S HOSPITAL OF MICHIGAN, No. 132029. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reason that the insanity saving provision of MCL 600.5851(1) applies to the plaintiff's medical malpractice claims. *Vega v Lakeland Hospitals at Niles and St Joseph, Inc*, 479 Mich 243 (2007). We remand this case to the Wayne Circuit Court for further proceedings consistent with this order. Court of Appeals No. 266948.

PANDY V BOARD OF WATER AND LIGHT, No. 132891. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. In this case, Lansing City Charter § 5 202.1

provides that the Director of the Board of Water and Light shall serve "at its pleasure." The parties entered into a contract that specifically stated that the agreement could be terminated any time during its term "with or without cause." That means that the plaintiff served "at the pleasure" of the board. The remaining provisions governing the plaintiff's termination define the severance pay owed to the plaintiff depending on whether his termination was for cause, as defined by the contract, or without cause. We remand this case to the Ingham Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 259784.

PEOPLE V STRAWTHER, No. 133446. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals erred in concluding that the defendant's convictions for both assault with intent to commit great bodily harm (MCL 750.84) and felonious assault (MCL 750.82) violated his double jeopardy protections. Because the crimes have different elements, the defendant may be punished for each. *People v Smith*, 478 Mich 292 (2007). Due to the prosecutor's confession of error regarding the scoring of prior record variable 7 in the Court of Appeals, the defendant remains entitled to resentencing. Accordingly, we remand this case to the Wayne Circuit Court for resentencing. Court of Appeals No. 265911.

CAVANAGH, J. I would deny leave to appeal.

PEOPLE V CADARETTE, No. 133844. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Genesee Circuit Court for further proceedings consistent with this order. The record makes clear that the trial judge provided a preliminary sentence evaluation in chambers, off the record. At the guilty plea hearing, the prosecutor disclaimed any plea agreement. Defense counsel indicated that there was a discussion in chambers regarding an agreement for a minimum sentence that was within the guidelines and comported with the "two-thirds" rule and for a maximum sentence no greater than 32 years. The court specifically stated that it would sentence within the guidelines, to which the parties had agreed in chambers, but failed to specifically affirm or disclaim the agreement concerning the maximum sentence. At the outset of the sentencing proceeding, defense counsel again recited the deal, and the trial judge again failed to affirm the agreement for a maximum term no greater than 32 years. The record therefore demonstrates an attempt to reach an agreement under *People v Cobbs*, 443 Mich 276 (1993), but there is no clear agreement on the record as to the terms of the alleged agreement. On remand the court shall give the defendant the opportunity to withdraw his plea of guilty. 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. 267500.

SADOWY V DETROIT EDISON COMPANY, No. 134752. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the question whether, in light of this Court's holding in *Trentadue v Buckler Auto-*

matic Lawn Sprinkler Co, 479 Mich 378 (2007), and *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81-83 (1999), the plaintiffs' claim is barred by the statute of limitations. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. The motion for peremptory reversal is denied. We further order that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 278789.

WEAVER, J. (*dissenting*). I dissent from the majority's decision to remand this case to the Court of Appeals for consideration as on leave granted in light of *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378 (2007).

I would grant the application for leave to appeal, and request that the majority of four reconsider its decision eliminating the common-law discovery rule on the basis of my dissent in *Trentadue*, *supra* at 407-430.

CAVANAGH, J. I join the statement of Justice WEAVER.

Leave to Appeal Denied October 3, 2007:

PEOPLE v SNYDER, No. 132865; Court of Appeals No. 273652.

CAVANAGH and KELLY, JJ. We would remand this case for resentencing.

PEOPLE v MICHAEL EVANS, No. 132950. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271169.

PEOPLE v ALFRED JACKSON, JR, No. 132952. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271170.

PEOPLE v ANTHONY SANDERS, No. 133238; Court of Appeals No. 263092.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v STRAWTHER, No. 133560; Court of Appeals No. 265911.

PEOPLE v BALDWIN, No. 133689; Court of Appeals No. 275109.

PEOPLE v ANTHONY SANDERS, No. 133792; Court of Appeals No. 267264.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v DOLPH-HOSTETTER, No. 133911; Court of Appeals No. 262858.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEARS v RAMSEY, No. 134211; Court of Appeals No. 271820.

CHAPMAN v PHIL'S COUNTY LINE SERVICE, INC, No. 134385; Court of Appeals No. 269150.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MICHAEL UNDERWOOD II, No. 134457; Court of Appeals No. 268034.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Leave to Appeal Granted October 5, 2007:

STATE NEWS v MICHIGAN STATE UNIVERSITY, No. 133682. The motion for leave to file an amicus curiae brief is granted. The application for leave to appeal the March 6, 2007, judgment of the Court of Appeals is granted, limited to the issue whether the Court of Appeals erred in instructing the Ingham Circuit Court, on remand, regarding the "personal nature" of public records covered by the Freedom of Information Act privacy exemption, MCL 15.243(1)(a), or the law enforcement purposes privacy exemption, MCL 15.243(1)(b)(iii), including whether the "personal nature" of such records may be affected by the contemporaneous or later public status of some or all of the information. 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 prior to the completion of the proceedings ordered by the Court of Appeals. Reported below: 274 Mich App 558.

MICHIGAN FEDERATION OF TEACHERS AND SCHOOL RELATED PERSONNEL, AFT, AFL-CIO v UNIVERSITY OF MICHIGAN, No. 133819. The parties shall include among the issues to be briefed: (1) whether this Court should reconsider its construction of MCL 15.243(1)(a)'s statutory phrase "information of a personal nature" as meaning information that "reveals intimate or embarrassing details of an individual's private life," as set forth in *Bradley v Saranac Bd of Ed*, 455 Mich 285, 294 (1997); (2) whether, on the facts presented in this case, information that might otherwise be considered "ordinarily impersonal . . . might take on an intensely personal character," (quoting *Kestenbaum v Michigan State Univ*, 414 Mich 510, 547 [1982]), such that the privacy exemption might properly be asserted as argued by the defendant; and (3) if the *Bradley* test is not modified, whether the advent of the National Do-Not-Call Registry, PL 108-82, § 1, 117 Stat 1006, as well as the creation of the host of methods, unknown to the Court in 1997, which are designed for illicit purposes such as identity theft, have any impact on whether the disclosure of the home addresses and telephone numbers requested is inconsistent with "the customs, mores, or ordinary views of the community" (quoting *Bradley*, at 294) by which the applicability of the privacy exemption is evaluated. The motions for leave to file briefs amicus curiae are 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. 258666.

Summary Disposition October 5, 2007:

ELLS v EATON COUNTY ROAD COMMISSION, No. 130732. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we grant the motion for peremptory reversal and reverse the judgment of the Court of Appeals.

The plaintiff did not provide notice to the defendant as required by MCL 691.1404. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007). We remand this case to the Eaton Circuit Court for entry of an order granting summary disposition to the defendant. Court of Appeals No. 264635.

WEAVER, J. (*dissenting*). I dissent from the majority's decision to reverse the judgment of the Court of Appeals and remand this case to the Eaton Circuit Court for entry of an order granting summary disposition to the defendant.

I would deny defendant's application for leave to appeal the February 7, 2006, judgment of the Court of Appeals, which affirmed the Eaton Circuit Court's order denying summary disposition to defendant. I would deny the application on the basis that this Court's decision in *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197 (2007), should be applied prospectively, not retroactively. It is unfair to this plaintiff to apply our decision in *Rowland* to plaintiff's case because plaintiff relied on the law in effect at the time plaintiff filed this case. The law in effect before *Rowland* was that the 120-day notice rule[1] did not bar a plaintiff from filing suit unless the defendant could establish that the defendant was actually prejudiced by the plaintiff's failure to provide timely notice.[2]

Because defendant was unable to show actual prejudice from plaintiff's failure to provide timely notice, the circuit court denied defendant's motion for summary disposition. While this case was pending, a majority of this Court decided in *Rowland* to overrule *Hobbs* and *Brown* and thereby eliminate the actual-prejudice rule.[3] Because MCL 691.1404 does not contain any requirement that a defendant be actually prejudiced by a complainant's failure to provide timely notice, I do not disagree with the majority's decision to apply the statute as written. However, given that the law in effect both at the time plaintiff's decedent died and at the time plaintiff filed this action was that untimely notice did not bar a claim

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[1] MCL 691.1404(1) provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

[2] *Hobbs v Dep't of State Hwys,* 398 Mich 90 (1976), overruled by *Rowland*, *supra*; *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), overruled by *Rowland*, *supra*.

[3] But see *Rowland*, *supra* at 247 (WEAVER, J., concurring in part and dissenting in part). See, also, *Rowland*, *supra* at 248 (KELLY, J., concurring in part and dissenting in part).

unless a defendant could demonstrate actual prejudice, plaintiff should be allowed to rely on the law in existence at that time.

CAVANAGH, J. I join the statement of Justice WEAVER.

Leave to Appeal Denied October 5, 2007:

HEALING PLACE, LTD v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 133764; Court of Appeals No. 272438.

CORRIGAN, J. (*concurring*). Because the Court of Appeals ultimately reached the right result in this unpublished opinion, I concur in the order denying leave to appeal. I write separately to point out two legal flaws in the Court of Appeals opinion.

First, the Court of Appeals grossly misinterpreted *Nasser v Auto Club Ins Ass'n,* 435 Mich 33 (1990), as standing for the shocking proposition that a defendant in a no-fault case is never entitled to summary disposition under MCR 2.116(C)(10) when a plaintiff has failed to prove that a medical expense was reasonable or necessary. The Court of Appeals erred as a matter of law by ruling that a plaintiff claiming reimbursement for reasonable and necessary medical expenses need not respond to a defendant's motion for summary disposition under MCR 2.116(C)(10). The Court of Appeals cited no authority for this novel proposition, and it contravenes the no-fault act and this Court's decision in *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). *Nasser* merely held that "if it could be 'said with certainty' that an expense was both reasonable and necessary, the court could make the decision as a matter of law." *Nasser*, *supra* at 55 (citation omitted). This quotation cannot reasonably be construed to hold as a matter of law that only a no-fault plaintiff has a right to summary disposition on the issue of medical reasonableness and necessity.

Second, the Court of Appeals failed to review the trial court's ruling on plaintiff's motion for reconsideration under an abuse of discretion standard. *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 556-557 (2004).

MARKMAN, J. I join the statement of Justice CORRIGAN.

In re JAMES (DEPARTMENT OF HUMAN SERVICES v JAMES), No. 134693; Court of Appeals No. 274866.

SELLERS v SMITH, No. 134724; Court of Appeals No. 275592.

Reconsideration Denied October 5, 2007:

GRANT v AAA MICHIGAN/WISCONSIN, INC, No. 132211; reported below: 272 Mich App 142 (on remand).

CAVANAGH and WEAVER, JJ. We would grant reconsideration.

KELLY, J. (*dissenting*). In a published opinion, the Court of Appeals ruled that the no-fault act's one-year statute of limitations,[1] and not the

[1] MCL 500.3145.

Michigan Consumer Protection Act's (MCPA) six-year statute of limitations,[2] applies to plaintiff's MCPA claim. This decision is obviously incorrect. Although amendments of the MCPA will prevent a recurrence of this error, I would grant the motion for reconsideration and grant leave to appeal to correct the faulty decision.

FACTS

Jeanine Grant was paralyzed in a March 1995 automobile accident. She initially received professional care but, after a month, her family assumed responsibility. Defendant, Jeanine's no-fault insurer, informed Jeanine's husband that family members would be paid at the rate of $10 an hour for attendant care services. Family members were paid at this rate until November 1998, when the rate was increased to $11 an hour. In 1999, Jeanine's husband incorporated a home-care company, which employed him and his daughters to provide care for Jeanine and billed defendant at the higher agency rate.

Plaintiff brought this action in 2001 to recover the difference between the amount defendant had paid Jeanine's family from 1995 through 1999 and the amount due at the agency rate.[3] The complaint contained six counts, only one of which is relevant here. That claim arose under the MCPA.[4] Plaintiff alleged that defendant had concealed and misrepresented facts regarding the rate at which family members could be compensated for providing attendant care services. Plaintiff also asserted that the MCPA's six-year statute of limitations governed rather than the one-year statute of limitations of the no-fault act.[5]

Defendant moved for summary disposition on the MCPA claim. The motion was denied, and defendant sought interlocutory review. When the Court of Appeals denied leave to appeal, this Court remanded the case for consideration as on leave granted.[6] On first remand, the panel found that the no-fault act's one-year limitations period applied.[7] And, because all of plaintiff's claims had been incurred more than one year before she filed the complaint, the Court decided that defendant was entitled to summary disposition.[8]

Plaintiff applied for leave to appeal in this Court, and we remanded a second time,[9] asking the Court of Appeals to reconsider the decision in

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[2] MCL 445.911(7).

[3] Initially, plaintiff was Jeanine Grant. Since the suit was filed, she has passed away. Her estate has been substituted as plaintiff.

[4] MCL 445.901 *et seq*.

[5] MCL 500.3101 *et seq*.

[6] 468 Mich 948 (2003).

[7] *Grant v AAA Michigan/Wisconsin, Inc*, 266 Mich App 597, 599 (2005).

[8] *Id*.

[9] *Grant v AAA Michigan, Wisconsin, Inc*, 474 Mich 988 (2005).

light of *Smith v Globe Life Ins Co*.[10] We had specifically held in *Smith* that the MCPA permits private actions against an insurer pursuant to MCL 445.911.[11] MCL 445.911(7) contains the MCPA's six-year limitations period. Therefore, the remand was for the Court of Appeals to consider whether its decision that the no-fault act's statute of limitations applied was consistent with *Smith*. On second remand, the Court of Appeals completely failed to consider this point. Instead, it decided that plaintiff's claim was not barred by the version of MCL 445.904(3) that was amended by 2000 PA 432.[12] Considering that the parties stipulated that the 2000 amendment did not bar plaintiff's claim, it is baffling that the Court of Appeals thought we had remanded to consider this issue only. Regardless, this is the issue that it reconsidered.

Plaintiff again filed an application for leave to appeal in this Court. This time the Court denied leave by a vote of 4 to 3.[13] The denial order showed that I, as well as Justices CAVANAGH and WEAVER, would have granted leave to appeal.[14] Plaintiff has now filed this motion for reconsideration.

ANALYSIS

The key issue is whether the no-fault act's one-year statute of limitations or the MCPA's six-year statute of limitations applies to plaintiff's MCPA claim. The Court of Appeals conclusion that the no-fault act's one-year statute of limitations applies is obviously incorrect. Plaintiff does not merely assert a claim for benefits under the no-fault act. Rather, plaintiff asserts a claim under the MCPA that includes the additional elements of deceit, misrepresentation, and concealment of facts. Therefore, the MCPA's six-year statute of limitations applies, and not the no-fault act's one-year statute of limitations, as found by the Court of Appeals. A majority of this Court, however, apparently feels that this error is not worth correcting because the Legislature amended the MCPA in 2000 to prevent it from recurring.[15] What the majority overlooks is (1) that this is a real case involving real people and the Court of Appeals decision creates an injustice to those people that should be corrected and (2) that, because the Court of Appeals decision is published, other courts could improperly rely on its reasoning in interpreting other statutes.

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[10] *Smith v Globe Life Ins* Co, 460 Mich 446 (1999).

[11] *Id.* at 467.

[12] *Grant v AAA Michigan/Wisconsin, Inc* (*On Remand*), 272 Mich App 142, 148-149 (2006).

[13] 477 Mich 1043 (2007).

[14] *Id.*

[15] The MCPA was amended to remove from its scope actions based on conduct proscribed by the unfair trade practices act applicable to insurance companies. Plaintiff's claim was not affected by the amendments because it arose before the 2001 effective date of that amendment.

A plaintiff can recover damages for mental distress when the claim is a statutory action sounding in tort.[16] Mental distress is also recoverable in fraud cases if such damages are the natural consequence of the wrongful act and reasonably could have been anticipated.[17] And, unlike the no-fault act, which precludes attorney fees if the claim was reasonably in dispute, the MCPA attorney-fee provision does not contain the same limitation.[18]

Courts could rely on the Court of Appeals reasoning to improperly bar a plaintiff from recovering these damages by finding that the claim, though alleging deception, is actually one for no-fault benefits. And, although the error that occurred here has been addressed by legislative action, the published opinion could be relied on to apply an incorrect statute of limitations in non-MCPA claims involving misrepresentation. Rather than waiting for this to happen, we should correct the Court of Appeals decision now.

CONCLUSION

This Court should not allow the simplistic, superficial, and obviously incorrect Court of Appeals opinion to stand. To do so is to allow a miscarriage of justice to go uncorrected and to invite other courts to rely on this published opinion to reach similar incorrect results. I would grant the motion for reconsideration and grant leave to appeal to correct the Court of Appeals erroneous, unjust decision.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 12, 2007:

PAPPAS V BORTZ HEALTH CARE FACILITIES, INC, No. 128864. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether, assuming that the six-month discovery provision in MCL 600.5838a(2) applies in this case because the plaintiff's decedent was insane from the time the claim accrued until her death, the claim is barred where the plaintiff did not bring this action within one year after the insanity disability was removed through death pursuant to MCL 600.5851(1); and (2) whether the wrongful death saving statute, MCL 600.5852, is controlling under the circumstances of this case. The parties should not submit mere restatements of their application papers. Court of Appeals No. 251144.

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[16] *Phillips v Butterball Farms Co, Inc* (*After Second Remand*), 448 Mich 239, 251 (1995).

[17] *Phinney v Perlmutter*, 222 Mich App 513, 532 (1997).

[18] Compare MCL 500.3148(1) with MCL 445.911(2).

BOODT v BORGESS MEDICAL CENTER, No. 132688. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the Court of Appeals erred in reversing the trial court and holding that the notice of intent met the requirements of MCL 600.2912b with regard to defendant Lauer. 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: 272 Mich App 621.

STOYKA ESTATE v MT CLEMENS GENERAL HOSPITAL, No. 134020. 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 plaintiffs' notices of intent met the requirements set forth in MCL 600.2912b(4) and *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679 (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. 271970.

Leave to Appeal Granted October 12, 2007:

RODRIGUEZ v ASE INDUSTRIES, INC, No. 133686. The application for leave to appeal the March 22, 2007, judgment of the Court of Appeals is granted, limited to the issues: (1) whether the trial court properly made independent findings in avoidance of the cap on noneconomic damages provided for in MCL 600.2946a(1) after the jury had made contrary findings; and (2) if the damages cap applies, whether the trial court properly applied the apportionment of fault between defendant and American Axle before applying the damages cap. The clerk of the Court is directed to place this case on the January 2008 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 16, 2007, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 17, 2007. The Michigan Association of Justice, the Michigan Defense Trial Counsel, Inc., the Michigan Chamber of Commerce, and the Michigan Manufacturers 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: 275 Mich App 8.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

Leave to Appeal Denied October 12, 2007:

In re OSTRANDER (DEPARTMENT OF HUMAN SERVICES v OSTRANDER), No. 134890; Court of Appeals No. 274901.

Summary Dispositions October 17, 2007:

BAILEY v PORNPICHIT, No. 132087. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portion of the judgment of the Court of Appeals remanding this case to the trial court for entry of an order dismissing the case *with* prejudice, and remand this case to the Wayne Circuit Court for entry of an order dismissing the case *without* prejudice. See *Kirkaldy v Rim*, 478 Mich 581 (2007). 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. 267546.

KELLY, J. I would grant leave to appeal.

PEOPLE v WOOLSEY, No. 133654. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Macomb Circuit Court and we remand this case to the circuit court for resentencing under properly scored sentencing guidelines. *People v Kimble,* 470 Mich 305 (2004). A defendant is entitled to be sentenced on the basis of accurate information, which includes accurately scored guidelines. *People v Francisco*, 474 Mich 82, 88-89 (2006). The defendant argues that he should have received zero points for offense variable (OV) 3, as is appropriate when "[n]o physical injury occurred to a victim." MCL 777.33(1)(f). Here, the evidence was insufficient to support a score of 5 points for OV 3. While resentencing would not be required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range, *People v Mutchie*, 468 Mich 50, 51 (2003), the trial court neither gave a reason to deny the defendant's objection to the scoring of OV 3 nor did it state that it would impose the same sentence regardless of the scoring error. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). 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. 274110.

WALLINGTON v WOLVERINE ENGINEERS AND SURVEYORS, INC, No. 133698. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion discussing an issue not raised by the parties, specifically, the issue of whether defendant Wolverine Engineers and Surveyors, Inc., might not be entitled to summary disposition of claims that the plaintiff never pleaded. We remand this case to the Ingham Circuit Court for entry of an order granting Wolverine's motion for summary disposition. The motion to supplement the appellate record is denied as moot. Court of Appeals No. 263758.

KELLY TRUST v ADKISON, NEED, GREEN & ALLEN, PLLC, No. 134101. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this

case to the Oakland County Probate Court for entry of an order granting summary disposition to the respondents. In all other respects, leave to appeal and leave to appeal as cross-appellant are denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 268550.

AUSLANDER v CHERNICK, No. 134147. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Oakland Circuit Court for entry of a judgment granting the defendants' motion for summary disposition. Court of Appeals No. 274079.

KELLY, J. I would grant leave to appeal.

Reconsideration Granted October 17, 2007:

PEOPLE v QUEEN, No. 132473. We vacate our order dated April 13, 2007. On reconsideration, the application for leave to appeal the September 21, 2006, order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reinstatement and consideration of defendant's claim of appeal and motion for remand. Aspects of defendant's appeal relate to offenses allegedly committed before December 27, 1994. See *People v Monaco*, 474 Mich 48 (2006). Court of Appeals No. 265914.

YPSILANTI FIRE MARSHAL v KIRCHER and BARNES v KIRCHER, Nos. 133240 to 133243. We vacate our order dated May 30, 2007. On remand, the Washtenaw Circuit Court may utilize evidence and testimony already in the record and it need not duplicate such evidence and testimony. In all other respects, the application for leave to appeal the January 9, 2007, judgment of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion requesting judicial notice is denied. Reported below: 273 Mich App 496 (on reconsideration).

Leave to Appeal Denied October 17, 2007:

PEOPLE v JONATHAN HILL, No. 132149; Court of Appeals No. 271746.

KELLY, J. I would remand the case for resentencing.

ARMADA TOWNSHIP v MARAH, No. 132402; Court of Appeals No. 268142.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v GOODGER, No. 132663; Court of Appeals No. 273204.

PEOPLE v EVERETTE, No. 132858. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270063.

ALLSTATE INSURANCE COMPANY v VAUGHAN, No. 133077; Court of Appeals No. 268908.

CORRIGAN, J. I would reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and remand this case to the Oakland Circuit Court for further proceedings not inconsistent with the Court of Appeals dissent.

PEOPLE v DOBRA, No. 133464. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271567.

PEOPLE v PAUS, No. 133889; Court of Appeals No. 266883.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SALVADOR MARTIN, No. 134067; Court of Appeals No. 265385.

PEOPLE v KAREEM RHODES, No. 134109; Court of Appeals No. 261276.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v TURRENTINE, No. 134118; Court of Appeals No. 261277.

PEOPLE v ISSAC HARRIS, No. 134126; Court of Appeals No. 265230.

PEOPLE v BRIAN LOTT, No. 134143; Court of Appeals No. 265051.

PEOPLE v SHAWN MARTIN, No. 134155; Court of Appeals No. 277043.

PEOPLE v GARY PATTERSON, No. 134170; Court of Appeals No. 267113.

LENAWEE COUNTY v WAGLEY, LENAWEE COUNTY v GARDENER, LENAWEE COUNTY v HALSTEAD, LENAWEE COUNTY v SELLERS, AND LENAWEE COUNTY v BARON, Nos. 134260-134264; Court of Appeals Nos. 268819-268823.

Interlocutory Appeal

Leave to Appeal Denied October 17, 2007:

MCGUIRE v CITY OF DEARBORN, No. 134956; Court of Appeals No. 279309.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 19, 2007:

BURRIS v ALLSTATE INSURANCE COMPANY, No. 132949. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 261505.

HAAS v DEAL, No. 133370. We direct the clerk to schedule oral argument on November 14, 2007, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The

parties may file supplemental briefs no later than November 7, 2007, but they should not submit mere restatements of their application papers. Court of Appeals No. 262987.

MANZELLA v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 133620. 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 the dissenting opinion in the Court of Appeals. The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 271365.

Summary Dispositions October 19, 2007:

MAUER v TOPPING, No. 128676. By order of March 31, 2006, the application for leave to appeal the April 7, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Rowland v Washtenaw Co Rd Comm* (Docket No. 130379). The case was decided on May 2, 2007, 477 Mich 197 (2007). On May 29, 2007, the defendant Board of County Road Commissioners of Manistee County filed a motion for peremptory reversal. On order of the Court, the application and the motion for peremptory reversal are considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we grant, in part, the motion for peremptory reversal and reverse the judgment of the Court of Appeals with respect to the defendant's motion for summary disposition regarding the claims of individual plaintiffs Joseph Mauer, Minde Mauer, Carl Mauer, and Cory Mauer. The plaintiffs' notice to the defendant board was untimely under MCL 691.1404 as to these plaintiffs. *Rowland*, *supra*. We remand this case to the Manistee Circuit Court for entry of an order granting summary disposition to the defendant board with respect to these individual plaintiffs. With respect to the claims brought on behalf of the estate of Kristiana Leigh Mauer, the application and motion for peremptory reversal are denied, because we are not persuaded that the questions presented should now be reviewed by this Court. Court of Appeals No. 250858.

WEAVER, J. (*concurring*). I concur in the majority's decision because, as was the case in *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197 (2007), the notice provided by the plaintiffs in this case was insufficient under the statute in that it failed to provide "the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." MCL 691.1404(1). Consequently, the defendant road commission need not show actual prejudice arising from the untimeliness of the notice because, even if the notice had been timely, it was deficient under the statute.

CAVANAGH, J. (*dissenting*). I continue to adhere to the views expressed in my dissent in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 270-279 (2007).

KELLY, J. (*dissenting*). I continue to adhere to the views expressed in my dissent in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 248-270 (2007).

DYKEMA GOSSETT, PLLC v AJLUNI, No. 133251. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals, but we vacate part II of the Court of Appeals opinion and judgment, for the reasons stated in the separate Court of Appeals opinion of Judge JANSEN, who concurred in part and dissented in part. Reported below: 273 Mich App 1.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

MICHIGAN REHABILITATION CLINIC, INC, PC v AUTO CLUB GROUP INSURANCE COMPANY, No. 133671. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. The Court of Appeals erred by holding that defendant was obligated to pay benefits when the health insurers did not cover plaintiffs' services, because the relevant contractual language exempts defendant from paying benefits if a health insurer offers "comparable services." On remand, the Court of Appeals shall order the trial court to consider whether the insureds' health insurers offered "comparable services." If so, then defendant is not required to pay benefits under the actual language of the contract. Only if "comparable services" were not offered should the trial court consider whether the services were "reasonably necessary." We do not retain jurisdiction. Court of Appeals No. 263835.

PEOPLE v HAWTHORNE, No. 133729. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for an evidentiary hearing on the defendant's speedy trial claims. At that hearing, the court shall take testimony and other evidence, and make findings of fact, regarding (1) all of the factors specified in *Barker v Wingo*, 407 US 514, 530 (1972); (2) whether the defendant knew that the charges in this case were pending against him when he was released from the Wayne County jail in November 1994, or whether he otherwise became aware of such charges before the prosecution commenced further action in 2001; and (3) any other factors relevant to the question whether the charges against the defendant must be dismissed for a violation of his speedy trial rights. We further order the Oakland Circuit 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 the court's findings of fact. We retain jurisdiction. Court of Appeals No. 265473.

KELLY, J. (*dissenting*). I would deny the application for leave to appeal. The Court has already remanded this case to the trial court for a hearing on defendant's speedy trial motion. At that time, the prosecution failed to explain its failure over a period of nine years to bring defendant to trial. I see no reason for a second remand.

CAVANAGH and MARKMAN, JJ. We join the statement of Justice KELLY.

Leave to Appeal Denied October 19, 2007:

GRACE v LEITMAN, No. 131035. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of March 30, 2007. The application for leave to appeal the March 16, 2006, judgment

of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 257896.

KELLY, J. (*dissenting*). I would reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings. An attorney's exercise of judgment on matters of trial strategy, including which witnesses to call, does not *ipso facto* immunize the attorney from malpractice liability. Rather, counsel must exercise the same reasonable professional judgment "as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." *Simko v Blake*, 448 Mich 648, 658 (1995). The defendants here have not shown as a matter of law that attorney Leitman exercised reasonable judgment such that no rational jury could grant plaintiff relief.

YOUNG, J. I join the statement of Justice KELLY.

MICHIGAN REHABILITATION CLINIC, INC, PC v AUTO CLUB GROUP INSURANCE COMPANY, No. 133673; Court of Appeals No. 263835.

Summary Dispositions October 24, 2007:

PEOPLE v BLANKS, No. 129807. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals that excused the 180-day-rule violation based on the prosecutor's good-faith efforts to bring the defendant to trial within 180 days. We remand this case to the Court of Appeals for reconsideration in light of *People v Williams*, 475 Mich 245 (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. 255257.

DUBE v ST JOHN HOSPITAL & MEDICAL CENTER, No. 131534. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse part VI of the judgment of the Court of Appeals, which affirmed the dismissal of the complaint *with* prejudice, and we remand this case to the Wayne Circuit Court for entry of an order dismissing the complaint *without* prejudice. See *Kirkaldy v Rim*, 478 Mich 581 (2007). 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. 265887.

XIAOXIN v BROWN, No. 133101. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we modify the Court of Appeals order remanding this case for entry of an order dismissing the complaint to provide that any order dismissing the complaint should be without prejudice. See *Kirkaldy v Rim*, 478 Mich 581 (2007). In the event that the Washtenaw Circuit Court entered an order dismissing the complaint *with* prejudice because the Court of Appeals gave its order immediate effect, that order is vacated and the court is directed to enter an order consistent with this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 273015.

In re BALDWIN TRUST (SHOAFF v WOODS), Nos. 133622, 133623. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals but we reject the reasoning of the Court of Appeals majority to the extent it is inconsistent with the partially dissenting opinion. Under the facts of this case, which the probate judge viewed in the light most favorable to the petitioner, even if the respondent owed a duty to the petitioner, the probate judge did not err in granting summary disposition to the respondent in both the estate proceeding and the trust proceeding, because there was no evidence of wrongdoing by the respondent. The petitioner received ample opportunity to set forth a genuine issue of material fact. MCR 2.116(I)(1). Reported below: 274 Mich App 387.

POTTER v MCLEARY, Nos. 133867, 133868. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portion of the judgment of the Court of Appeals dismissing the complaint *with* prejudice, because the dismissal should have been *without* prejudice as to the affidavit of merit issue. See *Kirkaldy v Rim*, 478 Mich 581 (2007). Accordingly, we remand this case to the Court of Appeals for consideration of the defendants' other issues that were not addressed in its opinion. 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. Reported below: 274 Mich App 222.

MALOY v ST JOHN DETROIT RIVERVIEW HOSPITAL, No. 134099. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order granting the defendant's motion for summary disposition. The lower courts erred in finding that the plaintiff's amended complaint sounded in ordinary negligence. First, there was a professional relationship between the plaintiff's decedent and the defendant hospital. *Bryant v Oakpointe Villa Nursing Ctr*, *Inc,* 471 Mich 411, 422 (2004). Second, the claim raises questions of medical judgment. *Id*. The record indicates that the continuing patient care (CPC) form at issue was prepared on the order of, and reviewed by, the decedent's surgeon and related only to aftercare for the plaintiff's decedent's colostomy. The decedent was given separate discharge orders from the doctor who was treating her for her diabetes. That physician would have exercised his own medical judgment to assess whether the decedent was capable of administering her own insulin and thus needed home health care for this condition. It is not within the scope of jurors' common knowledge to know what information must be included on a CPC form, or whether there is some standard or requirement that all patient information be contained in a single form, rather than in a separate form from each treating physician. Because expert medical testimony would be required to establish the standard of care, the claim sounds in medical malpractice. *Bryant*, *supra* at 423. The plaintiff's failure to comply with the expert testimony requirements relating to such claims required that the defendant's motion for summary disposition be granted. Court of Appeals No. 273292.

WEST MICHIGAN MECHANICAL, INC v WEST MICHIGAN MECHANICAL SERVICES, LLC, No. 134217. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and remand this case to the Court of Appeals for plenary consideration. Because the February 12, 2007, order of the Ottawa Circuit Court is a postjudgment order awarding attorney fees and costs, it is a final order under MCR 7.202(6)(a)(iv) that is appealable as a matter of right under MCR 7.203(A)(1). We note that there is nothing in the language of MCR 7.202(6)(a)(iv) that distinguishes between postjudgment orders awarding attorney fees incurred prior to a final judgment and such orders awarding attorney fees incurred after final judgment has entered. Moreover, the phrase "other law or court rule" cannot be read as limiting the scope of the rule to orders involving attorney fees incurred prior to entry of a final judgment. Had this Court intended the rule to limit appeals of right from postjudgment orders awarding attorney fees to those involving attorney fees incurred after a final judgment, it would have included language to that effect in the court rule. We do not retain jurisdiction. Court of Appeals No. 276613.

FELDKAMP v FARM BUREAU INSURANCE COMPANY, No. 134322. 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. 272855.

STONE v R W LAPINE, INC, No. 134516. 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. 275684.

PROASSURANCE CORPORATION v NEFCY, No. 134568. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals that the plaintiff failed to prove it was free from active negligence and that, for this reason, it may not seek indemnification from the defendant. Courts primarily look to the plaintiff's complaint in the underlying lawsuit to determine whether a prospective indemnitee was actively negligent. *Hill v Sullivan Equipment Co*, 86 Mich App 693, 696-697 (1978). The Court of Appeals erred in concluding that the underlying complaint alleged both active and passive negligence against the defendant. At all stages of the underlying litigation, the plaintiff alleged that the defendant was vicariously liable for the acts of its agent, not its own active negligence. We remand this case to the Court of Appeals to consider the trial court's other grounds for denying summary disposition to the plaintiff and granting summary disposition to the defendant. We do not retain jurisdiction. Court of Appeals No. 272963.

Leave to Appeal Denied October 24, 2007:

PEOPLE v COTTRELL, No. 133383; Court of Appeals No. 264991.

KELLY, J. I would grant leave to appeal.

STONEMAN v CARSON CITY HOSPITAL, No. 133467; Court of Appeals No. 263637.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal for the reasons stated in my dissent from the denial of leave to appeal in *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484 (2005). See 479 Mich 854 (2007).

PEOPLE v GARY WILLIAMS, No. 133545. The motion to remand is denied. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500, raising the issue whether the affidavit of Andrew Miller, in which he confesses to the crimes for which the defendant was convicted, constitutes newly discovered evidence under the test established in *People v Cress*, 468 Mich 678, 691-692 (2003), and, if so, whether the defendant is entitled to some form of relief. Court of Appeals No. 265109.

TRZCIENSKI v MAPLE RIDGE BUILDING, INC, No. 133712; Court of Appeals No. 273209.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MACKLEY v GRAY, No. 134102; Court of Appeals No. 272409.

KELLY, J. I would grant leave to appeal.

PEOPLE v JIM WALKER, No. 134133; Court of Appeals No. 276610.

PEOPLE v GREENHILL, No. 134156; Court of Appeals No. 267576.

PEOPLE v RAYNELLE JOHNSON, No. 134250; Court of Appeals No. 266901.

PEOPLE v GOGINS, No. 134285; Court of Appeals No. 267371.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 26, 2007:

In re CREDIT ACCEPTANCE CORPORATION (CREDIT ACCEPTANCE CORPORATION v 46TH DISTRICT COURT), No. 133292. We vacate our order dated April 24, 2007. On reconsideration, the application for leave to appeal the January 16, 2007, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. The Michigan Creditors Bar Association, the Michigan Financial Institutions Bureau, the National Federation of Independent Business, and the Michigan Chamber of Commerce are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 273 Mich App 594.

Leave to Appeal Denied October 26, 2007:

DRAKE v CITIZENS INSURANCE COMPANY, No. 130855; reported below: 270 Mich App 22.

FLEISCHFRESSER v PETERSON TOWING, INC, No. 133730; Court of Appeals No. 274353.

MARKMAN, J. (*concurring*). I reluctantly concur in the Court's decision. I concur because it is in accord with this Court's decision in *Day v W A Foote Mem Hosp*, 412 Mich 698 (1982), and that decision has not been challenged. I concur reluctantly because the result of *Day* is that the caselaw in our state now bears no relationship to the statutory law. Whereas the Legislature in enacting MCL 418.331 specified that a person in claimant's position (a deserted wife) should, for purposes of workers' compensation survivor benefits be "conclusively presumed to be wholly dependent for support upon a deceased employee," *Day* has nullified this presumption and substituted a case-by-case factual determination. Claimant likely would have been entitled to survivor benefits under the statute enacted by the Legislature, but not under the present judicially rewritten statute. While I agree with *Day* that the United States Supreme Court's decision in *Wengler v Druggists Mut Ins Co*, 446 US 142 (1980), is controlling and requires that MCL 418.331 be held violative of the Equal Protection Clause, I do not believe that this Court had, as it asserted in *Day*, a *choice* to determine "the appropriate remedy for this unconstitutional gender-based presumption: invalidation, extension to widowers, or preservation of the statute for a short period of time to enable the Legislature to forge its own solution." *Day*, *supra* at 703. Rather, this Court had only one proper option in light of *Wengler* and that was to strike down MCL 418.331 as unconstitutional and leave it to the Legislature to enact a different and constitutionally valid provision if it chose to do so. See *North Ottawa Hosp v Kieft*, 457 Mich 394, 408 n 14 (1998) (rejecting the approach of *Day* and instead "await[ing] the judgment of the Legislature regarding which is the better policy for the state to adopt" in the wake of an equal protection violation). This Court does not have the authority to rewrite a statute, even if it does so wisely.

CAVANAGH, WEAVER, and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

AMERICAN FAMILY ASSOCIATION OF MICHIGAN v MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, No. 134214; reported below: 276 Mich App 42.

CAVANAGH and KELLY, JJ. We would grant leave to appeal to consider the standing issue.

WEAVER, J. I would grant plaintiff's application for leave to appeal to reconsider *Lee v Macomb Co Bd of Comm'rs*,[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[2] *Rohde v Ann Arbor Pub Schools*,[3] and *Michi-*

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[1] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004).

[3] *Rohde v Ann Arbor Pub Schools*, 479 Mich 336 (2007).

gan Citizens for Water Conservation v Nestlé Waters North America Inc.[4] These erroneously decided cases created new standing law in Michigan that denies Michigan citizens access to the courts. *Lee*, *Nat'l Wildlife*, *Rohde*, and *Michigan Citizens* represent examples of judicial activism by the majority of four justices of this Court (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN).

In re HOYT (DEPARTMENT OF HUMAN SERVICES v HOYT), No. 135030; Court of Appeals No. 276729.

Summary Dispositions October 29, 2007:

PEOPLE v ALSPAUGH, No. 132725. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Baraga Circuit Court, and we remand this case to the circuit court for resentencing. The defendant's sentence is a departure from the 12-month maximum jail sentence required by MCL 769.34(4)(a). On remand, the circuit court shall either sentence the defendant to an intermediate sanction or state on the record a substantial and compelling reason to sentence the defendant to the Department of Corrections, in accordance with MCL 769.34(4)(a). *People v Harper*, 479 Mich 599 (2007). 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. 273354.

PEOPLE v HOLOWESKI, No. 134686. 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. 278029.

Leave to Appeal Denied October 29, 2007:

PEOPLE v FRASURE, No. 131828; reported below: 271 Mich App 280.

PEOPLE v DAVID SWANIGAN, No. 132145; Court of Appeals No. 270096.

PEOPLE v JONATHAN HILL, No. 132400; Court of Appeals No. 271732.

PEOPLE v DEVORE, No. 132753. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269800.

PEOPLE v GOLDEN, No. 132909; Court of Appeals No. 260020.

PEOPLE v BROWNLOW, No. 133027; Court of Appeals No. 273875.

PEOPLE v MARTH, No. 133104; Court of Appeals No. 273534.

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[4] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007).

CARGAS v BEDNARSH, Nos. 133224, 133225; Court of Appeals Nos. 263869, 263870.

FORNARI v HOOVER, No. 133460; Court of Appeals No. 265813.

PEOPLE v BERNARD, No. 133579; Court of Appeals No. 264825.

PEOPLE v GERMAIN, No. 133593; Court of Appeals No. 265372.

PEOPLE v CLARENCE SCOTT, No. 133785; reported below: 275 Mich App 521.

PEOPLE v DARRYL JOHNSON, No. 133803; Court of Appeals No. 265371.

PEOPLE v DEALS, No. 133821; Court of Appeals No. 266619.

In re HEINZ ESTATE (HEINZ v HEINZ), No. 133835; Court of Appeals No. 264155.

PORTFOLIO RECOVERY ASSOCIATES v KNUBBE, No. 133874; Court of Appeals No. 273362.

PEOPLE v TAUREEN HARRIS, No. 133909; Court of Appeals No. 266275.

PEOPLE v MICHAEL ALEXANDER, No. 133990. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272122.

PEOPLE v DONTRELL SMITH, No. 134009. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273743.

PEOPLE v REGINALD WILLIAMS, No. 134016; reported below: 275 Mich App 194.

PEOPLE v JEROME LEWIS, No. 134062. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272595.

PEOPLE v MCQUEEN, No. 134089. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272761.

PEOPLE v BYRD, No. 134096. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274189.

PEOPLE v LEROY SCOTT, No. 134125. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273532.

PEOPLE v KELLEY, No. 134146; Court of Appeals No. 276940.

SAM'S TOWN AND COUNTRY MARKET, INC v MIHELICH & KAVANAUGH, PLC, No. 134149; Court of Appeals No. 270940.

PEOPLE v DONALDSON, No. 134153. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272647.

PEOPLE v ANTHONY MOSS, No. 134182; Court of Appeals No. 274118.

FIRST NATIONAL BANK OF CRYSTAL FALLS v KOSKI, No. 134225; Court of Appeals No. 277396.

PEOPLE v MORTON, No. 134236. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277688.

PEOPLE v BURGER, No. 134239. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275184.

PEOPLE v MARK PORTER, No. 134241. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277676.

PEOPLE v JEFFERY PHIPPS, No. 134242; Court of Appeals No. 277514.

PEOPLE v RODNEY HICKS, No. 134247. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274181.

DALE OSBURN, INC v AUTO-OWNERS INSURANCE COMPANY, No. 134249; Court of Appeals No. 267927.

PEOPLE v GOLLMAN, No. 134255. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275047.

PEOPLE v SONES, No. 134256. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275626.

PEOPLE v CRISTON, No. 134257. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275574.

PEOPLE v KRZYZANIAK, No. 134259; Court of Appeals No. 276623.

PEOPLE v MCGILL, No. 134265. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274698.

PEOPLE v LEONARD STEWART, No. 134270. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278066.

PEOPLE v KERR, No. 134274. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275872.

KELLY, J. I would grant leave to appeal.

PEOPLE v GREGORY POINDEXTER, No. 134282. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273792.

PEOPLE v GRANDBERRY, No. 134284. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275725.

PEOPLE v PELICHET, No. 134288. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274979.

PEOPLE v DAMIEN TAYLOR, No. 134289. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273253.

PEOPLE v RECTOR, No. 134293; Court of Appeals No. 266553.

PEOPLE v RILEY FORD, No. 134298; Court of Appeals No. 266891.

PEOPLE v FREDERICK MILLER, No. 134311. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274477.

PEOPLE v CAUVIN, No. 134313. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274212.

PEOPLE v JULIUS CLAYTON, No. 134314. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274270.

PEOPLE v MARVIN JOHNSON, No. 134333; Court of Appeals No. 267660.

PEOPLE v MICHAEL BAKER, No. 134335; Court of Appeals No. 277792.

PEOPLE v JERRY STEELE, No. 134341; Court of Appeals No. 267337.

PEOPLE v ERNEST GREEN, No. 134342. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278324.

PEOPLE v EATMON, No. 134343; Court of Appeals No. 277208.

PEOPLE v CURTIS GREEN, SR, No. 134344; Court of Appeals No. 266616.

PEOPLE v MARSHALL WRIGHT, No. 134347; Court of Appeals No. 268339.

PEOPLE v MCCORMICK, No. 134352; Court of Appeals No. 266329.

PEOPLE v CASTANEDA, No. 134354. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274319.

GERMAN v LEFORGE, No. 134357; Court of Appeals No. 274224.

PEOPLE v JEFFREY EVANS, No. 134361; Court of Appeals No. 267300.

PEOPLE v WILLIAM STEWART, No. 134366. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274292.

PEOPLE v HUSTON, No. 134367. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275014.

PEOPLE v CASEY PERRY, No. 134372; Court of Appeals No. 266509.

MENEFEE v DEPARTMENT OF CORRECTIONS, No. 134373; Court of Appeals No. 276906.

In re RUSIECKI ESTATE (JENSEN v RUSIECKI), No. 134374; Court of Appeals No. 266145.

PEOPLE v HUNTER, No. 134378. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275607.

PEOPLE v CASTLE, No. 134390; Court of Appeals No. 265379.

PEOPLE v MCCUTCHEON, No. 134395. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274815.

PEOPLE v EL AMIN MUHAMMAD, No. 134397. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274640.

BMJ ENGINEERS & SURVEYORS, INC v NATURE'S WAY PROPERTIES, LLC, No. 134403; Court of Appeals No. 272835.

PEOPLE v JAMES SCOTT, No. 134407. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275430.

PEOPLE v GIFFORD OWENS, No. 134412. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273811.

PEOPLE v KALASHO, No. 134413. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274272.

PEOPLE v PANOUSOPOULOS, No. 134416. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275243.

PEOPLE v FABIAN, No. 134419. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274457.

PEOPLE v BRASWELL, No. 134424. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275714.

BALLARD v ALPENA SURGICAL ASSOCIATES, PLLC, No. 134426; Court of Appeals No. 275344.

PEOPLE v RAMIREZ, No. 134435. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275062.

KANDALAFT v JOHN M PETERS, PLC and JOHN M PETERS, PLC v KANDALAFT, Nos. 134439 and 134440; Court of Appeals Nos. 267471 and 267497.

TAYLOR v MUSE, No. 134448; Court of Appeals No. 274655.

PEOPLE v SHERWOOD, No. 134451; Court of Appeals No. 259303.

PEOPLE v EARLAND COLLINS, No. 134454; Court of Appeals No. 269468.

PEOPLE v HENRY LOTT, No. 134455; Court of Appeals No. 267265.

BROMLEY v AEROPOSTALE, INC, Nos. 134459 and 134594; Court of Appeals No. 278143.

PEOPLE v ROSAS, No. 134469; Court of Appeals No. 267866.

PEOPLE v EDMONDS, No. 134471; Court of Appeals No. 267292.

AUKEMAN v AUKEMAN, No. 134476; Court of Appeals No. 267326.

PEOPLE v GARZA, No. 134480; Court of Appeals No. 277679.

PEOPLE v MCCLENTON, No. 134487; Court of Appeals No. 277943.

PEOPLE v MARCUS WALLACE, No. 134488; Court of Appeals No. 267724.

PEOPLE v HUFF, No. 134489; Court of Appeals No. 270556.

PEOPLE v SHANE MOORE, No. 134492; Court of Appeals No. 277886.

PEOPLE v LENNY WALKER, No. 134497. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276459.

PEOPLE v CLARENCE MCKINNEY, No. 134503; Court of Appeals No. 276561.

PEOPLE v NATHANIEL JENKINS, No. 134506; Court of Appeals No. 270013.

PEOPLE v ANTHONY DAVIS, No. 134507; Court of Appeals No. 278127.

PEOPLE v VANHORN, No. 134509. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276637.

PEOPLE v JAMES E JOHNSON, No. 134511; Court of Appeals No. 277453.

PEOPLE v RANIS HILL, No. 134513. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276460.

PEOPLE v ACOSTA, No. 134521; Court of Appeals No. 266373.

PEOPLE v DENTON, No. 134522; Court of Appeals No. 267790.

PEOPLE v CROWE, No. 134523; Court of Appeals No. 266908.

PEOPLE v SOUTHWARD, No. 134525. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272444.

PEOPLE v BRINKER, No. 134527; Court of Appeals No. 274590.

PEOPLE v AMARO, No. 134530; Court of Appeals No. 269692.

PEOPLE v EDMUND FIELDS, No. 134539; Court of Appeals No. 266738.

PEOPLE v DODAJ, No. 134542; Court of Appeals No. 278325.

PEOPLE v JOHN WALLACE, JR, No. 134543; Court of Appeals No. 277565.

PEOPLE v SHELTON, No. 134546; Court of Appeals No. 268078.

PEOPLE v BRADDOCK, No. 134550. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277045.

PEOPLE v SONYA COLEMAN, No. 134551; Court of Appeals No. 278128.

PEOPLE v WINER, No. 134553; Court of Appeals No. 267299.

PEOPLE v FRY, No. 134557; Court of Appeals No. 278015.

PEOPLE v JEREMY BANKS, No. 134558; Court of Appeals No. 277073.

PEOPLE v ORTEGA, No. 134563. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277279.

PEOPLE v JAMES A JOHNSON, No. 134565; Court of Appeals No. 277719.

JUDGE v JUDGE, Nos. 134569, 134570; Court of Appeals Nos. 276007, 278640.

COHEN v GENERAL MOTORS CORPORATION, No. 134571; Court of Appeals No. 268239.

PEOPLE v CRAWFORD, No. 134579; Court of Appeals No. 267728.

PEOPLE v WILLIAM BAILEY, No. 134580; Court of Appeals No. 270061.

PEOPLE v KANE, No. 134583; Court of Appeals No. 267899.

PEOPLE v STREETER, No. 134596; Court of Appeals No. 276951.

PEOPLE v ROMONDA LEWIS, No. 134597; Court of Appeals No. 269200.

PEOPLE v OLMAN, No. 134598; Court of Appeals No. 268464.

E T MACKENZIE COMPANY v LONG INVESTMENT COMPANY, LTD, Nos. 134602, 134604; Court of Appeals No. 265811.

PEOPLE v CEASOR, No. 134605; Court of Appeals No. 268150.

NOLEN v NOLEN, No. 134606; Court of Appeals No. 271111.

PEOPLE v JUAN WALKER, No. 134609; Court of Appeals No. 278126.

PEOPLE v CHOYCE, No. 134611; Court of Appeals No. 277210.

PEOPLE v JALOVEC, No. 134614; Court of Appeals No. 278448.

PEOPLE v STEPHAN CLARK, No. 134616; Court of Appeals No. 277906.

PEOPLE v BRYANT, No. 134617; Court of Appeals No. 265908.

PEOPLE v DARIUS CARTER, No. 134626; Court of Appeals No. 270680.

PEOPLE v GALES, No. 134630; Court of Appeals No. 269803.

PEOPLE v RINCKEY, No. 134634; Court of Appeals No. 276972.

PEOPLE v AKANS, No. 134636; Court of Appeals No. 268805.

PEOPLE v WAGNER, No. 134637; Court of Appeals No. 267646.

PEOPLE v JALVELYN LEE, No. 134638; Court of Appeals No. 267566.

PEOPLE v DEMARIO RICHARDSON, No. 134639; Court of Appeals No. 278157.

PEOPLE v FREDDIE WATKINS, No. 134642; Court of Appeals No. 276550.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v RIDDELL, No. 134647; Court of Appeals No. 262413.

PEOPLE v KEVIN ROSS, No. 134651; Court of Appeals No. 278113.

PEOPLE v WATSON WARD, No. 134654; Court of Appeals No. 267726.

PEOPLE v DESMONE STINSON, No. 134656; Court of Appeals No. 278359.

PEOPLE v WALTERS, No. 134657; Court of Appeals No. 278198.

PEOPLE OF FARMINGTON HILLS v HOOPS, No. 134658; Court of Appeals No. 274656.

PEOPLE v WIGFALL, No. 134662; Court of Appeals No. 267645.

PEOPLE v ANTONIO COLEMAN, No. 134672; Court of Appeals No. 268770.

PEOPLE v DAVID JONES, No. 134678; Court of Appeals No. 278199.

PEOPLE v DERRICK JAMES, No. 134679; Court of Appeals No. 266653.

PEOPLE v D'ANTONIO, No. 134685; Court of Appeals No. 277839.

PEOPLE v FRANK SMITH, No. 134688; Court of Appeals No. 277842.

PEOPLE v REDICK, No. 134692; Court of Appeals No. 275285.

PEOPLE v ORLANDO GONZALEZ, No. 134697; Court of Appeals No. 269761.

PEOPLE v DAMON JOHNSON, No. 134704; Court of Appeals No. 267149.

EPICENTRE STRATEGIC CORPORATION-MICHIGAN v JENKINS CONSTRUCTION, INC, No. 134719; Court of Appeals No. 277836.

DONAHUE v CATERAID, INC, No. 134721; Court of Appeals No. 276103.

PEOPLE v HAYES, No. 134722; Court of Appeals No. 277627.

PEOPLE v PRATER, No. 134725; Court of Appeals No. 278720.

PEOPLE v MATTHEW SMITH, No. 134736; Court of Appeals No. 278633.

PEOPLE v MCCUNE, No. 134755; Court of Appeals No. 278327.

PEOPLE v KEITH THOMPSON, No. 134765; Court of Appeals No. 258336 (on remand).

Interlocutory Appeal

Leave to Appeal Denied October 29, 2007:

MAURINO v STERN, No. 134549; Court of Appeals No. 275858.

Reconsideration Denied October 29, 2007:

CELLEY v STEVENS, No. 132851. Leave to appeal denied at 477 Mich 1113. Court of Appeals No. 273846.

PEOPLE v DAVID KENNEDY, No. 132990. Leave to appeal denied at 478 Mich 869. Court of Appeals No. 252104.

WOODS v WILLIAMS & SON PLUMBING & HEATING, INC, No. 133553. Leave to appeal denied at 479 Mich 862. Court of Appeals No. 256394.

PEOPLE v MACK, No. 133618. Leave to appeal denied at 479 Mich 863. Court of Appeals No. 266374.

PEOPLE v ROUMMEL INGRAM, No. 133841. Leave to appeal denied at 479 Mich 867. Court of Appeals No. 275786.

ORR v WILSHIRE CREDIT CORPORATION, No. 134166. Leave to appeal denied at 479 Mich 868. Court of Appeals No. 276809.

Summary Dispositions October 31, 2007:

STANKE v STANKE, No. 133834. 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. On

remand, the Court shall review the plaintiff's appeal of the Isabella Circuit Court's grant of summary disposition with respect to the attorney judgment rule solely under the standards applicable to MCR 2.116(C)(8). The defendant brought its motion solely under MCR 2.116(C)(8) and, as a result, the reviewing court must limit its review to the well-pleaded allegations in the plaintiff's complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should now be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 263446.

PEOPLE V MAGUIRE, No. 134159. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the trial court's assessment of $100 in court costs against the defendant. 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. 275836.

CORRIGAN, J. I would simply deny leave to appeal.

Leave to Appeal Denied October 31, 2007:

PEOPLE V HANS THOMAS, No. 130182; Court of Appeals No. 257557.

KELLY, J. I would remand this case for correction of the judgment of sentence.

HASTINGS MUTUAL INSURANCE COMPANY V MOSHER, DOLAN, CATALDO & KELLY, INC, No. 131546. The order of May 23, 2007, which granted leave to appeal, is vacated and leave to appeal is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 265621 (on reconsideration).

PEOPLE V RAVIS ANDREWS, No. 131908; Court of Appeals No. 259834.

MORRIS PUMPS V CENTERLINE PIPING, INC AND R VANDER LIND & SON, INC V CENTERLINE PIPING, INC, Nos. 133013, 133014; reported below: 273 Mich App 187.

PEOPLE V DEANDRE WOODS, No. 133496; Court of Appeals No. 262939.

WOLVERINE WORLD WIDE, INC V LIBERTY MUTUAL INSURANCE COMPANY, No. 133697; Court of Appeals No. 260330.

PEOPLE V CHITTICK, No. 133921; Court of Appeals No. 264033.

CAVANAGH and KELLY, JJ. We would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE V MARQUIS FISHER, No. 133984; Court of Appeals No. 274813.

PEOPLE V BALES, No. 134179; Court of Appeals No. 267756.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE V LAWRENCE WOODS, No. 134215; Court of Appeals No. 274210.

FAUROT V MILLER, No. 134229; Court of Appeals No. 265476.

KELLY, J. I would grant leave to appeal to reconsider *DeShambo v Anderson*, 471 Mich 27 (2004), and *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004).

PEOPLE v GEORGE SCOTT, JR, No. 134251; Court of Appeals No. 277406.

ZACHARSKI v WAL-MART STORES, INC, No. 134296; Court of Appeals No. 274410.

PEOPLE v KONE, No. 134332; Court of Appeals No. 278008.

PEOPLE v COMPEAU, No. 134538; Court of Appeals No. 277908.
KELLY, J. I would remand this case for resentencing.

PEOPLE v JOAN MUHAMMAD, No. 134703; Court of Appeals No. 278440.

MUSKEGON COUNTY PROSECUTOR v DEPARTMENT OF CORRECTIONS, No. 135139. We direct the Court of Appeals to issue a decision on the appeal before November 30, 2007. Court of Appeals No. 281321.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal November 2, 2007:

MANUEL v GILL, No. 131103. The motion for reconsideration of this Court's April 4, 2007, order is granted. We vacate our order dated April 4, 2007. On reconsideration, the application for leave to appeal the March 23, 2006, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address: (1) whether, in light of the statement in the Court of Appeals judgment that a breach of contract action against Tri-County Metro Narcotics Squad (TCM) was possibly viable in the Court of Claims, TCM was an aggrieved party entitled to appeal, despite the Court of Appeals affirmance of the Ingham Circuit Court's grant of summary disposition on all grounds; and (2) whether the Court of Appeals erred in ruling that TCM is equivalent to a state agency. The parties may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 270 Mich App 355.

PEOPLE v BLACKSTON, No. 134473. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(l). At oral argument, the parties shall address: (1) considering that the grounds for evidentiary error that defendant asserted at trial, citing MRE 613, differ from the grounds he now advances upon appellate review, whether the Court of Appeals applied the correct standard of review when addressing admissibility under MRE 806 and MRE 403; (2) whether the trial court could properly exclude two

witnesses' inconsistent statements, which were made after they had testified in the defendant's first trial but before the defendant's second trial; (3) whether exclusion of this evidence, if error and if the claim of error was properly preserved, was harmless beyond a reasonable doubt; and (4) whether exclusion, if error but the claim of error was not preserved through a sufficient objection at trial, is plain error requiring reversal. The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 245099 (on remand).

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Summary Dispositions November 2, 2007:

JOHNSON v SUBURBAN MOBILITY AUTHORITY REGIONAL TRANSPORTATION, No. 133743. 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. 273010.

CORRIGAN, J. (*concurring*). I concur with the order remanding to the Court of Appeals for consideration as on leave granted. I write separately to point out that the Workers' Compensation Appellate Commission (WCAC) majority reversed the magistrate's decision on the basis of a faulty legal premise. The WCAC held that the magistrate's decision granting defendant's petition to stop benefits must be reversed because it was not supported by the medical expert testimony. But the law does not require that a petition to stop workers' compensation benefit payments be supported by affirmative expert medical testimony. For example, if an employee collecting benefits for a torn rotator cuff is videotaped bench-pressing 300 pounds, no medical testimony confirming the employee's recovery is necessary. In any case, both medical and nonmedical testimony were available to the magistrate to support his decision that plaintiff no longer had a work-related mental disability in 1999. First, plaintiff did not receive any medical treatment through most of 1999, and defendant filed its petition to stop in May 2000. Second, the magistrate stated that plaintiff's anger at defendant for opposing her claim for workers' compensation benefits did not disable her from returning to her former job, because "neither Dr. Lingam nor Dr. Rubin felt her anger in itself was disabling, while Dr. Kezlarian found her expression of anger bizarre and disproportionate." Defendant's expert, Dr. Kezlarian, expressed skepticism about plaintiff's claims of a work-related condition, and the magistrate apparently gave more credence to Dr. Kezlarian's opinion after learning that plaintiff had repeatedly lied about her work and treatment history and had neglected to tell her treating physician that she had secured a new job at a different company. Thus, the WCAC's decision appears to contain some serious flaws. In any case, on remand, the Court of Appeals should closely scrutinize the WCAC majority's ill-reasoned and apparently result-driven decision.

In re ENGLE (DEPARTMENT OF HUMAN SERVICES V ENGLE), No. 134801. 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 reinstate the November 21, 2006, opinion, and November 27, 2006, order of the Oakland Circuit Court, Family Division, terminating respondent-mother's parental rights to the minor children. The Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court, MCR 2.613(C); *In re Miller*, 433 Mich 331 (1989), failed to acknowledge that the applicable statutes and court rules do not require efforts for reunification or provision of services under the circumstances of this case, see, e.g., MCL 722.638(1)(a)(ii) and (2); MCL 712A.19a(2)(b); MCR 3.965(D)(2), and rendered a decision that was contrary to the clear and convincing evidence supporting the statutory grounds for termination and the best interests of the minor children, MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341 (2000). We remand this case to the Oakland Circuit Court, Family Division, for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 275064.

Leave to Appeal Denied November 2, 2007:

PEOPLE V VILLEGAS, No. 129981; Court of Appeals No. 253447.

MARKMAN, J. (*dissenting*). Defendant used a hammer to break a jewelry case at a flea market and stole the jewelry inside. He then swung the hammer at a vendor who tried to stop him, but missed. His codefendant, Ernest Chapman, cut a security guard with a box cutter to get away, and another codefendant, Quentin Johnston, served as the getaway driver. Following a jury trial, defendant was convicted of unarmed robbery, conspiracy to commit unarmed robbery, and felonious assault. Chapman was convicted of unarmed robbery, conspiracy to commit unarmed robbery, and two counts of assault with the intent to commit great bodily harm less than murder. Johnston was convicted of larceny from the person and conspiracy to commit larceny from the person. The Court of Appeals affirmed the convictions and sentences.

Defendant argues that offense variables (OVs) 1 (aggravated use of weapon), 2 (lethal potential of weapon possessed), and 3 (physical injury to victim) were scored on the basis of the assault with intent to commit great bodily harm committed by his codefendant, Chapman, but not by defendant himself. Chapman was scored 25 points for OV 1 because he cut the security guard with a box cutter, 5 points for OV 2 because he used a box cutter, and 25 points for OV 3 because the injury was life threatening. In multiple offender cases, if one offender is assessed points under OV 1, OV 2, and OV 3, all offenders must be assessed the same number of points. MCL 777.31(2)(b); MCL 777.32(2); MCL 777.33(2)(a).

This case was held in abeyance for the companion case of *People v Johnston,* 478 Mich 903, 904 (2007), in which we held:

> [D]efendant 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.

In the instant case, although both defendant and Chapman were convicted of unarmed robbery, both were *not* convicted of an assault with intent to commit great bodily harm. That is, Chapman was convicted of using a box cutter to perpetrate an assault with the intent to commit great bodily harm, while defendant was *not* convicted of using a box cutter to perpetrate an assault with the intent to commit great bodily harm. Therefore, this case is not a "multiple offender case." Accordingly, I would remand this case to the trial court for resentencing.

The majority's position is not only incompatible with *Johnston*, it will inevitably lead to an understanding of the sentencing guidelines in which defendants who are not truly similarly situated are required to be sentenced similarly.

KELLY, J. I join the statement of Justice MARKMAN.

PEOPLE V LAMAR ROBERTS, No. 130207; Court of Appeals No. 252100.

CORRIGAN, J. (*concurring*). I join the order denying leave to appeal. I write separately only to observe that, in an appropriate case, this Court should address whether to apply the rationale of *People v Smith*, 478 Mich 292 (2007), to a case where the defendant was convicted of felony murder and the predicate felony. In light of our decision in *Smith,* the holding in *People v Wilder*, 411 Mich 328 (1981), is now in question. But because the defendant in *Smith* had not been convicted of the predicate felony, we did not in that case consider whether *Wilder* should be overruled. Although we should address this issue in an appropriate case, defendant here failed to preserve the *Wilder* issue. Therefore, I concur in the denial of leave to appeal.

KELLY, J. I would remand this case for correction of the judgment of sentence.

KOULTA V CITY OF CENTERLINE, No. 131891; Court of Appeals No. 266886.

KELLY, J. (*dissenting*). The Court denies leave to appeal in this case because it has construed the phrase "the proximate cause" as the "one most immediate, efficient, and direct cause of the injury" for purposes of the gross-negligence exception to governmental immunity, MCL 691.1407(2)(c).[1] I would grant leave to appeal to consider whether the gross negligence of the defendant police officers was the most direct cause of the injury here.

Plaintiff's case has never gone to trial. If allowed to do so, plaintiff would present evidence that the defendant police officers, responding to an unwanted-person call, ordered Chrissy Lucero to leave her boyfriend's property. Lucero told the officers that she had been drinking. When she got in her car but refused to drive because she was drunk, an officer told her that she had 10 seconds to leave. She then drove away. Six minutes

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[1] See *Robinson v Detroit*, 462 Mich 439, 462 (2000).

later, she ran a red light and killed plaintiff's decedent. Lucero had consumed two 40-ounce bottles of beer and had taken antidepressant medication. The combination caused her to black out at the time of the accident.

The truth of these allegations, including what the officers should have known about Lucero's condition, constitutes jury questions. However, the case cannot get to a jury if, under the current definition of "proximate cause," Lucero's act of driving while intoxicated is deemed the proximate cause of the collision. Plaintiff's position is that the proximate cause was the officers' insistence that Lucero drive while drunk.

This Court borrowed its current definition of "proximate cause" from the 1913 decision of *Stoll v Laubengayer*.[2] In *Stoll*, a five-year-old girl sledding down a hill lost control of her sled and was trampled by horses and a wagon left unattended at the bottom of the hill. The Court determined that the "immediate cause" of the injury was the act of the child in voluntarily starting her sled run down the hill. But for this act, which took place after the defendant had negligently left the horses unattended, no accident could have occurred.[3] The Court concluded that the girl's loss of control of her sled was irrelevant because the proximate cause of the injury was her initial voluntary act of initiating the sled run. Thus, the most direct cause of the injury in *Stoll* occurred at the voluntary beginning of the child's journey and not in the collision that occurred at its end.

Were we to apply *Stoll*'s direct-cause rule to the facts at hand, we would have to consider whether Lucero began driving voluntarily or was forced to drive against her will. In an interview on the morning after the accident, Lucero told the police that she blacked out after she drove away from her boyfriend's property. She stated that she might have driven through more than one red light before she crashed into decedent's car. Under *Stoll*'s reasoning, the direct cause of the accident was not her loss of control of her car. It was her beginning to drive by the order of the defendant police and against her will.

Because of the possible involuntariness of Lucero's decision to drive, this case presents a different factual situation than *Stoll*. It also differs from *Robinson*, in which *Stoll*'s direct-cause rule was applied in the context of a high-speed chase. *Robinson* held that, if a suspect involves the police in a high-speed chase, it is the suspect's voluntary decision to flee that directly causes the injury. It is not the suspect's later loss of control of the car. In a chase, the police do not order the suspect to drive at a high speed; on the contrary, the police's intent is that the suspect stop.

I would grant leave to appeal in this case to consider whether, under *Stoll*, direct causation requires a voluntary initial act and whether there was such a voluntary act here. I would also consider the relevance of the traditional tort concepts of foreseeability and intervening and superseding causation to the theory of direct or sole proximate causation. In

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[2] *Stoll v Laubengayer,* 174 Mich 701 (1913).

[3] *Id*. at 706.

Stoll,[4] the Court reviewed a series of decisions in which the foreseeability of injury was crucial to proximate cause. But we did not explain how foreseeability meshed with the theory of direct causation. *Robinson* was silent on the issue of foreseeability, and the Court of Appeals has since interpreted that silence as foreclosing discussion of the issue.[5]

In her dissent in *Cooper v Washtenaw Co*, Judge COOPER suggested that this Court's silence about such a fundamental tort concept leaves it an open question.[6] Judge COOPER's position merits attention. In multiple-causation cases, a government employee's gross negligence arguably can be the sole proximate cause of injury if it supersedes and cuts off liability for the negligent acts of others. This Court needs to examine superseding causation, which focuses on the foreseeability of injury caused by an intervening force. We need to consider its relevance to the sole-proximate-cause analysis based on direct causation, which focuses on the voluntariness of the original act.

In this case, Lucero had drunk beer and driven earlier in the evening. Had an accident occurred at the time, her voluntary decision to drink and drive could have been the direct cause. However, by the time she encountered the police, Lucero had realized that she was incapable of driving safely. A police officer's ultimatum that she drive in her impaired condition would have superseded her earlier negligence because such police intervention would have been an unreasonable order. If Lucero drove because of any such order, the injury that resulted would have been foreseeable at the time of the order. Hence, her driving would not have intervened to cut off the police officers' liability. Thus, traditional causation principles are not incompatible with direct-causation analysis on the facts of this case.

I would grant leave to appeal to clarify whether these causation principles are relevant under the Court's current definition of "proximate cause" and thus answer the question left open in *Robinson*.

CAVANAGH, J. I join the statement of Justice KELLY.

MARKMAN, J. I would grant leave to appeal.

PEOPLE v GUTLERREZ, No. 132607; Court of Appeals No. 272497.

MARKMAN, J. (*dissenting*). For the reasons stated in my dissenting statement in *People v Villegas,* 480 Mich 931 (2007), I would remand this case to the trial court for resentencing.

KELLY, J. I join the statement of Justice MARKMAN.

PEREZ v OAKLAND COUNTY, No. 133854; Court of Appeals No. 271406.

CAVANAGH, J. I would grant leave to appeal.

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[4] *Id.* at 704-706.

[5] See *Cooper v Washtenaw Co*, 270 Mich App 506, 510 (2006).

[6] *Id.* at 513 (COOPER, P.J., dissenting).

KELLY, J. (*dissenting*). The Court denies leave to appeal in yet another case of inmate suicide.[1] Once again, it declines to resolve the open question whether it is relevant to consider the foreseeability of such a suicide when determining proximate cause. In this case, a jail employee removed Mr. Perez from a suicide watch despite her knowledge that he had recently tried to kill himself while in the jail's custodial care. This Court should put to rest the question whether, in so doing, the employee committed gross negligence that was the proximate cause of the inmate's death.[2]

This Court has acknowledged that a custodial relationship is a special relationship that gives rise to a duty to protect an inmate from harm, including self-inflicted harm.[3] In an inmate-suicide case, is that duty not meaningless if the failure to protect the inmate from himself can never be the proximate cause of his death? This question should not remain unanswered.

TWITCHELL v TWITCHELL, No. 134941; Court of Appeals No. 278805.

In re BOSHAW (DEPARTMENT OF HUMAN SERVICES v BOSHAW), No. 135061; Court of Appeals No. 275465.

Leave to Appeal Denied November 9, 2007:

In re BRANCH (DEPARTMENT OF HUMAN SERVICES v SCOTT), No. 135119; Court of Appeals No. 274738.

HONIGMAN, MILLER, SCHWARTZ & COHN, LLP v COGAN, No. 135144; Court of Appeals No. 281189.

WELLS FARGO HOME MORTGAGE, INC v BRAMLAGE, No. 135148; Court of Appeals No. 276935.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 14, 2007:

PEOPLE v REAM, No. 134913. We direct the clerk to schedule oral argument on December 13, 2007, at 9:30 a.m., on whether to grant the prosecutor's application or take other peremptory action. MCR 7.302(G)(1). Court of Appeals No. 268266.

Leave to Appeal Denied November 14, 2007:

PEOPLE v COREY FRAZIER, No. 135035; Court of Appeals No. 280475.

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[1] See the recent order denying leave to appeal in *Cooper v Washtenaw Co*, 477 Mich 953 (2006).

[2] See *Robinson v Detroit*, 462 Mich 439, 462 (2000).

[3] *Hickey v Zezulka* (*On Resubmission*), 439 Mich 408, 438 (1992).

Summary Disposition November 16, 2007:

MARTIN v THE RAPID INTER-URBAN PARTNERSHIP, No. 132164. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. MCL 691.1405 states that governmental agencies "shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." In this case, the plaintiff alleges that she slipped and fell down the steps of a shuttle bus owned and operated by the defendants as she was attempting to exit the bus. The loading and unloading of passengers is an action within the "operation" of a shuttle bus. Accordingly, the plaintiff has satisfied the exception to governmental immunity set forth in MCL 691.1405. We remand this case to the Kent Circuit Court for reinstatement of the order denying the defendants' motion for summary disposition, and for further proceedings not inconsistent with this order. Reported below: 271 Mich App 492.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the majority's peremptory order of reversal. I believe the issue presented in this case requires a fuller analysis than the majority's short order provides. In particular, we should more carefully analyze the distinction between the "operation" and "maintenance" of a motor vehicle.

Plaintiff claims that she slipped and fell on an icy or snowy step on defendant's bus. Defendant is the governmental agency that operated and maintained the bus. Plaintiff alleges that defendant failed to install step heaters or to scrape the steps to eliminate snow and ice.

Defendant moved for summary disposition, arguing that plaintiff's allegations amounted to claims of negligent *maintenance* rather than negligent operation and, thus, that the motor vehicle exception to governmental immunity, MCL 691.1405, did not apply. The trial court denied summary disposition on this issue, but the Court of Appeals reversed. *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492 (2006). Applying the definition of "operation" set forth in *Chandler v Muskegon Co*, 467 Mich 315 (2002), the Court of Appeals concluded that defendant's failure to remove ice or snow from the steps was not an activity directly associated with the driving of the bus. In other words, plaintiff's allegations amounted to a claim of negligent *maintenance* rather than negligent operation.

Plaintiff applied for leave to appeal in this Court. After hearing oral argument regarding whether to grant leave to appeal or take other peremptory action, the Court now issues an order peremptorily reversing the judgment of the Court of Appeals. The majority finds that "[t]he loading and unloading of passengers is an action within the 'operation' of a shuttle bus" and thus that the motor vehicle exception is satisfied.

I believe this question is more complex than the majority's order suggests. The motor vehicle exception, MCL 691.1405, provides: "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ."

In *Chandler*, *supra* at 321, we held that the phrase "operation . . . of a motor vehicle" in MCL 691.1405 "encompasses activities that are directly associated with the driving of a motor vehicle." We further noted that "the Legislature clearly intended that 'operation' was distinct from- . . . maintenance . . . and use." *Id*. at 320 n 7, citing MCL 550.3105.

As the Court of Appeals recognized, we stated in *Chandler* that negligent *maintenance* is distinct from negligent operation. Installing step heaters and scraping ice from steps may be maintenance activities that are distinct from "operation" under *Chandler*. Thus, it is not clear that plaintiff has established a connection between the "operation" of the bus and her injuries.

In reversing the Court of Appeals, the majority reasons that a bus is used to transport passengers, who must use the steps to get on and off the bus. But *all* motor vehicles require a means of ingress and egress. The majority does not explain why we must analyze a bus differently from other types of motor vehicles.

More fundamentally, the majority's order does not explicate the appropriate analytic framework to distinguish between "operation" and "maintenance" of a motor vehicle. Indeed, the majority's order *raises* more questions than it answers. For example, suppose that a governmental agency fails to repair a broken seat or a loose handrail on a bus. Would these omissions now constitute "operation" within the motor vehicle exception? After all, a passenger must use a seat to sit on a bus and must grasp a handrail to safely walk or stand. Thus, would the majority analyze a broken seat or a loose handrail differently than a slippery step? If not, then how would the existence of these defects arise from the negligent "operation" of the bus?

These questions arise because the majority's short order seems to conflate the *location* of the slip and fall with the *conduct* that caused it. The majority is certainly correct that a passenger must use the steps to get on and off the bus. But the question remains whether a slip and fall in this location resulted from the negligent *operation* of the bus. Negligent operation certainly *could* cause a plaintiff to fall on the steps if, for example, the driver prematurely released the brakes. In that situation, the driver's negligent operation would have caused the fall.

But that is not what occurred here. Plaintiff fell because defendant allegedly failed to remove ice and snow from the steps. The majority has not explained how such an omission constitutes *operating* the bus. This failure to distinguish the mere *location* of the fall from the *conduct* that caused it will generate confusion.

If "operation" means something more than driving, then the Court should answer the next logical question: What precisely *does* "operation" mean? Does the size of the vehicle in question define "operation"? Does "operation" include *maintenance* activities? How does the majority convey meaning to "operation" independent of the word "use" and consistent with our analysis in *Chandler*? The current order offers no answers to these questions. I predict that this order will spawn future litigation on these points.

For these reasons, in lieu of resolving this case by peremptory order, I would more fully address the appropriate analytic framework for distinguishing between operation and maintenance of a motor vehicle.

TAYLOR, C.J. I join the statement of Justice CORRIGAN.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 21, 2007:

PEOPLE v STEVEN CARTER, No. 134687. We direct the clerk to place the matter on the January 2008 session calendar for argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs no later than December 18, 2007, addressing whether the constitutional underpinnings of *People v Dunbar*, 264 Mich App 240 (2004), are sound. They should avoid submitting mere restatements of their application papers. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae no later than December 18, 2007. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 270195.

Leave to Appeal Granted November 21, 2007:

MILLER v ALLSTATE INSURANCE COMPANY, Nos. 134393, 134406. The parties shall include among the issues to be briefed whether PT Works, Inc., must be incorporated under the Professional Services Corporations Act (PSCA), MCL 450.221 *et seq*., and, if so, whether the failure of PT Works to properly incorporate under the PSCA means that the physical therapy treatment it provided to the defendant's insured was not lawfully rendered under the no-fault act, MCL 500.3101 *et seq*. In addressing the latter issue, the parties are invited to consider the possible application of MCL 450.229, MCL 450.233, and MCL 450.1271(c). The Attorney General, the Prosecuting Attorneys Association of Michigan, the Michigan Association for Justice, the Michigan Insurance Federation, the Insurance Institute of Michigan, and the Business Law and Health Care 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: 275 Mich App 649.

Summary Dispositions November 21, 2007:

PEOPLE v DIPZINSKI, No. 133641. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Midland Circuit Court, and we remand this case to the trial court for resentencing. The prosecutor acknowledges errors in the scoring of offense variables 1 and 9, which errors alter the guidelines sentence ranges for both convictions. Resentencing is therefore warranted. *People v Francisco*, 474 Mich 82 (2006). On remand, the trial court shall make a record explaining the

reasons for scoring each offense variable. 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. 276029.

PEOPLE v UPHAUS, No. 133928. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the judgment of the Court of Appeals holding that *Blakely v Washington*, 542 US 296 (2004), applies to a trial court's factual determinations underlying a decision to depart from the sentencing guidelines. *People v Harper*, 479 Mich 599 (2007). We remand this case to the Court of Appeals to address the defendant's remaining arguments. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Reported below: 275 Mich App 158.

KELLY, J. I would deny leave to appeal.

KASETA v BINKOWSKI, No. 134728. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Macomb Circuit Court for entry of a judgment of summary disposition in favor of the defendants. Court of Appeals No. 273215.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

GREBNER v STATE OF MICHIGAN, No. 135274. On order of the Court, the motions for immediate consideration and to file briefs amicus curiae are granted. The application for leave to appeal the November 16, 2007, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, generally for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Ingham Circuit Court for entry of an order denying the plaintiffs' motions and dismissing the complaint. The motion for stay is denied as moot.

(A) The issue here is whether MCL 168.615c, which was enacted by the Legislature with a vote of less than two-thirds of the members of each house, violates Const 1963, art 4, § 30.

(B) MCL 168.615c provides, in pertinent part:

> (1) In order to vote at a presidential primary, an elector shall indicate in writing, on a form prescribed by the secretary of state, which participating political party ballot he or she wishes to vote when appearing to vote at a presidential primary.
>
> * * *
>
> (3) The secretary of state shall develop a procedure for city and township clerks to use when keeping a separate record at a presidential primary that contains the printed name, address, and

> qualified voter file number of each elector and the participating political party ballot selected by that elector at the presidential primary.
>
> * * *
>
> (5) To ensure compliance with the state and national political party rules of each participating political party and this section, the records described in subsection (3) shall be provided to the chairperson of each participating political party as set forth in subsection (6).
>
> * * *
>
> (8) A participating political party may only use the information transmitted to the participating political party under subsection (6) to support political party activities by that participating political party, including, but not limited to, support for or opposition to candidates and ballot proposals.

(C) Const 1963, art 4, § 30 provides: "The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or public property for local or private purposes."

(D) This Court "must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional." *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 9 (2007).

(E) If an appropriation predominantly serves a public purpose, it is not an appropriation for a private purpose. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10),* 396 Mich 465, 496 (1976). "The fact that certain individuals benefit from the appropriation does not necessarily imply that the appropriation is lacking a public purpose. The question is whether society at large has an interest in having those individuals benefited." *Id*.

(F) Because "the determination of what constitutes a public purpose for which an appropriation of public money may be made is primarily the responsibility of the Legislature," *id.* at 495-496, considerable deference is owed to the Legislature's determination. *Baker v Carr*, 369 US 186, 217 (1962). "[D]etermination of what constitutes a public purpose involves consideration of economic and social philosophies and principles of political science and government. Such determinations should be made by the elected representatives of the people." *Gregory Marina, Inc v Detroit*, 378 Mich 364, 394 (1966).

(G) Political parties unquestionably serve a public purpose. As the United States Supreme Court explained, "parties and their representatives have become the custodians of official power . . . ; and that if heed is

to be given to the realities of political life, they are now agencies of the state, the instruments by which government becomes a living thing." *Nixon v Condon,* 286 US 73, 84 (1932). See also generally *Smith v Allwright*, 321 US 649 (1944), and *Terry v Adams*, 345 US 461 (1953), on the uniquely "public functions" carried out by political parties within the electoral process.

(H) As a consequence of MCL 168.615c, the political parties are given access to certain information gathered at public expense in order to support or oppose candidates and ballot proposals. The debate engendered as the result of that access is integral to the operation of our democracy, our electoral process, and our political campaigns and thus serves a public purpose by "enlighten[ing] the public and encourag[ing] an informed decision-making process." *Advisory Opinion*, *supra* at 494. "Discussion of public issues and debate on the qualification of candidates are integral to the operation of the system of government established by our constitution." *Buckley v Valeo*, 424 US 1, 14 (1976).

(I) Whether there are better means of serving these same interests, and whether the costs of permitting that access are warranted in light of their benefits, are principally matters for legislative, not judicial, determination. "[I]t is well within the legislature's powers to so determine." *Advisory Opinion*, *supra* at 497.

(J) We respectfully disagree with the Court of Appeals majority that the public purpose served here is merely "incidental[]." Instead, the "predominant" role that political parties serve in our system of government is informing the public about candidates and ballot proposals and facilitating public debate in the context of such candidates and ballot proposals. This is indisputably a "public purpose" and such purpose appears central to the legislative judgment. Indeed, it is hard to comprehend what alternative purpose the Legislature might have contemplated in enacting MCL 168.615c.

(K) The consideration and balancing of "public" and "private" interests in this case do not require that this Court construe these or any other terms in a "broad" or "narrow" manner, as asserted by the Court of Appeals dissent. Rather, such terms need only be interpreted in a reasonable manner.

(L) For the reasons discussed above, MCL 168.615c does not violate Const 1963, art 4, § 30.

(M) In addition, MCL 168.615c is not violative of Const 1963, art 2, § 4, which provides, in part: "The legislature shall enact laws to preserve the purity of elections . . . ." Plaintiffs argue that § 615c violates the Purity of Elections Clause because only the two major political parties, having each received "20% of the total vote cast in this state for the office of president in the last presidential election," MCL 168.613a(3), at present qualify to obtain the information gathered under this act. However, as the United States Supreme Court has recognized, "the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . ." *Timmons v Twin Cities Area New Party,* 520 US 351, 367 (1997). States have a "strong interest" in the stability of their political systems and, while they may not enact "unreasonably exclusionary restrictions," they

"need not remove all of the many hurdles third parties face in the American political arena today." *Id*. See also *Buckley*, *supra* at 97-98. Further, it may conceivably be argued that MCL 168.615c, in fact, "preserve[s] the purity of elections" by preventing so-called "party raiding" "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary," *Rosario v Rockefeller*, 410 US 752, 760 (1973).

(N) We agree with plaintiffs that there is standing and that the issues are ripe. Plaintiff Practical Political Consulting is a political consulting firm whose business will be directly affected by the fact that, pursuant to MCL 168.615c, a part of the market research for the two major political parties will be provided to the parties by the state, and, thus, this plaintiff has standing to challenge § 615c. In addition, the challenges to this law are ripe because § 615c has been enacted without the assent of two-thirds of both houses, and if § 615c violates Const 1963, art 4, § 30, the state cannot conduct the January 15, 2008, presidential primary election because of the nonseverability provision of 2007 PA 52, enacting § 1.

(O) This order addresses only the question whether MCL 168.615c violates Const 1963, art 2, § 4 and art 4, § 30, the only issues addressed by the lower courts. In particular, this order does not address the validity of MCL 168.615c under any other provision of the federal or the state constitution, and it does not address whether MCL 168.615c is inconsistent with any other provision of federal or state law. Reported below: 277 Mich App 220.

CAVANAGH, J. (*dissenting*). I would deny leave to appeal because:

A. There is no express public purpose for the granting of access to the lists. MCL 168.615c states two purposes for the list provision: (1) to ensure compliance with the state and national political party rules and (2) to support political party activities by that participating political party. MCL 168.615c(5) and (8). Neither purpose has any relation to the public interest. The express purposes apply exclusively to the political parties, which are concededly private entities. While political parties undoubtedly serve a public purpose, as do many private entities, the question here is whether this public appropriation serves a public interest.

It is possible that an incidental benefit would accrue to the public if "support for or opposition to candidates and ballot proposals," MCL 168.615c(8), leads to public discussion or exchange of ideas, as the Court of Appeals dissent assumes it will. But nothing in the statute ensures this result. Support could take the exclusive form of financial support. Discourse, if there were any, would be entirely within the particular party. There is simply no express benefit to the public.

B. Speculation that a benefit may trickle down to the public is not enough. The Court of Appeals dissent asserts that *Advisory Opinion on Constitutionality of 1975 PA 277 (Questions 2 — 10)*, 396 Mich 465 (1976), "appears" to stand for the proposition that any public purpose is sufficient for a constitutional appropriation. I believe that this is a misstatement. *Advisory Opinion* actually states that "[t]he question is whether society at large has an interest in having those individuals benefited." 396 Mich at 496. I read this as a primary purpose test.

Advisory Opinion does not stand for the proposition that any attendant public benefit amounts to a public purpose; the benefit must be one that is closely and clearly related to the welfare of the public to amount to a public purpose. The goals of MCL 168.615c are closely and clearly related to the welfare of the qualifying political parties. Any benefit to the public is speculative at worst and attenuated at best.

C. The "any public purpose" test of the Court of Appeals dissent is unworkable and dangerous. If any slight public benefit is sufficient, as the dissent would have it, the distinction between public and private purpose loses all meaning. As the Court of Appeals majority observes, appropriating property and funds for a shopping mall involves some public benefit, if only in increased tax revenues. Adopting the Court of Appeals dissent's translation of the public purpose test invites bad consequences for Michigan citizens in the future.

D. The purposes of MCL 168.615c are inapposite, arguably inimical, to those in the cases on which the dissent relies. The legislation at issue in *Buckley v Valeo*, 424 US 1, 91 (1976), public presidential campaign funding, had a public purpose "to reduce the deleterious influence of large contributions on our political process . . . ." The legislation at issue in *Advisory Opinion*, public gubernatorial campaign funding, had a public purpose "[t]o allow gubernatorial candidates to become less dependent upon financial support from special-interest groups . . . ." 396 Mich at 497. So both had a purpose to mitigate the influence of highly funded private entities or special interest groups.

The effect of MCL 168.615c appears to be the opposite. It enables increased funding and influence in particular groups. Significantly, this influence and funding benefit is not just in the parties themselves; the list may be provided to "another person, organization, or vendor for the purpose of supporting political party activities by that participating political party," in other words, special interest groups. MCL 168.615c(8). The fact that MCL 168.615c directly benefits not only the parties but unnamed subgroups somehow loosely connected to the "political party activities" drives a stake through the heart of any attenuated public purpose as far as I am concerned.

E. Plaintiffs' contention that the act implicates the "purity of elections" is not wholly without merit. Const 1963, art 2, § 4 states in part: "The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, [and] to guard against abuses of the elective franchise . . . ." The "purity of elections" clause has been interpreted by this Court to require that " 'any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.' " *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596 (1982), quoting *Wells v Kent Co Board of Election Comm'rs*, 382 Mich 112, 123 (1969). "The phrase, 'purity of elections,' is one of large dimensions. It has no single, precise meaning." *Wells*, *supra* at 123. "Although the 'purity of elections' concept has been applied in different factual settings, it unmistakably requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers*, *supra* at 598. "The touchstone [of Const 1963, art 2, § 4] is whether the election

procedure created affords an unfair advantage to one party or its candidates over a rival party or its candidates." *Id.* at 598-599.

Arguably, supplying a list of voters to secondary vendors of political parties adversely affects the purity of elections and creates an unfair advantage. Further, it is not clear to me that the general reasonableness of favoring the two-party system for the stability of elections applies when the purported good, as the Court of Appeals dissent suggests, is " 'to assure the unfettered exchange of ideas for the bringing about of political and social changes desired by the people . . . .' " *Monitor Patriot Co v Roy*, 401 US 265, 272 (1971) (citation omitted).

Finally, the very idea of supplying lists of voters to private parties, when the voters must either be on the list or not vote, strikes me as an abuse of the elective franchise.

For these reasons, I would deny leave to appeal.

KELLY, J. I join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). I dissent from the majority of four's (Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN) order reversing the Court of Appeals majority opinion and generally adopting the flawed dissent. Justice CAVANAGH's dissent has correctly explained some of the flaws of this Court's majority of four's mistaken decision and reasoning.

I would deny leave to appeal because the Court of Appeals correctly held that 2007 PA 52 is unconstitutional because it violates the Michigan Constitution by appropriating public property for private purposes without the assent of "two-thirds of the members elected to and serving in each house of the legislature." Const 1963, art 4, § 30.

Leave to Appeal Denied November 21, 2007:

RUMFIELD v HENNEY, No. 132755; Court of Appeals No. 260540.

CAVANAGH, J. I would grant leave to appeal.

AMERIQUEST MORTGAGE COMPANY v ALTON, Nos. 132889, 132890; reported below: 273 Mich App 84.

KELLY, J. I would grant leave to appeal.

PRESERVE THE DUNES, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 133083; Court of Appeals No. 273932.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

TINGLEY v WARDROP, No. 133583; reported below: 274 Mich App 335 (on remand).

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MOON, No. 133613; Court of Appeals No. 266327.

CAVANAGH, J. I would grant leave to appeal.

CITIFINANCIAL MORTGAGE COMPANY, LLC v COMERICA BANK, No. 133645; Court of Appeals No. 270453.

BYZEWSKI v BAUMBACH, No. 133778; Court of Appeals No. 272441.

KILBURN v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 133881; Court of Appeals No. 272379.

PEOPLE v RONEY, No. 133959; Court of Appeals No. 265071.

KELLY, J. I would grant leave to appeal.

SMITH v MARTINREA INTERNATIONAL, INC, No. 134080; Court of Appeals No. 275860.

LANG v FLINT BOARD OF EDUCATION, No. 134329; Court of Appeals No. 274635.

KELLY, J. I would grant leave to appeal.

PEOPLE v AYLWARD, No. 134453; Court of Appeals No. 269693.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HASSELBRING, No. 134478; Court of Appeals No. 257846 (on remand).

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HOMECOMINGS FINANCIAL NETWORK v CRYSTAL HOMES, INC, No. 134502; Court of Appeals No. 267095.

KELLY, J. I would grant leave to appeal.

PEOPLE v TESEN, No. 134572; reported below: 276 Mich App 134.

CORRIGAN, J. I would grant leave to appeal.

PEOPLE v GERALD BASS, No. 134589; Court of Appeals No. 277941.

PEOPLE v WAYNE BROWN, No. 134698; Court of Appeals No. 277675.

CORRIGAN, J. (*concurring*). I concur in the Court's decision to deny leave to appeal. I write separately to address two points.

First, the prosecutor challenged the circuit court's sentencing decisions at a probation revocation hearing. The prosecutor did not attend the hearing or raise the issues now advanced in his application to this Court. Therefore, the prosecutor did not preserve the issues for review or take any action to persuade the circuit court to impose a new sentence instead of discharging defendant from probation and permitting him to relocate outside the state. For these reasons, I agree that we must decline to address the prosecutor's arguments.

Second, I do believe that the Court of Appeals correctly resolved the question at issue in this case in *People v Robinson,* unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 255672). Here, as in *Robinson,* the defendant entered a plea pursuant to a *Killebrew* agreement that fixed his minimum sentence range. See *People v Killebrew*, 416 Mich 189 (1982). The legislative sentencing guidelines prescribed a minimum sentence range of 78 to 130 months. But, pursuant to the plea deal, defendant was sentenced, within an agreed-to range of 5 to 23 months, to 12 months' jail time and 36 months' probation. Defendant violated the terms of his probation within a few months of his release from jail. He pleaded guilty of violating probation, yet the trial judge discharged him from probation and did not impose any additional jail time. The judge was under the impression that, if she

resentenced defendant, she was bound to adhere to the originally agreed-to 5- to 23-month minimum range.

The legislative guidelines apply "whether or not the sentence is imposed after probation revocation." *People v Hendrick*, 472 Mich 555, 560 (2005). Under MCL 771.4, when a defendant violates the terms of his probationary sentence,

> the court may continue, extend, or revoke probation. In the event that the court revokes a defendant's probation, it *may* sentence the defendant "in the same manner and to the same penalty as the court might have done if the probation order had never been made." A judge, however, is not required to sentence the defendant "in the same manner." [*Id.* at 562 (emphasis in original).]

Indeed, as we recently observed in *People v Harper*, 479 Mich 599, 630-631 (2007), the permissive language in MCL 771.4 reflects the nature and purpose of probation. We noted, for example, that "if a judge may never impose additional imprisonment, he is [effectively] unable to revoke probation." *Id.* at 630. In other words, for a probationary sentence to have its intended effect, a judge must have the ability to resentence a probation violator to additional jail or prison time. Accordingly, a judge must be able to exceed the original minimum sentence range if appropriate and necessary. See *id.* at 631 (judge must be able to exceed the original, 12-month limit on jail time for intermediate sanctions); cf. *Hendrick*, *supra* at 562-563 (a judge may depart upward from the original guidelines range on the basis of postprobation factors).

Here, defendant received the benefit of his plea bargain at his original sentencing. In spite of the favorable sentence, he chose to violate the terms of his probation. The judge in this case erred when, after defendant pleaded guilty of violating the terms of his probation, she concluded that she was constrained to resentence him within the same minimum sentence range prescribed by his plea agreement.

Leave to Appeal Granted November 27, 2007:

PEOPLE V GERACER TAYLOR, No. 134206. The parties shall include among the issues to be briefed: (1) whether Lasater's identifications were testimonial or nontestimonial under *Davis v Washington*, 547 US 813 (2006); (2) whether, if the statements were testimonial, they constitute dying declarations; and (3) "whether the Sixth Amendment incorporates an exception for testimonial dying declarations." See *Crawford v Washington*, 541 US 36, 56 n 6 (2004). The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 275 Mich App 177.

Summary Dispositions November 27, 2007:

HAAS v DEAL, No. 133370. On November 14, 2007, the Court heard oral argument on the application for leave to appeal the January 25, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the trial court for entry of an order denying the motion for sanctions filed by defendants Wade H. Deal and Sarah J. Deal. On the facts and law of this case, the plaintiffs' civil action cannot be considered devoid of arguable legal merit. MCL 600.2591(3)(a)(iii). Court of Appeals No. 262987.

PEOPLE v KEENAN ROBINSON, No. 134840. In lieu of granting leave to appeal, we reverse the July 17, 2007, order of the Court of Appeals denying the motion to file a supplemental brief, and we remand this case to the Court of Appeals for plenary consideration of the issue raised in the defendant's supplemental brief: whether the trial court's upward departure from the applicable sentencing guidelines range and extent of departure were supported by substantial and compelling reasons. *People v Babcock*, 469 Mich 247 (2003). The Court of Appeals shall issue an order permitting the prosecutor to respond. 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. 269605.

WEAVER J. I would deny leave to appeal.

YOUNG, J. (*dissenting*). I respectfully dissent from this Court's order reversing the order of the Court of Appeals denying defendant's motion to file a supplemental brief and remanding this case to the Court of Appeals for plenary consideration of the issue raised in defendant's supplemental brief. A party may not file a supplemental brief in the Court of Appeals except "by leave of the Court." MCR 7.212(G). With the assistance of counsel, defendant filed his initial brief on September 5, 2006. Upon defendant's request, his counsel filed in the trial court a motion to withdraw, which was granted on February 15, 2007. Substitute counsel was appointed on April 19, 2007. On July 9, 2007, the day before this case was submitted on the case call, substitute counsel moved to file a supplemental brief. On July 17, 2007, the Court of Appeals denied defendant's motion and returned the supplemental brief. I disagree with the majority that the Court of Appeals abused its discretion by denying defendant's 11th hour motion to add issues to his appeal. Therefore, I would deny his application and require him to raise these issues in a motion for relief from judgment.

CORRIGAN, J. I join the statement of Justice YOUNG.

Leave to Appeal Denied November 27, 2007:

PEOPLE v HAROLD BELL, No. 134402; Court of Appeals No. 269517.

PEOPLE v SPANGLER, No. 134431; Court of Appeals No. 266078.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal in this case to consider when offense variable (OV) 19 is properly scored. Ten points are scored for OV 19 where the defendant has "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In this case, defendant hid himself and items used in methamphetamine production in a closet when the police arrived at the house to investigate a crime committed by another person. For doing so, he was scored 10 points under OV 19. Given that it would be extraordinary for a criminal perpetrator *not* to attempt to hide evidence of his or her crime or to make such crime less detectable, it would seem that OV 19 would almost always be scored under the trial court's interpretation. Perhaps this is consistent with OV 19, but, if that was the Legislature's intention, it would seem that it would have simply increased the base level for theft offenses and other criminal offenses involving contraband. Because the guidelines are more than hortatory, and must be construed in the same fashion as any other binding law of this state, I would grant leave to enable a closer review of the Legislature's intentions. See *People v Barbee*, 470 Mich 283 (2004).

SPIRES V BERGMAN, No. 134977; reported below: 276 Mich App 432.

KELLY, J. I would grant leave to appeal.

Summary Disposition November 28, 2007:

MULLINS V ST JOSEPH MERCY HOSPITAL, No. 131879. We reverse the July 11, 2006, judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*. In the instant case, because the plaintiff filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. Accordingly, we remand this case to the Washtenaw Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order. Reported below: 271 Mich App 503.

Summary Dispositions November 29, 2007:

WAR-AG FARMS, LLC V FRANKLIN TOWNSHIP, No. 133298. 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. 270242.

PEOPLE V VADEN, No. 133632. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Berrien Circuit Court, and we remand this case to the trial court for resentencing. The prosecuting attorney concedes that the defendant should have been

scored zero points for offense variable 9 in light of *People v Melton*, 271 Mich App 590 (2006), and that the defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82 (2006). 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. 275598.

PEOPLE v MARC SANDERS, No. 134049. 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. 273929.

PEOPLE v WALTON, No. 134470. 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 was denied the effective assistance of counsel due to his attorney's failure to object when the Oakland Circuit Court did not sentence the defendant pursuant to the legislative sentencing guidelines, MCL 777.1 *et seq*., and (2) whether the defendant is entitled to postappeal relief under MCR 6.501 *et seq*. 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. 276161.

PEOPLE v BOBBY PERRY, No. 134829. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court erred in scoring 10 points on offense variable 4 for serious psychological injury to a victim under MCL 777.34(1)(a). 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. 278484.

Leave to Appeal Denied November 29, 2007:

PEOPLE v STANLEY MCCRAY, No. 132245. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268557.

DIVERGILIO v WEST BLOOMFIELD CHARTER TOWNSHIP, No. 133174; Court of Appeals No. 261766.

HALL v COHEN, No. 133735; Court of Appeals No. 270949.

BRIGGS TAX SERVICE, LLC v DETROIT PUBLIC SCHOOLS, No. 133737; Court of Appeals No. 271631.

PEOPLE v JAMES FLETCHER, No. 133877; Court of Appeals No. 266827.

PEOPLE v ANDREW MILLER, JR, No. 133926; Court of Appeals No. 274999.

PEOPLE v BOURNE, No. 133956. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272178.

PEOPLE v SALLIS, No. 134000; Court of Appeals No. 267261.

PEOPLE v MEEKS, No. 134025. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277468.

LANGE v LANGE, No. 134093; Court of Appeals No. 274197.

PEOPLE v YANT, No. 134119. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272991.

PEOPLE v PALADINO, No. 134123. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274704.

PEOPLE v LARRY SMITH, No. 134131. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272946.

PEOPLE v JORDAN, No. 134139; reported below: 275 Mich App 659.

PEOPLE v STEPHEN WILLIAMS, No. 134167. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274191.

PEOPLE v CHARLES HARPER, No. 134218. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273601.

PEOPLE v DARIN SMITH, No. 134221. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273160.

MICHIGAN STATE EMPLOYEES ASSOCIATION v DEPARTMENT OF CORRECTIONS, No. 134228; reported below: 275 Mich App 474.

PEOPLE v CORNELIUS BROWN, No. 134266. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273027.

ROOYAKKER & SITZ, PLLC v PLANTE & MORAN, PLLC, No. 134268; reported below: 276 Mich App 146.

PEOPLE v MARCEL SMITH, No. 134292. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273898.

PEOPLE v RAMSEY, No. 134299; Court of Appeals No. 274641.

PEOPLE v POWELL, No. 134300. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275633.

PEOPLE v MILSTEAD, No. 134306. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273714.

PEOPLE v DURAND CLINIC, PC, Nos. 134308, 134309. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 271104, 272736.

PEOPLE v JARRETT DORSEY, No. 134325. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274770.

PEOPLE v JEREMIAH BROOKS, No. 134331. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274956.

PEOPLE v LAWRENCE SMITH, No. 134337. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275573.

PEOPLE v TYRONE BELL, No. 134377; Court of Appeals No. 266277.

PEOPLE v HARDY, No. 134388. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272479.

PEOPLE v CHILDS, No. 134391. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276673.

PEOPLE v GOREE, No. 134392. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276638.

PEOPLE v NALI, No. 134396. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276743.

PEOPLE v DOWELL, No. 134398. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274984.

PEOPLE v WINGO, No. 134399; Court of Appeals No. 268697.

PEOPLE v TRAPP, No. 134400. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275396.

PEOPLE v GALVIN, No. 134409; Court of Appeals No. 264598.

PEOPLE v HENDRICKS, No. 134414. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272764.

PEOPLE v SIROIS, No. 134415; Court of Appeals No. 269645.

PEOPLE v ARMSTRONG, No. 134434. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275003.

PEOPLE v DAVID SWANIGAN, No. 134436. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276253.

PEOPLE v GLEASON, No. 134468. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275637.

KELLY, J. I would grant leave to appeal.

PEOPLE v ROMANDO SMITH, No. 134475. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275282.

PEOPLE v DEWON WILLIAMS, No. 134479. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275423.

PEOPLE v ERIC MARTIN, No. 134484. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276403.

PEOPLE v MORRIS FOSTER, No. 134485; Court of Appeals No. 273987.

PEOPLE v TERRENCE MOORE, No. 134486; Court of Appeals No. 268465.

PEOPLE v FAIDLEY, No. 134495. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276302.

PEOPLE v COLEY, No. 134499. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275923.

HILGENDORF v LEE, No. 134501; Court of Appeals No. 270335.

PEOPLE v WALLAGER, No. 134510. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274275.

PEOPLE v JUSTIN WATKINS, No. 134518. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275037.

PEOPLE v DON GIBSON, No. 134534. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276897.

PEOPLE v CARLTON, No. 134536. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278767.

PEOPLE v CLEVELAND COLEMAN, No. 134541; Court of Appeals No. 269372.

PEOPLE v SHULICK, No. 134555. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275793.

MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION v PUBLIC SERVICE COMMISSION, No. 134559; Court of Appeals No. 263262.

PEOPLE v SILVA, No. 134561. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275601.

PEOPLE v MICHAEL PARKS, No. 134562. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277250.

PEOPLE v BERNARD JONES, No. 134566; Court of Appeals No. 267111.

PEOPLE v WALDEN, No. 134575. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275643.

PEOPLE v BROYLES, No. 134581. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276332.

PEOPLE v LUMPKIN, No. 134584. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276810.

PEOPLE v COX, No. 134585; Court of Appeals No. 278629.

PEOPLE v FANNIN, No. 134586. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276781.

PEOPLE v STRAYHORN, No. 134587. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276280.

HARRIS v BOTSFORD CONTINUING CARE CORPORATION, Nos. 134591, 134592; Court of Appeals Nos. 267997, 269452.

PEOPLE v MONTEZ STOVALL, No. 134610. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273612.

PEOPLE v MARCUS HARVEY, No. 134612. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278524.

PEOPLE v DANIEL JENKINS, No. 134613; Court of Appeals No. 266236.

PEOPLE v LONG, No. 134622. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275853.

FAIRVIEW BUILDERS, INC v BIRETA, No. 134632; Court of Appeals No. 266197.

MASSE v HARDING, No. 134633; Court of Appeals No. 273798.

PEOPLE v JEFFREY HAMILTON, No. 134635. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277936.

PEOPLE v SOSA, No. 134643. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276063.

PEOPLE v MURPHY, No. 134644. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275916.

PEOPLE v DAVID STEWART, No. 134646. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276740.

PEOPLE v STEPHEN JOHNSON, JR, No. 134649. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274195.

PEOPLE v DOWNING, No. 134650; Court of Appeals No. 276016.

PEOPLE v DIXON, No. 134652. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274435.

COMPLETE AUTO & TRUCK PARTS, INC v CITY OF FLINT, No. 134664; Court of Appeals No. 268485.

PEOPLE v ALTOONIAN, No. 134681; Court of Appeals No. 267398.

PEOPLE v DEAN JOHNSON, No. 134683. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276073.

PEOPLE v RONNIE ANDERSON, No. 134684; Court of Appeals No. 268463.

PEOPLE v TRAVIS UNDERWOOD, No. 134690; Court of Appeals No. 266714.

PEOPLE v DEAN, No. 134691; Court of Appeals No. 275925.

PEOPLE v RITCHIE, No. 134700. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277167.

PEOPLE v LARRY STOVALL, No. 134702; Court of Appeals No. 278119.

PEOPLE v GROSSNICKLE, No. 134705. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277290.

PEOPLE v FREDERICK TERRY, No. 134708. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278504.

PEOPLE v LEROY TAYLOR, No. 134709. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276182.

PEOPLE v MCNAMEE, No. 134710. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273736.

PEOPLE v SHAWN DAVIS, No. 134713. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277009.

PEOPLE v DESMOND SHAW, No. 134714; Court of Appeals No. 269864.

PEOPLE v VIEAU, No. 134715. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277228.

PEOPLE v JASON GREEN, No. 134716; Court of Appeals No. 277841.

PEOPLE v CIESLINSKI, No. 134723; Court of Appeals No. 278355.

PEOPLE v GOZA, No. 134727. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276870.

PEOPLE v KENDELL LEE, No. 134729; Court of Appeals No. 278521.

PEOPLE v RUSHELL, No. 134730. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277563.

PEOPLE v COBAS, No. 134731. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278650.

PEOPLE v SIMPSON, No. 134732. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278921.

WOZNIAK v VENTURE INDUSTRIES, INC, No. 134734; Court of Appeals No. 274026.

PEOPLE v ARTIS JOHNSON, No. 134737; Court of Appeals No. 278305.

PEOPLE v PENDERGRASS, No. 134738; Court of Appeals No. 260633.

PEOPLE v KNIFF, No. 134740; Court of Appeals No. 278702.

PEOPLE v ANTHONY CHAPMAN, No. 134742; Court of Appeals No. 266736.

PEOPLE v HOLZER, No. 134744; Court of Appeals No. 269142.

PEOPLE v ROBERT ANDERSON, No. 134745. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277630.

PEOPLE v BREELOVE COLLINS, No. 134746. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277810.

PEOPLE v PRINTICE SMITH, No. 134754; Court of Appeals No. 278884.

PEOPLE v JOHN TAYLOR, JR, No. 134757; Court of Appeals No. 277840.

PEOPLE v TIMOTHY HAMILTON, No. 134760. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277113.

PEOPLE v WENDELL GREEN, JR, No. 134762. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277122.

PEOPLE v CURTIS FERGUSON, No. 134763. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277821.

PEOPLE v MANNING, No. 134764. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277169.

PEOPLE v MURDOCK, No. 134768; Court of Appeals No. 278437.

PEOPLE v VALENTINE, No. 134769; Court of Appeals No. 278883.

BURGESS v BERNHARDT, No. 134770; Court of Appeals No. 268569.

PEOPLE v MARTINEZ, No. 134772. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276608.

PEOPLE v ROBERT REYNOLDS, No. 134773. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276272.

PEOPLE v OHLENDORF, No. 134774; Court of Appeals No. 278462.

PEOPLE v STEVENS, No. 134775. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276216.

PEOPLE v PHILIP SMITH, No. 134776. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276122.

PEOPLE v LAQUAN JAMES, No. 134778. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278116.

PEOPLE v WALTON, No. 134779. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276160.

PEOPLE v ERLICH, No. 134783. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275384.

PEOPLE v GENO, No. 134784. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278886.

PEOPLE v LAROSA, No. 134785. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274290.

PEOPLE v KEVIN YOUNG, No. 134786; Court of Appeals No. 278889.

PEOPLE v DONALD WRIGHT, No. 134788. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278754.

PEOPLE v JOHN COOPER, No. 134789. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276602.

PEOPLE v BONNELL, No. 134790; Court of Appeals No. 277111.

PEOPLE v COBURN, No. 134792; Court of Appeals No. 279036.

PEOPLE v HEMP, No. 134794; Court of Appeals No. 277171.

YOUNG v FAREMOUTH, No. 134803; Court of Appeals No. 269730.

PEOPLE v HEARN, No. 134804; Court of Appeals No. 278677.

PEOPLE v PIOTTER, No. 134808. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278579.

ANDERSON v SENGER, No. 134811; Court of Appeals No. 266941.

PEOPLE v GATLIN, No. 134813; Court of Appeals No. 278369.

PEOPLE v LAWTON, No. 134823; Court of Appeals No. 266674.

PEOPLE v PARDEE, No. 134824; Court of Appeals No. 278598.

PEOPLE v JAMES JACKSON, No. 134826; Court of Appeals No. 270014.

PEOPLE v JAMES WILLIAMS, No. 134828; Court of Appeals No. 269794.

PEOPLE v TEEL, Nos. 134832, 134833; Court of Appeals Nos. 264588, 273860.

PEOPLE v ROUNDTREE, No. 134836. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277220.

PEOPLE v SCHORLING, No. 134839; Court of Appeals No. 268026.

PEOPLE v RICHARD, Nos. 134842, 134843; Court of Appeals Nos. 269203, 272072.

SPENCER v DEPARTMENT OF CORRECTIONS, No. 134844; Court of Appeals No. 278922.

PEOPLE v DAWSON, No. 134849. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278159.

PEOPLE v LAMKIN, Nos. 134852, 134854; Court of Appeals Nos. 276696, 276698.

BARNWELL v CITY OF PETOSKEY, No. 134853; Court of Appeals No. 277195.

PEOPLE v RYDER, No. 134855; Court of Appeals No. 277523.

PEOPLE v MORRIS, No. 134858; Court of Appeals No. 279097.

PEOPLE v JOEY HUMPHREY, No. 134860; Court of Appeals No. 270450.

PEOPLE v LARRY JONES, No. 134861; Court of Appeals No. 279099.

PEOPLE v WALTONEN, No. 134862; Court of Appeals No. 278851.

PEOPLE v ROXIE ALLEN, No. 134864; Court of Appeals No. 279317.

PEOPLE v KENNEY WILLIAMS, No. 134868; Court of Appeals No. 278844.

PEOPLE v AARON CHAPMAN, No. 134871; Court of Appeals No. 265064.

PEOPLE v WITCZAK, No. 134873; Court of Appeals No. 278752.

PEOPLE v LYONS, No. 134874; Court of Appeals No. 278775.

PEOPLE v JEFFREY HUMPHREY, II, No. 134875; Court of Appeals No. 270451.

PEOPLE v DALGLIESH, No. 134878; Court of Appeals No. 278971.

ERBY v DELPHI AUTOMOTIVE SYSTEMS, No. 134881; Court of Appeals No. 276051.

PEOPLE v SLEEP, No. 134883; Court of Appeals No. 278999.

PEOPLE v CATHRON, No. 134884. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275974.

PEOPLE v DANA KENNEDY, No. 134886; Court of Appeals No. 269102.

PEOPLE v DILLAHUNTY, No. 134892; Court of Appeals No. 269691.

PEOPLE v HURT, No. 134903; Court of Appeals No. 275886.

PEOPLE v FRANTA, No. 134905; Court of Appeals No. 279164.

PEOPLE v RUTHERFORD, No. 134911; Court of Appeals No. 269690.

PEOPLE v DAWAN NEAL, No. 134916; Court of Appeals No. 278441.

PEOPLE v LESTER WILLIAMS, No. 134918; Court of Appeals No. 279148.

PEOPLE v FULTON, No. 134920; Court of Appeals No. 278848.

PEOPLE v DUNSON, No. 134927; Court of Appeals No. 268124.

PEOPLE v ERIC ANDERSON, No. 134929; Court of Appeals No. 268491.

PEOPLE v PURIFOY, No. 134930; Court of Appeals No. 279197.

PEOPLE v DEANGELO JONES, No. 134931. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278624.

PEOPLE v TESLEY, No. 134932. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 280021.

PEOPLE v AURICH, No. 134933; Court of Appeals No. 277964.

VAUGHN v SEVERSTAL NORTH AMERICA, INC, No. 134937; Court of Appeals No. 276695.

PEOPLE v BRUCE WILLIAMS, No. 134938. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279566.

PEOPLE v ORLANDO MAY, No. 134947. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277116.

PEOPLE v TURNER, No. 134970; Court of Appeals No. 279618.

PEOPLE v SUNDE, No. 134972; Court of Appeals No. 278849.

PEOPLE v JAMES WRIGHT, No. 134973; Court of Appeals No. 279030.

PEOPLE v SHANE SMITH, No. 134983; Court of Appeals No. 279312.

PEOPLE v WILLIAM WRIGHT, No. 134985; Court of Appeals No. 270538.

PEOPLE v DOMINE, No. 134988; Court of Appeals No. 278703.

PEOPLE v BRIAN ANDERSON, No. 134990; Court of Appeals No. 279290.

PEOPLE v CARETHERS, No. 134991; Court of Appeals No. 278366.

PEOPLE v JACOBSEN, Nos. 134999, 135014; Court of Appeals Nos. 279564, 279565.

PEOPLE v SCOTT-PARKIN, No. 135002; Court of Appeals No. 279315.

PEOPLE v SHAWN WILSON, No. 135003; Court of Appeals No. 267945.

MOORE & CARTER LUMBER REAL ESTATE COMPANY v HASSLER, No. 135005; Court of Appeals No. 267883.

PEOPLE v MICHAEL BROWN, No. 135045. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279697.

Interlocutory Appeal

Leave to Appeal Denied November 29, 2007:

PEOPLE v DALTON, No. 134753; Court of Appeals No. 276386.

Reconsideration Denied November 29, 2007:

SCHWARZE v DILWORTH, Nos. 132025, 132026. Leave to appeal denied at 480 Mich 853. Court of Appeals Nos. 257467, 257511.

CITY OF DETROIT v 17526 RIOPELLE, No. 133316. Leave to appeal denied at 479 Mich 860. Court of Appeals No. 269377.

PEOPLE v THURMAN JONES, No. 133317. Leave to appeal denied at 480 Mich 874. Court of Appeals No. 273193.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would reverse the judgment of the trial court for the reasons set forth in my dissenting statement in *People v Thurman Jones*, 480 Mich 874 (2007).

PEOPLE v REDMOND, No. 133334. Leave to appeal denied at 480 Mich 883. Court of Appeals No. 261458.

SCHILS v WASHTENAW COUNTY, SCHILS v WASHTENAW COMMUNITY HEALTH ORGANIZATION, AND SCHILS v WASHTENAW COUNTY OFFICE OF THE SHERIFF, Nos. 133427, 133497, 133498, 134113, 134290, 134291. Leave to appeal denied at 480 Mich 888. Court of Appeals Nos. 263938, 267650, 273104, 273428, 274231, 274664.

PEOPLE v OTIS, No. 133569. Leave to appeal denied at 480 Mich 886. Court of Appeals No. 275876.

KELLY, J. I would grant reconsideration.

PEOPLE v PARKER, No. 133638. Leave to appeal denied at 480 Mich 854. Court of Appeals No. 263276.

PEOPLE v WINBUSH, No. 133667. Leave to appeal denied at 480 Mich 854. Court of Appeals No. 264012.

PEOPLE v NIXON, No. 133678. Leave to appeal denied at 480 Mich 854. Court of Appeals No. 266033.

PEOPLE v RAND GOULD, No. 133684. Leave to appeal denied at 480 Mich 854. Court of Appeals No. 274982.

ROGERS v DEPARTMENT OF CORRECTIONS, No. 133799. Leave to appeal denied at 479 Mich 866. Court of Appeals No. 273287.

JENSEN v COCA COLA ENTERPRISES, INC, No. 133828. Leave to appeal denied at 479 Mich 866. Court of Appeals No. 272641.

PEOPLE v DADO, No. 133845. Leave to appeal denied at 480 Mich 855. Court of Appeals No. 266962.

BAZZETTA v DEPARTMENT OF CORRECTIONS, No. 133974. Leave to appeal denied at 480 Mich 857. Court of Appeals No. 275989.

PEOPLE v MASSEY, No. 134068. Leave to appeal denied at 480 Mich 859. Court of Appeals No. 267115.

PEOPLE v BURKE, No. 134111. Leave to appeal denied at 480 Mich 889. Court of Appeals No. 275110.

PEOPLE v BARNARD, No. 134132. Leave to appeal denied at 480 Mich 860. Court of Appeals No. 265068.

PEOPLE v BRANDON JOHNSON, No. 134165. Leave to appeal denied at 480 Mich 860. Court of Appeals No. 268413.

PEOPLE v OLA-TOKUMBO UNGER, No. 134324. Leave to appeal denied at 480 Mich 892. Court of Appeals No. 275246.

PEOPLE v JAMES WHEELER, No. 134379. Leave to appeal denied at 480 Mich 893. Court of Appeals No. 269790.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 30, 2007:

PEOPLE v OSANTOWSKI, No. 134244. 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 address whether, under MCL 777.49a, a threat must *itself* constitute an "act of terrorism," as defined by MCL 750.543b, in order for 100 points to be assessed under offense variable 20. The parties shall submit supplemental briefs within 42 days of the date of this order addressing this limited issue. The parties should avoid submitting mere restatements of their application papers. Court of Appeals No. 264368.

Leave to Appeal Granted November 30, 2007:

HERMAN v BERRIEN COUNTY, No. 134097. The motion to file brief amicus curiae is granted. The clerk of the Court is directed to place this case on the March 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than January 14, 2008, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than February 7, 2008. 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, with such briefs to be filed no later than February 21, 2008. Court of Appeals No. 273021.

WHITE v TAYLOR DISTRIBUTING COMPANY, INC, No. 134751. The parties shall include among the issues to be briefed whether the Court of Appeals majority correctly ruled that MCR 2.116(C)(10) permits a trial court to deny summary disposition to the moving party even though the opposing

party did not present countervailing evidence, on the ground that judgment is not appropriate under MCR 2.116(G)(4). The clerk of the Court is directed to place this case on the March 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than January 14, 2008, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than February 7, 2008. The Michigan Defense Trial Counsel, Inc., and the Michigan Association of Justice are invited to file briefs amicus curiae, to be filed no later than February 21, 2008. 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. 272114.

Summary Dispositions December 5, 2007:

ENGLISH GARDENS CONDOMINIUM, LLC v HOWELL TOWNSHIP, No. 132859. On November 8, 2007, the Court heard oral argument on the application for leave to appeal the November 28, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we affirm in part and reverse in part the judgment of the Court of Appeals. We reverse the holding that the township acted beyond the scope of § 20.15 of its ordinance in drawing on the letter of credit without first incurring compensable expenses. The ordinance did not prohibit the township from retaining some form of security to ensure compliance with the contract. The township did not violate its ordinance when it drew on the letter of credit. We affirm the Court of Appeals in all other respects. Accordingly, we reinstate the judgment of the Livingston Circuit Court. Reported below: 273 Mich App 69.

FROHRIEP v FLANAGAN, No. 134227. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals only with regard to defendants Jeremy Hughes and Frank Ciloski. MCL 691.1407(2) does not apply to these defendants because they are individual government employees who are not provided immunity under MCL 691.1407(5), and because the plaintiffs alleged intentional torts for which liability was imposed before July 7, 1986. MCL 691.1407(3) and *Sudul v Hamtramck*, 221 Mich App 455, 458 (CORRIGAN, J.); 480-481 (MURPHY, J.) (1997). We remand this case to the Court of Appeals for consideration of these defendants' remaining arguments. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion for oral argument is denied. Reported below: 275 Mich App 456.

PEOPLE v STAPLETON, No. 134912. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of the defendant's remaining issues. Court of Appeals No. 264175.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v SCHMITT, No. 134914. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of the defendant's remaining issues. Court of Appeals No. 264176.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v TROY DAVIS, No. 135048. 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. On remand, the Court of Appeals may, at its option, remand to the trial court for further proceedings, e.g., for factual determinations concerning the reasonable and customary hourly fees paid to experts of the type sought by the defendant, the hourly fees paid to the proposed defense expert by the prosecution in prior cases, and whether the fee cap set in this case effectively precludes the defendant from access to an expert witness. We further order that the trial not occur until the completion of this appeal. We do not retain jurisdiction. Court of Appeals No. 277870.

PEOPLE v MARKOS, No. 135387. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and we direct that court to decide the case on an expedited basis. The motion for stay is granted in part. We order that the previously scheduled trial not occur until the completion of this appeal. We do not retain jurisdiction. Court of Appeals No. 282211.

Leave to Appeal Denied December 5, 2007:

COOPER-REID v STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT, No. 133802; Court of Appeals No. 269254.

PEOPLE v TIPTON, No. 133931; Court of Appeals No. 276799.

PEOPLE v ANTOINE THOMAS, No. 134280; Court of Appeals No. 277305.

CAVANAGH, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v BRIAN ROGERS, No. 134287. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276801.

DOWELL v MARSACK, No. 134316; Court of Appeals No. 274532.

PEOPLE v ROEDER, No. 134432. Although the trial court improperly instructed the jury that it could consider MRE 404(b) testimony for the limited purpose of judging the believability of the testimony contrary to this Court's explicit instruction in *People v Sabin* (*After Remand*), 463 Mich 43, 69-70 (2000), defendant has failed to demonstrate prejudicial error where the prosecution presented a strong case against him, and the

MRE 404(b) evidence was properly admitted to show defendant's system, plan, or scheme in committing the acts. Court of Appeals No. 269785.

PEOPLE v PEREZ-GARCIA, No. 134452; Court of Appeals No. 275747. KELLY, J. I would grant leave to appeal.

PEOPLE v MIDDLETON, No. 134512; Court of Appeals No. 268265. KELLY, J. I would grant leave to appeal.

PEOPLE v HANSEND, No. 134519; Court of Appeals No. 275068.

PEOPLE v MARVIS ROBERTS, No. 134645; Court of Appeals No. 266650.

PEOPLE v FISH, No. 134694; Court of Appeals No. 269784.

Summary Dispositions December 7, 2007:

SIMPSON v BORBOLLA CONSTRUCTION & CONCRETE SUPPLY, INC, No. 133274. On November 8, 2007, the Court heard oral argument on the application for leave to appeal the January 25, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we vacate the opinion of the Court of Appeals because the panel erroneously held that *Rakestraw v Gen Dynamics Land Sys, Inc,* 469 Mich 220 (2003), does not apply to the facts of this case. We affirm the result reached by the Court of Appeals for the reasons stated in the Workers' Compensation Appellate Commission opinion. Reported below: 274 Mich App 40.

WEAVER, J. (*concurring*). I concur in the order vacating the Court of Appeals opinion but affirming the result of the opinion for the reasons stated in the Workers' Compensation Appellate Commission opinion. Although I dissented in *Rakestraw v Gen Dynamics Land Sys, Inc,* 469 Mich 220, 234 (2003), my dissent in that case is not inconsistent with the order.

KELLY, J. (*concurring in part and dissenting in part*). I concur in that part of the order affirming the result reached by the Court of Appeals. But I dissent from the order to the extent that it vacates the Court of Appeals decision. I believe that the Court of Appeals panel correctly analyzed the issue, and I would not vacate its published opinion.

ANSPAUGH v IMLAY TOWNSHIP, No. 133351. 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 Lapeer Circuit Court for further hearing, if necessary, and further findings of fact. The Court of Appeals engaged in appellate fact-finding when it concluded that "we too find that the I-2 zoning provided for by defendants is exclusionary," because "there is no direct route of travel" to the property zoned for I-2 use, and consequently "the I-2 land use siting provided by the township is not appropriate to foster the commercial uses to which land designated for I-2 uses must be put." 273 Mich App at 129-130. On remand, the Lapeer Circuit Court shall determine whether, as the Court of Appeals held, "the township's zoning ordinance effectively excludes

lawful and otherwise appropriate I-2 uses for which there is a demonstrated need," owing to the unsuitability for I-2 uses of the available routes of access to the I-2 zoned property within the township. In making this determination, the Lapeer Circuit Court shall consider whether there are available indirect routes that provide reasonably suitable access to the I-2 zoned property. We do not retain jurisdiction. Reported below: 273 Mich App 122.

PEOPLE v RONALD WHEELER, No. 134552. 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 vacate the defendant's felonious assault convictions. The prosecution originally charged the defendant with four counts of felonious assault, but later successfully moved to amend the information to instead charge four counts of assault with intent to commit murder. The defendant subsequently conceded in his opening statement before the jury that the conduct forming the basis of the charges against him might have amounted to felonious assault, but he contended that it did not amount to assault with intent to murder. The defendant's testimony was premised on his contention that, though firing his weapon in the air to convey to those he believed to be burglars that he was armed constituted felonious assault, he did not have the intent to commit murder. Felonious assault is a cognate lesser offense to assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486 (1979). Where the defendant was no longer charged with felonious assault, it was error for the trial court to grant the prosecution's request to instruct on this cognate lesser offense. *People v Cornell*, 466 Mich 335, 353-359 (2002). Moreover, even if the defendant's repeated objections to instructing the jury on felonious assault were insufficiently specific to preserve this issue, reversal is warranted because the instruction on felonious assault was plain error. *People v Otterbridge*, 477 Mich 875 (2006). Court of Appeals No. 267445.

CAVANAGH, J. I would vacate the conviction for possession of a firearm during the commission of a felony as well as the felonious assault convictions.

KELLY, J. (*dissenting*). I would vacate defendant's convictions of possession of a firearm during the commission of a felony and felonious assault. In *People v Vaughn*,[1] this Court held that juries may convict a defendant of felonious assault while acquitting him of a related felony-firearm charge. It noted that one element of the jury's power is its capacity for leniency. In *People v Lewis*,[2] this Court further explored the relationship between a felony-firearm offense and the underlying felony. It held that it is not necessary that a defendant be convicted of the underlying felony before a sentence for a felony-firearm conviction may be imposed. In doing so, this Court again cited the jury's power to be lenient.[3]

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[1] 409 Mich 463 (1980).

[2] 415 Mich 443 (1982).

[3] *Id*. at 449-453.

However, the jury's power to be lenient is not at issue here because the jury convicted defendant of both felony-firearm and the underlying felony. Therefore, the rationale of *Lewis* and *Vaughn* is inapplicable. In addition, this Court has noted that "*Lewis* does not grant an *appellate court* the option of reaching an inconsistent result."[4] However, the majority's decision in this matter does precisely that.

In this case, defendant's felony-firearm conviction is premised on a finding that he was guilty of an offense, felonious assault, for which he could not be properly charged. The jury should not have been instructed on that offense. Because defendant's felonious assault convictions should be vacated, the felony-firearm conviction should be vacated as well because it is necessarily premised on the felonious assault convictions. We should not base our decision here on the theory that it was permissible for the jury to render an inconsistent verdict. To do so overlooks this Court's responsibility to identify a logical interpretation for verdicts where possible.[5] A logical interpretation is possible in this case.

The jury could have found defendant guilty of felony-firearm in one of three ways: (1) by finding that he committed assault with intent to commit murder, even though it did not convict him of the crime, and by tying the felony-firearm conviction to that assault; (2) by finding that he committed assault with intent to commit great bodily harm, even though it did not convict him of that crime, and by tying the felony-firearm conviction to that assault; or (3) by finding that he committed and should be convicted of felonious assault and by tying the felony-firearm conviction to that crime.

Because this Court must presume consistent verdicts, it must presume that the jury followed the latter reasoning. This is the most logical explanation for the jury verdict, and it avoids a determination that the jury acted inconsistently.

Given that the jury should not have been instructed on felonious assault, the felonious assault convictions should be vacated. Because the felonious assault convictions should be vacated, the felony-firearm conviction, which is premised on the felonious assault convictions, should be vacated as well.

CORRIGAN, J. I would deny leave to appeal.

Leave to Appeal Denied December 7, 2007:

PEOPLE v PISCOPO, No. 127129. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 23, 2007. The application for leave to appeal the June 24, 2004, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 245835.

MARKMAN, J. (*dissenting*). I respectfully dissent. Defendant, a pastor of a church, was accused of second-degree criminal sexual conduct (CSC)

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[4] *People v Burgess*, 419 Mich 305, 311 (1984) (emphasis added).

[5] See *People v Tombs*, 472 Mich 446, 462-463 (2005).

after allegedly touching the complainant in a sexual manner during a religious ceremony. Although an estimated 100 people were present at the time of the alleged incident, no one corroborated the complainant's testimony that the touching occurred. Moreover, four eyewitnesses, as well as defendant, testified that the touching never happened. Because no physical evidence supported the complaint, the prosecutor's case boiled down to a credibility contest between the alleged victim on one side and the four eyewitnesses and defendant on the other side.

Defendant sought to admit evidence that the complainant had made prior false allegations of sexual abuse against another pastor and that the complainant also claimed to have been raped by a "demon." Although this evidence would almost certainly have cast light on the complainant's credibility, and despite the obvious relevance of her credibility, the trial court refused to admit this evidence. This decision was based, in significant part, on its conclusion that the rape-shield statute, MCL 750.520j, prevented the admission of defendant's proffered evidence. Defendant was eventually convicted on the lesser-included charge of fourth-degree CSC after the jury deliberated for $4\frac{1}{2}$ days.

This Court's decision to allow this conviction to stand effects a remarkable deprivation of justice by affirming a trial court decision that has denied defendant his fundamental right to mount an effective defense to the charges against him. If the trial court had admitted defendant's evidence suggesting that the complainant had made prior false allegations of sexual abuse and indicating that the complainant claimed to have been raped by a demon, a reasonable juror might well have considered this evidence relevant in assessing the credibility of the complainant, who was the exclusive source of evidence against defendant.

To ensure that a defendant can adequately defend himself, to safeguard the truth-seeking function of the criminal trial, and to prevent the conviction of an innocent person, criminal defendants are constitutionally guaranteed the right to confront witnesses against them, by subjecting adverse witnesses to "testing in the crucible of cross-examination." *Crawford v Washington*, 541 US 36, 61 (2004). Ordinarily, a defendant may engage in the most rigorous cross-examination to demonstrate a witness's bias or improper motivation to testify, or the witness's general or specific lack of credibility. This right of cross-examination constitutes the linchpin by which our criminal justice system facilitates the search for truth. Our decision today undermines this first principle of our judicial system by preventing defendant from offering evidence that might well have suggested to a reasonable juror that the principal evidence against defendant was unreliable or incredible.

The instant decision singles out one class of criminal defendants—those accused of sex offenses—and affords them a substantially diluted right of cross-examination, impeding the search for truth in these cases. In criminal trials, " '[t]he special concern with fairness for the defendant . . . stems from the special abhorrence of erroneous conviction.' " *People v Anstey*, 476 Mich 436, 456 (2006) (citation omitted). "The American criminal justice system rightly sets the ascertainment of truth and the protection of innocence as its highest goals." *Harvey v Horan*, 285 F3d 298, 299 (CA 4, 2002). "[A] basic premise of our judicial system [is that]

providing more, rather than less, information will generally assist the jury in discovering the truth." *Anstey*, *supra* at 457.

I would reverse the trial court's decision that barred the admission of defendant's evidence. The trial court erred by concluding that the rape-shield statute applied to this case. It further erred by ruling that defendant's proposed evidence was irrelevant and prejudicial. As a result, defendant was deprived of any effective defense and denied his constitutional right of confrontation under the constitutions of the United States and Michigan.

I. FACTS AND PROCEDURAL HISTORY

Defendant was the pastor of a church. In 2001, the complainant attended a "deliverance" ceremony at the church, a ceremony that was intended to expel evil spirits from the participants. An estimated 100 people were present. Of those present, about 20 to 30 were participants from whom evil spirits were to be expelled; the remaining persons were church workers and volunteers who were facilitating the ceremony. On the morning of the deliverance, the complainant filled out a questionnaire at the church about herself. In the questionnaire, the complainant alleged that her father, who was also a pastor, had sexually abused her for a 10-year period. The questionnaire also indicated that the complainant alleged that she had been raped by a demon as a teenager, and that demons continued to torment her by grabbing her ankles in the basement.

During the deliverance, all 100 persons present for the deliverance congregated in a room. Each person to be "delivered" would sit on a folding chair, while church workers would either sit across from each participant or stand to either side. During the three-hour deliverance, church workers prayed with and yelled at participants, and lightly struck them to drive out the evil spirits. Participants apparently were expected to shake, cry, and possibly vomit. The complainant stated that, during the deliverance, she refused to participate by screaming or crying. As a consequence, she alleged that defendant approached her with two other male church workers. These two workers held her by the arms, while defendant stood behind her. According to the complainant, defendant then rubbed her arms, legs, hair, breasts, and vaginal area.

Defendant was charged with two counts of second-degree CSC with regard to the complainant. Defendant was also charged with three counts of fourth-degree CSC with regard to two other alleged victims, who also alleged improper touching by defendant during previous religious ceremonies. Defendant sought to admit the questionnaire into evidence, as well as evidence that suggested that the allegations against the complainant's pastor-father were false. Defendant sought to introduce the statements regarding the demon-rape to suggest that the complainant's testimony was unreliable. The trial court refused to admit any of this evidence, citing the rape-shield statute. The trial court also held that the evidence was not relevant and constituted inadmissible hearsay.

Although defendant acknowledged that he had touched the complainant's arms and legs, and had placed his hands on her head to pray, defendant denied having touched her breasts or vaginal area. Four other eyewitnesses, who had been immediately present while defendant was near the complainant, testified that no such touching occurred. None of the other estimated 100 people in the conference room testified that they had seen any inappropriate touching. After deliberating for 4½ days, the jury acquitted defendant of the five charges brought against him; however, defendant was convicted of one count of fourth-degree CSC with regard to complainant, that offense being a lesser-included offense of second-degree CSC.

The Court of Appeals affirmed, asserting that the disputed evidence was not relevant because the demon-rape and the allegations against complainant's father were "markedly different from [complainant's] allegations against defendant." *People v Piscopo*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2004 (Docket No. 245835), p 6. Hence, the trial court had "properly excluded the questionnaire evidence as irrelevant and contrary to the rape-shield laws." *Id.* Defendant appealed to this Court, and this case was held in abeyance for *People v Jackson*, 477 Mich 1019 (2007). After *Jackson* was decided, this Court granted leave to appeal. 478 Mich 860 (2007).

II. RAPE-SHIELD LAW

The first issue is whether the rape-shield statute, MCL 750.520j, categorically bars the admission of defendant's proffered evidence, consisting of the complainant's allegations of prior abuse and description of the demon-rape. MCL 750.520j states:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Whether particular evidence implicates the rape-shield statute thus hinges on whether that evidence constitutes "specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, [or] reputation evidence of the victim's sexual conduct . . . ." The statute does not define the term "conduct." See MCL 750.520a (defining other statutory terms for the chapter of the Michigan Penal Code concerning criminal sexual conduct). Hence, it is appropriate to consider relevant dictionary definitions to determine the actual meaning of the

term. *Woodard v Custer*, 476 Mich 545, 561 (2006). The term "conduct" is defined as "personal behavior; way of acting; deportment." *Random House Webster's College Dictionary* (1997). The term "behavior" means "the manner of conducting oneself." *Id.* These definitions suggest that "conduct" refers to volitional actions undertaken by a person; such actions would constitute "personal behavior" and "conducting oneself." Thus, "conduct" does not seem to encompass prior sexual abuse, which is involuntary and not a person's "behavior."

This conclusion is buttressed by further analysis of the statute. The term "conduct" is given meaning by its other uses in statutes in the same chapter of the penal code that criminalize "criminal sexual conduct." For example, MCL 750.520d states that a person is guilty of "criminal sexual conduct in the third degree" if that person

> engages in sexual penetration with another person and if any of the following circumstances exist:
>
> (a) [t]hat other person is at least 13 years of age and under 16 years of age.

If "conduct" referred to passive or involuntary activity, then a girl who was raped by a 15-year-old boy would *herself* be guilty of third-degree CSC under the law. However, such an outcome would obviously be absurd and illogical. Hence, the use of "conduct" throughout the relevant statute suggests strongly that the Legislature must have intended "conduct" to refer to volitional behavior and that the term does not encompass involuntary sexual abuse.

Finally, MCL 750.520j distinguishes between "sexual conduct" and "sexual activity" by preventing the admission of "specific instances of the victim's sexual *conduct*" but permitting the admission of "specific instances of the victim's sexual *activity* showing the source or origin of semen, pregnancy, or disease." (Emphasis added.) By using the different terms "conduct" and "activity," the Legislature distinguished between two types of actions. The term "activity" means "1. the state or quality of being active; 2. energetic activity; animation; liveliness." *Random House Webster's College Dictionary* (1997). "Activity" thus refers to a significantly broader sphere of events than "conduct," because "conduct" connotes volition, while "activity" merely connotes some degree of action. By using these terms, the Legislature further indicated that "conduct" refers to volitional activity. This understanding is consistent with the motivating idea of the rape-shield statute, which was to prevent irrelevant inquiries into the sexual histories of victims of criminal sexual conduct.

Because "conduct" requires some volitional element, the rape-shield statute does not apply at all to defendant's proffered evidence. The alleged abuse by the complainant's father and the alleged demon-rape did not implicate voluntary activity on the part of the complainant, and hence could not fairly be described as "conduct" on the part of the complainant within the scope of MCL 750.520j.

Moreover, "testimony concerning prior false allegations does not implicate the rape shield statute." *Jackson*, *supra* at 1019. Defendant offered evidence that the pastor-father denied the allegations made against him by the complainant, thereby raising the question whether the allegations against the pastor-father were false. Similarly, with regard to the demon-rape, jurors should have been permitted to determine whether this allegation was true or false. In neither case did such evidence even implicate the rape-shield statute, and both the trial court and the Court of Appeals erred by concluding that the statute barred admission of the evidence.

III. RELEVANCE

Even though the rape-shield statute does not bar the admission of defendant's evidence, the proposed evidence must still be relevant in order to be admitted. Both the trial court and the Court of Appeals also held that defendant's evidence was not relevant. "A trial court's decision to admit evidence is . . . reviewed for an abuse of discretion." *Barnett v Hidalgo*, 478 Mich 151, 158-159 (2007). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. at 158.

MRE 401 states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Following this definition of "relevant evidence," MRE 402 then states that "[a]ll relevant evidence is admissible . . . ." However, MRE 403 creates exceptions to the admissibility of relevant evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Even if defendant's proposed evidence is not barred by MCL 750.520j, defendant must nonetheless demonstrate that the evidence is relevant and not rendered inadmissible under MRE 403.

With regard to the complainant's allegations against her father, defendant argued at trial that this evidence was admissible because it suggested that the complainant had made prior false allegations. Prior false allegations shed obvious light on a complainant's credibility. Because the complainant's credibility was the critical issue at trial, and indeed virtually the dispositive issue, evidence bearing on her credibility would clearly "make the existence of any fact that is of consequence to

the determination of the action more probable or less probable," and hence would be relevant under MRE 401. See *Jackson*, *supra*; *People v Hackett*, 421 Mich 338, 348 (1984) (stating that evidence of prior false allegations would "not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation").

Defendant also contends that the prior allegations against the complainant's father were relevant to demonstrate the victim's state of mind, namely, to support an inference that the victim may associate men of the cloth, exercising religious authority over her, with abuse, and that she transferred her experiences or perceptions with regard to her father to her experience with defendant. Jurors thus might conclude that the complainant would be prone to viewing innocent actions of this pastor through a sexual prism. Defendant asserts that on the basis of this theory as well, the complainant's credibility might be called into question and therefore the evidence would be relevant.

Concerning the demon-rape, defendant similarly offered this evidence to demonstrate that the complainant had made prior false allegations. The complainant stated on the day of her "deliverance" that she had been raped by a demon in her attic when she was 17 years old. Jurors are entitled to assess the complainant's credibility using such evidence. See *United States v Jones*, 49 MJ 85, 88 (CAAF, 1998) (holding that evidence that the complainant used a Ouija board and saw demons and spirits was relevant for determining "defects in [the complainant's] capacity to observe events, remember them, and communicate them").

Because the evidence proffered by defendant was clearly relevant to the central issue in his criminal trial—the credibility of the lone witness against him—the trial court's determination to the contrary, in my judgment, was well outside the range of principled outcomes and therefore constituted an abuse of its discretion.

Once evidence is found to be relevant, a court must determine whether MRE 403 nonetheless excludes the relevant evidence as "unfairly prejudicial." " 'Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.' " *Waknin v Chamberlain*, 467 Mich 329, 334 n 3 (2002), quoting *People v Crawford*, 458 Mich 376, 398 (1998). In this case, the proffered evidence cannot reasonably be described as merely "marginally probative." Rather, the central issue in this case was credibility—the complainant's word against the word of defendant and four eyewitnesses. Hence, any evidence bearing on the credibility of complainant or defendant would have been extremely probative one way or the other. Moreover, because of the critical nature of evidence regarding credibility, the jury could hardly have given such evidence "undue weight" in this case. Instead, the probative value of the evidence was high and the potential prejudice was low. Further, any potential prejudice resulting from the admission of the evidence could have been cured by an appropriate limiting instruction from the trial court. Therefore, the prejudicial nature of the proffered evidence did not "substantially outweigh" its probative value.

For these reasons, I continue to believe that the trial court abused its discretion in preventing the jury from evaluating defendant's evidence. Therefore, I would reverse and remand for a new trial at which defendant would be allowed to present his proffered evidence on cross-examination.[1]

IV. CONFRONTATION CLAUSE

This case presents more than an abuse of discretion by the trial court, however. Even if one disagrees with the analysis of the rape-shield statute offered above, reversal of the trial court's exclusion of evidence is still required because that exclusion violated defendant's constitutional right of confrontation, thereby depriving defendant of the ability to adequately defend himself against complainant's accusations. Further, the trial court's understanding of the rape-shield statute, as well as this Court's apparent understanding of that statute, threatens to deprive future defendants in sexual-offense cases of the ability to fully respond to allegations made against them.

The Confrontation Clause of the Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" See also Const 1963, art 1, § 20. The United States Supreme Court has held that " '[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' " *Davis v Alaska*, 415 US 308, 315-316 (1974) (citation omitted). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id*. at 316. A defendant must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id*. at 318. In other words, "the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v Ritchie*, 480 US 39, 51-52 (1987). The Confrontation Clause is "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id*. at 52. As the Sixth Circuit Court of Appeals recently concluded, the Confrontation Clause "affords the right to impeach a witness . . . , subject to the trial court's discretion to impose reasonable limitations to prevent harassment and annoyance of the witness," even if such impeachment evidence "goes only to the witness's credibility." *Vasquez v Jones*, 496 F3d 564, 571 (CA 6, 2007). Of course, the Confrontation Clause does not "prevent[] a trial judge from imposing any limits on defense counsel's inquiry . . . ." *Delaware v Van Arsdall*, 475

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[1] The trial court also ruled that defendant's evidence constituted hearsay. Once again, I disagree. To the extent that the evidence was offered to suggest that the complainant had made false allegations of sexual abuse, such evidence was not offered "to prove the truth of the matter asserted." MRE 801(c).

US 673, 679 (1986). A trial court may still "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id*.

In the instant case, the trial court prevented defendant from cross-examining the complainant with regard to evidence that might have reflected adversely on the complainant's credibility. Thus, the trial court denied defendant the ability to show that the complainant's testimony was "exaggerated or unbelievable," and denied the jurors, "the sole triers of fact and credibility," the ability to "draw inferences relating to the reliability of the witness." Because the prosecutor's case hinged solely on the credibility of the complainant, defendant was not given the opportunity to effectively cross-examine the complainant's testimony. Moreover, the proffered evidence was highly relevant, not cumulative of other evidence, and would not have been unfairly prejudicial. Any possibility of "confusion of the issues" could have been alleviated in the normal course by a proper jury instruction. Thus, by unduly restricting defendant's ability to cross-examine the complainant on the most critical issue in this case, the trial court violated defendant's rights under the confrontation clauses of the federal and state constitutions.

A Confrontation Clause error does not require reversal if the error was harmless. The United States Supreme Court has stated:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. [*Van Arsdall*, *supra* at 684.]

In this case, the complainant's testimony was central to the prosecutor's case, and no other evidence corroborated the complainant's version of events. The defendant's testimony suggesting the falsity of the complainant's *prior allegations of sexual abuse in this sexual-abuse prosecution* were in no way cumulative of any other evidence offered at trial and could not have been more relevant to the jury in determining the truthfulness of the complainant's testimony. In short, the prosecutor's case depended on the credibility of the complainant, and it is reasonable to conclude that admission of the defendant's evidence would likely have caused a different result. Hence, the Confrontation Clause error was not harmless. By violating defendant's right of confrontation, the trial court denied defendant the ability to respond fully to the criminal charges against him. Consequently, I would reverse the trial court's exclusion of defendant's evidence even if the rape-shield statute precludes the admission of such evidence, which I do not believe it does.

V. CONCLUSION

Today's decision denies to defendant, an accused sex offender, the same constitutional right to fully defend himself that is granted to accused murderers, burglars, arsonists, and carjackers. It is precisely because sex offenses are so destructive to their victims and so understandably stigmatizing to their perpetrators that the law cannot permit persons to be convicted of these offenses by applying something other than traditional standards of due process. By holding that leave was improvidently granted, this Court rejects the opportunity to authoritatively resolve how the rape-shield statute should be interpreted. Under the contorted and unconstitutional interpretation of the rape-shield statute now countenanced by this Court, the accused sex offender, alone among criminal defendants, is to be restricted in his ability to defend himself—even in a case in which it is his word against the word of another—by being deprived of the ability to fully call into question the credibility of his accuser. And, make no mistake about it, the accuser's credibility in this case is highly dependent on what is made of her allegations of sexual abuse against her father and her claim of having been subject to a demon-rape. I cannot conceive of a reasonable juror—whatever ultimate effect he might accord to this evidence—who would not find it pertinent and helpful in forming a judgment.

Our adversarial system of justice "is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.' " *Penson v Ohio*, 488 US 75, 84 (1988) (citation omitted). To accomplish this goal of ascertaining guilt, the right of defendants to cross-examine adverse witnesses has been protected as the " 'greatest legal engine ever invented for the discovery of truth.' " *California v Green*, 399 US 149, 158 (1970) (citation omitted). If the truth cannot be discovered, then the guilty cannot be punished and the innocent cannot be set free, and the criminal justice system cannot succeed in its essential mission.

I would reverse the trial court's decision that barred the admission of defendant's evidence and remand for a new trial.

CAVANAGH, J. I join the statement of Justice MARKMAN.

CARTER v CITY OF ANN ARBOR, No. 131823; reported below: 271 Mich App 425.

MARKMAN, J. (*dissenting*). The veterans' preference act states that "[i]n every public department and upon the public works of the state and of every county and municipal corporation thereof[,] honorably discharged veteran[s] . . . shall be *preferred* for appointment and employment." MCL 35.401 (emphasis added). However, to be "preferred," a veteran must possess "other requisite qualifications." *Id.* This Court has never fully considered the nature and extent of the veterans' preference. Is a veteran to be preferred only if all things are "equal and comparable" between applicants? Are things ever truly "equal and comparable" between applicants when a public employer may consider subjective factors and not merely objective factors such as test scores? If the preference pertains to circumstances in which applicants are not "equal

and comparable," when would this be so? How substantial would the preference be in such circumstances? Are "requisite qualifications" to be viewed in an "either/or" sense, such that an applicant is either qualified or not qualified, or are qualifications to be evaluated along a continuum, such that an applicant may be viewed as being *better* or *less* qualified than another? If the latter is the proper understanding, when would the preference apply and how substantial would it be? Are standards required to ensure that the preference is given genuine effect, or is it sufficient that courts defer to the judgments of individual public employers? Is greater or lesser judicial scrutiny required of employment decisions implicating the veterans' preference than is required of other public employment decisions, such as those pertaining to nondiscrimination laws? The veterans' preference act is worthy of thorough review and of an authoritative interpretation that gives it practical and effective meaning. Accordingly, I would grant leave to appeal.

In re BORGHESE (BORGHESE V MICHIGAN CHILDREN'S INSTITUTE), No. 135134; Court of Appeals No. 274337.

METCALF (DEPARTMENT OF HUMAN SERVICES V NIEMINEN), Nos. 135275, 135276; Court of Appeals Nos. 276846, 276847.

PETTINEO V SCIENTIFIC IMAGE CENTER STAFFING, INC, No. 135391; Court of Appeals No. 281729.

MARKMAN, J. I would stay the trial and remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal December 13, 2007:

MINTER V CITY OF GRAND RAPIDS, No. 133988. We direct the clerk to schedule oral argument during the January 2008 session 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 majority correctly applied *Kreiner v Fischer*, 471 Mich 109 (2004), in partially reversing the Kent Circuit Court's order granting the defendants' motion for summary disposition. The parties may file supplemental briefs no later than January 4, 2008, but they should not submit mere restatements of their application papers. Reported below: 275 Mich App 220.

Leave to Appeal Granted December 13, 2007:

In re MILTENBERGER ESTATE (EIFLER V SWARTZ), No. 133847. The parties are to discuss whether the dower election in MCL 700.2202(2)(c), as defined in MCL 558.1, violates the equal protection clauses of the Michigan and federal constitutions as set forth in Const 1963, art 1, § 2 and the Fourteenth Amendment of the United States Constitution. The clerk of the Court is directed to place this case on the April 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than January 28, 2008, and appellees' brief and

appendix, if appellees choose to submit an appendix, must be filed no later than February 21, 2008. 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, to be filed no later than March 6, 2008. Reported below: 275 Mich App 47.

SBC MICHIGAN v PUBLIC SERVICE COMMISSION, Nos. 134493, 134500. The parties shall include among the issues to be briefed: (1) what legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview; (2) whether the Court of Appeals erred in deferring to the Michigan Public Service Commission's interpretation of MCL 484.2502(1)(a); (3) whether the commission abused its discretion in applying this statutory provision to a carrier's diagnostic mistakes; and (4) whether the Court of Appeals erred in holding that the commission lacks the jurisdiction to prohibit the imposition of a fee for a carrier's inspection of its own services when that inspection eliminates the carrier as the cause of a service disruption. The parties shall detail the relationship between state regulatory authority and federal authority regarding deregulation in addressing the last question. The clerk of the Court is directed to place this case on the March 2008 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than January 25, 2008, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than February 15, 2008. 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, to be filed no later than February 27, 2008. Reported below: 276 Mich App 55.

Summary Dispositions December 14, 2007:

GOWER v HARKEMA, Nos. 128158, 128159. By order of April 13, 2007, the application for leave to appeal the January 25, 2005, and February 1, 2005, orders of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the orders of the Court of Appeals, reinstate the order of the Ingham Circuit Court denying defendants' motion for summary disposition, and remand this case to the Ingham Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals Nos. 256824, 257967.

MCCLENDON v APOSTOLOU, No. 129228. By order of April 13, 2007, the application for leave to appeal the June 28, 2005, order of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals, reinstate

the order of the Wayne Circuit Court denying the defendants' motion for summary disposition, and remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 260583.

COSTA v GAGO, No. 130318. By order of April 13, 2007, the application for leave to appeal the December 6, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the order of the Washtenaw Circuit Court denying the defendant's motion for summary disposition, and remand this case to the Washtenaw Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 256673.

MCLEAN v MCELHANEY, No. 130376. By order of April 4, 2007, the application for leave to appeal the December 13, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Chippewa Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. 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. Reported below: 269 Mich App 196.

POWELL v OAKWOOD HEALTHCARE, INC, No. 130452. By order of April 13, 2007, the application for leave to appeal the December 22, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 263639.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

AMON v BOTSFORD GENERAL HOSPITAL, No. 130484. By order of April 13, 2007, the application for leave to appeal the December 27, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment

of the Court of Appeals, reinstate the order of the Oakland Circuit Court denying the defendants' motion for summary disposition, and remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 260252.

JORDAN v MERCY MEMORIAL HOSPITAL, No. 131670. By order of April 13, 2007, the application for leave to appeal the April 25, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Monroe Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 259224.

FORSYTH v HOPPER, No. 132446. By order of April 4, 2007, the application for leave to appeal the August 3, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the order of the Wayne Circuit Court denying the defendants' motion for summary disposition, and remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 263378.

WARD v SIANO, No. 132797. By order of April 4, 2007, the application for leave to appeal the November 14, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Ingham Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Reported below: 272 Mich App 715.

GREEN v PIERSON, No. 132917. By order of May 30, 2007, the application for leave to appeal the November 30, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Berrien Circuit Court for entry of an order

denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 257802.

TAYLOR v YALAMANCHI, Nos. 133305-133307. By order of May 30, 2007, the application for leave to appeal the January 18, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the order of the Oakland Circuit Court denying defendants' motion for summary disposition, and remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals Nos. 262763, 262771, 262777.

HADDAD v MAMMO, No. 133597. By order of September 24, 2007, the application for leave to appeal the February 27, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Macomb Circuit Court for entry of an order denying the defendant's motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 266646.

JONES v DETROIT MEDICAL CENTER, Nos. 133626, 133627. By order of September 24, 2007, the application for leave to appeal the January 4, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the order of the Wayne Circuit Court denying the defendants' motion for summary disposition, and remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. 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 Nos. 262343, 262347.

BROOKSHIRE v PATEL, Nos. 133750, 133751. By order of September 24, 2007, the application for leave to appeal the March 15, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the order of the Washtenaw Circuit Court denying the defendants' motion for summary disposition, and

remand this case to the Washtenaw Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals Nos. 257214, 257629.

HOFFMAN v BARRETT, No. 134295. By order of October 29, 2007, the application for leave to appeal the May 22, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Calhoun Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 258982.

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE (WAYNE COUNTY TREASURER v WATSON), No. 134608. 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 reinstate the June 10, 2005, order of the Wayne Circuit Court that set aside the foreclosure sale and provided other relief. The foreclosure sale of publicly owned property is prohibited. MCL 211.7*l*; MCL 211.78g(1). The Wayne County Treasurer had reason to know that the property was publicly owned during the tax years that led to the tax foreclosure, because the county was engaged in litigation with the state of Michigan concerning tax liability and other matters pertaining to the property. Further, prior to the property being sold to the respondent, a settlement of the litigation required removal and rescission of the assessments that were the basis for the foreclosure sale. Court of Appeals No. 265426.

MARKMAN, J. (*dissenting*). I would deny leave to appeal in this case because the state of Michigan received notice of the action to foreclose its property and failed to protect its interests. The trial court lacked jurisdiction to grant relief under MCR 2.612(C) when there was no due process violation.

The state purchased the property at issue in 1989, and the warranty deed was recorded. The Wayne County Treasurer mistakenly taxed the property and, in June 2003, instituted foreclosure proceedings based on the 2001 tax year and some previous tax years. In December 2003, the state filed a complaint to quiet title and to settle the tax issue. On March 5, 2004, while the case was pending, the county treasurer was granted a foreclosure of the property. On April 21, 2004, the state's case was settled, with property taxes being rescinded and the county being obligated to take steps to reverse the sale of the foreclosed property. Despite this, the county treasurer auctioned the property on April 27, 2004, and respondent Watson purchased the property. Watson recorded the deed on November 1, 2004.

On January 20, 2005, the county treasurer filed a motion to set aside the foreclosure judgment and the auction sale. The state also filed a motion to set aside the foreclosure judgment on February 25, 2005. The trial court granted these motions. The Court of Appeals reversed,

concluding that the trial court lacked the authority to set aside the foreclosure. The Court of Appeals agreed that the property was exempt from taxation and should not have been subject to foreclosure. However, the state was aware of the foreclosure proceedings and did not object, failing to avail itself of its rights under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. The Court of Appeals also held that the trial court's authority under MCR 2.612(C) to set aside a foreclosure judgment is limited to proceedings that are invalidated by a due process violation.

MCL 211.78g(1) states, in pertinent part:

> A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of property from forfeiture under this subsection shall be determined by the state tax commission.

The state cites an April 17, 2002, State Tax Commission bulletin, which provides:

> A property owned by the U.S. Government, the State of Michigan, a county, a city, a village or a township shall be withheld from foreclosure.
>
> Procedure: If the property is forfeited in error, the County Treasurer removes all of the fees attached to the parcel, files a certificate of cancellation of forfeiture (form 3839) with the Register of Deeds. Notifies the State Treasurer and the Contractor of the error. The State Treasurer will withhold the parcel from foreclosure and stop all title work on the parcel.

In this case, the Court of Appeals acknowledged that the county treasurer had failed to comply with the bulletin, but found that even if public property *should* be withheld from foreclosure, that did not mean that it *cannot* be foreclosed under the GPTA. I agree. In this case, the property was forfeited in error, the county treasurer did not cancel the forfeiture, the property was foreclosed, and the property was sold to a third party. The bulletin does not provide a remedy for property foreclosed in error that is sold to a third party. There is no language stating that such a foreclosure is void or that the foreclosure falls outside the realm of the GPTA. And there is nothing in the GPTA exempting state property from its provisions. Indeed, should the State Tax Commission revoke its bulletin, state property would then be treated no differently under the GPTA than any other property. Once the property was foreclosed, the county treasurer had fee simple title to the property, which was transferred to Watson pursuant to MCL 211.78k.

MCL 211.78k(6) provides, in pertinent part:

> [F]ee 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 . . . 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 state did not pursue the remedy available in subsection 7 by appealing the foreclosure judgment in the Court of Appeals. Subsection 9 provides:

> After the entry of a judgment foreclosing the property under this section, if the property has not been transferred under section 78m to a person other than the foreclosing governmental unit, a foreclosing governmental unit may cancel the foreclosure by recording with the register of deeds for the county in which the property is located a certificate of error in a form prescribed by the department of treasury, if the foreclosing governmental unit discovers any of the following:
>
> (a) The foreclosed property was not subject to taxation on the date of the assessment of the unpaid taxes for which the property was foreclosed . . . . [MCL 211.78k(9).]

The county treasurer did not cancel the foreclosure in this case before the property was sold to Watson.

This Court considered the constitutionality of MCL 211.78k(6) in *In re Petition by Wayne Co Treasurer*, 478 Mich 1 (2007) (*Perfecting Church*). In *Perfecting Church*, the county treasurer failed to comply with the notice provisions of the GPTA when it foreclosed the church's property. *Id*. at 5. This Court considered whether MCL 211.78k(6) deprived the circuit court of jurisdiction to alter the judgment of foreclosure under MCR 2.612(C) when a property owner does not redeem the property or appeal the foreclosure judgment within 21 days:

> [The intervening parties] 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.
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> [13] The recent amendments of the GPTA add further support to this conclusion. See MCL 211.78k(5)(g).
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> [*Id.* at 8 (third emphasis added).][1]

This Court went on to hold that, to the extent the statute limited the trial court's jurisdiction to modify judgments of foreclosure when property owners are denied due process, the statute is unconstitutional:

> [I]n 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 court's jurisdiction to modify judgments of foreclosure is *unconstitutional and unenforceable as applied to property owners who are denied due process*. [*Id.* at 10-11 (second emphasis added).]

Perfecting Church did not purport to rule that MCL 211.78k was unconstitutional in any respect other than cases in which there is a due process violation.

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[1] MCL 211.78k(5)(g) provides:

> 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.

There is no due process claim in this case. The state knew about the foreclosure proceedings and auction and chose to file a separate suit rather than objecting to the foreclosure action. While the property should never have had property taxes assessed in the first place, MCL 211.7*l*, and the county treasurer auctioned the property in violation of the settlement agreement in the separate case, I agree with the Court of Appeals that the state neglected to pursue its available remedies under the GPTA to protect its interest.[2] Given the holding in *Perfecting Church*, the trial court did not have jurisdiction to grant relief under MCR 2.612(C) when there was no due process violation.

In conjunction with *Perfecting Church*, the instant decision renders the purchase of foreclosed property less certain and more tentative. However, while *Perfecting Church* was compelled by the constitution, there is neither a constitutional nor a statutory imperative for the present decision.

Leave to Appeal Denied December 14, 2007:

UMBARGER v HAYES GREEN BEACH MEMORIAL HOSPITAL CORPORATION, No. 134011. By order of September 24, 2007, the application for leave to appeal the March 1, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered, and it is denied, because the plaintiff is not within the class of plaintiffs entitled to relief under this Court's order in *Mullins*. Court of Appeals No. 264699.

ERNSTING v AVE MARIA COLLEGE, No. 134444. We are not persuaded that the questions presented should be reviewed by this Court. We take this opportunity to note that, although we generally agree with the approach in the Court of Appeals majority opinion, it was unnecessary for that opinion to state, 274 Mich App 506, 518 (2007), that "remedial statutes like the WPA [Whistleblowers' Protection Act] are liberally construed in favor of the persons intended to be benefited, *Brown v Mayor of Detroit*, 271 Mich App 692, 706; 723 NW2d 464 (2006)." Rather, as this Court later stated in its own opinion in *Brown*, 478 Mich 589, 593-594, when addressing the same statutory provision that is at issue in this case, MCL 15.361(d), "[t]he statutory language in this case is unambiguous," and "[i]f the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." Reported below: 274 Mich App 506.

CAVANAGH, J. I would deny leave to appeal.

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[2] This case can be distinguished from *Detroit Bldg Authority v Wayne Co Treasurer*, 480 Mich 897 (2007), in which the plaintiff city did not receive notice and was therefore deprived of an opportunity to protect its interests under the GPTA.

WEAVER, J. I would simply deny leave to appeal because I am not persuaded that the questions presented should be reviewed by this Court.

KELLY, J. (*concurring in part and dissenting in part).* I concur in the decision to deny leave to appeal. But I dissent from that part of the order admonishing the Court of Appeals majority for utilizing the canon of construction that calls for remedial statutes to be construed liberally. I disagree with including that statement for two reasons. First, because it is completely unnecessary to the resolution of the case, it has no force and, therefore, adds nothing to the order. Second, the canon that remedial statutes must be liberally construed is one of the oldest and most respected tools of construction in all the law. It was perfectly appropriate for the Court of Appeals majority to employ it in this case.

This canon of statutory construction can be traced to the 1584 decision in *Heydon's Case*.[1] That decision set forth the rule that, when statutes are enacted in response to "defect[s] for which the common law did not provide,"[2] courts should identify the problem prompting the legislative enactment and apply the statute in a manner that would "suppress the mischief, and advance the remedy . . . ."[3] The decision in *Heydon's Case* was expanded on by Blackstone, who declared that statutes are " 'either declaratory of the common law, or remedial of some defects therein.' "[4] Blackstone reasoned that, when statutes are remedial in purpose, courts should give them a liberal interpretation in order to carry out the intent the lawmakers had in enacting them.[5]

Today, the canon that remedial statutes shall be liberally construed is deeply embedded in American jurisprudence. As I discussed in my concurring opinion in *Haynes v Neshewat*,[6] courts in all 50 states and in each federal circuit have utilized it. The United States Supreme Court has also used the canon to interpret numerous federal laws. And this Court has employed the rule for nearly 150 years.[7]

Given this canon's long history and wide acceptance, and because the Whistleblowers' Protection Act is remedial in nature, it was entirely appropriate for the Court of Appeals majority to apply the canon in this case. And although the members of the majority can reject the tool for themselves, they should not scold other judges for choosing not to do the same.

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[1] Blake A. Watson, *Liberal construction of CERCLA under the remedial purpose canon: Have the lower courts taken a good thing too far?*, 20 Harv Envtl L Rev 199, 229 (1996).

[2] *Heydon's Case*, 76 Eng Rep 637, 638 (Ex 1584).

[3] *Id.*

[4] *Watson*, *supra* at 230, quoting 1 Blackstone, Commentaries.

[5] *Id.*

[6] *Haynes v Neshewat*, 477 Mich 29, 42-44 (2007) (KELLY, J., concurring).

[7] See *Shannon v People*, 5 Mich 36, 48 (1858) ("[A] remedial statute- . . . should be construed liberally for the advancement of the remedy.").

Reconsideration Denied December 17, 2007:

GRACE v LEITMAN, No. 131035. Leave to appeal denied at 480 Mich 913. Court of Appeals No. 257896.

KELLY and YOUNG, JJ. We would grant reconsideration.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal December 20, 2007:

WILLER v TITAN INSURANCE COMPANY, No. 133596. We direct the clerk to schedule oral argument during the March 2008 session calendar on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the defendant was entitled to summary disposition because of the absence of a genuine issue of material fact as to whether the causal connection between the plaintiff's injuries and her scraping the windshield of her vehicle was anything beyond "incidental, fortuitous or 'but for' " such that the injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" within the meaning of MCL 500.3105(1). The parties may file supplemental briefs no later than February 7, 2008, but they should not submit mere restatements of their application papers. Court of Appeals No. 273805.

Leave to Appeal Granted December 20, 2007:

PEOPLE v HORTON, No. 135021. The parties shall address: (1) whether the serologist's testimony regarding nontestifying technicians' findings and reports was "testimonial" within the meaning of *Crawford v Washington*, 541 US 36 (2004); (2) whether the defendant waived the *Crawford* issue; and (3) whether the Court of Appeals erred in concluding that the defendant's substantial rights were affected by the error, if any, and that the fairness, integrity, or public reputation of the judicial proceedings in this case was seriously affected by the error, if any. The clerk of the Court is directed to place this case on the April 2008 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than January 31, 2008, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than February 21, 2008. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae, to be filed no later than March 6, 2008. 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, with such briefs to be filed no later than March 6, 2008. Court of Appeals No. 268264.

Summary Dispositions December 20, 2007:

H A SMITH LUMBER & HARDWARE COMPANY v DECINA, No. 128560. On November 8, 2007, the Court heard oral argument on the application for

leave to appeal the April 27, 2005, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. To be awarded attorney fees as a "prevailing party" under MCL 570.1118(2), the party must prevail on the lien foreclosure action. In this case, the unpaid subcontractors filed a lien foreclosure action against the property owners and a breach of contract action against the general contractor. The subcontractors lost on their lien claim, but prevailed on the breach of contract claim. While the statute allows a lien claimant to bring an underlying contract action at the same time as the lien foreclosure action, it does not preclude the option of bringing the two actions separately. MCL 570.1117(5). If the subcontractors had chosen to bring their breach of contract claims against the general contractor as a separate action, they would not have been allowed to recover attorney fees. The language of MCL 570.1118(2) does not permit recovery of attorney fees on the contract action merely because it was brought together with the lien foreclosure action. Accordingly, we vacate the portion of the Oakland Circuit Court order granting attorney fees to plaintiff H.A. Smith Lumber & Hardware Company and defendant William Gardella, doing business as Williams Glass Company. Reported below: 265 Mich App 380 (on remand).

CAVANAGH, J. (*dissenting*). The majority's order vacating the award of attorney fees is flawed because it fails to address the actual language of the Construction Lien Act (CLA), MCL 570.1101 *et seq*., and it fails to honor the CLA's provision that it "shall be liberally construed to secure the beneficial results, intents, and purposes of this act." MCL 570.1302(1). A purpose of the CLA is to prevent subcontractors from bearing the costs of litigation every time their work goes uncompensated. I presume that subcontractors will often be in the position where they must pursue their claims against a general contractor who has been paid, as here. To do so, subcontractors must plead the underlying contract.

The statute appears to include such claims in its attorney-fee provision. It does not expressly preclude them. It states that "[i]n each action in which enforcement of a construction lien through foreclosure is sought, the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant . . . ." MCL 570.1118(2). "Each claim" must include more than just the lien claim. The statute further provides that "[t]he court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party." *Id.* The subcontractors here were "lien claimants." The trial court found that their liens were valid, but simply did not attach because the owners had paid the general contractor. The subcontractors were prevailing parties: they prevailed on the underlying contract claims against the general contractor. Because the general contractor had been paid, the contract claims were the subcontractors' only recourse for the payment that the lien was meant to secure.

Guided by the statute's aim to relieve unpaid contractors of the financial burden of litigation, I would deny leave to appeal.

KELLY, J. I join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). I dissent from the majority's order reversing the judgment of the Court of Appeals. Instead, I would affirm the Court of Appeals affirmance of the trial court's grant of attorney fees to H. A. Smith Lumber and Hardware Company and William Gardella, for the reasons stated in the Court of Appeals opinion.

PEOPLE v MEANS, No. 133486. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's application as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and admits his sole responsibility for the error. Accordingly, the defendant was deprived of his appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States,* 526 US 23, 28 (1999). Costs are imposed against appellate counsel, only, in the amount of $250, to be paid to the clerk of this Court. We do not retain jurisdiction. Court of Appeals No. 274888.

PEOPLE v MCCOY, No. 133695. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and admits his sole responsibility for the error. Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States,* 526 US 23, 28 (1999). Costs are imposed against the attorney, only, in the amount of $250, to be paid to the clerk of this Court. We do not retain jurisdiction. Court of Appeals No. 275627.

PEOPLE v ARTHUR RODGERS, No. 134040. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been timely filed and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). The defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States*, 526 US 23, 28 (1999). Costs are imposed against the attorney, only, in the amount of $250, to be paid to the clerk of this Court. We do not retain jurisdiction. Court of Appeals No. 277412.

MULLEN v ZERFAS, No. 134418. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Eaton Circuit Court for reconsideration of the defendant's motion for summary disposition. The Court of Appeals in *O'Donnell v Garasic,* 259 Mich App 569 (2003), erred by indicating that MCL 554.139(1) establishes a duty on the part of owners of leased residential property to invitees or licensees generally.

The covenants created by the statute establish duties of a lessor or licensor of residential property to the lessee or licensee of the residential property, most typically of a landlord to a tenant. By the terms of the statute, the duties exist between the contracting parties. The defendant landlord did not have a duty under MCL 554.139(1) to the plaintiff, a social guest of the tenant. On remand, the circuit court must decide the defendant's motion for summary disposition under common-law premises liability principles. Court of Appeals No. 275262.

PEOPLE v KIPFER, No. 134797. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and admits his sole responsibility for the error. Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States,* 526 US 23, 28 (1999). Costs are imposed against the attorney, only, in the amount of $250, to be paid to the clerk of this Court. We do not retain jurisdiction. Court of Appeals No. 279981.

LOOS v J B INSTALLED SALES, INC, No. 134957. 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. 275704.

Leave to Appeal Denied December 20, 2007:

INGHAM COUNTY v CAPITOL CITY LODGE NO 141 OF THE FRATERNAL ORDER OF POLICE, No. 133900; reported below: 275 Mich App 133.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

GRILLO v POSEN CONSTRUCTION, INC, No. 133965; Court of Appeals No. 273985.

CORRIGAN, J. I would grant leave to appeal.

LAUREL WOODS APARTMENTS v ROUMAYAH, Nos. 134150, 134154; reported below: 274 Mich App 631.

KELLY, J. I would grant leave to appeal.

SWEET AIR INVESTMENT, INC v KENNEY, No. 134267; reported below: 275 Mich App 492.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

WILLIAMS v BOLDON'S BODY SHOP, LLC, Nos. 134449, 134450; Court of Appeals Nos. 265901, 269022.

ATTORNEY GENERAL v PHILIP MORRIS USA, No. 134464; Court of Appeals No. 273665.

THE GEO GROUP, INC v DEPARTMENT OF CORRECTIONS, Nos. 134573, 134574; Court of Appeals Nos. 273466, 273492.

BASQUIN v MENKEN, No. 134659; Court of Appeals No. 274855.

W J O'NEIL COMPANY v BARTON MALOW COMPANY, No. 134666; Court of Appeals No. 277502.

PEOPLE v STOKES, No. 134717; Court of Appeals No. 269345.

PEOPLE v HOLDER, Nos. 134761, 134894; Court of Appeals Nos. 278965, 278967.

PEOPLE v DALAYNARD JACKSON, No. 134787; Court of Appeals No. 278935.

PEOPLE v NASH, No. 134819; Court of Appeals No. 270382.

PEOPLE v ROSENBERG, No. 134846; Court of Appeals No. 262673 (on remand).

PEOPLE v PRINCE, No. 134850; Court of Appeals No. 268084.

PEOPLE v KELLY, No. 134857; Court of Appeals No. 269918.

PEOPLE v HODO, No. 134971; Court of Appeals No. 279252.

PEOPLE v SAARI, No. 135037; Court of Appeals No. 279028.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

Summary Dispositions December 21, 2007:

SHORT v ANTONINI, No. 130442. By order of April 6, 2007, the application for leave to appeal the December 20, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the case is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals with regard to its affirmance of the trial court's grant of summary disposition to defendant Antonini on the basis of *Waltz v Wyse*, 469 Mich 642 (2004), and remand this case to the Jackson Circuit Court for entry of an order denying defendant Antonini's motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 256423.

CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY v US OUTDOOR ADVERTISING, INC, No. 133992. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment that held that the plaintiff lacked standing to challenge the Detroit Board of Zoning Appeals decision regarding the variance for the property located at 124 Cadillac Square. This Court has adopted a three-part test for

standing that requires (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) a causal connection between that injury and the complained of conduct; and (3) that the injury will be redressed by a favorable decision. *Michigan Citizens for Water Conservation v Nestle Waters of North America Inc*, 479 Mich 280, 294-295 (2007). In this case, plaintiff has shown that it has made substantial investments in the area surrounding the variance, that it owns nearby buildings, and that it has supervisory authority over the development district that encompasses the variance. Further, plaintiff has shown that the variance will potentially cause economic injury to its interests. Because a judgment in favor of plaintiff will eliminate these injuries, plaintiff has established standing to challenge the variance. We remand this case to the Court of Appeals for consideration of defendant's remaining issues. Court of Appeals No. 262311.

CAVANAGH, J. I concur in the reversal.

WEAVER, J. (*concurring*). I concur in the order reversing the Court of Appeals judgment and remanding this case to the Court of Appeals for consideration of defendant's remaining issues, because I agree that the plaintiff has standing to challenge the Detroit Board of Zoning Appeals decision regarding the variance for the property located at 124 Cadillac Square.

I write separately because I disagree with the application of the majority of four's (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) erroneously created standing test in *Lee v Macomb Co Bd of Comm'rs*,[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[2] *Rohde v Ann Arbor Pub Schools*,[3] and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*.[4] In those cases, the majority of four systematically dismantled Michigan's standing law and replaced years of precedent with its own test that denies Michigan citizens access to the courts.[5]

I would hold that the plaintiff has standing under the pre-*Lee* prudential test for standing because the plaintiff has demonstrated "that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker v State Administrative Bd*, 441 Mich 547, 554 (1993).

KELLY, J. I concur in the result only.

MARKMAN, J. (*concurring*). It is by now a customary part of Justice WEAVER's separate statements to condemn some purported judicial "as-

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[1] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004).

[3] *Rohde v Ann Arbor Pub Schools*, 479 Mich 336 (2007).

[4] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007).

[5] See my opinions chronicling the majority of four's assault on standing in *Lee*, 464 Mich at 742; *Nat'l Wildlife*, 471 Mich at 651; *Rohde*, 479 Mich at 366; and *Michigan Citizens*, 479 Mich at 310.

sault" by the "majority of four." Here, the object of the Court's assault is denying "citizens access to the courts" and stems from the Court reaffirming, over Justice WEAVER's dissent, that the "judicial power" in Michigan requires that the parties have standing. While I am content to rely on this Court's previous opinions, see, e.g., *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), as well as those of the United States Supreme Court, see, e.g., *Lujan v Defenders of Wildlife*, 504 US 555 (1992), in support of the necessity of standing, Justice WEAVER's statement prompts me to remind the bench and bar of the constitutional and other values served by the standing doctrine. This is the doctrine that parties to a lawsuit must have a concrete and particularized interest in that lawsuit distinct from the interest of the people as a whole.

(1) The requirement of standing ensures that the judiciary will exercise only the "judicial power" by resolving actual "cases and controversies," rather than also exercising the powers of the Governor and the executive branch by addressing matters of policy and law enforcement that are appropriately part of the "executive power."

(2) The requirement of standing ensures that the judiciary will exercise only the "judicial power" by resolving actual "cases and controversies," rather than deciding matters in which there are no coherent legal standards or rules but simply policy judgments to be exercised.

(3) The requirement of standing ensures that citizens will have genuine "access" to government by preserving decision-making authority in the most representative and accountable branches of government and thereby allowing citizens to effectively exercise their constitutional right to "petition the Government for a redress of grievances." US Const, Am I; see also Const 1963, art 1, § 3.

(4) The requirement of standing ensures that the constitution ratified by "we the people" of Michigan will be accorded respect by restricting institutions of government to the exercise of their proper powers and by upholding the principle of the separation of powers.

(5) The requirement of standing ensures that the Legislature will not diminish the powers of the executive branch by transferring its powers to the judiciary. "To permit [the Legislature] to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.' " *Lujan*, *supra* at 577 (citation omitted).

(6) The requirement of standing ensures that ours will not become a government of lawyers by lawyers and that the power of judges will be restricted to matters traditionally within the authority of the courts and not extended to matters traditionally within the authority of the executive.

(7) The requirement of standing ensures that citizens will continue to have meaningful control over their own government by reposing policy decisions in the branches of government that are the most directly representative and accountable to the people. To dilute standing is not to

enhance the access of ordinary citizens to their own government, but only to enhance the role of judges, lawyers, and litigating organizations in the formulation of public policy.

(8) The requirement of standing ensures that policy will be established on the basis of information, derived in the course of legislative and executive hearings and investigations from the testimony of individuals and organizations of a broad range of interests and perspectives, rather than only from the plaintiff and the defendant in a lawsuit.

(9) The requirement of standing ensures that historical constitutional restraints and limitations on the judiciary will be maintained to balance the judiciary's authority with that of the other branches of government within our system of separated powers.

By seeking to erode the standing doctrine in Michigan, Justice WEAVER does not facilitate "access" by citizens, but only the establishment of a more powerful judiciary. In the end, such an establishment would inevitably undermine access by the people to the most representative and accountable institutions of their own government.

Leave to Appeal Denied December 21, 2007:

In re ARCHER (DEPARTMENT OF HUMAN SERVICES v NIERESCHER), No. 135280; reported below: 277 Mich App 71.

THIRD JUDICIAL CIRCUIT COURT v THE JUDICIAL ATTORNEYS ASSOCIATION, Nos. 129500, 129501. By order of January 13, 2006, we remanded this case to the Court of Appeals for consideration as on leave granted, retaining jurisdiction. On August 2, 2007, the Court of Appeals issued an unpublished per curiam opinion. On order of the Court, the application for leave to appeal is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The stay of proceedings ordered on September 29, 2005, and continued by order of January 13, 2006, is dissolved, except that the sanctions ordered by the trial court at the September 28, 2005, contempt hearing shall not be imposed if the plaintiff initiates compliance with its obligations under the July 17, 2000, order of the trial court by April 15, 2008. Court of Appeals Nos. 262586, 263412.

CORRIGAN, J. (*concurring*). I concur in the Court's order. I note that plaintiff persuasively argues that the collective-bargaining agreement in this case, which was executed in accordance with the public employment relations act (PERA), MCL 423.201 *et seq.,* could not include a provision constraining a chief judge's power to appoint judicial referees. See, e.g., MCL 552.507(1). Such a provision appears to offend the constitutional separation of powers provision, Const 1963, art 3, § 2, because the legislatively enacted PERA may not be construed to interfere with the power of the judiciary to appoint judicial officers whose duties are derived from article 6 of the Michigan Constitution. But plaintiff stipulated to dismiss its appeal from the trial court's final decision in the earlier dispute concerning the terms of the collective-bargaining agreement. Under these circumstances, I conclude that plaintiff waived any challenges to the validity of the collective-bargaining agreement.

CAVANAGH and KELLY, JJ. We would affirm the judgment of the Court of Appeals in its entirety.

WEAVER, J. (*concurring in part and dissenting in part).* I would affirm the judgment of the Court of Appeals in its entirety.

I dissent from the majority's decision declining to immediately impose the sanctions ordered by the trial judge and instead conditioning the imposition of sanctions on whether the plaintiff initiates compliance with this Court's order by April 15, 2008. In effect, years after the plaintiff was found in contempt of court and sanctions were ordered, this Court is providing the plaintiff with yet another chance to avoid sanctions for its deliberate disobedience in refusing to abide by the arbitration agreement and a court order to do so.

The Court's order supplies no written reasons for the majority's decision to conditionally impose the ordered sanctions, as required by Const 1963, art 6, § 6, because no legal reason exists to justify the majority's decision.[1]

The trial court did not abuse its discretion in finding the plaintiff, the Third Judicial Circuit Court, in contempt because of the deliberate actions of Chief Judge Mary Beth Kelly. The material facts and law in this case are not in dispute.[2] As chief judge, Judge Kelly violated the arbitration award in November 2004 and has knowingly continued to do so since March 2005. In June 2001, almost five years earlier, the Third Judicial Circuit Court, through the actions of its then-chief judge, had stipulated in writing to the dismissal with prejudice of its appeal regarding the validity of the arbitration order. The arbitration award and stipulation order had been res judicata for almost five years.

As chief judge, Judge Kelly knew of and should have obeyed the arbitration award and stipulation order. Because of res judicata, Judge Kelly did not have the option of not following the trial court's order in 2005 simply because she disagreed with the order. Her actions have caused defendant to accrue over two years of unnecessary costs and efforts. The trial court did not abuse its discretion in ordering sanctions against the plaintiff for Chief Judge Kelly's noncompliance with the court

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[1] For a more detailed analysis of this Court's duty to provide written reasons for its decision, see my statements in *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007); *Ansari v Gold*, 477 Mich 1076, 1077 (2007); *Short v Antonini*, 729 NW2d 218, 219 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222, 223 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); *Tate v Dearborn*, 477 Mich 1101, 1102 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007); *Cooper v Auto Club Ins Assn*, 739 NW2d 631 (2007).

[2] See n 3 of this statement for a more detailed recitation of the facts.

order. Therefore, sanctions are appropriate and properly and legally within the discretion of the trial court, and this Court should not dilute the trial court's contempt power by now conditionally reversing the imposed sanctions.

An appellate court reviews for abuse of discretion a trial court's decision to issue an order of contempt. *In re Contempt of Dudzinski,* 257 Mich App 96, 99 (2003). A trial court's factual findings are reviewed for clear error. *McFerren v B & B Investment Group,* 253 Mich App 517, 522 (2002).

The circuit court executes the judicial power of the state of Michigan under Const 1963, art 6, § 1 and has broad jurisdiction under Const 1963, art 6, § 13. *Kirby v Michigan High School Athletic Ass'n,* 459 Mich 23, 40 (1998). Michigan courts of record have the inherent common-law right to punish all contempts of court. *In re Contempt of Robertson*, 209 Mich App 433, 436 (1995); *In re Contempt of Steingold*, 244 Mich App 153, 157 (2000). Additionally, the Legislature has statutorily recognized that the circuit courts, and all other courts of record, have contempt powers. MCL 600.1701 *et seq*. A party must obey an order entered by a court with proper jurisdiction, even an incorrect order, or risk being held in contempt and facing possible sanctions. *Kirby*, *supra* at 40.

In the present case, there is no factual dispute that the plaintiff, the Third Judicial Circuit Court, through the actions of Chief Judge Mary Beth Kelly, did not follow the arbitration order or the trial court's order requiring compliance with the arbitration order. The plaintiff, in answering the defendant's motion for an order to show cause why the plaintiff should not be held in contempt, only argued the merits of the underlying arbitration order. However, the plaintiff's option for remedying a defective arbitration order was appellate review, which the plaintiff exhausted in 2001 when the plaintiff and the defendant stipulated the dismissal with prejudice of the appeal to the arbitration order. The plaintiff did not have the option of simply not following the trial court's order in 2005 because it thought that the order was wrong.

The trial court did not abuse its discretion in finding the plaintiff in contempt. The plaintiff was required by court order to follow the arbitration award, and Chief Judge Kelly admitted at the September 28, 2005, hearing in front of the trial judge that the Third Judicial Circuit Court was not in compliance with the arbitration award and that she, as chief judge acting for the Third Judicial Circuit Court, had not followed the trial court's previous contempt order. See *Kirby*, *supra* at 40. The trial court ordered sanctions against the plaintiff because the plaintiff, through Chief Judge Kelly, had expressly refused to comply with the trial court's previous order. This Court did not issue a stay of proceedings until after the trial court had ordered sanctions against the plaintiff. This Court should not interfere with a trial court's execution of its judicial power and overturn a contempt order and sanctions imposed unless the trial court abused its discretion in ordering the sanctions. The trial court did not abuse its discretion in exercising its inherent authority to hold parties in contempt for not following a court order, and the trial court was correct to subsequently order sanctions for noncompliance with its order. *Steingold*, *supra* at 157.

The majority's arbitrary decision not to impose the trial court's sanctions as long as the plaintiff initiates compliance by April 15, 2008, does not provide an explanation of whether the trial court abused its discretion in ordering the sanctions.

Although I concur with this Court's decision to deny the plaintiff's application for leave to appeal in this case, I dissent from the majority's decision to not immediately impose the sanctions ordered by the trial judge, but to instead condition the imposition of sanctions on whether the plaintiff initiates compliance with this Court's order by April 15, 2008. The Court's order supplies no written reasons for the majority's decision, as required by Const 1963, art 6, § 6, because no legal reason exists to justify the majority's decision. The trial court did not abuse its discretion in ordering immediate sanctions against the plaintiff for noncompliance with a court order, and this Court should not dilute the trial court's contempt power by now conditionally reversing the sanctions imposed.[3]

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[3] The plaintiff, the Third Judicial Circuit Court, employs Friend of the Court attorneys, some of whom are represented by the defendant, Judicial Attorneys Association (JAA), a labor organization. The parties' employment relationship has been governed by a collective bargaining agreement (CBA) since 1982. In 1998, during renegotiation of the CBA, the plaintiff agreed to a provision giving the defendant's members hiring preference over nonmembers for the position of domestic relations referee. The plaintiff subsequently combined the duties of its domestic relations referees and its juvenile referees to form the single position of "family division referee." In early 1999, immediately after the CBA was implemented, the plaintiff appointed a non-JAA member attorney to the position of family division referee. Although the newly hired attorney was assigned to the juvenile division, the plaintiff shortly thereafter transferred another referee from the court's juvenile division to the family division. The plaintiff, through its chief judge, subsequently appointed two other non-JAA attorneys as family division referees assigned to the juvenile division.

The defendant filed a grievance, asserting that the plaintiff was trying to circumvent the CBA by appointing referees to the juvenile division (calling them "family division referees" as opposed to "domestic relations referee") and then transferring the newly appointed referees to the domestic relations division. The grievance was arbitrated, and, in a January 2000 ruling, the arbitrator found that the plaintiff's appointment of non-JAA member attorneys to the position of family division referee circumvented the requirements of the CBA. The arbitrator ordered that the defendant's members be appointed to the next three family division referee vacancies.

The plaintiff posted its first family division referee vacancy after the arbitration award in August 2004. The plaintiff, through Chief Judge

MILLER v PROGRESSIVE CORPORATION, No. 131987; Court of Appeals No. 259504.

MARKMAN, J. (*concurring*). "[T]he person named in the policy" may be entitled to personal protection insurance benefits under the no-fault act.

Mary Beth Kelly, appointed a non-JAA attorney to the post in November 2004. At the time, there was at least one JAA member qualified for the referee position. In December 2004, the defendant filed a motion to enforce the arbitration award and a motion for an order to show cause why the plaintiff should not be held in contempt for violating the arbitration award. The plaintiff did not deny that it had violated the arbitration award, but argued instead that none of the JAA members had the requisite experience to qualify for a position as a family division referee. In March 2005, almost five years after the arbitration award was entered, the plaintiff argued for the first time that it should be relieved from the arbitration award.

In April 2005, the trial court issued an order denying the plaintiff's request for relief from the arbitration order and granting the defendant's motion for an order to show cause why the plaintiff should not be held in contempt. The plaintiff appealed the trial court's order denying relief from the arbitration award. While the appeal was pending, the trial court conducted a show cause hearing and issued an order and memorandum of law finding the plaintiff in civil contempt. On May 26, 2005, the trial court held that in addition to filling the referee position with a JAA member, the plaintiff must pay any difference in compensation to the JAA member from the compensation that would have resulted had the JAA member been hired according to the original arbitration order. The trial court also held that the plaintiff must pay the defendant reasonable attorney fees and costs under MCR 2.625 and MCR 2.626 because the defendant had prevailed.

The plaintiff appealed the trial court's contempt order as of right in the Court of Appeals, but the Court of Appeals denied the appeal on September 15, 2005, for lack of merit in the grounds presented. The plaintiff appealed in this Court, and this Court entered a stay of proceedings on September 29, 2005. On September 28, 2005, Chief Judge Kelly appeared before the trial court and admitted that the plaintiff was still not in compliance with the trial court's order. The trial court assessed fines and sanctions. The trial court's contempt sanctions were imposed before this Court's stay order.

This Court remanded the case to the Court of Appeals for consideration as on leave granted, while continuing the stay of proceedings. The Court of Appeals consolidated the plaintiff's pending appeals on the substantive issue of the validity of the arbitration order and the contempt order and affirmed the trial court on both issues. The plaintiff filed for leave to appeal in this Court.

MCL 500.3114(1). Plaintiff contends that she is "the person named in the policy" in which her parents are the named insureds because she is listed as an occasional driver on the declarations sheet, and the policy states that the "Declarations, endorsements and application are hereby incorporated into and made a part of this policy." However, the following statement immediately precedes the portion of the declarations sheet that lists plaintiff as an occasional driver: "Your Policy Premium Is Based On The Following Information Which Is Not Part Of The Policy." Therefore, it is clear that the portion of the declarations sheet that lists plaintiff as an occasional driver is *not* part of the policy, and thus plaintiff is *not* "the person named in the policy." Because plaintiff is *not* "the person named in the policy," it is unnecessary to address whether it is possible for a person who is not a named insured in the policy to be "the person named in the policy" under MCL 500.3114(1). For these reasons, I concur in this Court's order denying leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the majority's denial of leave to appeal in this case. I would grant leave to appeal to consider whether plaintiff can recover personal injury protection benefits from the defendant pursuant to the insurance policy and the plain language MCL 500.3114(1) of the no-fault act.

MCL 500.3114(1) states that a "person named in the [automobile insurance] policy" is entitled to personal injury protection benefits. Plaintiff in this case is a nonresident child of the policy owners and is listed as an occasional driver on the policy declarations page. The insurance policy has a clause incorporating the declarations page as part of the policy. The issue in this case is whether MCL 500.3114(1) requires that the insurance company provide personal injury protection coverage for a person who is named in the policy but is not a named insured.

The question presented in this case is a jurisprudentially significant one for no-fault insurance litigants, and I would grant leave to appeal for consideration of this issue.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

Reconsideration Granted December 21, 2007:

PEOPLE v CRON, No. 133896. On order of the Court, the motion for reconsideration of this Court's September 10, 2007, order is considered, and it is granted. We vacate our order dated September 10, 2007. On reconsideration, the application for leave to appeal the March 22, 2007, judgment of the Court of Appeals is considered. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals to the extent it affirms the defendant's conviction for fourth-degree criminal sexual conduct, we vacate the defendant's conviction and sentence for fourth-degree criminal sexual conduct, and we remand this case to the Kent Circuit Court for resentencing on the defendant's remaining conviction. In this case, the jury should not have been instructed on fourth-degree criminal sexual conduct, because that offense is not a necessarily included lesser offense of second-degree criminal sexual conduct. See *People v Nyx*, 479 Mich 112 (2007). 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. 265576.

CORRIGAN, J. I would deny the motion for reconsideration.

Reconsideration Denied December 21, 2007:

PEOPLE v HAWTHORNE, No. 133729. Summary disposition entered at 480 Mich 913. Court of Appeals No. 265473.

KELLY, J. (*dissenting*). I would grant the motion for reconsideration and deny the application for leave to appeal. The Court has already remanded this case to the trial court for a hearing on defendant's speedy-trial motion. At that time, the prosecution failed to explain its failure over a period of nine years to bring defendant to trial. I see no reason for a second remand.

CAVANAGH and MARKMAN, JJ. We join the statement of Justice KELLY.

Summary Dispositions December 27, 2007:

LEWIS v BRIDGMAN PUBLIC SCHOOLS, No. 134631. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the teacher tenure act, MCL 38.101 *et seq*., does not require the State Tenure Commission to apply a "clear error," rather than a "de novo," standard of review to its consideration of the preliminary decisions of administrative law judges. We remand this case to the Court of Appeals for consideration of whether the commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material, and substantial evidence on the whole record. See Const 1963, art 6, § 28; MCL 24.306(1)(d), (e). The motion to stay is denied. We do not retain jurisdiction. Reported below: 275 Mich App 435.

NEUHAUS v PEPSI COLA METROPOLITAN BOTTLING COMPANY, No. 134661. 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 Workers' Compensation Appellate Commission (WCAC) properly awarded an attorney fee on plaintiff's medical benefits award. In answering this question, the Court of Appeals shall consider whether the WCAC correctly construed the term "prorate," as it is used in MCL 418.315(1). 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. We do not retain jurisdiction. Court of Appeals No. 274960.

SCHORNAK v DAIMLERCHRYSLER CORPORATION, No. 134924. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall include among the issues addressed whether the plaintiff's medical proofs satisfied his burden of proving that the damage done to his heart by the work he performed during the course of his heart attack was medically distinguishable and that the condition of his heart

was made significantly worse than it would have been without performance of the work. If the Court of Appeals answers this question in the affirmative, it shall specifically identify the evidence it relied upon to reach that conclusion. MCL 418.301(2); *Rakestraw v Gen Dynamics Land Systems, Inc,* 469 Mich 220 (2003); *Fahr v Gen Motors Corp,* 478 Mich 922 (2007). We do not retain jurisdiction. Court of Appeals No. 277024.

Leave to Appeal Denied December 27, 2007:

BOIK v ALPENA GENERAL HOSPITAL, No. 131097; Court of Appeals No. 258158.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal for the reasons stated in my dissent from the denial of leave to appeal in *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484 (2005). See 479 Mich 854 (2007).

BRADSHAW v WEST SHORE MEDICAL CENTER, Nos. 131210, 131588; Court of Appeals No. 258764.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal for the reasons stated in my dissent from the denial of leave to appeal in *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484 (2005). See 479 Mich 854 (2007).

KENNEDY v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 132295; Court of Appeals No. 268021.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

ELEZOVIC v BENNETT, No. 133369. The application for leave to appeal the January 25, 2007, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. We note, however, that without expressly finding a section of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, ambiguous, the Court of Appeals majority determined that the statute is remedial and thus must be liberally construed. In this respect, the Court of Appeals majority erred. *Rakestraw v Gen Dynamics Land Systmes, Inc*, 469 Mich 220, 232 n 12 (2003). In addition, the Court of Appeals erred by mixing its analysis of defendant's agency and liability. Under the plain terms of the statute, the threshold issue is whether defendant is an agent. After that issue is resolved in the affirmative, defendant's liability is based on the Civil Rights Act and his liability thereunder is direct. Therefore, agency principles of authority relating to the principal's vicarious liability for the acts of the agent are irrelevant. We take special care to emphasize that agency principles of authority and liability still apply when the defendant is "a person who has 1 or more employees" and did not personally participate in the harassment. We acknowledge that the use of the term "employer" to mean both "a person who has 1 or more employees" and "an agent of that person" is ripe for confusion. However, where the Court of Appeals stated that "when the claim of sexual harassment against an employer is for direct liability, and not vicarious liability, intent need not be inferred through a respondeat

superior analysis," it should not be interpreted to mean that the principal is strictly liable for its agent's actions. Although a principal's agent may be directly liable, a respondeat superior analysis is still required for a principal that did not directly participate in the harassment. The motions to dismiss and to strike are denied. Reported below: 274 Mich App 1.

WEAVER, J. I would deny leave to appeal because I am not persuaded that this Court should review the questions presented at this time.

KELLY, J. (*concurring in part and dissenting in part).* I concur in the decision to deny leave to appeal. But, for the reasons explained in my statement in *Ernsting v Ave Maria College*,[1] I dissent from that part of the order scolding the Court of Appeals majority for using the canon of construction that remedial statutes shall be liberally construed. Because the statute at issue, the Civil Rights Act,[2] is a remedial statute,[3] it was appropriate for the Court of Appeals majority to apply the canon to this case.

CAVANAGH, J. I join the statement of Justice KELLY.

PIONEER STATE MUTUAL INSURANCE COMPANY v WAGNER, No. 133816; Court of Appeals No. 273080.

CORRIGAN and YOUNG, JJ. We would reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion.

PEOPLE v CAROEN, No. 133915; Court of Appeals No. 261929.

KELLY, J. I would grant leave to appeal.

PEOPLE v HAYMER, No. 134237; Court of Appeals No. 275756.

CITY OF MADISON HEIGHTS v ELGIN SWEEPER COMPANY, No. 134619; Court of Appeals No. 266333.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v CHRISTOPHER JACKSON, No. 134675; Court of Appeals No. 269071.

KELLY, J. I would grant leave to appeal.

PEOPLE v BACKUS, No. 134726; Court of Appeals No. 278548.

KELLY, J. I would grant leave to appeal.

PEOPLE v STEPHENSON, No. 134735. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279250.

KELLY, J. I would grant leave to appeal.

PEOPLE v CERVI, No. 134758; Court of Appeals No. 276927.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

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[1] 480 Mich 985, 986 (2007).

[2] MCL 37.2101 *et seq.*

[3] *Eide v Kelsey-Hayes Co*, 431 Mich 26, 36 (1988).

PEOPLE v METAMORA WATER SERVICE, INC, No. 134949; reported below: 276 Mich App 376.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Denied December 28, 2007:

PEOPLE v MARSHALL, No. 132985. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270359.

PEOPLE v ABBY, No. 133694; Court of Appeals No. 262365.

KLOIAN v VAN FOSSEN, No. 134321; Court of Appeals No. 262953.

PEOPLE v DICKSON, No. 134386. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272952.

PEOPLE v EFFINGER, No. 134410. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275787.

PEOPLE v CHRISTINE JACKSON, No. 134420. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275785.

PEOPLE v DEYONTA ROBINSON, No. 134421. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274566.

PEOPLE v YBARRA, No. 134456. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276803.

PEOPLE v BOLER, No. 134462. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275141.

PEOPLE v SHAWN BURNETT, No. 134472. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274692.

PEOPLE v ROBERT THOMPSON, No. 134483. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276358.

PEOPLE v BRIAN JONES, No. 134494. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274553.

PEOPLE v DEAN ANDREWS, No. 134515. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274365.

PEOPLE v JOHN SWANIGAN, No. 134517. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278457.

PEOPLE v MALTOS, No. 134529. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278117.

PEOPLE v AMOR BASS, No. 134533. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275091.

PEOPLE v NEWSON, No. 134537. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276361.

PEOPLE v ANTONIO TAYLOR, No. 134548; Court of Appeals No. 277914.

PEOPLE v BRADFORD ROSS, No. 134554; Court of Appeals No. 267338.

PEOPLE v TRAYLOR, No. 134560. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273844.

PEOPLE v WALLEMAN, No. 134582; Court of Appeals No. 277492.

PEOPLE v TRUELOVE, No. 134588. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275951.

PEOPLE v MASON, No. 134590. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274896.

PEOPLE v LAVELL, No. 134593. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275745.

PEOPLE v MURRAY, No. 134599. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274506.

PEOPLE v CLOY, No. 134603. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276066.

WHITE v SECRETARY OF STATE, No. 134615; Court of Appeals No. 276010.

PEOPLE v HOUSTON, No. 134618. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275644.

PEOPLE v PIERRE MCCALL, No. 134620. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276974.

PEOPLE v HARDRICK, No. 134621; Court of Appeals No. 276250.

PEOPLE v RATAJCZAK, No. 134624. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278055.

PEOPLE v REA, No. 134625. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277026.

PEOPLE v DELMAREY MITCHELL, No. 134655; Court of Appeals No. 270581.

PEOPLE v KINT, Nos. 134689, 134707. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 275273, 275874.

PEOPLE v DWAYNE JONES, No. 134695. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277504.

PEOPLE v STEPHAN COCHRANE, No. 134699. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277008.

PEOPLE v CALVIN HARPER, No. 134701. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276526.

PEOPLE v HENNING, No. 134759; Court of Appeals No. 268651.

LAHTINEN v MICHIGAN EDUCATION SUPPORT PERSONNEL — WUPEA/MEA-NEA, No. 134771; Court of Appeals No. 266907.

PEOPLE v AMBROSE, No. 134777. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275571.

PEOPLE v JONATHON HILL, No. 134791; Court of Appeals No. 269095.

PEOPLE v TIMOTHY GILLAM, No. 134793; Court of Appeals No. 266893.

PEOPLE v PERRY DAVIS, No. 134800. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274796.

PEOPLE v CHRISTLE, No. 134806; Court of Appeals No. 267374.

PEOPLE v LLANES, No. 134807. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277242.

LIVONIA BUILDING MATERIALS COMPANY v HARRISON CONSTRUCTION COMPANY, Nos. 134810, 134812; reported below: 276 Mich App 514.

PEOPLE v HAROLD SHAW, No. 134815. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277613.

PEOPLE v MICHAEL WARD, No. 134817; Court of Appeals No. 278538.

PEOPLE v MCLAUGHLIN, No. 134818. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 278224.

PEOPLE v THEODORE WATKINS, No. 134820; Court of Appeals No. 278670.

PEOPLE v GARRISON, No. 134830. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277524.

PEOPLE v PHILLIP JONES, No. 134831. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279095.

BRIGGS v OAKLAND COUNTY, No. 134837; reported below: 276 Mich App 369.

PEOPLE v ROMMELL SANDERS, No. 134838; Court of Appeals No. 267953.

PEOPLE v ONUMONU, No. 134848. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278938.

PEOPLE v CHRISTOPHER HOPKINS, No. 134856. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276899.

PEOPLE v FOUNTAIN, No. 134863. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277241.

PEOPLE v MCCLELLAN, No. 134866. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279129.

PEOPLE v BUSHEY, No. 134867; Court of Appeals No. 264849.

PEOPLE v SHEMANSKI, No. 134869; Court of Appeals No. 278301.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v ROGER THOMPSON, No. 134870; Court of Appeals No. 269035.

PEOPLE v ELIJAH FORD, No. 134872. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276907.

PEOPLE v HOLLIS, No. 134876. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276211.

Reconsideration Denied December 28, 2007:

PEOPLE v BLANKS, No. 129807. Summary disposition entered at 480 Mich 914. Court of Appeals No. 255257.

PEOPLE v RODNEY HUBBARD, No. 133360. Leave to appeal denied at 480 Mich 898. Court of Appeals No. 263300.

LAKE STATES INSURANCE COMPANY v MASON INSURANCE AGENCY, INC, No. 133587. Leave to appeal denied at 479 Mich 863. Court of Appeals No. 271666.

RESPESS v IRWIN MORTGAGE CORPORATION, No. 134076. Leave to appeal denied at 480 Mich 889. Court of Appeals No. 273902.

PEOPLE v CONRAD SANDERS, No. 134116. Leave to appeal denied at 480 Mich 860. Court of Appeals No. 274116.

Summary Disposition January 8, 2008:

EVANISH v LEDIS, No. 135006. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Genesee Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 259995.

FOWLER v BOTSFORD GENERAL HOSPITAL, No. 135008. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Oakland Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 259325.

LANGE v ST JOSEPH MERCY HOSPITAL, No. 135054. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Washtenaw Circuit Court denying the defendant's motion for summary disposition because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Washtenaw Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 259496.

PEOPLE v ABRAHAM, No. 135108. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Macomb Circuit Court, and we remand this case to the trial court for resentencing. For the reasons stated in the Court of Appeals dissenting statement, and considering the particular circumstances of this case, the circuit court on

remand is directed to either allow the defendant to withdraw her plea or resentence her to a minimum of 19 months. Court of Appeals No. 279561.

Leave to Appeal Denied January 8, 2008:

PEOPLE v COREY JACKSON, No. 134877; Court of Appeals No. 268940.

MENDEZ v MENDEZ, No 134880; Court of Appeals No. 268610.

PEOPLE v HAMPTON, No. 134882; Court of Appeals No. 268812.

PEOPLE v LEITERMAN, No. 134885; Court of Appeals No. 265821.

WILSON v DEPARTMENT OF MANAGEMENT AND BUDGET, No. 134887; Court of Appeals No. 277265.

BAKER v HBI, No. 134888; Court of Appeals No. 265994.

PEOPLE v NORTHERN, No. 134889; Court of Appeals No. 268809.

PEOPLE v LINDENSMITH, No. 134891. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No.277052.

PEOPLE v PETTIGREW, No. 134895. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276741.

PEOPLE v JEFFREY MOORE, Nos. 134896, 134898, 134900; Court of Appeals Nos. 278544-278546

PARAMOUNT PROPERTIES GROUP LLC v MCSHANE & BOWIE, No. 134899; Court of Appeals No. 275331.

PEOPLE v WILLIAM SPENCER, No. 134904. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279167.

PEOPLE v BOSS, No. 134906; Court of Appeals No. 267013.

PEOPLE v HANKS, No. 134909; reported below: 276 Mich App 91.

PEOPLE v NOLAN HALL, No. 134910; Court of Appeals No. 269990.

PEOPLE v SWANSON, No. 134919. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270995.

PEOPLE v VERNON SIMMONS, No. 134921; Court of Appeals No. 274214.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v CARL NEAL, No. 134923. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277083.

PEOPLE v SHELDON, No. 134926; Court of Appeals No. 268659.

PEOPLE v HANNA, No. 134935. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277668.

PEOPLE v ERVIN, No. 134942; Court of Appeals No. 268199.

PEOPLE v DOVE, No. 134944; Court of Appeals No. 277546.

PEOPLE v SUEING, No. 134945; Court of Appeals No. 268490.

PEOPLE v KENA BANKS, No. 134946; Court of Appeals No. 278888.

PEOPLE v MISSOURI, No. 134955. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277754.

PEOPLE v ALFORD, No. 134959. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279000.

PEOPLE v BOOTH, No. 134960; Court of Appeals No. 268085.

PEOPLE v SILLIVAN, No. 134961; Court of Appeals No. 269501.

PEOPLE v ARRAHMAAN, No. 134962; Court of Appeals No. 278030.

PEOPLE v DENNIS MATHIS, No. 134963. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277786.

PEOPLE v SPEARMAN, No. 134964; Court of Appeals No. 278983.

PEOPLE v MALONE, No. 134965; Court of Appeals No. 278885.

PEOPLE v CARROLL, No. 134966; Court of Appeals No. 270544.

FIFTH THIRD BANK v TAYLOR, No. 134968; Court of Appeals No. 269872.

PEOPLE v DERRICK SMITH, No. 134974; Court of Appeals No. 279052.

PEOPLE v MCCALEB, No. 134975; Court of Appeals No. 279253.

LIGON v CITY OF DETROIT, No. 134976; reported below: 276 Mich App 120.

PEOPLE v HALE, No. 134980. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279956.

PEOPLE v SEID, No. 134982; Court of Appeals No. 267900.

PEOPLE v MCGINNIS, No. 134984; Court of Appeals No. 279018.

PEOPLE v PONIEDZIALEK, No. 134987; Court of Appeals No. 277456.

MILLER v SCHUCHARD, No. 134992; Court of Appeals No. 275540.

PEOPLE v JACOBY, No. 134994; Court of Appeals No. 268804.

JACQUES v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 134996; Court of Appeals No. 268016.

PEOPLE v BLUNT, No. 135000; Court of Appeals No. 272632.

PEOPLE v LUDY, No. 135004. For purposes of MCR 6.502(G)(1), the Court notes that contrary to the Court of Appeals characterization of the defendant's application as a motion for relief from judgment, the defendant filed an application for leave to appeal that should have been denied for lack of merit in the grounds presented. Court of Appeals No. 277969.

PEOPLE v JAHED, No. 135009; Court of Appeals No. 279784.

PEOPLE v RANGE, No. 135012; Court of Appeals No. 270831.

PEOPLE v LOWN, No. 135015; Court of Appeals No. 269363.

PEOPLE v TYRONE JACKSON, No. 135016; Court of Appeals No. 271506.

PEOPLE v AARON MCDONALD, No. 135017. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279722.

PEOPLE v JILES, No. 135018. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279355.

PEOPLE v GOLDRING, No. 135020; Court of Appeals No. 278050.

PEOPLE v APPLEWHITE, No. 135022; Court of Appeals No. 279318.

PEOPLE v FRITZ, No. 135024; Court of Appeals No. 278354.

PEOPLE v ALEX MORGAN, No. 135026; Court of Appeals No. 276556.

PEOPLE v PHRAXAYAVONG, No. 135027; Court of Appeals No. 270381.

PEOPLE v ANDRE NELSON, No. 135031. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279877.

PEOPLE v GEORGE, No. 135032; Court of Appeals No. 269465.

PEOPLE v ABDELLATIF, No. 135034; Court of Appeals No. 280059.

PEOPLE v DRAIN, No. 135039; Court of Appeals No. 271059.

PEOPLE v VANBROCKLIN, No. 135040; Court of Appeals No. 279636.

PEOPLE v HUCKABY, No. 135041; Court of Appeals No. 265200.

PEOPLE v ECHOLS, No. 135042. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278675.

PEOPLE v TERRY DAVIS, No. 135043; Court of Appeals No. 269096.

PEOPLE v LYNN DAVIS, No. 135044; Court of Appeals No. 279271.

PEOPLE v COLEMAN WALKER, No. 135046; Court of Appeals No. 263278.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v STEVEN CARTER, No. 135047; Court of Appeals No. 270195.

PEOPLE v JON MULLINS, No. 135051. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279361.

PEOPLE v HORAN, No. 135055; Court of Appeals No. 279360.

PEOPLE v CHEATHAM, No. 135057; Court of Appeals No. 278774.

PEOPLE v LONYE JONES, No. 135058; Court of Appeals No. 279886.

PEOPLE v BIRD, No. 135060; Court of Appeals No. 269154.

PEOPLE v REDINGER, No. 135063; Court of Appeals No. 269139.

PEOPLE v CURTIS SMITH, JR, No. 135065; Court of Appeals No. 267942.

PEOPLE v AUSTIN, No. 135071; Court of Appeals No. 279513.

PEOPLE v ANGELO PARKS, No. 135072; Court of Appeals No. 271291.

PEOPLE v PAGE, No. 135073; Court of Appeals No. 268541.

PEOPLE v SCHAUB, No. 135075; Court of Appeals No. 278708.

PEOPLE v FUQUA, No. 135076; Court of Appeals No. 279195.

BAUBLITZ v INGHAM CIRCUIT JUDGE, No. 135077; Court of Appeals No. 277798.

PEOPLE v VAUGHN, No. 135079. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279940.

PEOPLE v DUNLAP, No. 135081. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277059.

PEOPLE v ANTHONY GREEN, No. 135082; Court of Appeals No. 279198.

PEOPLE v RAWLS, No. 135083; Court of Appeals No. 271472.

PEOPLE v WESTERFIELD, No. 135085; Court of Appeals No. 279635.

PEOPLE v KISSNER, No. 135086; Court of Appeals No. 271977.

PEOPLE v MEJIA, No. 135087; Court of Appeals No. 279205.

PEOPLE v PALAZZOLO, No. 135088; Court of Appeals No. 269098.

PEOPLE v TERRY MITCHELL, No. 135092; Court of Appeals No. 279316.

PEOPLE v STOKES, No. 135093; Court of Appeals No. 271714.

PEOPLE v MICHAEL ANTHONY YOUNG, No. 135094; Court of Appeals No. 272465.

PEOPLE v ALFREY, No. 135096; Court of Appeals No. 269644.

PEOPLE v MICHAEL DARBY, No. 135101; Court of Appeals No. 270420.

PEOPLE v MYOTT, No. 135103; Court of Appeals No. 279357.

PEOPLE v ANTJUAN OWENS, No. 135104; Court of Appeals No. 271064.

PEOPLE v ANTHONY JONES, No. 135105. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277244.

PEOPLE v ERTMAN, No. 135106; Court of Appeals No. 274360.

PEOPLE v BERNARD MARTIN, No. 135109. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277726.

EVANS v DEPARTMENT OF HUMAN SERVICES, No. 135110; Court of Appeals No. 277004.

PEOPLE v JOSEPH FLOWERS, No. 135112; Court of Appeals No. 267943.

PEOPLE v TERRY SMITH, No. 135113; Court of Appeals No. 270761.

PEOPLE v MEIER, No. 135116; Court of Appeals No. 278155.

PEOPLE v YOUNGER, No. 135121; Court of Appeals No. 269299.

PEOPLE v VARGAS JOHNSON, No. 135127. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277968.

PEOPLE v TALLEY, No. 135128; Court of Appeals No. 271178.

PEOPLE v HOBSON, No. 135129; Court of Appeals No. 279779.

PEOPLE v STEVENSON BELL, No. 135130; Court of Appeals No. 279440.

PEOPLE v KEITH WILLIAMS, No. 135131. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279642.

PEOPLE v CONELY, No. 135135; Court of Appeals No. 276792.

PEOPLE v TREYVEON WILSON, No. 135136; Court of Appeals No. 272240.

PEOPLE v OTIS NELSON, No. 135142; Court of Appeals No. 269958.

PEOPLE v LEONARD ROBINSON, No. 135143; Court of Appeals No. 270687.

PEOPLE v ALTONEY BAKER, No. 135145; Court of Appeals No. 271084.

PEOPLE v MCDANIELS, No. 135153; Court of Appeals No. 279190.

PEOPLE v DUSTIN HICKS, No. 135154; Court of Appeals No. 270898.

PEOPLE v GRADY BROWN, No. 135155. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278843.

PEOPLE v TATUM, No. 135174; Court of Appeals No. 272249.

PEOPLE v KEMP, No. 135175. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278291.

PEOPLE v BREWER, No. 135177; Court of Appeals No. 279686.

PEOPLE v CHARLES BELL, No. 135180; Court of Appeals No. 279883.

PEOPLE v ARDITO, No. 135181. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278432.

PEOPLE v GREG DARBY, No. 135182; Court of Appeals No. 278609.

PETSCH v CONVENTION & SHOW SERVICES, No. 135183; Court of Appeals No. 278313.

HUGHES v TIMKO, No. 135186; Court of Appeals No. 255229 (on remand).

PEOPLE v SWANSBROUGH, No. 135188; Court of Appeals No. 271126.

PEOPLE v CHARLES LEWIS, No. 135192. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279450.

PEOPLE v JAMES MULLINS, No. 135194; Court of Appeals No. 279659.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v GEE, No. 135196; Court of Appeals No. 278637.

PEOPLE v BRUCE HOWARD, No. 135197. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 277843.

PEOPLE v BANKSTON, No. 135198; Court of Appeals No. 271676.

PEOPLE v MAYBEE, No. 135205; Court of Appeals No. 279664.

PEOPLE v ALGEROW WRIGHT, No. 135216; Court of Appeals No. 279620.

PEOPLE v TONY KEAN, No. 135218; Court of Appeals No. 279987.

PEOPLE v KLEMAS, No. 135239; Court of Appeals No. 280561.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 11, 2008:

ORAM v ORAM, No. 134670. 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 circuit court properly imposed the sanction of dismissal with prejudice and whether the dismissal order was a "verdict" as defined in MCR 2.403(O)(4) for purposes of ordering case evaluation sanctions. 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. 267077.

PEOPLE V GARY SMITH, No. 134682. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address: (1) whether the upward departure from the recommendation of the sentencing guidelines is proportionate, see *People v Babcock*, 469 Mich 247, 264, 273 (2003); and (2) whether the trial court fulfilled its obligation to "articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure." *Babcock*, *supra* at 272 (emphasis in original). We further order the Wayne Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court. The parties may file supplemental briefs within 42 days of the date of either the appointment of counsel or the determination that the defendant is not entitled to appointed counsel, but they should not submit mere restatements of their application papers. Court of Appeals No. 267099.

YOUNG, J. (*concurring*). I concur in the order scheduling oral argument on the application, but write separately because I fear that this Court is embarking on an impossible mission. This case raises the question whether a trial judge who articulates substantial and compelling reasons to depart from the sentencing guidelines range must sentence the defendant with such mathematical precision, by comparing the facts and circumstances of the defendant's crime against a hypothetically better or worse fact pattern, that the severity of his crime is perfectly matched with the extent of the departure. I do not believe that there is a principled way to achieve this mathematical precision, nor do I think that the guidelines statutes, properly construed, impose this burden on the trial judge.

WEAVER and CORRIGAN, JJ. We join the statement of Justice YOUNG.

Summary Dispositions January 11, 2008:

JAMES V STATE FARM FIRE & CASUALTY COMPANY, No. 130460. On December 5, 2007, the Court heard oral argument on the application for leave to appeal the November 8, 2005, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and the judgment of the St. Clair Circuit Court granting defendant-appellee Gasowski and plaintiff-appellee Safeco Insurance Company summary disposition, and we remand this case to the St. Clair Circuit Court for further proceedings not inconsistent with this order. The "Release and Settlement Agreement" resolving the underlying action specifically contemplated litigating the identity of the driver of the

jet-ski in this case. Therefore, the circuit court erred in granting summary disposition to Gasowski and Safeco against defendant-appellant State Farm Fire & Casualty Company on collateral estoppel grounds. Court of Appeals No. 262805.

PEOPLE v CHRISTIAN-BATES, No. 134922. 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. On remand, the Court of Appeals shall address whether the trial judge's admitted error in cutting off defense counsel's closing argument was harmless, taking into consideration that the defendant admitted shooting at the victim, the only question for the jury was the defendant's intent, and the defendant was convicted of the lesser offense of assault with intent to do great bodily harm. We do not retain jurisdiction. Court of Appeals No. 269919.

CAVANAGH, J. I would deny leave to appeal.

Leave to Appeal Denied January 11, 2008:

ODOM v WAYNE COUNTY, No. 133433; Court of Appeals No. 270501.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). The defendant police officer has several years of experience in arresting prostitutes. She suspected plaintiff of being a prostitute because of the way she was walking back and forth on the street and making eye contact with drivers in an area known for prostitution. Defendant eventually saw plaintiff get into a vehicle. She followed the vehicle, stopped it, and arrested plaintiff for disorderly conduct. In my judgment, defendant appears to have conducted herself in a conscientious and responsible manner. However, when the charges were subsequently dismissed, plaintiff sued defendant for false imprisonment and malicious prosecution. The trial court denied defendant's motion for summary disposition, and the Court of Appeals affirmed.

MCL 691.1407 provides, in pertinent part:

> (2) [E]ach officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to *gross negligence* that is the proximate cause of the injury or damage.
>
> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986. [Emphasis supplied.]

Plaintiff's complaint does not allege that defendant was grossly negligent. The trial court held that "[t]his does not amount to a claim of an intentional act" and that the issue was whether defendant was grossly negligent, defining this in terms of whether defendant had "probable cause" to arrest plaintiff. The Court of Appeals held that a question of fact existed regarding whether defendant acted in an "objectively reasonable" manner. Defendant now argues that imposing liability for "unreasonable" conduct contravenes the Legislature's grant of governmental immunity.

In *Stewart v Haan,* unpublished opinion per curiam of the Court of Appeals, issued September 25, 1998 (Docket No. 201250), slip op at 2, the Court of Appeals stated that "[t]he law of governmental immunity and alleged intentional torts by government agents is beset by confusion." As that Court explained,

> [t]he governmental immunity statute provides an exception for gross negligence. MCL 691.1407(2); MSA 3[.]996(107)(2). The statute also contains the cryptic provision that "[s]ubsection (2) shall not be construed as altering the law of intentional torts as it existed before July 7, 1986." MCL 691.1407(3); MSA 3[.]996(107)(3). Researching the interplay between these two provisions, we encountered two seemingly contradictory authorities on immunity for officers charged with intentional torts. *Bell v Fox*, 206 Mich App 522; 522 NW2d 869 (1994), held that officers sued for false arrest were entitled to immunity because they had acted within the scope of their authority (implicitly referring to Subsection [2]) and stated that "contrary to plaintiff's argument, there is no intentional tort exception to the doctrine of governmental immunity." *Id.* at 525. In contrast, in *Sudul v Hamtramck*, 221 Mich App 455, 482; 562 NW2d 478 (1997), this Court held that "an individual employee's intentional torts are not shielded by our governmental statute, a proposition that too frequently is mired in confusion." *Id.* at 458. [*Id.*, slip op at 3 n 2.]

Because the law in this area is in such disarray, I would grant leave to appeal. Although this appeal is interlocutory, if defendant is entitled to immunity, she should not have to expend time and resources to defend herself. "[A] 'central purpose' of governmental immunity is 'to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.' " *Costa v Community Emergency Med Services*, 475 Mich 403, 410 (2006), quoting *Mack v Detroit*, 467 Mich 186, 203 n 18 (2002). "Allowing governmental employee defendants to raise an immunity defense while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare an unnecessary affidavit of meritorious defense, would render illusory the immunity afforded by the [governmental tort liability act, MCL 691.1401 *et seq*.]." *Costa*, *supra* at 410.

Further, this is an issue not only of jurisprudential confusion, but also of considerable substantive significance given the potential deterrent effect of this decision on police officers undertaking legitimate arrests. Not every arrest leads to a criminal conviction, and not every arrest proves in the end to have been well-founded. The "gross negligence" standard for immunity affords a significantly greater level of protection for police officers in carrying out their responsibilities than does the "probable cause" standard of the trial court, the "objectively reasonable" standard of the Court of Appeals, or the "intentional conduct" standard. Police officers are entitled to know the standard of liability applicable to their conduct, as is the Legislature, which enacted the governmental immunity statute. If the liability of police officers is to be judged by a standard other than gross negligence, this should be made clear. It is hard to imagine a legal proposition more damaging to effective law enforcement activity than that a mistaken arrest will expose a police officer to personal civil liability. There are many things that a police officer should be evaluating when he or she makes an arrest; the threat of civil liability if he or she makes a wrong decision should not be at the top of this list.

DULEMBA V THOMAS M COOLEY LAW SCHOOL, No. 134477; Court of Appeals No. 274811.

KELLY, J. (*dissenting*). Plaintiff attempted to sue defendant Thomas M. Cooley Law School in the Ingham Circuit Court alleging a violation of the Persons with Disabilities Civil Rights Act.[1] The complaint was delivered to the clerk of the court on September 19, 2005, the day that the statutory period of limitations expired. However, the complaint was not signed. The clerk informed plaintiff of the error a few days later. On September 27, plaintiff corrected the error. Defendant subsequently moved for summary disposition on the basis that the claim was barred by the statute of limitations. The circuit court agreed and granted defendant's motion. The Court of Appeals affirmed in an unpublished opinion per curiam, issued June 12, 2007 (DOCKET NO. 274811).

Plaintiff argues that her claim is timely because it was "filed" on September 19, 2005. I find merit to her argument and would grant leave to appeal to consider it further.

A claim is untimely unless it is commenced within the period provided by the applicable statute of limitations.[2] "A civil action is commenced by filing a complaint with the court."[3]

Here, the complaint was delivered to the court within the period of limitations. But it was not signed until after the limitations period had expired. Accordingly, the issue is whether delivery of the document to the clerk of the court was sufficient to "file" the complaint or whether the complaint was "filed" only after it was signed.

In considering this issue, I find MCR 2.114(C)(2) instructive. That court rule provides:

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[1] MCL 37.1101 *et seq*.

[2] MCL 600.5805(1).

[3] MCL 600.1901.

> Failure To Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

Hence, an unsigned document will be "stricken unless it is signed promptly." The fact that the document may be "stricken" indicates that it was "filed" when it was delivered to the clerk. If the document had not been "filed" upon delivery, there would be no need to strike it. Therefore, it appears that an unsigned complaint is "filed" upon delivery, but it will be stricken if it is not signed promptly.

In this case, the complaint was delivered to the clerk before the expiration of the period of limitations, and plaintiff signed it promptly after she was informed that it was unsigned. Therefore, if the above argument is correct, the complaint was timely filed. I would grant leave to consider this argument further.

Besides finding support for plaintiff's position in MCR 2.114(C)(2), I find the facts of this case analogous to those in *Kirkaldy v Rim*.[4] In that case, the plaintiff filed with the court an affidavit of merit that was defective.[5] The Court of Appeals determined that the filing did not toll the period of limitations.[6] This Court unanimously reversed, concluding that the statutory period of limitations was tolled when the complaint and affidavit of merit were filed, regardless of whether the affidavit was defective.[7]

Similarly, here, plaintiff filed a complaint but failed to sign it. In essence, she filed a defective complaint. But just as a defective affidavit of merit was sufficient in *Kirkaldy*, so too should a defective complaint be sufficient here.

Because I find support for plaintiff's argument in MCR 2.114(C)(2) and in *Kirkaldy*, I would grant leave to appeal to consider whether we should reverse the Court of Appeals decision on this interesting issue.

WEAVER, J. I join the statement of Justice KELLY.

PEOPLE v GOODWIN, No. 134490. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276338.

KELLY, J. (*dissenting*). Defendant pleaded guilty of assault with intent to murder and possession of a firearm during the commission of a felony. He was sentenced to life in prison, with the possibility of parole, for the assault conviction. In this motion for relief from judgment, defendant challenges the legitimacy of that sentence in light of the current Michigan Parole Board's "life means life" policy. In *Foster-Bey v Rubits-*

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[4] *Kirkaldy v Rim,* 478 Mich 581 (2007).

[5] *Id.* at 583.

[6] *Id.*

[7] *Id.* at 585-586.

chun,[1] Judge Marianne O. Battani of the United States District Court for the Eastern District of Michigan held that changes made to Michigan's parole law and polices in 1992 and 1999 violated the Ex Post Facto Clause of the United States Constitution.[2] For the reasons discussed in my dissenting statement in *People v Scott*, 480 Mich 1019 (2008), I believe the Court should grant leave to appeal in this case as well as in *Scott* to consider the jurisprudentially significant issues raised in the *Foster-Bey* decision.

CAVANAGH, J. I join the statement of Justice KELLY.

PEOPLE V ALEX SCOTT, No. 134743. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). See *People v Hill*, 267 Mich App 345 (2005), lv den 474 Mich 1069 (2006). Court of Appeals No. 278158.

KELLY, J. (*dissenting*). I would grant leave to appeal. In 1987, defendant pleaded guilty of second-degree murder and possession of a firearm during the commission of a felony. He was sentenced to life in prison with the possibility of parole for the murder conviction and a consecutive two-year term for the felony-firearm conviction. Nineteen years later, defendant filed a motion for relief from judgment. He argues that his plea was invalid because he made it under a misunderstanding of the consequences of a parolable life sentence. He also argues that he has a liberty interest in parole and that the current Michigan Parole Board's "life means life" policy violates the Ex Post Facto Clause of the United States Constitution.[1] The trial court denied the motion, and the Court of Appeals denied defendant's application for leave to appeal.

Defendant's argument implicates the 2007 decision of Judge Marianne O. Battani of the United States District Court for the Eastern District of Michigan in *Foster-Bey v Rubitschun*.[2] Judge Battani held that changes made to Michigan's parole law and policies in 1992 and 1999 violate the Ex Post Facto Clause of the United States Constitution when retrospectively applied to prisoners like defendant.[3]

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[1] Unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 23, 2007 (Docket No. 05-71318).

[2] US Const, art I, § 10, cl 1.

[1] US Const, art I, § 10, cl 1.

[2] *Foster-Bey v Rubitschun*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 23, 2007 (Docket No. 05-71318).

[3] The class of prisoners like defendant was stipulated to include

> [a]ll parolable lifers in the custody of the Michigan Department of Corrections who committed crimes (for which they received a parolable life sentence) before October 1, 1992, and whose parole the "new" parole board has denied, passed over, expressed no interest in pursuing, or otherwise rejected or

The 1992 changes included a statutory reduction in the frequency of parole interviews for lifers.[4] Previously, interviews were required in the fourth year of imprisonment and every two years thereafter. The schedule was changed to require the initial interview only after 10 years of imprisonment and every five years thereafter.[5] The 1992 changes increased the size of the parole board and permitted the victims of crimes to appeal from a grant of parole.[6]

Under the 1999 changes, the requirement for an interview every fifth year after the initial 10-year period was eliminated.[7] A file or paper review was deemed sufficient.[8] The 1999 changes also included a limitation on appeals of parole decisions to state courts. Appeals were allowed only by the prosecutor or the victim.[9] Finally, under the 1999 changes, when the parole board elects not to provide a public hearing to a convict serving a life sentence, it is not considered a "decision" of the board. This exempts the board from the statutory requirement to provide written reasons for the "denial."[10]

Retroactive changes in a law governing the parole of prisoners may violate the Ex Post Facto Clause if they increase the punishment for a crime after its commission.[11] To determine if a violation has occurred, courts must determine if the changes have created ' "a sufficient risk of increasing the measure of punishment attached to the covered

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> deferred. Excluded from this definition are so-called "drug lifers" who were convicted of distribution or possession of controlled substances, regardless of whether the crime was originally one subject to parolable life or one converted to parolable life at a later time. For purposes of this class definition, the "new" parole board refers to the board that came into existence pursuant to the 1992 statutory changes in parole, and that gradually took over from the old board in the period from c. 1992 to 1994. As before, if further refinement of the class definition is needed, including the creation of subclasses, that issue will be addressed when and if the parties raise it. [*Id*. at 3, quoting stipulation and order of class certification.]

[4] See 1992 PA 181.

[5] *Foster-Bey*, *supra* at 6-7.

[6] *Id*. at 7.

[7] See 1999 PA 191.

[8] *Foster-Bey*, *supra* at 7.

[9] *Id*.

[10] *Id*.

[11] *Garner v Jones*, 529 US 244, 249-250 (2000).

crimes." '[12] Parole decisions in Michigan are discretionary.[13] In *Garner*,[14] the United States Supreme Court explained that

> where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions.

However, given the 1992 and 1999 changes to Michigan's parole law and policies, the parole board appears to have effectively abdicated exercise of the discretion bestowed on it by statute. The parole board's apparent abdication of its discretionary authority is arguably exemplified by its admission that it believes the imposition of a life sentence means a prisoner will serve life in prison.[15] Moreover, there is evidence that is neither attenuated nor speculative that prisoners like defendant serve a longer sentence as a result of the parole board's new "life means life" policy. There is also evidence that the changes have resulted in a decreased parole rate.[16]

In *Shabazz v Gabry*,[17] the Sixth Circuit Court of Appeals held that the 1992 changes to Michigan's parole system did not violate the Ex Post Facto Clause. In doing so, the court rejected the district court's contrary holding with regard to two subclasses of prisoners. The Sixth Circuit found the district court's analysis unpersuasive because it rested on anecdotal observations and personal speculation about the risk of increased punishment.[18]

In *Foster-Bey*, Judge Battani carefully evaluated substantial evidence, including deposition testimony and statistics not available in *Shabazz*. That evidence indicates that the implementation of the 1992 and 1999 changes to Michigan's parole law and policies has resulted in longer periods of incarceration for parolable lifers.[19] In her well-supported opinion, Judge Battani concluded that the cumulative effect of the 1992

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[12] *Id*. at 250, quoting *California Dep't of Corrections v Morales*, 514 US 499, 509 (1995).

[13] MCL 791.233(1)(a); MCL 791.234(11).

[14] *Garner*, *supra* at 253.

[15] *Foster-Bey*, *supra* at 20.

[16] *Id.* at 34-42.

[17] *Shabazz v Gabry,* 123 F3d 909 (1997).

[18] *Id*. at 914-915.

[19] Judge Battani explained the flaws in the analysis used by the Court of Appeals in *People v Hill*, 267 Mich App 345 (2005). *Foster-Bey*, *supra* at 36-37.

and 1999 changes violated the constitutional rights of a class of prisoners of which defendant is a member. She held:[20]

> The change in the make-up of the Michigan Parole Board, the Board's understanding of why the change occurred and how it was to exercise its discretion, its redefining of the eligibility procedure for nonmandatory lifers, and changes to the timing and intervals of the interview and review process, when considered in total have significantly disadvantaged the class and constitute a violation of the *Ex Post Facto* Clause.

Judge Battani's opinion raises significant concerns about the constitutionality of this state's parole system for those sentenced to parolable life terms before 1992. The Court should grant leave to appeal to consider this jurisprudentially significant issue.

CAVANAGH, J. I join the statement of Justice KELLY.

In re MARSHALL (DEPARTMENT OF HUMAN SERVICES v THOMPSON), No. 135120; Court of Appeals No. 274736.

In re WHITE (DEPARTMENT OF HUMAN SERVICES v KESSLER), No. 135520; Court of Appeals No. 275043.

In re LONG (DEPARTMENT OF HUMAN SERVICES v LONG), No. 135541; Court of Appeals No. 278874.

PEOPLE v CAMP, No. 135545; Court of Appeals No. 281083.

Summary Dispositions January 18, 2008:

HOUDINI PROPERTIES, LLC v CITY OF ROMULUS, No. 132018. On November 8, 2007, the Court heard oral argument on the application for leave to appeal the June 13, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and vacate the Wayne Circuit Court's orders of October 19, 2005, granting summary disposition pursuant to MCR 2.116(C)(6) and (7), on the grounds of failure to comply with MCR 2.203(A) and res judicata. The plaintiff's claim of appeal pursuant to MCL 125.585(11) was not a "pleading." MCR 2.110(A). As the defendant has acknowledged, the joinder rules of MCR 2.203 therefore do not apply to a claim of appeal from the decision of a zoning board of appeals. The decision of the circuit court on appeal from the zoning board of appeals' denial of a use variance was not res judicata on the plaintiff's constitutional claims. The zoning board of appeals did not have jurisdiction to decide the plaintiff's substantive due process and taking claims. Under

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[20] *Id.* at 42.

MCL 125.585(11), the circuit court's review is confined to the record and decision of the zoning board of appeals. Therefore, the circuit court could not rule on taking issues in the plaintiff's appeal. The Court of Appeals and the Wayne Circuit Court erred in relying on the rationale of the unpublished decision in *Sammut v City of Birmingham*, issued January 4, 2005 (Docket No. 250322). We remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 266338.

CORRIGAN, J. (*dissenting*).

I

I dissent from the majority's decision to reverse the judgment of the Court of Appeals and vacate the trial court's orders granting summary disposition for defendant. Although I concur that the compulsory-joinder rules of MCR 2.203(A) do not apply, I believe that the decision of the circuit court on appeal from the zoning board of appeals' (ZBA) denial of a use variance was res judicata regarding plaintiff's taking claim.

Plaintiff, a sophisticated developer, acquired an odd-sized, one-third acre lot for $25,000 near Detroit Metropolitan Airport in 1998. When plaintiff acquired the lot, the location was zoned "business transitional" and prohibited the erection of billboards.[1] Although the city later rezoned the property as "regional center," that zoning classification also prohibited billboards. Six years after plaintiff acquired the lot, it sought a use variance to erect a billboard. Plaintiff asserted various constitutional claims before the ZBA, including a claim that the denial of the use variance for a billboard was a taking. The city's planning consultant recommended that the ZBA deny the application for the following reasons:

> 1. There are no exceptional or extraordinary circumstances or conditions applicable to the site that are not common to other similarly zoned lots in the immediate vicinity of this subdivision. The lots are of a similar size and configuration as the other surrounding lots within this subdivision and possess the same access issue.
>
> 2. Placing a billboard in this site would convey a special privilege to this land owner that is not enjoyed by others in the district and immediate vicinity of this subdivision.

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[1] A billboard on plaintiff's lot also required an airport zoning permit because the property is within Zone A of the airport's zoning ordinance, which is the precision instrument zone for 10 runways. There is no indication that plaintiff ever obtained the permit from the airport to allow the erection of a billboard on the property.

> 3. The billboard will not meet the 20 foot side yard setback from the north property line and will cast a shadow on the lot to the north.
>
> 4. That granting the variance will not be in harmony with the purpose and intent of the RC [regional center] District and is contrary to the recommendations of the Master Plan for development of the Metro Center area.
>
> 5. There are several other areas of the City that allow billboards.

The ZBA therefore denied the application, on the basis of the recommendation of the city's planning consultant.

Plaintiff appealed the ZBA decision in the circuit court, arguing, among other things, that the ZBA's denial of the use variance was a taking. Plaintiff later filed this separate civil action, seeking damages arising from the same denial by the ZBA. Plaintiff again asserted a taking claim, a denial of substantive due process, and a 42 USC 1983 civil rights claim. The circuit court then affirmed the ZBA's denial of a variance. In doing so, the circuit court effectively ruled on plaintiff's taking claim:

> [T]he fact that the property involved has very limited use doesn't mean that it's worthless or it can't be used. There are some uses that the property can be put to other than having a billboard, and it's not been shown to be totally worthless.

Then, in the instant case, the circuit court granted summary disposition for the city based on compulsory joinder and res judicata. The Court of Appeals affirmed.

In *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412 (2007), this Court stated the requirements for application of the doctrine of res judicata:

> "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. 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." [*Id.* at 418, quoting *Adair v Michigan*, 470 Mich 105, 121 (2004) (citations omitted).]

Here, there is no question that plaintiff's ZBA appeal in the circuit court was decided on the merits and that plaintiff's ZBA appeal and taking claim involve the same parties. I disagree with the majority that plaintiff's taking claim could not have been resolved with the ZBA appeal

in the circuit court. The order fails to explain why plaintiff could not have asserted its taking claim with its ZBA appeal.

The order holds that the circuit court could not rule on plaintiff's taking claim because the court's review under MCL 125.585(11) was confined to the decision of the ZBA. That MCL 125.585(11) stated that the circuit court "shall review the record and decision of the board of appeals," however, does not mean that the court is precluded from also reviewing other general jurisdiction claims involving the same facts, such as a taking claim stemming from the ZBA decision.

The majority also concludes that res judicata does not apply to plaintiff's taking claim because the circuit court's review is confined to the record created in the ZBA. When taking claims are not brought within the confines of MCL 125.585(11), however, nothing prevents the circuit court from taking additional evidence on those claims. Further, in applying res judicata, Michigan uses the "same transaction" test, not a "same evidence" test. *Adair*, *supra* at 124-125. In *Adair,* this Court explained the difference:

> "Under the 'same evidence' test, a second suit is barred 'if the evidence needed to sustain the second suit would have sustained the first, or if the same facts were essential to maintain both actions.' 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[s] rise to the assertion of relief.'
>
> * * *
>
> "[U]nder the same evidence test the definition of what constitutes a cause of action is narrower than under the transactional test. As explained in the Restatement (Second) of Judgments, the same evidence test is tied to the theories of relief asserted by a plaintiff, the result of which is that two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs. By contrast, the transactional approach is more pragmatic. Under this approach, a claim is viewed in 'factual terms' and considered 'coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; * * * and regardless of the variations in the evidence needed to support the theories or rights.' " [*Id.* at 124, quoting *River Park, Inc v Highland Park*, 184 Ill 2d 290, 307-309 (1998).]

Thus, under Michigan's test, it is not dispositive that the evidence needed to prove the taking claim is different than what was needed in the ZBA appeal in the circuit court. *Adair*, *supra* at 124-125. In *Adair, supra* at

125, this Court held that although the fact that the two claims require different evidence "may have some relevance, the determinative question is whether the claims" in the taking case arose as part of the same transaction as the claims in the ZBA appeal in the circuit court. " '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, [and] whether they form a convenient trial unit . . . .' " *Id.* at 125, quoting 46 Am Jur 2d, Judgments, § 533, p 801 (emphasis deleted).

Here, a single set of facts gives rise to relief under both the ZBA appeal and the taking theory. Plaintiff even conceded as much in its complaint in the civil action when it stated the following: "There is another civil action pending in the Circuit Court for the County of Wayne involving the parties hereto that relates [to] the subject matter involved in this action. . . . That action is the Plaintiff's appeal of a decision by the Defendant's Zoning Board of Appeals." In the ZBA appeal in the circuit court, plaintiff argued that the ZBA erred in applying the zoning ordinance and denying plaintiff's application for a variance to erect a billboard. Plaintiff argued that the denial of the variance would result in a taking because it would deprive plaintiff's property of all value. In the civil action, plaintiff argued a taking claim, a violation of substantive due process, and a violation of 42 USC 1983, all stemming from defendant's application of its zoning ordinance and denial of plaintiff's variance request. The origin of both actions was plaintiff's inability to erect a billboard on the property. Plaintiff's civil action clearly involves facts that are closely related in time, space, and origin to the ZBA appeal in the circuit court. Thus, plaintiff's taking claim is barred by res judicata because plaintiff could have brought that claim together with the ZBA appeal in the circuit court.

II

Not only do I conclude that plaintiff could have asserted its taking claim *along with* the ZBA appeal in the circuit court, I also conclude that plaintiff did assert its taking claim within the confines of MCL 125.585(11) as *part of* its ZBA appeal. At all times relevant to this appeal, MCL 125.585(11) provided:[2]

> The decision of the board of [zoning] appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court *shall* review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

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[2] Effective July 1, 2006, MCL 125.585 was repealed by the new Michigan Zoning Enabling Act, 2006 PA 110, MCL 125.3101 *et seq*. The section equivalent to MCL 125.585(11) is now codified as MCL 125.3606(1), which is substantively identical.

(a) Complies with the constitution and laws of this state.

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals. [Emphasis added.]

That MCL 125.585(11) stated that the circuit court "shall review the record and decision of the board of appeals" does not mean that the court is precluded from reviewing the constitutional ramifications of the ZBA decision or other claims involving the same facts, such as a constitutional challenge to the zoning ordinance. Rather, the unambiguous statutory language clearly *required* the circuit court to review the ZBA decision to ensure that it complied with the constitution. Nothing in the statute allows a person appealing a ZBA decision to reserve an original civil action alleging claims related to the ZBA decision. By allowing plaintiff to file a taking claim separately from the ZBA appeal in the circuit court, the majority has mandated that extant procedures under our court rules trump the unambiguous statutory language mandating the circuit court to review constitutional issues to ensure that the ZBA decision complies with the constitution.

Perhaps more troubling is that the taking issue *was* adjudicated in the appeal. Plaintiff actually raised constitutional claims in the ZBA and its subsequent appeal in the circuit court. Plaintiff initially made the following arguments in its brief to the ZBA:

> The right to use one's property is one of the most basic property rights that an owner enjoys. It has long been the law in Michigan that the exclusion of an owner's enjoyment or the partial destruction or diminution of a property's value by a governmental agent may constitute a taking. See e.g. Pearsall v Easton Co Bd of Supervisors, 74 Mich 558, 561-562 (1889).
>
> The Applicant, unlike other property owners in the RC zoning district, is being fully deprived of its right to enjoy the Subject Property solely because of the City's action in zoning the Subject Property to a district in which it cannot be developed in any way. . . .
>
> * * *
>
> . . . Due to the Zoning Ordinance, the Subject Property literally cannot be developed in any way. This renders it both unusable and unmarketable and may constitute a taking. See Pearsall [, *supra* at 561-562].

Plaintiff made similar arguments in the circuit court when appealing the ZBA decision. Plaintiff even argued in the circuit court that the ZBA "missed" the taking issue and should have addressed it. Plaintiff argued, in pertinent part, as follows in its circuit court brief:

> This Honorable Court is not bound by the findings and conclusions of the ZBA, but may "negate actions which are so unreasonable as to rise to the level of unconstitutionality." Macenas v Michiana, [433 Mich 380, 395 (1989)].
>
> * * *
>
> The substantial right at issue is the right to use one's property, which is one of the most basic property rights that an owner enjoys. *The exclusion of an owner's enjoyment or the partial destruction or diminution of a property's value by a governmental actor may constitute a taking*. See e.g. Pearsall [,*supra* at 561-562]. Houdini, which has owed [sic] the Property for years, is being denied this right and is entitled to a variance as a matter of law. See e.g. Bassey [*v Huntington Woods*, 344 Mich 701, 705-706 (1956)].
>
> Despite the fact that Houdini's Use Variance Application clearly framed this issue and provided supporting Michigan case law, the ZBA and the Planning Consultant's Report again missed the issue, claiming that the construction of the billboard itself was the property right at issue.
>
> * * *
>
> As discussed previously, the ZBA wholly ignored the most critical fact—that the Property cannot be developed due entirely to the City's own actions. This is the exceptional issue that creates an unnecessary hardship justifying a variance. It is also an unconstitutional use of the City's police power. See Bassey, supra. [Emphasis added; citations omitted.]

Thus, plaintiff actually argued in its appeal of the ZBA's decision that application of the zoning ordinance and the denial of the variance application resulted in a taking. The circuit court affirmed the ZBA's denial of plaintiff's variance application.[3] The Court of Appeals denied leave to appeal that decision.

The circuit court had a duty under MCL 125.585(11) to address the constitutional implications of the ZBA's decision. Yet, instead of complying with MCL 125.585(11), plaintiff filed a separate, duplicative civil

action alleging an unconstitutional taking. The majority's decision encourages gamesmanship by allowing a person appealing a ZBA decision a second bite at the apple by filing a civil suit. If a plaintiff's constitutional arguments are unsuccessful in the ZBA appeal in the circuit court, the separate civil action allows another trip on the same issue.

Even if the facts established in the ZBA record might have been insufficient for the circuit court to decide the taking claim, both statutory and court rule solutions exist that permit the taking of additional evidence so that the taking claim can be made in a ZBA appeal in the circuit court. Specifically, MCL 125.585(12)[4] and MCR 7.105(I)[5] permit the circuit court to order the ZBA to take additional evidence. In *Womack-Scott v Dep't of Corrections*, 246 Mich App 70 (2001), the Court of Appeals explained this procedure as it applies under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*:

> *Constitutional issues not within the administrative agency's jurisdiction can be raised in the circuit court through the review procedure in the APA; no separate action is contemplated or allowed.* Indeed, MCR 24.304(3) provides that "[t]he court, on request, shall hear oral arguments and receive written briefs." Moreover, the APA and the applicable court rule provide a method for taking additional evidence if necessary. MCL 24.305; MCR 7.105(I); cf. In re Nichols, 150 Mich App 1, 9; 388 NW2d 682 (1986) ("While the APA limits review to the record, it also provides [a party] a remedy rendering a de novo court hearing unnecessary.").

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[4] MCL 125.585(12) provided:

> If the court finds the record of the board of appeals inadequate to make the review required by this section, or that additional material evidence exists that with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions that the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court.

[5] MCR 7.105(I) provides:

> Additional Evidence. An application to present proofs of alleged irregularity in procedure before the agency, or to allow the taking of additional evidence before the agency, is timely only if it is filed with or included in the petition for review. The petitioner shall promptly notice the request for hearing in the manner for notice of hearing of motions. If the court orders the taking of additional evidence, the time for filing briefs is stayed until the taking of the evidence is completed.

> Further, when there is an appeal from an administrative agency, the circuit court "may affirm, reverse, remand, or modify the decision of the agency and may grant the petitioner or the respondent further relief as appropriate based on the record, findings, and conclusions." MCR 7.105(M). *This procedure is sufficient to provide plaintiff relief from an administrative agency decision and for claims not decided by the administrative agency.* [*Womack-Scott*, *supra* at 81 (emphasis added).]

As the *Womack-Scott* panel explained, this procedure permits a plaintiff filing a ZBA appeal in the circuit court to also obtain relief on a taking claim, even though the ZBA did not decide or take evidence on that claim. Under this procedure, once the ZBA takes additional evidence regarding the taking claim, the circuit court will have a sufficient factual basis to decide that claim. Accordingly, constitutional issues that were not within the ZBA's jurisdiction can be raised in the circuit court with the ZBA appeal. "[N]o separate action is contemplated or allowed." *Id.*

Caselaw supports the application of res judicata in this case. In *Krohn v City of Saginaw*, 175 Mich App 193, 194-195 (1988), the defendant obtained a variance from the planning commission (acting for the ZBA) to build a store. The plaintiffs, adjacent landowners, appealed that decision in the circuit court. *Id.* at 195. The circuit court dismissed the plaintiffs' appeal as untimely, and the Court of Appeals affirmed that decision. *Id.* at 196-197. The Court of Appeals, however, stated that it was necessary to consider the plaintiffs' argument that certain aspects of their complaint should not have been dismissed because they represented different causes of action not covered by the filing deadline. The Court of Appeals held that the plaintiffs' taking and due process claims did not establish separate causes of action and should be raised in an appeal from the planning commission:

> Count III of plaintiffs' complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. . . . With respect to [this count and two other counts of plaintiffs' complaint], we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, *those are issues to be raised in an appeal from the decision of the planning commission*. Since plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [*Id.* at 198 (emphasis added).]

Although *Krohn* did not involve the application of res judicata, the Court of Appeals discussion of the taking and due process claims as they related

to the ZBA appeal supports defendant's position. Thus, plaintiff's taking claim is barred by res judicata because plaintiff could have brought the taking claim within the confines of the ZBA appeal under MCL 125.585(11).

III

In sum, the majority has failed to adequately explain why res judicata does not bar plaintiff's taking claim in its civil suit. Because plaintiff's subsequent civil suit involves the same transaction as its ZBA appeal in the circuit court, plaintiff's second suit is barred. By allowing plaintiff to file a second action alleging an unconstitutional taking, the Court authorizes splitting these actions in all future cases. This is exactly what the doctrine of res judicata was designed to prevent. As noted by this Court in *A Krolik & Co v Ossowski*, 213 Mich 1, 7 (1920): "The law abhors multiplicity of suits. Attempts to split a claim into separate causes of action have often met with disfavor." Therefore, I would deny leave to appeal.

TAYLOR, C.J. I join parts I and III of Justice CORRIGAN's statement.

Leave to Appeal Denied January 18, 2008 :

In re COLLIER (DEPARTMENT OF HUMAN SERVICES v MILLER), No. 135552; Court of Appeals No. 278257.

In re AL-MAYAHI, No. 135578; Court of Appeals No. 282568.

Summary Dispositions January 22, 2008:

HARTMAN v PORT HURON HOSPITAL, No. 135052. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the St. Clair Circuit Court for the entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. In addition, we direct the St. Clair Circuit Court to enter an order granting the motion to substitute the successor personal representative as the plaintiff in this action, consistent with MCL 700.3613. Court of Appeals No. 257536.

KIMPSON v BOTSFORD GENERAL HOSPITAL, No. 135056. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Oakland Circuit Court for the entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 269253.

CALDWELL V WASTE MANAGEMENT OF MICHIGAN, INC, No. 135097. 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. 280386.

CLEMENS V KOZIARSKI AND MACKENZIE V KOZIARSKI, Nos. 135150, 135151. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in part because plaintiff Linda Jean Clemens falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Calhoun Circuit Court for the entry of an order denying the defendants' motion for summary disposition in Case No. 03-001783-NH and for further proceedings not inconsistent with this order and the order in *Mullins*. 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 Nos. 264688, 265619.

PONTE V PONTE, No. 135159. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the August 30, 2007, order of the Court of Appeals and remand this case to the Court of Appeals for plenary consideration. Because the July 12, 2007, order of the Washtenaw Circuit Court is a postjudgment order awarding attorney fees and costs, it is a final order under MCR 7.202(6)(a)(iv) that is appealable as a matter of right under MCR 7.203(A)(1). We do not retain jurisdiction. Court of Appeals No. 279758.

Leave to Appeal Denied January 22, 2008:

PEOPLE V BONIOR, No. 130397; Court of Appeals No. 265985.

THOMAS V HAWKINS, No. 133825; Court of Appeals No. 273283.

PEOPLE V DEWULF, No. 134297; Court of Appeals No. 258148.

MICHIGAN ENVIRONMENTAL COUNCIL V PUBLIC SERVICE COMMISSION, No. 134474; reported below: 275 Mich App 369.

PEOPLE V TOTH, No. 134540. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275817.

PEOPLE V GEORGE CLARK, No. 134627. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274825.

PEOPLE V DELVRENE WALLACE, No. 134711; Court of Appeals No. 269202.

PEOPLE V BURKS, No. 134766; Court of Appeals No. 269569.

PEOPLE v LEE WHITE, No. 134928; Court of Appeals No. 269156.

PEOPLE v POINTER, No. 135033; Court of Appeals No. 270327.

PEOPLE v GALINEAU, No. 135059; Court of Appeals No. 268492.

AD HOC MEMBERSHIP GROUP v YANKEE AIR FORCE, INC, No. 135099; Court of Appeals No. 276382.

HARRINGTON v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, No. 135118; Court of Appeals No. 270082.

PEOPLE v HINES, No. 135132; Court of Appeals No. 271154.

TAYLOR v CITY OF WESTLAND, No. 135160; Court of Appeals No. 269454.

PEOPLE v JOHN PARKER, No. 135178; Court of Appeals No. 268695.

PEOPLE v PRESCOTT, No. 135179; Court of Appeals No. 270917.

PEOPLE v RICE, No. 135189; Court of Appeals No. 272142.

PEOPLE v JIMMIE YOUNG, No. 135199; Court of Appeals No. 267084.

PEOPLE v COMONTE, No. 135204; Court of Appeals No. 270684.

PEOPLE v DAMON LOVE, No. 135206; Court of Appeals No. 271032.

PEOPLE v CARL BROOKS, No. 135207; Court of Appeals No. 270062.

PEOPLE v BRYAN JACKSON, No. 135208; Court of Appeals No. 271158.

PEOPLE v GLOVER, No. 135209; Court of Appeals No. 271293.

PEOPLE v KEVIN CURRIER, No. 135211; Court of Appeals No. 269564.

PEOPLE v REBMAN, No. 135213; Court of Appeals No. 272729.

PEOPLE v PHILLIP MOORE, No. 135214; Court of Appeals No. 271807.

PEOPLE v PANN, No. 135217; Court of Appeals No. 271013.

PEOPLE v JOHN GEORGE, No. 135220; Court of Appeals No. 279411.

PEOPLE v JENNIFER COLE, No. 135223; Court of Appeals No. 280163.

PEOPLE v BRANTLEY, No. 135224; Court of Appeals No. 271677.

PEOPLE v GERRED, No. 135225; Court of Appeals No. 280094.

PEOPLE v MARK WOOD, No. 135230; reported below: 276 Mich App 669.

PEOPLE v COLBERT, No. 135231; Court of Appeals No. 279619.

JAAKKOLA v AUTO OWNERS INSURANCE COMPANY, No. 135233; Court of Appeals No. 279787.

PEOPLE v NICOLAIDES, No. 135235; Court of Appeals No. 271804.

PEOPLE v ROBERT ANDREWS, No. 135246; Court of Appeals No. 279938.

PEOPLE v MICHAEL POWELL, No. 135253; Court of Appeals No. 279988.

PEOPLE v BRIGGS, No. 135273; Court of Appeals No. 281016.

PEOPLE v WEISS, No. 135286; Court of Appeals No. 280133.

FLAGSTAR BANK, FSB v BAYSIDE MALL, LLC, No. 135462; Court of Appeals No. 281880.

Reconsiderations Denied January 22, 2008:

PEOPLE v LAMAR ROBERTS, No. 130207. Leave to appeal denied at 480 Mich 932. Court of Appeals No. 252100.

KELLY, J. I would grant the motion for reconsideration and, on reconsideration, would remand this case for correction of the judgment of sentence.

BAILEY v PORNPICHIT, No. 132087. Summary disposition entered at 480 Mich 909. Court of Appeals No. 267546.

FLEISCHFRESSER v PETERSON TOWING, INC, No. 133730. Leave to appeal denied at 480 Mich 918. Court of Appeals No. 274353.

WEAVER, J. I would grant the motion for reconsideration.

KELLY, J. I would grant the motion for reconsideration and, on reconsideration, would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MICHAEL ALEXANDER, No. 133990. Leave to appeal denied at 480 Mich 920. Court of Appeals No. 272122.

PEOPLE v MCQUEEN, No. 134089. Leave to appeal denied at 480 Mich 920. Court of Appeals No. 272761.

PEOPLE v RODNEY HICKS, No. 134247. Leave to appeal denied at 480 Mich 921. Court of Appeals No. 274181.

PEOPLE v SOUTHWARD, No. 134525. Leave to appeal denied at 480 Mich 925. Court of Appeals No. 272444.

FISH v ATTORNEY GRIEVANCE COMMISSION, No. 134660.

Summary Dispositions January 24, 2008:

In re BARNES, No. 134934. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion. Court of Appeals No. 269384.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MOYER v SIELOFF, No. 134936. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the decision of the Macomb Circuit Court denying summary disposition to the defendants on the ground that

the defendants' knowledge of an ice hazard rendered the open and obvious doctrine inapplicable. Because the plaintiff was a licensee, the defendants only had a duty to warn the plaintiff of hidden dangers known to the defendants. *Stitt v Holland Abundant Life*, 462 Mich 591, 596 (2000). The fact that the danger was known to the defendants does not mean that the danger was hidden to the plaintiff. We remand this case to the Macomb Circuit Court for further consideration of the defendants' motion for summary disposition to determine whether the icy condition that allegedly caused the plaintiff's injury was open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001). We do not retain jurisdiction. Court of Appeals No. 276154.

PEOPLE v KEITH, No. 134939. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals remanding the case to the Wayne Circuit Court for completion of a sentence departure evaluation report. Defendant was sentenced on May 26, 2006, almost a year after the July 13, 2005, effective date of the amendment of MCR 6.425(D)(1) eliminating the requirement that the court complete a sentence departure evaluation report on a form prescribed by the State Court Administrator. Therefore, it was sufficient that the trial court stated on the record a substantial and compelling reason for an upward departure. 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. 270873.

LINK v THOMAS ELECTRIC, LLC, No. 134958. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the ruling of the Workers' Compensation Appellate Commission (WCAC) that the magistrate's order does not provide for an offset to the plaintiff's workers' compensation benefits except in the case of actual earnings. The magistrate's order incorporated by reference all the rulings in his attached opinion. Because that opinion clearly gives the employer credit for the plaintiff's ability to earn $8 an hour, 25 hours per week, the WCAC clearly erred in ruling that the magistrate's order did not grant such credit. We remand this case to the WCAC for plenary consideration of the plaintiff's cross-appeal. We do not retain jurisdiction. Court of Appeals No. 276745.

PEOPLE v FRANK STEPHENS, No. 134993. 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 50th District Court for a determination whether the evidence presented at the preliminary examination was sufficient, by a preponderance of the evidence, to establish the corpus of the crime charged in the absence of the statement the defendant made to the police. *People v Konrad*, 449 Mich 263, 269-270 (1995) (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). The Court of Appeals erred in ruling that the defendant had waived the right to claim error in the district court's use of his statement to the police by supposedly stipulating to the admission of the statement. The Court of Appeals further erred by

independently determining that the evidence presented at the preliminary examination was sufficient to create probable cause apart from defendant's statement, when such a determination was not made by either the district court or the Oakland Circuit Court. Court of Appeals No. 271046.

CORRIGAN, J. I would deny leave to appeal.

Leave to Appeal Denied January 24, 2008:

PEOPLE v TIMOTHY MOORE, No. 134142; Court of Appeals No. 267663.

CAPRATHE v JUDGES RETIREMENT BOARD, No. 134482; reported below: 275 Mich App 315.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v JAVONTA WALKER, No. 134524; Court of Appeals No. 278160.

PEOPLE v BASIL PERRY, No. 134577; Court of Appeals No. 270283.

KELLY, J. I would remand this case to the trial court for articulation of the court's basis for scoring offense variable 11.

PEOPLE v GRABIEC, No. 134767; Court of Appeals No. 266805.

PEOPLE v MARCHANT, No. 134825; Court of Appeals No. 269427.

KELLY, J. I would grant leave to appeal.

PEOPLE v KELLER, No. 134851; Court of Appeals No. 266804.

JENKINS v KOESTER, No. 135019; Court of Appeals No. 268175.

TAYLOR, C.J., and YOUNG, J. We would reverse this case for the reasons stated in the Court of Appeals dissenting opinion.

Summary Disposition January 25, 2008:

PEOPLE v LATHROP, No. 135066. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, we vacate the sentence of the Muskegon Circuit Court, and we remand this case to the trial court for resentencing. Absent any indication in the record that the trial judge would have departed upward to the same extent if the guidelines had been properly scored, the prosecution's admission that prior record variable 5, MCL 777.55, was improperly scored establishes a plain error affecting the defendant's substantial rights. Had prior record variable 5 not been scored, the correct guidelines range would have been 108 to 180 months, rather than the 126 to 210 months on which the decision to depart upward was based. The trial court believed that it was departing upward by 30 months, when, in fact, the upward departure was 60 months above the minimum sentence range under properly scored sentence guidelines. Therefore, the defendant is entitled to relief under the rationale of *People v Francisco*, 474 Mich 82 (2006), and *People v Horan*, 477 Mich 1062 (2007). On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling

reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). We do not retain jurisdiction. Court of Appeals No. 268152.

WEAVER, J. (*concurring*). I concur in the order remanding this case for resentencing because the sentencing judge did not specifically state that, despite the scoring error, he would have imposed the same upward sentencing departure.

For the reasons stated in my concurrence/dissent in *People v Babcock,* 469 Mich 247, 280 (2003), I continue to believe that *Babcock, People v Reincke,* 469 Mich 957 (2003) (WEAVER, J., dissenting), and *People v Francisco,* 474 Mich 82, 93-95 (2006) (CORRIGAN, J., dissenting, joined by WEAVER, J.), were wrongly decided.

Further, I agree with and join the following portions of Justice YOUNG's concurrence in this case:

> I write to provide a suggestion to sentencing courts that will hopefully curtail the cycle of appellate sentencing litigation that this Court's prior decisions have created. This Court has, through a series of recent decisions, construed the statutory sentencing guidelines in such a fashion that even modal defects necessitate resentencing. I do not believe that the sentencing guidelines warrant such a construction or result.
>
> In *People v Babcock*, this Court held that
>
> "if the trial court articulates multiple reasons, and the Court of Appeals . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticulation."
>
> I joined Justice CORRIGAN in her partial dissent in *Babcock* because I shared her belief that the remand requirement stated therein was inconsistent with the language of MCL 769.34(11). . . . I respectfully continue to believe that most remands mandated by this Court's holding in *Babcock* are unnecessary and not mandated by the statutory guidelines.
>
> In a similar vein, this Court, in *People v Francisco*, mandated a remand for resentencing anytime an appellate court finds " 'an error in scoring the sentencing guidelines,' " regardless [of] whether the original sentence still falls within the appropriate sentencing guidelines range upon rescoring. Again, I joined Justice CORRIGAN dissenting from the majority's decision because I believed the holding was contrary to the language of MCL 769.34(10). I continue to believe that scoring errors should be

reviewed under our harmless error rule, MCR 2.613(A), and that most remands mandated by this Court's holding in *Francisco* are not required by the statute.

The cumulative effect of remands mandated by *Babcock* and *Francisco* has left this Court in a perpetual state of error correction . . . .

* * *

In an effort to provide some relief to sentencing courts that wish to avoid resentencing orders that this Court's previous decisions would otherwise require, I am providing two sentencing instructions that I recommend all trial court judges cut out and paste into their bench books and use when they appropriately reflect the judge's sentencing intent. First, to avoid unnecessary remands for cases involving a sentencing departure, I suggest that all judges read the following passage into the record when appropriate:

"Having acknowledged the substantial and compelling reasons justifying an upward/downward departure from the recommended sentencing guidelines, I believe a ____ year/month sentence is sufficiently warranted by each of the substantial and compelling reasons I have outlined. Moreover, I believe that the ____ year/month sentence I am imposing today is proportionate to the seriousness of the defendant's conduct and record and produces a proportionate criminal sentence, regardless of any potential errors in scoring the sentencing guidelines that may affect the recommended sentencing guidelines range."

Second, to avoid unnecessary remands for cases where a sentencing departure is not necessary, I suggest the following:

"I believe that the ____ year/month sentence I am imposing today is proportionate to the seriousness of the defendant's conduct and record and produces a proportionate criminal sentence, regardless of any potential errors in scoring the sentencing guidelines that may affect the recommended sentencing guidelines range."

While I do not encourage the trial judges of this state to "game" the statutory sentencing guidelines, I do encourage judges to include these statements when a sentencing judge is convinced that the length of the sentence imposed is appropriate, even if there may be some undetected minor defect in the calculation of the recommended sentencing guidelines range.

KELLY, J. (*concurring*). I concur in the order reversing the Court of Appeals decision and remanding this case to the trial court for resentenc-

ing. I write separately to express my concern about the advice of Justices WEAVER, CORRIGAN, and YOUNG to sentencing judges to add an explicit disclaimer to their judgments of sentence. I believe that this advice encourages judges to disregard the law that requires them to consider accurate sentencing guidelines recommendations when sentencing convicts.

Generally, a defendant's minimum sentence must be within the appropriate sentence range.[1] However, MCL 769.34(3) allows a sentencing judge to "depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure . . . ." Importantly, this statute allows departure only from "the appropriate sentence range."

It follows that a sentence beyond the guidelines range that is based on an inappropriate range is invalid. Therefore, when a trial judge departs from a sentence range that is the product of incorrect scoring, the case must be remanded for resentencing. Of course, the judge could impose the same sentence on remand if there is a substantial and compelling reason justifying the particular departure from the sentence range produced by the correctly scored guidelines. But there are no magic words that insulate an otherwise improper sentence from challenge.

Justices WEAVER, CORRIGAN, and YOUNG express their displeasure with the current state of sentencing law. Regardless of our personal opinions on whether a departure from a sentence range based on incorrectly scored guidelines calls for resentencing, the Legislature, rather than this Court, has spoken about this matter. It has given sentencing judges the authority to depart from "the appropriate sentence range" only. A judge exceeds the scope of this authority and issues an invalid sentence when he or she departs from a sentence range that results from incorrect scoring. Harmless-error review is inapplicable to an invalid sentence. Accordingly, our personal opinions aside, a remand is necessary when a judge departs from a sentence range incorrectly scored. We should not encourage judges to violate this statutory requirement by indicating that they would render a sentence that exceeds the guidelines range regardless of whether the range is accurate.

In footnote 13 of his concurrence, Justice YOUNG purports to "highlight[] for members of the judiciary what this Court has stated in its decisions concerning the statutory guidelines." The only overt suggestion this Court has ever offered sentencing courts had to do with any substantial and compelling reason for an upward departure about which a sentencing court may have doubts.[2] This Court has never instructed sentencing courts to ignore the appropriate sentencing guidelines.

In *People v Mutchie*,[3] we declined to interpret offense variable (OV) 11 because, in departing upward, the sentencing court "clearly expressed its view that the sentences imposed in this case were the proper sentences

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[1] MCL 769.34(2).

[2] *People v Babcock*, 469 Mich 247, 260 n 15 (2003).

[3] *People v Mutchie,* 468 Mich 50 (2003).

without regard to how OV 11 might be scored."[4] We took into consideration the sentencing court's clearly expressed intent in *Mutchie*. But we did not advise sentencing courts that they should routinely state their intent to depart upward to the same extent no matter how much the appropriate guidelines range might change because of scoring errors.

My colleagues caution judges to use their instructions only when appropriate. But they also direct trial judges to state that the sentence imposed after an upward departure is proportionate regardless of any scoring errors that may affect the recommended sentencing guidelines range. This instruction has the potential of producing upward departures much greater than the judge contemplated on the basis of the sentencing range he or she believed to be applicable at sentencing. It precludes the judge from reviewing the changed sentencing range and reconsidering the upward departure. What is worse, it gives the judge a choice to consciously deny himself or herself such a review and reconsideration. Because the Court has never sanctioned giving such an overt instruction to sentencing courts, my colleagues' instruction does not highlight anything that the Court has stated in its decisions. This is notwithstanding Justice YOUNG's assertion to the contrary.

In their second instruction regarding sentences without upward departures, my colleagues again direct judges to state that the sentence is proportionate regardless of any potential scoring errors that may affect the recommended guidelines range. This instruction is contrary to the majority opinion in *People v Francisco*.[5] Again, in suggesting that instruction, my colleagues are not highlighting the position of the majority of this Court. The instruction reflects the position of the dissent in *Francisco*, in which my colleagues concurred,[6] rather than the position of the majority.

YOUNG, J. (*concurring*). I write to provide a suggestion to sentencing courts that will hopefully curtail the cycle of appellate sentencing litigation that this Court's prior decisions have created. This Court has, through a series of recent decisions,[1] construed the statutory sentencing guidelines in such a fashion that even modal defects necessitate resentencing.[2] I do not believe that the sentencing guidelines warrant such a construction or result.

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[4] *Id.* at 52.

[5] *People v Francisco,* 474 Mich 82, 91-92 (2006).

[6] *Id*. at 93-95 (CORRIGAN, J., dissenting).

[1] See *People v Babcock*, 469 Mich 247, 271 (2003); *People v Francisco*, 474 Mich 82, 91 (2006).

[2] See, e.g., *People v Reincke*, 469 Mich 957, 957-958 (YOUNG, J., dissenting) (explaining that "[t]he nature and extent of the injuries suffered by the victim in this case *epitomize* the type of objective and verifiable reasoning that 'keenly or irresistibly' grabs the Court's attention," but a remand was ordered because "a majority of this Court apparently believes that the justification given by the trial court is insufficient"); *People v Jackson*, 474 Mich 996 (2006) (CORRIGAN, J.,

In *People v Babcock*, this Court held that

> if the trial court articulates multiple reasons, and the Court of Appeals . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticulation.[3]

I joined Justice CORRIGAN in her partial dissent in *Babcock* because I shared her belief that the remand requirement stated therein was inconsistent with the language of MCL 769.34(11).[4] Although I am obligated to follow the law as established by this Court, I respectfully continue to believe that most remands mandated by this Court's holding in *Babcock* are unnecessary and not mandated by the statutory guidelines.

In a similar vein, this Court, in *People v Francisco*, mandated a remand for resentencing anytime an appellate court finds " 'an error in scoring the sentencing guidelines,' "[5] regardless whether the original sentence still falls within the appropriate sentencing guidelines range upon rescoring.[6] Again, I joined Justice CORRIGAN dissenting from the majority's decision because I believed that the holding was contrary to the language of MCL 769.34(10). I continue to believe that scoring errors should be reviewed under our harmless error rule, MCR 2.613(A), and that most remands mandated by this Court's holding in *Francisco* are not required by the statute.

The cumulative effect of the remands mandated by *Babcock* and *Francisco* has left this Court in a perpetual state of error correction. Fortunately, the trial courts of this state are not hopelessly subject to endless review by this Court when imposing a criminal sentence. In *Babcock*, this Court made the remand requirement contingent on the appellate court's ability to "determine the trial court's intentions."[7] This Court even suggested that if a trial court suspects that one of its reasons for departure may not be "substantial and compelling" to the appellate courts, the judge may avoid the requisite remand by stating: "I would impose the same sentence regardless of this reason."[8] In addition, in

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concurring) (explaining that this Court's holding in *Babcock* required an otherwise unnecessary remand because the trial court did not use the "precise magic language necessary to sustain a departure").

[3] *Babcock*, *supra* at 271.

[4] *Id.* at 275 (CORRIGAN, C.J., concurring in part and dissenting in part).

[5] *Francisco*, *supra* at 88-91, quoting MCL 769.34(10).

[6] *Id.* at 93 (CORRIGAN, J., dissenting).

[7] *Babcock*, *supra* at 260.

[8] *Id.* at 260 n 15.

People v Mutchie,[9] this Court held that the remand that is required by *Francisco* is not required when the trial court "clearly expressed its view that the sentences imposed in [that] case were the proper sentences without regard to [a potential scoring error]."[10] Thus, it is imperative that sentencing judges do a more precise job in articulating their sentencing decisions when they believe that they have imposed a fair sentence.

In the present case, defendant's original recommended sentencing guidelines range was 126 to 210 months. The trial court departed upward from the original guidelines and sentenced defendant to a minimum sentence of 240 months in prison. The parties do not dispute that the trial court gave substantial and compelling reasons for the departure.[11] The prosecutor concedes, however, that prior record variable 5[12] was incorrectly scored and that the recommended guideline range should have been 108 to 180 months. However, the trial court did not expressly state that it would impose the same sentence regardless of any scoring errors that may change the guidelines range; thus, defendant is entitled to resentencing under *Francisco*.

In an effort to provide some relief to sentencing courts that wish to avoid resentencing orders that this Court's previous decisions would otherwise require, I am providing two sentencing instructions that I recommend all trial court judges cut out and paste into their bench books and use when they appropriately reflect the judge's sentencing intent. First, to avoid unnecessary remands for cases involving a sentencing departure, I suggest that all judges read the following passage into the record when appropriate:

> Having acknowledged the substantial and compelling reasons justifying an upward/downward departure from the recommended sentencing guidelines, I believe a ____ year/month sentence is sufficiently warranted by each of the substantial and compelling reasons I have outlined. Moreover, I believe that the ____

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[9] 468 Mich 50, 52 (2003).

[10] See also *Francisco*, *supra* at 89 n 8 (stating that "[r]esentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range," and citing *Mutchie*).

[11] The court gave three reasons: (1) defendant assaulted the victim, his wife, in front of their young children; (2) "the testimony in this case that once—with one of the thrusts into your wife's abdomen you then moved the knife. In other words you dragged it through here [sic, her] in a way that it seems like a hunter might do when he was trying to kill his prey"; and (3) after his arrest, defendant attempted to manipulate his children and turn them against their mother, blaming her for his actions.

[12] MCL 777.55.

> year/month sentence I am imposing today is proportionate to the seriousness of the defendant's conduct and record and produces a proportionate criminal sentence, regardless of any potential errors in scoring the sentencing guidelines that may affect the recommended sentencing guidelines range.

Second, to avoid unnecessary remands for cases in which a sentencing departure is not necessary, I suggest the following:

> I believe that the ____ year/month sentence I am imposing today is proportionate to the seriousness of the defendant's conduct and record and produces a proportionate criminal sentence, regardless of any potential errors in scoring the sentencing guidelines that may affect the recommended sentencing guidelines range.

While I do not encourage the trial judges of this state to "game" the statutory sentencing guidelines, I do encourage judges to include these statements when a sentencing judge is convinced that the length of the sentence imposed is appropriate, even if there may be some undetected minor defect in the calculation of the recommended sentencing guidelines range.[13]

CORRIGAN, J. I join the statement of Justice YOUNG.

Summary Disposition January 30, 2008:

MARTIN v SMG, No. 134358. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Kent Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 273528.

Leave to Appeal Denied January 30, 2008:

TURNER v DETROIT BOARD OF EDUCATION, No. 134595; Court of Appeals No. 275575.

PEOPLE v SCHUMACHER, No. 134712; reported below: 276 Mich App 165.

PEOPLE v JAMES RAMSEY, No. 134814. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276031.

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[13] In her concurrence, Justice KELLY chastises me for highlighting for members of the judiciary what this Court has stated in its decisions concerning the statutory guidelines. If the Court no longer subscribes to the positions it has taken, the Court ought overrule the portions of those decisions on which I rely to provide counsel to the Michigan trial bench on sentencing questions.

PEOPLE v GREGORY JONES, No. 134847; Court of Appeals No. 277536.
KELLY, J. I would grant leave to appeal.

PEOPLE v DERRICK MITCHELL, No. 134893. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Defendant is entitled to early parole eligibility under MCL 791.234(13). See *People v Kelly*, 474 Mich 1026 (2006). Court of Appeals No. 276100.

PEOPLE v LEECLIFTON MOORE, No. 134954; Court of Appeals No. 269246.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SABO, No. 135050; Court of Appeals No. 279548.
KELLY, J. I would remand this case for resentencing.

MCCUMMINGS v PIONEER STATE MUTUAL INSURANCE COMPANY, No. 135068; Court of Appeals No. 269832.
CORRIGAN and MARKMAN, JJ. We would grant leave to appeal.

GRISWOLD PROPERTIES, LLC v LEXINGTON INSURANCE COMPANY, No. 135074; reported below: 275 Mich App 543, 801.

PEOPLE v TAFIL, No. 135078; Court of Appeals No. 279639.
KELLY, J. I would remand this case to the trial court for resentencing regarding offense variable 2.

GAINORS MEAT PACKING, INC v HOME-OWNERS INSURANCE COMPANY, No. 135091; reported below: 276 Mich App 551.

DEPARTMENT OF ENVIRONMENTAL QUALITY v SOUTH HURON VALLEY UTILITY AUTHORITY, No. 135098; Court of Appeals No. 265964.

PEOPLE v KEVIN MEYERS, No. 135107; Court of Appeals No. 279092.
KELLY, J. I would grant leave to appeal.

PEOPLE v CHAMBLESS, No. 135111; Court of Appeals No. 279100.

PEOPLE v DONALD WHITE, No. 135157; Court of Appeals No. 280450.

PEOPLE v FARMER, No. 135170; Court of Appeals No. 271217.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DUQUIL LOVE, No. 135203; Court of Appeals No. 270410.

PEOPLE v LASCO, No. 135308; Court of Appeals No. 279277.
KELLY, J. I would remand this case for the appointment of appellate counsel.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal February 1, 2008:

DEPARTMENT OF TRANSPORTATION v INITIAL TRANSPORT, INC, No. 134798. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address (1) whether the Motor Carrier

Safety Act (MCSA), MCL 480.11 *et seq*., provides a private cause of action or remedy for third parties; (2) whether the MCSA, at MCL 480.11a, implicitly amended the cap on recoverable property damages found in the Michigan no-fault act, MCL 500.3101 *et seq*., at MCL 500.3121; (3) whether, if the cap has been amended by the MCSA, this has any relevance to this case, where the applicable financial responsibility amount found in the MCSA is apparently the same as the property damage cap established in the no-fault act; and (4) whether the plaintiff is entitled to any penalty interest pursuant to MCL 500.2006. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 276 Mich App 318.

CAVANAGH, J. I would deny the application for leave to appeal.

MILJEVICH CORPORATION v NORTH COUNTRY BANK & TRUST, No. 134780. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the plaintiff was damaged by the defendant's failure to publish its interest rate, and whether the defendant bank indirectly published its interest rate by telling the plaintiff that the *Wall Street Journal* prime rate was the applicable interest rate. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of their application papers. Court of Appeals No. 268356.

Leave to Appeal Granted February 1, 2008:

ROBERSON BUILDERS, INC v LARSON, No. 132363. The parties shall address (1) whether a claim for setoff is a counterclaim or an affirmative defense and (2) whether asserting a claim for a setoff as a defense to another party's claim amounts to "bring[ing] or maintain[ing] an action in a court of this state for the collection of compensation" under MCL 339.2412(1). Court of Appeals No. 260039.

Summary Dispositions February 1, 2008:

MAZUMDER v UNIVERSITY OF MICHIGAN BD OF REGENTS, No. 130836. 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 Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the court erred in invoking the doctrine of equitable tolling under these circumstances. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590-591 & n 65 (2005). However, because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins*, *supra*, we reinstate the order of the Washtenaw

Circuit Court denying the defendants' motion for summary disposition and remand this case to that court for further proceedings not inconsistent with this order and the order in *Mullins*. Reported below: 270 Mich App 42.

The motion to consolidate is denied as moot.

CAVANAGH and WEAVER, JJ. We concur in the result.

KELLY, J. (*concurring*). The issue in this case is whether our decision in *Waltz v Wyse*[1] bars plaintiff's claim. The Court of Appeals invoked the doctrine of equitable tolling to find that plaintiff's claim was not barred by *Waltz*.[2] We affirm that decision, but for a different reason. Plaintiff is within the class of plaintiffs who are entitled to relief under our unanimous order in *Mullins v St Joseph Mercy Hosp*.[3] For that reason, it is unnecessary for us invoke the doctrine of equitable tolling to find that plaintiff's claim is not barred by *Waltz*.

I write to point out that, given the state of the law when the Court of Appeals reached its decision, resort to the doctrine of equitable tolling was highly appropriate. As the Court of Appeals correctly recognized, the doctrine should be invoked " 'to ensure fundamental practicality and fairness and to prevent the unjust technical forfeiture of a cause of action.' "[4] The Court of Appeals persuasively concluded that circumstances justifying its application existed in this case.

PEOPLE V BERNAICHE, No. 131459. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals that affirmed the trial court's order granting the defendant's motion for new trial. Although the prosecutors violated their discovery obligation by failing to disclose their expert witness's supplemental report, the violation amounted to harmless error. We remand this case to the Court of Appeals for consideration of the issues raised by defendant in that court but not addressed, in light of its prior disposition. Leave to appeal as cross-appellant 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. 261498.

CAVANAGH and KELLY, JJ. We would deny the prosecution's application for leave to appeal.

LAKE FOREST PARTNERS 2, INC V DEPARTMENT OF TREASURY, No. 132013. On October 3, 2007, the Court heard oral arguments on the application for leave to appeal the June 6, 2006, judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the part of the Court of Appeals judgment that reversed the Michigan Tax Tribunal order that concluded that petitioner

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[1] *Waltz v Wyse,* 469 Mich 642 (2004).

[2] *Mazumder v University of Michigan Bd of Regents*, 270 Mich App 42, 62 (2006) (citations omitted).

[3] *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007).

[4] *Mazumder*, 270 Mich App at 61 (citations omitted).

should have paid the state real estate transfer tax based on the value of the lots as improved by the homes. The State Real Estate Transfer Tax Act, MCL 207.521 *et seq*., taxes recorded instruments. MCL 207.523. In this case, the only recorded instrument was the deed. The "value" exchanged for that deed included both the cost of the lot and the home; thus, the Tax Tribunal correctly held that that value was the proper measure for taxation.

We reverse the Tax Tribunal's order imposing penalties against petitioner. The Department of Treasury did not prove that petitioner acted negligently or with any intent to defraud when it paid taxes on the value of the unimproved land. The imposition of penalties is not warranted in the absence of such evidence. MCL 205.23(3); Mich Admin Code, R 205.1012. We remand this case to the Tax Tribunal for entry of an order reinstating petitioner's assessment but reversing the imposition of penalties. Reported below: 271 Mich App 244.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. I would grant leave to appeal.

JOHNSON v HURLEY MEDICAL GROUP, PC, No. 132953. By order of May 30, 2007, the application for leave to appeal the April 13, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the court erred in invoking the doctrine of equitable tolling under these circumstances. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590-591 & n 65 (2005). However, because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins*, *supra*, we remand this case to the Genesee Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Reported below: 270 Mich App 575.

CAVANAGH and WEAVER, JJ. We concur in the result.

KELLY, J. (*concurring*). I concur with the conclusion that our decision in *Waltz v Wyse*[1] does not bar plaintiff's claim. But, as explained in my statement in *Mazumder v Univ of Michigan Bd of Regents*,[2] given the state of the law when the Court of Appeals rendered its decision, resort to the doctrine of equitable tolling was highly appropriate.

PEOPLE v MCBRIDE, No. 133142. On November 8, 2007, the Court heard oral argument on the application for leave to appeal the December 19, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with this order. The trial court erred in determining that the

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[1] *Waltz v Wyse,* 469 Mich 642 (2004).

[2] *Mazumder v Univ of Michigan Bd of Regents,* 480 Mich 1045 (2008).

prosecutor failed to prove by a preponderance of the evidence that defendant made a knowing and intelligent waiver of her *Miranda*[1] rights. The totality of the circumstances surrounding the interrogation reflects that defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights. *Moran v Burbine*, 475 US 412 (1986). Reported below: 273 Mich App 238.

WEAVER, J. (*concurring*). I concur with the majority's partial reversal of the judgment of the Court of Appeals and with the majority's order remanding this case to the trial court for further proceedings because the totality of the circumstances surrounding the interrogation reflects that the defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights. See *Miranda v Arizona*, 384 US 436 (1966).

I write separately because viewing the defendant's videotaped confession is integral to evaluating whether the defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights. Although the defendant's confession tape should not be posted on the Court's website before the trial in this matter, the Court should post the tape after the conclusion of the trial and all possible appeals.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

LONG V GOODSON, Nos. 133197, 133209, 133210, 133212, 133213, 133215-133218. By order of May 30, 2007, the application for leave to appeal the April 18, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the court erred in invoking the doctrine of equitable tolling under these circumstances. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590-591 & n 65 (2005). However, because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins*, *supra*, we remand this case to the Wayne Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals Nos. 261049, 261050, 261051, 261052.

CAVANAGH and WEAVER, JJ. We concur in the result.

KELLY, J. (*concurring*). I concur with the conclusion that our decision in *Waltz v Wyse*[1] does not bar plaintiff's claim. But, as explained in my statement in *Mazumder v Univ of Michigan Bd of Regents*,[2] given the state of the law when the Court of Appeals rendered its decision, resort to the doctrine of equitable tolling was highly appropriate.

HOPKINS V GRAHAM, Nos. 133208, 133214. By order of May 30, 2007, the application for leave to appeal the April 20, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St*

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[1] *Miranda v Arizona*, 384 US 436 (1966).

[1] *Waltz v Wyse,* 469 Mich 642 (2004).

[2] *Mazumder v Univ of Michigan Bd of Regents,* 480 Mich 1045 (2008).

Joseph Mercy Hosp (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the court erred in invoking the doctrine of equitable tolling under these circumstances. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590-591 & n 65 (2005). However, because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins*, *supra*, we remand this case to the Genesee Circuit Court for entry of an order denying the defendant's motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 261867.

CAVANAGH and WEAVER, JJ. We concur in the result.

KELLY, J. (*concurring*). I concur with the conclusion that our decision in *Waltz v Wyse*[1] does not bar plaintiff's claim. But, as explained in my statement in *Mazumder v Univ of Michigan Bd of Regents*,[2] given the state of the law when the Court of Appeals rendered its decision, resort to the doctrine of equitable tolling was highly appropriate.

BEAVERS V BARTON MALOW COMPANY, No. 133294. On December 5, 2007, the Court heard oral argument on the application for leave to appeal the January 18, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to that court for it to exercise its discretion as to whether to hear the appeal. The Court of Appeals erred in dismissing the appeal on the basis of MCR 7.205(F)(3) because, in doing so, it ignored *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1980), and *People v Kincade (On Remand)*, 206 Mich App 477, 483 (1994). This Court plans to open an administrative file to explore whether to amend MCR 7.205(F)(3), in recognition of the uncertainty present in cases like this one. Court of Appeals No. 269007.

CORRIGAN, J. (*dissenting*). I respectfully dissent because tolling is not appropriate in this case under *Riza v Niagara Machine & Tool Works, Inc,* 411 Mich 915 (1981), or *People v Kincade (On Remand),* 206 Mich App 477 (1994). *Riza,* a one-paragraph peremptory order of this Court, stated that the 18-month period for delayed appeal provided in former GCR 1963, 806.2 was tolled while the plaintiff's claim of appeal was pending. *Riza*, *supra* at 915. We offered no legal analysis and no description of the facts in that case. The Court of Appeals opinion in *Kincade* in turn cited *Riza* in the context of a criminal defendant's complex series of applications to the Court of Appeals. The defendant initially filed a claim of right and petition for superintending control in the Court of Appeals, seeking the appointment of new counsel to appeal a circuit court order denying his postconviction motion for a new trial. *Kincade*, *supra* at 480. The Court of Appeals dismissed both the claim of right and the petition. *Id.* This Court ultimately directed the Court of

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[1] *Waltz v Wyse,* 469 Mich 642 (2004).

[2] *Mazumder v Univ of Michigan Bd of Regents,* 480 Mich 1045 (2008).

Appeals to consider as on leave granted the substantive questions presented in the defendant's purported claim of right, which included whether he was constitutionally entitled to appointment of counsel and an appeal as of right under the circumstances. 439 Mich 1022 (1992); *Kincade*, *supra* at 481. The Court of Appeals concluded that, because the defendant sought to appeal an order denying a motion for relief from judgment, he could only seek leave to appeal and any right to counsel was governed by MCR 6.509(B). *Kincade*, *supra* at 483. The panel relied on *Riza* to conclude that, if the attorney previously appointed to pursue the defendant's postconviction motion concluded that an application for leave was warranted, she could still file such an application because the period for late appeal was tolled "during the time the various appellate proceedings connected with the order denying relief from judgment ha[d] been pending in [the Court of Appeals] or the Supreme Court." *Id.* at 483. The cases cited in the order offer no authority to establish that the period for late appeal was tolled here. MCR 7.205(F)(1) explicitly prohibits tolling under the circumstances of this case. MCR 7.205(F)(1) permits a party to apply for late appeal "[w]hen an appeal of right or an application for leave *was not timely filed*." (Emphasis added.) Here, plaintiff *did* file a *timely claim of appeal* and his claim was dismissed because, through his own negligence, he failed to comply with the Court of Appeals filing requirements. Accordingly, the Court of Appeals appropriately declined to give plaintiff a second bite at the apple. I would also deny leave. I support the Court's intention to open an administrative file, however, to address whether and when tolling of the period for late appeal is appropriate.

PATRICK V SHAW, No. 133972. The application for leave to appeal the April 10, 2007, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals. The Alternative Mortgage Transaction Parity Act (AMPTA), 12 USC 3803(c), does not preempt MCL 438.31c(2), but we disagree with that part of the opinion of the Court of Appeals that ruled that AMPTA was inapplicable because the loan here at issue was an extension, rather than an origination. Rather, AMPTA is inapplicable to this case because the loan here at issue was not an "alternative mortgage transaction" as defined by AMPTA in 12 USC 3802. Reported below: 275 Mich App 201.

UMBARGER V HAYES GREEN BEACH MEMORIAL HOSPITAL CORPORATION, No. 134011. On order of the Court and on the Court's own motion, we vacate our order dated December 14, 2007. By order of September 24, 2007, the application for leave to appeal the March 1, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). The case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins*, *supra*. We remand this case to the Eaton Circuit

Court for entry of an order denying the defendant's motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. 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. 264699.

PEOPLE v DEKUBBER, No. 134663. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and she knowingly allowed the appellate filing deadline to pass because defendant's family was unable to pay for her services. We conclude that the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States,* 526 US 23, 28 (1999). Counsel's decision to delay filing and permit the deadline to pass without seeking to withdraw from representation so that the court could appoint appellate counsel to prepare defendant's appeal was the "but for" cause of defendant's lost appeal. Costs are imposed against the attorney, only, in the amount of $250, to be paid to the Clerk of this Court. We do not retain jurisdiction. Court of Appeals No. 278507.

CORRIGAN, J. (*dissenting*). I respectfully dissent. The defendant's retained appellate attorney missed the deadline for late appeal in the Court of Appeals. As a result, his appeal was dismissed for lack of jurisdiction. Under *Roe v Flores-Ortega,* 528 US 470, 486 (2000), a defendant alleging that ineffective assistance of counsel deprived him of his appeal must show that, "but for counsel's deficient conduct, he would have appealed." Thus, the defendant must establish, as a factual matter, that his appellate attorney caused him to forgo an appeal by rendering assistance that fell below professional norms. His attorney may not be the "but for" cause of his lost appeal if the defendant contributed to the delay or indicated that he did not wish to appeal. Cf. *Peguero v United States,* 526 US 23, 25-26, 28 (1999). Here, the defendant replaced his appointed appellate attorney by retaining a second attorney almost 11 months after his convictions and sentences were entered. After the retained attorney filed an unsuccessful motion for resentencing in the trial court, the defendant's family did not pay his legal bills on time. His retained attorney asserts that, although the family's inability to pay was "not Defendant's fault," she waited to prepare and file his appeal until she received payment. She also claims that she informed the defendant and his family that she would not pursue an appeal until the defendant paid his outstanding legal bills and an additional retainer. Under these circumstances, questions of fact remain regarding whether the retained attorney caused the defendant to forgo his appeal by rendering assistance that fell below professional norms and whether the defendant contributed to the delay. Accordingly, I would remand for the trial court to address these questions at a *Ginther* hearing. *People v Ginther,* 390 Mich 436 (1973).

PEOPLE v CURTIS GOODMAN, No. 135126. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the defendant's sentences, and we remand this case to the Wayne Circuit Court for resentencing under properly scored guidelines. *People v Kimble*, 470 Mich 305 (2004). The defendant should have been scored zero points for offense variable 11 where there was no record evidence to support a finding that any charged or uncharged criminal sexual penetration arose out of a sentencing offense. MCL 777.41(2)(a); *People v Johnson*, 474 Mich 96 (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. 269620.

CORRIGAN, J., did not participate for the reasons stated in *People v Parsons*, 477 Mich 1065 (2007).

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY v COURT OF CLAIMS JUDGE, No. 135185. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we direct the Court of Claims to rule on the plaintiff board's motion for summary disposition, filed in Docket No. 07-000026-MZ, within 21 days of the date of this order. In ruling on the motion, the Court of Claims shall not enter another order merely stating that the motion is neither granted nor denied. Instead, the Court of Claims shall enter an order that decides the motion itself. We do not retain jurisdiction. Court of Appeals No. 280103.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order directing the Court of Claims to rule on the plaintiff's motion for summary disposition.

I would deny leave to appeal because the Court of Appeals properly denied the complaint for superintending control because the plaintiff had an adequate legal remedy in the underlying suit. See MCR 7.203(B)(1) and (4) and MCR 2.116(J)(2)(a).

Writs for superintending control are governed by MCR 3.301, 3.302, 7.206 (Court of Appeals), and 7.304 (Supreme Court). "If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed." MCR 3.302(B). "When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed." MCR 3.302(D)(2). Superintending control is an extraordinary remedy generally limited to determining whether a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or failed to proceed according to law. *Dep't of Public Health v Rivergate Manor*, 452 Mich 495 (1996).

KELLY, J. I join the statement of Justice WEAVER.

Reconsideration Denied February 1, 2008:

MARTIN v THE RAPID INTER-URBAN TRANSIT PARTNERSHIP, No. 132164. Summary disposition entered at 480 Mich 936. Reported below: 271 Mich App 492.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ. We would grant the motion.

Leave to Appeal Denied February 1, 2008:

BERO MOTORS, INC v GENERAL MOTORS CORPORATION, No. 132540; Court of Appeals No. 257675.

CORRIGAN, J. (*dissenting*). I dissent from the order denying leave to appeal. I would grant leave to appeal to address whether plaintiff's theories of breach of oral contract and promissory estoppel were properly questions for the jury on this record.

The parties entered into a dealer's sales and service agreement allowing plaintiff, Bero Motors, Inc. (Bero), to sell Pontiac and Buick cars and General Motors (GM) parts at Bero's dealership. Bero wanted to also sell GMC trucks, but another dealership, Town and Country Motors, had the franchise to sell GMC trucks in that area. After the Town and Country Motors dealership was offered for sale, two GM employees allegedly made an oral promise that Bero would have the opportunity to match any offer other potential buyers made for Town and Country Motors. After GM approved a sale between Town and Country Motors and a third party without giving Bero the opportunity to exercise the right of first refusal, Bero sued defendant GM, alleging four theories of relief: breach of oral contract, promissory estoppel, negligence, and breach of fiduciary duty. The trial court granted GM's motion for summary disposition on all four counts. In a split decision, the Court of Appeals, in an unpublished opinion per curiam, SAWYER, P.J., and SMOLENSKI, J. (WHITBECK, J., concurring in part and dissenting in part), issued October 2, 2001 (Docket No. 224190), affirmed the dismissal of the negligence and breach of fiduciary duty counts, but reversed on the breach of oral contract and promissory estoppel counts. This Court denied leave to appeal on an interlocutory basis. 467 Mich 868 (2002). I dissented from the order because I would have granted leave to appeal at that time. At the trial after remand, the trial court instructed the jury that the oral promises could support a jury verdict, as the first Court of Appeals opinion essentially directed. The jury entered a verdict of over $3 million for Bero on the breach of oral contract count.[1] The Court of Appeals affirmed. Unpublished opinion per curiam, MURPHY, P.J., and WHITE and METER, JJ., issued August 10, 2006 (Docket No. 257675).

The issue that the jury considered is before us on final review. The problem persists from the first appeal. The breach of oral contract and promissory estoppel theories are not properly jury questions. The written contract between Bero and GM includes the following provision, entitled "Sole Agreement of the Parties":

> No agreement between Division [GM] and Dealer [Bero] which relates to matters covered herein, and no change in, addition to (except for the filling in of blank lines) or erasure of any printed portion of this Agreement, will be binding unless permitted under

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[1] The jury did not decide the promissory estoppel claim because it found that GM breached the oral contract.

> the terms of this Agreement or related documents, or *approved in a written agreement* executed as set forth in Division's Dealer Sales and Service Agreement. [Emphasis added.]

The agreement further states that all related agreements are valid only if signed on behalf of GM by its general sales and service manager or his authorized representative. An agreement regarding Bero's right of first refusal to purchase another dealership appears to be a matter covered in the written contract that must be reduced to writing and signed by a GM-authorized representative. The written contract is comprehensive in nature and expressly provides that it "states the terms under which Dealer and Division agree to do business together" and "states the responsibilities of Dealer and Division to each other . . . ." The contract governed all aspects of the Bero dealership from its formation to its sale. For example, the contract provides, "No change in location or in the use of Premises, including addition of any other vehicle lines, will be made without Division's prior written authorization." This provision gave GM significant authority over decisions concerning the Bero dealership. Under this provision, for example, the Bero dealership was prohibited from selling GMC trucks without GM's prior written authorization. Additionally, the written contract contained a section entitled "Right of First Refusal to Purchase—Creation and Coverage," which gave GM the right of first refusal to purchase the Bero dealership if it were to be offered for sale. It appears that this written contract was meant to govern all aspects of the Bero dealership and its dealings with GM, including an agreement regarding Bero's purchase of another dealership. Thus, an agreement regarding Bero's right of first refusal to purchase another dealership appears to be a matter covered in the written contract that must be reduced to a writing and signed by a GM-authorized representative. No record evidence establishes that a GM-authorized representative agreed to waive the writing requirement for the modifications to the written contract.[2]

We have issued some significant opinions regarding written/oral contracts and promissory estoppel since 2002. For example, in *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373 (2003), this Court held that a party who seeks to prove that a written agreement prohibiting oral modifications was orally modified must prove by clear and convincing evidence "that the parties mutually intended to modify the particular original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses." (Emphasis deleted.) With such decisions to guide us, I would grant leave to appeal to consider this case.

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[2] Neither of the GM employees who allegedly made the oral promise to Bero regarding a right of first refusal, Jim Dalbec and Dick Loughman, was a general sales and service manager or his authorized representative.

MARKMAN, J. I join the statement of Justice CORRIGAN.

PEOPLE v DUYST, No. 132763. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 269911.

CAVANAGH, J. (*dissenting*). I would remand this case to the Kent Circuit Court for entry of an order granting the defendant's request for release and testing of the physical evidence specified in Issue VI of the defendant's application for leave to appeal to this Court and described in his motion for testing. After such tests are complete, I would permit defendant to file a motion in the circuit court seeking the appropriate evidentiary hearing(s) and to renew his motion for relief from judgment. I would further hold that the defendant's application for leave to appeal any decision by the circuit court regarding motions filed under this order would not be barred by MCR 6.502(G) or MCR 6.508(D)(2).

KELLY, J. (*dissenting*). Defendant moved for forensic testing of evidence and for an evidentiary hearing. The trial court considered these motions along with defendant's motion for relief from judgment. It denied all of them for failure to establish good cause under MCR 6.508(D).

The offer of proof that defendant made is quite extraordinary and separates his motion from the typical motions for relief from judgment. Defendant's offer of proof indicates that the expert testimony at his trial was unreliable because it was based on incomplete testing. Defendant asserts that his trial counsel was ineffective for failing to investigate, request testing, or provide adequate rebuttal expert testimony. Defendant's trial counsel represented him on appeal and did not make a claim for ineffective assistance of counsel or raise any issues related to the handling of expert testimony. Hence, counsel may have been ineffective at two levels.

I believe that the trial court should not have denied defendant's motion for relief from judgment for failure to establish good cause. Defendant could not establish good cause without testing the evidence. I would remand the case so that the trial court could order independent testing of the evidence and hold an evidentiary hearing under MCR 6.508(C) on the issue of ineffective assistance of counsel. Only after that would the trial court be in a position to rule on defendant's motion for relief from judgment.

WATTS v HENRY FORD HEALTH SYSTEMS, No. 133588. Pursuant to MCL 600.5838a(1), a claim for medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice." In this case, the last date the defendant had any contact with the decedent was January 2, 2003, as shown by the decedent's medical records and as admitted by the plaintiff in his answer to the defendant's motion in the trial court. Therefore, plaintiff's claim for medical malpractice accrued no later than January 2, 2003. Accordingly, the period of limitations would have expired on January 2, 2005; however, because this was a Sunday, pursuant to MCR 1.108(1), the notice of intent that was filed on January 3, 2005, was timely. The notice of intent tolled the period of limitations

for 182 days, and, thus, the complaint that was filed on July 1, 2005, was also timely. Court of Appeals No. 267551.

REEVES v CARSON CITY HOSPITAL, No. 134084; reported below: 274 Mich App 622.

CORRIGAN, J. (*concurring*). This case returns to this Court after the Court of Appeals reconsidered it in light of *Woodard v Custer*, 476 Mich 545 (2006). In this medical malpractice case, defendants argue that plaintiffs' expert is not qualified under MCL 600.2169 to testify against defendant Lynn Squanda, D.O. Squanda is board-certified in family medicine but she treated plaintiff Catherine Reeves in the emergency room for a presumed ectopic pregnancy. Plaintiffs' expert is board-certified in emergency medicine but not in family medicine.

The trial court, relying on *Halloran v Bhan*, 470 Mich 572 (2004), struck plaintiffs' expert because he was not qualified as a board-certified expert in family medicine. *Halloran* required that the proposed expert witness share the same specialty and board certification as the party against whom or on whose behalf the testimony was offered. *Id.* at 579. After striking plaintiffs' expert witness, the trial court granted defendants' motion for summary disposition. The Court of Appeals affirmed on the basis of *Halloran*. *Reeves v Carson City Hosp*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2006 (Docket No. 266469). In lieu of granting leave to appeal, this Court vacated the Court of Appeals judgment and remanded the case for reconsideration in light of *Woodard*, which we decided after the Court of Appeals had issued its opinion in this case. *Woodard* addressed an issue not reached in *Halloran*–whether board certificates that are not relevant to the alleged malpractice must match. In *Halloran*, the parties did not dispute that the relevant specialty was internal medicine. Because plaintiff's expert was not board-certified in internal medicine, he was not qualified to testify under MCL 600.2169. *Woodard*, however, later held that a plaintiff's expert must match only the one most relevant specialty of the defendant physician.[1] On remand, the Court of Appeals ruled that the relevant specialty was emergency medicine, the specialty that defendant Squanda was practicing at the time of the alleged malpractice. Although plaintiffs' expert did not match defendant Squanda's board certification in family medicine, that specialty was irrelevant. Therefore,

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[1] *Woodard*, *supra* at 559, explained:

> That is, § 2969(1) addresses the necessary qualifications of an expert witness to testify regarding the "appropriate standard of practice or care," not regarding an inappropriate or irrelevant standard of medical practice or care. Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify.

it was sufficient under *Woodard* that plaintiffs' expert was board-certified in emergency medicine.[2] *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622 (2007).

In my view, the Court of Appeals has complied with *Woodard*'s direction to identify the one most relevant specialty. I concur in the denial of leave to appeal because the Court of Appeals result is consistent with the *Woodard* decision. Defendant Squanda was practicing emergency medicine and could become board-certified in it, so under *Woodard* she was practicing the relevant specialty of emergency medicine.

Although I concur in the denial of leave to appeal, I note that other potential avenues remain available for testing an expert witness's qualifications for testifying. The Court unanimously agreed in *Woodard* that "even when a proffered expert meets the criteria contained in § 2169(1), the expert is subject to further scrutiny under § 2169(2)and (3), [MCL 600.2955], and MRE 702." A majority specifically agreed that the trial court may require that other relevant specialties match. *Id.* at 580, 582 (MARKMAN, J., concurring); *id*. at 591 (Opinion of TAYLOR, C.J.).

Here, plaintiffs' expert may well match the "one most relevant specialty" of emergency medicine. Nonetheless, on the basis of *Woodard*, an argument may be advanced that an expert lacks expertise in the additional relevant specialty of family medicine. Defendants here, for example, may argue that the practice of family medicine was so integral to the care defendant Squanda provided that plaintiffs' expert must specialize in emergency medicine *and* be board-certified in family medicine. Because *Woodard* was decided after defendants filed their motion to strike, the record contains no argument under § 2169(2), § 2955, or MRE 702. Therefore, I join the order denying leave to appeal. Nevertheless, a potentially viable argument is available, even after *Woodard*.

PEOPLE V ALPHONZO WRIGHT, No. 135025; Court of Appeals No. 256475 (on remand).

CORRIGAN, J. (*dissenting*). I dissent from the order denying leave to appeal. I would grant leave to appeal to consider whether the circumstantial evidence was sufficient to support defendant's conviction of keeping or maintaining a drug vehicle, MCL 333.7405(1)(d), under *People v Thompson*, 477 Mich 146 (2007).

In *Thompson*, *supra* at 148, 155, this Court held that MCL 333.7405(1)(d) precludes a conviction of keeping or maintaining a drug vehicle for an isolated incident without other evidence of continuity. "The phrase 'keep or maintain' implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that conduces to the same conclusion." *Thompson*, *supra* at 155.

Here, defendant was arrested after driving a vehicle in which there was a brick of 125 grams of uncut cocaine worth $25,000. An expert in drug distribution testified at defendant's trial that 125 grams of uncut cocaine is enough to divide into 1,200 individual units. Defendant also

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[2] Because the Court of Appeals had no record regarding the remaining statutory requirements, it remanded the case for further consideration.

had a digital scale in the vehicle but no paraphernalia for personal drug use. He had his cell phone plugged into the car for battery recharging and received three phone calls asking for "Al" after his arrest, while he was being transported to the police station. This circumstantial evidence, when viewed in a light most favorable to the prosecution, appears to show an ongoing drug sales enterprise being conducted in defendant's car. Thus, under *Thompson*, there appears to be sufficient evidence of continuity to establish that defendant kept or maintained a vehicle for the purpose of making drug sales and deliveries in violation of MCL 333.7405(1)(d).

PEOPLE v HARTMAN, No. 135038; Court of Appeals No. 279313.

MARKMAN, J. (*dissenting*). Defendant pleaded guilty of three counts of making child sexually abusive material. The factual basis for this guilty plea was defendant's admission that he *downloaded* child sexually abusive material from the Internet and saved it to a flash drive. MCL 750.145c(2) provides, in pertinent part, "A person who . . . produces, makes or finances . . . child sexually abusive material is guilty of a felony." I question whether defendant's admission constitutes a sufficient factual basis to support a guilty plea to a charge of "producing or making" child sexually abusive material. While such admission is clearly sufficient to establish the "possession" of such material, it is less clear that it is sufficient to establish the "producing or making" of such material.

As in *People v Hill*, 477 Mich 897 (2006), I would grant leave to appeal to determine: (a) whether the reasonable meaning of MCL 750.145c(2) is to punish those who create or originate child sexually abusive material; (b) whether the majority's interpretation essentially renders nugatory the prohibition in MCL 750.145c(4) concerning the "possession" of child sexually abusive materials, imposing the same penalty on a person who downloads such material as on a person who actually entices the child to pose and who thereby creates or originates the material; and (c) whether the majority's interpretation of "makes or produces" has legal consequences in other digital contexts. For example, does a person who downloads a pirated movie from the Internet "make or produce" this movie and would such person be subject to the same penalty as a person who originally pirated the movie and placed it on the Internet? Does a person who downloads a pirated song from the Internet "make or produce" this song and would such person be subject to the same penalty as a person who originally pirated the song and made it available on the Internet? Does a person who downloads a defamatory article from the Internet "make or produce" this article and would such person be subject to the same penalty as an original publisher of the defamation?

There is a substantial question whether the Legislature in MCL 750.145c(2) intended to punish a person who downloads pornographic images of children from the Internet and then places or burns these onto a flash drive or compact disc for personal use the same as a person who coerces children into posing for sexual activities in order to create pornographic images. Moreover, there are significant legal implications arising from this question for other forms of Internet use.

CAVANAGH and KELLY, JJ. We join the statement of Justice MARKMAN.

In re FAULKNER (DEPARTMENT OF HUMAN SERVICES v FAULKNER), No. 135632; Court of Appeals No. 277707.

In re COATES (DEPARTMENT OF HUMAN SERVICES v CONKLE), No. 135656; Court of Appeals No. 278680.

Summary Dispositions February 6, 2008:

PEOPLE v ANTHONY SMITH, No. 135007. 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 circuit court erred in admitting the testimony of Latrice Lewis under MRE 404(b); (2) whether the error in admitting the testimony, if any, was reversible; (3) whether the testimony was admissible under MCL 768.27a; and (4) whether the prosecution's failure to rely on MCL 768.27a precludes sustaining its admission based on that provision. Court of Appeals No. 277736.

PEOPLE v DARNELL WALKER, JR, Nos. 135049, 135165. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the second and third paragraphs of part II(C) and all of part II(D) of the September 6, 2007, judgment of the Court of Appeals. These portions of the Court of Appeals discussion of the notice requirement and the "good-faith exception" to the 180-day rule statute, MCL 780.131, are dicta. In all other respects, the application for leave to appeal is denied. We are not persuaded that the questions presented regarding the 180-day rule should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals, and we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Reported below: 276 Mich App 528.

CAVANAGH and KELLY, JJ. We would simply deny leave to appeal.

In re ATTORNEY FEES (DUMAS v AUTO CLUB INSURANCE ASSOCIATION AND ANDRIS v MILLER), No. 135262. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the August 30, 2007, order of the Court of Appeals and remand this case to the Court of Appeals for plenary consideration. Because the August 2, 2005, order of the Wayne Circuit Court is a postjudgment order awarding an attorney fee, it is a final order under MCR 7.202(6)(a)(iv) that is appealable as a matter of right under MCR 7.203(A)(1). We do not retain jurisdiction. Court of Appeals No. 279149.

In re HROBA TRUST (HROBA v HROBA), No. 135277. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Oakland County Probate Court. Because the issue of the validity of the amendment to the trust was never litigated in the summary proceedings action brought in the 52-4 District Court, res judicata did not bar the petitioner's action in the Oakland County Probate Court. MCL 600.5750; *JAM Corp v AARO Disposal, Inc*, 461 Mich 161 (1999); *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569 (2001). Court of Appeals No. 266783.

Leave to Appeal Denied February 6, 2008:

PEOPLE v ROBERT PARKS, No. 134172; Court of Appeals No. 265843.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v GARY WARD, No. 135141; Court of Appeals No. 271641.

KELLY, J. I would grant leave to appeal.

WATTS v NEVILS, No. 135156; Court of Appeals No. 267503.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ANTHONY BELL, No. 135193; Court of Appeals No. 280514.

CAVANAGH and KELLY, JJ. We would remand this case to the trial court to allow the defendant to move to withdraw his plea.

PEOPLE v SWIFT, No. 135236; Court of Appeals No. 271105.

OWCZAREK v STATE OF MICHIGAN, No. 135241; reported below: 276 Mich App 602.

PEOPLE v ENGLISH, No. 135519; Court of Appeals No. 269887.

CAVANAGH and KELLY, JJ. We would remand this case to the trial court for reconsideration under the appropriate standard, as explained in the partially dissenting opinion in the Court of Appeals, of whether the juror was excusable for cause.

Interlocutory Appeal

Leave to Appeal Denied February 6, 2008:

STRUCK v KUSMIERZ, No. 135138; Court of Appeals No. 276219.

FORD MOTOR CREDIT COMPANY v ODOM, No. 135184; Court of Appeals No. 266770.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal February 8, 2008:

FUNDUNBURKS v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 134408. 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 are directed to discuss (1) whether the fact that the bus driver's deposition had not been taken was a sufficient reason to deny her motion for summary disposition and (2) whether there is sufficient evidence to warrant a trial on the claim that defendant Beard's conduct, including her action of closing the doors of the bus while the plaintiff was attempting to exit the vehicle, constituted gross negligence or whether no reasonable juror could conclude that defendant Beard's conduct amounted to reckless conduct showing a substantial lack of concern as to whether injury would result, MCL 691.1407(7)(a), and thus that sum-

mary disposition should have entered for defendant Beard. MCL 691.1407(2)(c). See *Stanton v Battle Creek*, 466 Mich 611, 620-621 (2002). 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. 274928.

Summary Dispositions February 8, 2008:

PEOPLE v HOPSON, No. 134018. Pursuant to MCR 7.302(G)(1), in lieu of granting appeal, we reverse the Court of Appeals erroneous holding that the defendant is not an aggrieved party and we remand this case to the Wayne Circuit Court for further proceedings consistent with this order. Court of Appeals No. 276344.

To have standing on appeal, a party must be aggrieved by the act of a trial court or appellate court. MCR 7.203(A); *Federated Ins Co v Oakland Co Road Comm*, 475 Mich 286, 291-292 (2006). He must show that the act of which he complains caused an " 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' " *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628 (2004) (citations omitted). He must also show that it is likely, rather than merely speculative, that the injury will be "'redressed by a favorable decision.'" *Id.* at 629 (citation omitted).

Here, defendant has a right to be tried by a jury drawn from a fair cross-section of the community. *Taylor v Louisiana,* 419 US 522, 527 (1975); *People v Smith*, 463 Mich 199, 214 (2000). The November 2, 2006, order transferred resolution of the defendant's constitutional challenge to the jury array to the chief judge, but held resolution of his challenge in abeyance until *after* his trial. Accordingly, the chief judge's order signified an imminent invasion of a concrete, legally protected interest, and the potential injury was more than speculative. Further, a favorable decision on appeal would redress the imminent injury because the defendant sought reassignment of his jury challenge back to the trial judge for resolution *before* trial.

Because the chief judge's November 2, 2006, order in this case was entered pursuant to Local Administrative Order 2006-12, we remand this case to the circuit court for further proceedings consistent with this order and this Court's February 8, 2008, administrative order rescinding a portion of the Third Judicial Circuit Court's LAO 2006-12. We do not retain jurisdiction.

CAVANAGH, J. I concur with the result of the order.

WEAVER, J. (concurring). I concur in the order reversing the judgment of the Court of Appeals that the defendant is not an aggrieved party and remanding this case to the Wayne Circuit Court for further proceedings.

I write separately because I disagree with the application of the erroneous test for standing created by the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) in *Nat'l Wildlife*

Federation v Cleveland Cliffs Iron Co.[1] In that case, the majority of four continued its systematic dismantling of Michigan's standing law, which replaced years of precedent with the majority's own test that denies Michigan citizens access to the courts.[2]

I would hold that the plaintiff has standing under the pre-*Lee* prudential test for standing because the plaintiff has demonstrated "that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker v State Admin Bd*, 441 Mich 547, 554 (1993).

KELLY, J. I concur with the result of the order. I would, however, remand this case to the Court of Appeals for a ruling on the validity of Local Administrative Order No. 2006-12 before the Court takes action on that local administrative order. See my statement dissenting from the order rescinding in part Local Administrative Order No. 2006-12, 480 Mich cxxxix (2008).

KWIATKOWSKI V COACHLIGHT ESTATES OF BLISSFIELD, INC, No. 135036. 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 reinstate the July 10, 2006, order of the Lenawee Circuit Court denying summary disposition on plaintiff's negligence claim for the reasons stated in the Court of Appeals dissenting opinion. We remand this case to the circuit court for further proceedings not inconsistent with this order. Court of Appeals No. 272106.

MARKMAN, J. (*dissenting*). I concur with the analysis and conclusion of the Court of Appeals and would deny leave to appeal. In particular, I agree with the Court of Appeals that plaintiff's claim sounds in premises liability, not general or ordinary negligence.

CORRIGAN, J. I join the statement of Justice MARKMAN.

Leave to Appeal Denied February 8, 2008:

DAVENPORT V HSBC BANK USA, No. 134458; reported below: 275 Mich App 344.

MARKMAN, J. (*dissenting*). On October 27, 2005, defendant bank initiated foreclosure proceedings by publishing notice. On October 31, the mortgage was assigned to defendant bank and defendant subsequently purchased the property. The Court of Appeals held that defendant bank was unable to initiate foreclosure proceedings on October 27 because

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[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004).

[2] See my opinions chronicling the majority of four's assault on standing in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 742 (2001), *Nat'l Wildlife*, 471 Mich at 651, *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 366 (2007), and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 310 (2007).

"one who is not the record holder of a mortgage may not foreclose the mortgage . . . ." *Davenport v HSBC Bank USA*, 275 Mich App 344, 347 (2007) (emphasis omitted).

MCL 600.3204(1)(d) states that "[a] party may foreclose a mortgage by advertisement" when:

> The party *foreclosing* the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage. [Emphasis added.]

Thus, the Court of Appeals essentially held that the term "foreclosing" in MCL 600.3204(1)(d) refers to the time that the foreclosure process is initiated. That is, the party who initiates a foreclosure must be the "owner of the indebtedness" or the owner "of an interest in the indebtedness" when the foreclosure process begins. Although this understanding is not unreasonable, MCL 600.3208 explains how notice should be given when a mortgage "will be foreclosed *by a sale* of the mortgaged premises . . . ." (Emphasis added.) This arguably suggests that a "foreclosure" takes place at the time a property is sold and does not encompass presale procedures. Under such an interpretation, defendant bank could have commenced the process of foreclosing plaintiff's home by publishing notice in anticipation of the actual assignment of the mortgage.

In my judgment, the proper meaning of the term "foreclosure" constitutes an important statutory question. I would grant leave to appeal to consider whether the Court of Appeals properly held that the term "foreclosing" in MCL 600.3204(1)(d) refers generally to the procedure involved in foreclosing a property or only to the actual sale of the property.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v STEVEN CARTER, No. 134687; Court of Appeals No. 270195.

CORRIGAN, J. (*dissenting*). I dissent from the order denying leave to appeal. I would grant leave and reverse the Court of Appeals judgment insofar as it remands the case to the trial court to consider sua sponte defendant's financial circumstances before imposing as a condition of probation the repayment of court-appointed attorney fees. Twenty-one years ago this Court unanimously held that MCL 771.3(6)(a) does not require a sentencing court to inquire into the defendant's ability to pay before imposing the repayment of attorney fees as a condition of probation. *People v Music*, 428 Mich 356, 357 (1987); see also *People v Grant*, 455 Mich 221 (1997); *People v Hill*, 430 Mich 898 (1988). The trial court in this case conducted the sentencing proceeding under the controlling principles of law in *Music*. The majority *sub silentio* overturns this authority in allowing the Court of Appeals judgment to stand.

I would further grant to overrule *People v Dunbar*, 264 Mich App 240 (2004), which is inconsistent with *Music*, insofar as it chose a case from the United States Court of Appeals for the Fourth Circuit to conclude that absent any objection to the order requiring the repayment of

attorney fees, the federal constitution compels a state court to consider a defendant's ability to pay without any claim of indigency by the defendant. A court is compelled to inquire into ability to pay before sanctioning a defendant by revoking probation; it need not conduct such an inquiry sua sponte, before imposing costs. The imposition of costs is distinct from a sanction for nonpayment.

I. FACTS AND PROCEDURAL POSTURE

Defendant was charged with fourth-degree criminal sexual conduct (CSC IV) (force or coercion) after grabbing the victim's buttocks as she walked out of a Church's Chicken restaurant in Detroit. Because defendant was indigent, the court appointed counsel for him. The order appointing counsel explicitly stated that the court might require defendant to pay the cost of his court-appointed attorney. After a jury trial, defendant was convicted of CSC IV. At sentencing, the court did not mention that defendant would be required to reimburse the county for the cost of appointed counsel. Defendant did, nonetheless, sign a probation order acknowledging that he agreed to pay attorney fees of $730 as a condition of his probation.

The Court of Appeals affirmed defendant's conviction, but remanded "for the trial court to consider defendant's attorney fees in light of his current and future financial circumstances and for resentencing." *People v Carter*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2007 (Docket No. 270195), p 1. In regard to defendant's financial ability to repay attorney fees, the Court of Appeals pointed out that the issue was unpreserved, so it reviewed the claim for plain error affecting substantial rights. The Court of Appeals held that "a court must indicate that, in assessing attorney fees, it considered defendant's ability to pay. *Dunbar*, *supra* at 254-255." *Carter*, *supra* at 7.

> Defendant failed to raise the issue of his ability to pay the assessed fees and costs at sentencing. Therefore, the court was not required to hold a hearing. See *Music*, *supra* at 361-362. However, in assessing attorney fees to defendant, the court failed to indicate whether it considered defendant's financial circumstances. Therefore, we remand this case for the trial court to consider these assessments in light of defendant's current and future financial circumstances. *Dunbar*, *supra* at 255. [*Carter*, *supra* at 7.]

The prosecution appealed. This Court directed the clerk to schedule oral argument on whether to grant the application or take other peremptory action. 480 Mich 938 (2007). The order directed the parties to submit supplemental briefs "addressing whether the constitutional underpinnings of *People v Dunbar*, 264 Mich App 240 (2004), are sound." *Id*.

II. STANDARD OF REVIEW

Defendant did not argue at sentencing that the court was required to inquire into his financial ability to pay before ordering him to reimburse the court for attorney fees. This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774 (1999); *Dunbar*, *supra* at 251.

III. ANALYSIS

A. MCL 771.3(6)(a) REQUIREMENTS

The sentencing court ordered defendant to pay the cost of his court-appointed attorney as a condition of probation under MCL 771.3(2).[1] MCL 771.3(6)(a) discusses a sentencing court's obligation to consider the defendant's ability to pay these fees:

> If the court imposes costs under subsection (2) as part of a sentence of probation, all of the following apply:
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> (a) The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

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[1] MCL 771.3 provides, in pertinent part:

> (2) As a condition of probation, the court may require the probationer to do 1 or more of the following:
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> (c) Pay costs pursuant to subsection (5).
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> (5) If the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer. [Emphasis added.]

In *Music*, this Court unanimously held that MCL 771.3(6)(a)[2] does not require "that a sentencing judge inquire, before ordering that a defendant pay costs, as to the defendant's ability to pay the costs." *Music*, *supra* at 357. This Court agreed with the Court of Appeals holding that the statute does *not* require that the sentencing court hold a hearing or make findings on the record to determine whether a defendant, who has not asserted an inability to pay costs, is able to make such payment. *Id.* at 359. This Court also accepted the explanation by the Court of Appeals that the statute distinguishes between the *imposition* of costs and the sanctioning for the nonpayment of costs; a court may impose costs without considering the defendant's ability to pay, but may not enforce payment of those costs without determining whether the defendant is able to pay. *Id.* at 360. This Court concluded as follows:

> [MCL 771.3(6)(a)] does not expressly state that a trial court must conduct a hearing to determine whether a defendant has the ability to pay costs. In the absence of a clear statement from the Legislature, the statute is to be given a reasonable interpretation. A probationer is free to ask the sentencing judge to reduce the amount of restitution or costs, and it is clear that a probationer cannot be punished for failure to pay restitution or costs that the probationer cannot afford. Moreover, a defendant who timely asserts an inability to pay restitution or costs must be heard. In that situation, a sentencing judge shall determine whether the restitution or costs are within the defendant's means. [*Music*, *supra* at 361-362.]

Subsequently, in *People v Hill*, 430 Mich 898, 899 (1988), this Court, citing *Music*, explained, "Unless a defendant indicates an inability to pay, the sentencing judge need not inquire into the defendant's ability to pay prior to imposing costs and restitution as conditions of probation."

Here, the sentencing court imposed attorney fees as a condition of defendant's probation, as permitted by MCL 771.3(2). Defendant had notice of the fees and an opportunity to object, but did not do so. The petition and order appointing counsel stated, "I understand that I may be ordered to contribute and/or reimburse the court for all or part of my attorney and defense costs."[3] In *Dunbar*, *supra* at 254, the defendant's petition and order appointing counsel similarly stated that he "may be ordered to repay the court" for his court-appointed attorney fees. The *Dunbar* panel held that this petition and order sufficiently notified the

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[2] At the time this Court decided Music, what is now MCL 771.3(6)(a) was MCL 771.3(5)(a). The pertinent statutory language at the time Music was decided was almost identical to the present language.

[3] The petition and order also stated, "THE DEFENDANT SHALL CONTRIBUTE AND/OR REIMBURSE THE COURT AT A RATE OF

defendant of the court's decision to order the payment of attorney fees. *Id.* The petition and order in the instant case, which is virtually identical to the one at issue in *Dunbar*, similarly notified defendant about his responsibility to pay the attorney fees.

Defendant also had an opportunity to object. The *Dunbar* panel held that the defendant, who was given notice of the fees by the petition and order appointing counsel, was given the opportunity to object at sentencing. *Id.* at 254. "In regard to defendant's opportunity to be heard, defendant was not prevented from objecting at sentencing and asserting his indigency." *Id.* Similarly in the instant case, defendant, who had prior notice of the fees through the petition and order appointing counsel, had an opportunity to object at sentencing. Further, on the day of the sentencing hearing, defendant signed the probation order in which he agreed to pay $730 in attorney fees. He could have objected to the fees at any time on the record; he also signed the order without any protest. Thus, defendant had notice of the fees and a meaningful opportunity to object to those fees.

Under *Music*, the sentencing court did not violate MCL 771.3(6)(a) by imposing attorney fees without holding a hearing or stating on the record that it considered defendant's financial resources. The sentencing court was required to consider defendant's financial resources only if he timely asserted an inability to pay. Because defendant had notice of the fees but did not timely object and assert an inability to pay, MCL 771.3(6)(a) did not require the sentencing court, before ordering defendant to pay the cost of his court-appointed attorney, to make a finding on the record that he was able to make such a payment. *Music*, *supra* at 357, 359-362.[4]

B. CONSTITUTIONAL REQUIREMENTS

In *Dunbar*, *supra* at 252, the issue was whether a sentencing court may constitutionally require a defendant to contribute to the cost of his court-appointed attorney without first assessing his ability to pay.[5] The *Dunbar* panel adopted the test from *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984), to determine whether a sentencing court's procedure passes constitutional muster. In *Alexander*, the Fourth Circuit Court of Appeals discussed *James v Strange*, 407 US 128 (1972), *Fuller v Oregon*, 417 US 40 (1974), and *Bearden v Georgia*, 461 US 660 (1983), which all involved challenges to the constitutionality of statutory attorney-fee

_____." The order necessarily left blank the amount defendant would be required to pay; the appointed attorney's fee was not yet known because trial had not yet commenced.

[4] Defendant is free to petition the court at any time for remission of the payment of attorney fees or any unpaid portion, if he contends that he is unable to pay. MCL 771.3(6)(b).

[5] In *Dunbar*, MCL 771.3 did not apply because the defendant was not sentenced to probation. At the time *Dunbar* was decided, no statutory procedure existed governing the imposition on criminal defendants of the costs of court-appointed attorneys. *Dunbar*, *supra* at 254, 256 n 15.

recoupment schemes. The Fourth Circuit held that the following constitutional principles emerged from those cases:

> From the Supreme Court's pronouncements in *James, Fuller*, and *Bearden*, five basic features of a constitutionally acceptable attorney's fees reimbursement program emerge. First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. *Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required.* The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy. [*Alexander*, *supra* at 124 (emphasis added).]

After the *Dunbar* panel cited this test, it held that a sentencing court may order reimbursement of a court-appointed attorney's fees without specific findings on the record regarding the defendant's ability to pay, unless the defendant objects to the reimbursement amount at the time it is ordered. *Id.* at 254. The panel held, however, that even if the defendant does not object, "the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255.[6]

In my opinion, *Dunbar* misinterpreted Supreme Court precedent when it followed the Fourth Circuit. Nothing in *James*, *Fuller*, or *Bearden* requires a sentencing court to state on the record that it considered the defendant's ability to pay when the defendant did not timely object on indigency grounds to the reimbursement order.

James involved a constitutional challenge to a Kansas recoupment statute. Under this statute, when the state provided counsel, the indigent

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[6] The Court of Appeals then held that in deciding the amount that should be reimbursed, the court should consider the defendant's foreseeable ability to pay. *Id.* at 255.

defendant became obligated to repay the amount expended on his behalf. *James*, *supra* at 129-130. If the sum remained unpaid after a designated time, a judgment would be entered against the defendant for the unpaid amount. *Id.* at 130. The indigent defendant was not accorded any of the exemptions that a code of civil procedure accorded to other judgment debtors. *Id.* The Supreme Court held that this provision violated equal protection because it "strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors . . . ." *Id.* at 135.

In *Fuller*, the Supreme Court examined the constitutionality of Oregon's recoupment statute. The statute provided that in some cases, defendants may be required to pay the costs of court-appointed counsel and that the payment of such expenses could be made a condition of probation. *Fuller*, *supra* at 43. It further provided that a defendant could not be required to pay attorney fees if he was financially unable to pay.[7] *Id.* at 45. Further, a defendant ordered to pay his attorney fees could petition the court for remission of the payment of costs,[8] and a defendant could not be held in contempt for failure to repay if he made a good-faith effort to make the payment.[9] *Id.* at 45-46. The Supreme Court summarized: "a lawyer is provided at the expense of the State to all defendants who are unable, even momentarily, to hire one, and the obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.* at 46. The Court held that Oregon's recoupment statute did not infringe on a defendant's constitutional right to have counsel provided by the state when he is unable because of indigency to hire a lawyer. *Id.* at 51. The Court rejected the defendant's argument that "a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus 'chill' his constitutional right to counsel." *Id.* The Court explained that Oregon's statute in no way deprived any defendant of legal assistance when he needed it. *Id.* at 52-53. The Court emphasized the following points:

> The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work "manifest hardship" are forever exempt from any obligation to repay.
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> Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be

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[7] This provision is similar to MCL 771.3(6)(a).

[8] This provision is similar to MCL 771.3(6)(b).

[9] This provision is similar to MCL 771.3(8).

> required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship. [*Id.* at 53-54.]

In *Bearden*, the Supreme Court addressed whether the Fourteenth Amendment prohibits a state from *revoking* an indigent defendant's probation for failure to pay a fine and restitution. In that case, the trial court revoked the defendant's probation and imprisoned him for failing to pay his fine and restitution without considering his financial ability to pay. *Bearden*, *supra* at 663. The Supreme Court held as follows:

> We hold, therefore, that *in revocation proceedings for failure to pay a fine or restitution*, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. [*Id.* at 672-673 (emphasis added).]

Applying this holding to the facts of the case, the *Bearden* Court concluded that because the trial court had not made any finding that the defendant had not made a bona fide effort to pay the fine and restitution, the case must be remanded for resolution of this issue. *Id.* at 673-674.

In regard to the relevant issue here, Supreme Court precedents compel a sentencing court to inquire into a defendant's financial status and make findings on the record *when the court decides to enforce collection or sanction the defendant for failure to pay the ordered amount*. Our holding in *Music*, *supra* at 361-362, fully comports with those authorities. The Alaska Supreme Court correctly explained that "*James* and *Fuller* do not require a prior determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors . . . ." *State v Albert*, 899 P2d 103, 109 (Alas, 1995). See also the Washington Supreme Court's interpretation of *James*, *Fuller*, and *Bearden*:

> [C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a

> recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay. [*State v Blank*, 131 Wash 2d 230, 242 (1997).]

Nothing in *James, Fuller*, *Bearden*, or *Music* states that a sentencing court must state on the record that it considered the defendant's ability to pay when the defendant does not timely object on indigency grounds to the order requiring him to pay attorney fees. I would overrule *Dunbar*'s contrary holding.[10]

Applying this conclusion to the facts of this case, I would hold that the court satisfied its duties. It had no responsibility under the federal constitution or our state statute to make a preemptive inquiry into defendant's indigency before imposing attorney fees.

Further, the probation order does not state when payment must commence. The court has not enforced collection by revoking defendant's probation or imposing any other sanction. Therefore, defendant's challenge to the reimbursement order is premature. See *Dunbar*, *supra* at 256 ("[I]n most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment."). Therefore, I would reverse the Court of Appeals judgment and remand this case to the sentencing court to allow defendant to move to remit the payment of attorney fees if he contends that he is unable to pay. MCL 771.3(6)(b).

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[10] *Dunbar* cited *People v Grant*, 455 Mich 221, 242, 243 n 30 (1997), for the proposition that the sentencing court must provide some indication that it considered the defendant's ability to pay before ordering payment of attorney fees. But *Grant* does not support this conclusion. The issue in *Grant* was "whether the trial court's failure to make express findings with respect to the statutory factors regarding restitution set forth in . . . MCL 780.767(1), (4) [the Crime Victim's Rights Act] . . . was error that invalidates that portion of the judgment directing restitution." *Grant*, *supra* at 223. In *Grant*, *supra* at 224 n 4, this Court explained that under *Music*, a trial court ordering restitution under the Crime Victim's Rights Act, like under MCL 771.3, need *not* make an express determination on the record regarding the defendant's ability to pay, absent a timely objection at the time restitution is imposed. Although the Crime Victim's Rights Act requires the trial court "to consider" the defendant's ability to pay, "the statute does not require the trial judge to make a separate factual inquiry and individual findings on the record." *Id*. at 243. Nothing in *Grant* states that the trial court was constitutionally required "to provide some indication of consideration" of the defendant's ability to pay on the record.

SUMMERS v HURLEY MEDICAL CENTER, No. 134997; Court of Appeals No. 269824.

MUSKEGON COUNTY PROSECUTOR v DEPARTMENT OF CORRECTIONS, No. 135366; Court of Appeals No. 281321.

MARKMAN, J. (*concurring*). The prosecutor, in my judgment, raises reasonable questions concerning (a) whether the Department of Correction's "immediate usage" method of computing good-time and special good-time credits is in better accord with MCL 800.33 than the "earn as you serve" method identified by the prosecutor and (b) whether an inmate's escape sentence properly begins before the inmate's murder sentence has reached its statutory maximum or before the parole board has expressly terminated the murder sentence. However, in light of the fact that the department's current policies and practices have been employed for more than a half century, and in light of the reliance interests that have arisen in connection with these policies and practices, I believe that further relief must come from the legislative or executive branches of government. See *People v Lively*, 470 Mich 248, 259 (2004) (MARKMAN, J., concurring).

In re KLANK (DEPARTMENT OF HUMAN SERVICES v KUTTKUHN), No. 135677; Court of Appeals No. 277826.

In re BAKER (DEPARTMENT OF HUMAN SERVICES v GACH), No. 135682; Court of Appeals No. 277928.

Interlocutory Appeal

Leave to Appeal Denied February 8, 2008:

GALLIHER v TRINITY HEALTH-MICHIGAN, No. 135163; Court of Appeals No. 267185.

MARKMAN, J. (*dissenting*). Because I cannot imagine any more "open and obvious" condition than a pothole in a driveway during daylight hours, I would reverse the Court of Appeals judgment and remand for entry of an order granting summary disposition to defendant. "[P]otholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523 (2001).

It is hard to know whether the majority is more persuaded here by the argument (a) that a shadow cast by a hospital on a pothole constitutes a "special aspect," thus removing the pothole from the realm of the "open and obvious"; (b) that plaintiff's testimony that she fell during "dark evening hours" should be accorded credit despite the fact that 4:00 pm to 5:00 pm on the afternoon of March 1, 2003, the time of the accident, was a daylight hour; (c) that plaintiff's simultaneous arguments that there were sunny conditions at the time of her accident, thereby creating a shadow over the pothole, and that there were "overcast" conditions at the time of the accident with "heavy, dense clouds and fog and scattered snow showers," thereby obscuring the pothole, should be accepted as legiti-

mate alternative arguments; or (d) that plaintiff's assertion that she "did not discover the condition" is somehow relevant to this Court's analysis of premises liability cases.

That any of these arguments have been found to be persuasive by this Court evidences why *Lugo* has become an increasingly "dead letter," to be replaced by no coherent alternative rule of law.

Summary Dispositions February 19, 2008:

PEOPLE v HENRY DAVIS, No. 134208. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand these cases to the Wayne Circuit Court for entry of an amended judgment of sentence in Docket No. 03-002568. As the prosecution concedes, the judgment of sentence entered in that file on January 25, 2006, erroneously states that the sentences are to run consecutively with the sentences in Docket Nos. 03-001582, 03-001583, and 03-002554, contrary to the plea agreement provision, which was sanctioned by the circuit court, that all sentences are to run concurrently. See PT, 6, 10-11, 22 and 23. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motions for miscellaneous relief are denied as moot. We do not retain jurisdiction. Court of Appeals No. 275419.

WYATT v OAKWOOD HOSPITAL AND MEDICAL CENTERS, Nos. 135123, 135124, 135125. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Wayne Circuit Court denying the defendants' motions for summary disposition because the plaintiff's predecessor is within the class of plaintiffs identified in this Court's order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order and the order in *Mullins*. 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 Nos. 263370, 263372, 263375.

JUDD v TOWFIQ, No. 135261. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the plaintiff falls within the class of plaintiffs entitled to relief identified in our order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Genesee Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*. Court of Appeals No. 259107.

PRIORITY HEALTH v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INS SERVICES, No. 135311. 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. 278373.

PEOPLE v RYAN WILSON, No. 135369. 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. 276914.

PEOPLE v MORSE, No. 135413. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Montcalm Circuit Court for the trial court to correct the judgment of sentence by deleting the $300 fine. The fine was clearly not a part of the sentencing agreement, and the defendant was not offered the opportunity to withdraw his plea after the fine was imposed as part of the sentence. 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. 280205.

Leave to Appeal Denied February 19, 2008:

PEOPLE v ALAN WOOD, No. 134363; Court of Appeals No. 265841.

PEOPLE v HAROLD ANDERSON, No. 134384; Court of Appeals No. 265959.

PEOPLE v MARK BAILEY, No. 134897; Court of Appeals No. 265803.

BANKS v GENOVESE, No. 134901; Court of Appeals No. 277322.

MALIK v SALAMY, No. 134979; Court of Appeals No. 264780.

PEOPLE v MIELCAREK, No. 134986; Court of Appeals No. 268894.

FAARGSOB LLC v HTSTS, LLC, No. 134995; Court of Appeals No. 268482.

LAETHEM EQUIPMENT COMPANY v J & D IMPLEMENT, INC, No. 134998; Court of Appeals No. 266648.

SLOTA v SLOTA, No. 135062; Court of Appeals No. 269640.

PEOPLE v GOLDSTICK, No. 135064; Court of Appeals No. 267593.

PASSARO v TAGLIA, FETTE, DUMKE & WHITE, PC, No. 135067; Court of Appeals No. 266425.

PEOPLE v RICHARD LAWSON, No. 135080; Court of Appeals No. 276946.

PEOPLE v GORDON STEWART, No. 135122; Court of Appeals No. 270215.

MCMASTER v SETTY, No. 135140; Court of Appeals No. 276383.

PEOPLE v GARY, No. 135146; Court of Appeals No. 277270.

PEOPLE v DARRYL BALLARD, No. 135147; Court of Appeals No. 268151.

PEOPLE v ALTMAN, No. 135172; Court of Appeals No. 267592.

SACHS v SINAI HOSPITAL OF GREATER DETROIT, No. 135173; Court of Appeals No. 270321.

WARRING v TOTAL MANUFACTURING SYSTEMS INC, No. 135187; Court of Appeals No. 261497.

PEOPLE v FRANK BUTZ, No. 135190; Court of Appeals No. 275792.

SHAINA v COMPTON, No. 135201; Court of Appeals No. 274045.

PEOPLE v RODERICK LEE, No. 135210. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278054.

PEOPLE v BRANDOW, No. 135212; Court of Appeals No. 269628.

PEOPLE v ARNOLD, No. 135215; Court of Appeals No. 271511.

PEOPLE v BURK, No. 135219; Court of Appeals No. 277500.

PEOPLE v TONY COCHRANE, No. 135243; Court of Appeals No. 267151.

PEOPLE v NICHIOW-BRUBAKER, No. 135244; Court of Appeals No. 270464.

PEOPLE v CHRISTOPHER MCCRAY, No. 135252; Court of Appeals No. 271510.

PEOPLE v MCKALPAIN, No. 135254; Court of Appeals No. 270209.

PEOPLE v WILBURN, No. 135255; Court of Appeals No. 280546.

PEOPLE v PATRICK BARNES, No. 135256; Court of Appeals No. 271155.

PEOPLE v CATANZARO, No. 135257; Court of Appeals No. 280246.

PEOPLE v ARZOLA, No. 135259; Court of Appeals No. 270901.

PEOPLE v CRAPOFF, No. 135263; Court of Appeals No. 280147.

PEOPLE v BRAND, No. 135267; Court of Appeals No. 280244.

PEOPLE v HANIBLE, No. 135268; Court of Appeals No. 271177.

UMBARGER v DEPARTMENT OF CORRECTIONS, No. 135278; Court of Appeals No. 280340.

PEOPLE v SHEAMEKIA FOSTER, No. 135283; Court of Appeals No. 270191.

PEOPLE v STONE, No. 135284; Court of Appeals No. 280366.

PEOPLE v CHARLES DAVIS, No. 135285; Court of Appeals No. 280877.

MCCABE v MILLER & ASSOCIATES, LLP, No. 135290; Court of Appeals No. 275498.

TIPPINS v WAYNE CIRCUIT JUDGE, No. 135291; Court of Appeals No. 278887.

PEOPLE v EZEKIEL DAVIS, No. 135292; Court of Appeals No. 273134.

PEOPLE v RIZK, No. 135293; Court of Appeals No. 269865.

PANHANDLE EASTERN PIPELINE COMPANY v MUSSELMAN, No. 135294; Court of Appeals No. 268910.

GORDON v NUCRAFT FURNITURE COMPANY, INC, No. 135295; Court of Appeals No. 277331.

PEOPLE v KIRTDOLL, No. 135296; Court of Appeals No. 280480.

PEOPLE v ANTHONY DARRYL JAMES, No. 135297; Court of Appeals No. 278630.

KIM v DEPARTMENT OF LABOR & ECONOMIC GROWTH, No. 135298; Court of Appeals No. 277254.

FIRE & ICE MECHANICAL, INC v BIT MAT PRODUCTS OF MICHIGAN, INC, No. 135302; Court of Appeals No. 269978.

CITY OF DETROIT v THOMAS, No. 135303; Court of Appeals No. 274529.

PEOPLE v CHOZEN GREENE, No. 135304; Court of Appeals No. 271792.

SOULLIERE v JOHNSON, No. 135307; Court of Appeals No. 268874.

PEOPLE v BENTLEY, No. 135313; Court of Appeals No. 272551.

PEOPLE v ANTHONY JONES, No. 135314. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280415.

PEOPLE v SHIRLEY WILLIAMS, No. 135315; Court of Appeals No. 280929.

JOHNSON v GENERAL MOTORS CORPORATION, No. 135319; Court of Appeals No. 277685.

PEOPLE v PURIFOY, No. 135320; Court of Appeals No. 280446.

PEOPLE v CLEO POINDEXTER, No. 135321; Court of Appeals No. 269915.

PEOPLE v RAYMOND YOUNG, No. 135322; reported below: 276 Mich App 446.

PEOPLE v DANE BROWN, No. 135324; Court of Appeals No. 280604.

PEOPLE v FREDERICK JOHNSON, No. 135325; Court of Appeals No. 280313.

PEOPLE v HART, No. 135326; Court of Appeals No. 270395.

PEOPLE v CREEDEN, No. 135327; Court of Appeals No. 280964.

DENK v MARDEROSIAN, No. 135329; Court of Appeals No. 276746.

MANETTA v JOHNSON, No. 135330; Court of Appeals No. 265988.

PEOPLE v JESSE FLOWERS, No. 135334; Court of Appeals No. 280278.

PEOPLE v TERENCE JOHNSON, No. 135335; Court of Appeals No. 270444.

PEOPLE v WESLEY NEAL, JR, No. 135337; Court of Appeals No. 272244.

PEOPLE v GRAYS, No. 135338; Court of Appeals No. 270699.
KELLY, J. I would grant leave to appeal.

MOORE v DELPHI AUTOMOTIVE SYSTEMS CORPORATION, No. 135347; Court of Appeals No. 278821.

PEOPLE v PELLOT, No. 135356; Court of Appeals No. 272250.

PEOPLE v RILEY, No. 135358; Court of Appeals No. 280478.

PEOPLE v KEVIN BROWN, No. 135359; Court of Appeals No. 276527.

PEOPLE v MARK BROWN, No. 135360; Court of Appeals No. 270328.

PEOPLE v RUSSELL, No. 135364; Court of Appeals No. 268603.

PEOPLE v COREY NELSON, No. 135374; Court of Appeals No. 280799.

PEOPLE v WILLIS, No. 135378; Court of Appeals No. 267896.

PEOPLE v MICHAEL J HALL, No. 135379; Court of Appeals No. 279237.

MOSHER, DOLAN, CATALDO & KELLY, INC v FEINBLOOM, No. 135381; Court of Appeals No. 270579.

KETTERER v GREAT ATLANTIC & PACIFIC TEA COMPANY/FARMER JACK/BORMAN'S, INC, No. 135385; Court of Appeals No. 278141.

PEOPLE v LYON, No. 135393; Court of Appeals No. 270476.

PEOPLE v KLOCK, No. 135400; Court of Appeals No. 273406.

PEOPLE v FILIPIAK, No. 135408; Court of Appeals No. 271162.

STATE TREASURER v GROSSNICKLE, No. 135422; Court of Appeals No. 278820.

PEOPLE v BURRELL, No. 135430; Court of Appeals No. 280146.

PEOPLE v BEER, No. 135432; Court of Appeals No. 272941.

PEOPLE v MAURICIO, No. 135433; Court of Appeals No. 272909.

PEOPLE v JACKIE RAY KING, Nos. 135434, 135647; Court of Appeals Nos. 280965, 280966.

PEOPLE v HUCK, No. 135443; Court of Appeals No. 280992.

PEOPLE v FLORES, No. 135445; Court of Appeals No. 270117.

PEOPLE v MADISON, No. 135447; Court of Appeals No. 278590.

PEOPLE v DAVID JONES, No. 135461; Court of Appeals No. 270895.

Reconsiderations Denied February 19, 2008:

RUMFIELD v HENNEY, No. 132755. Leave to appeal denied at 480 Mich 944. Court of Appeals No. 260540.

KELLY, J. I would grant the motion for reconsideration.

DIVERGILIO v WEST BLOOMFIELD CHARTER TOWNSHIP, No. 133174. Leave to appeal denied at 480 Mich 949. Court of Appeals No. 261766.

PEOPLE v DONTRELL SMITH, No. 134009. Leave to appeal denied at 480 Mich 920. Court of Appeals No. 273743.

SAM'S TOWN AND COUNTRY MARKET, INC v MIHELICH & KAVANAUGH, PLC, No. 134149. Leave to appeal denied at 480 Mich 920. Court of Appeals No. 270940.

PEOPLE v ANTHONY MOSS, No. 134182. Leave to appeal denied at 480 Mich 921. Court of Appeals No. 274118.

PEOPLE v MILSTEAD, No. 134306. Leave to appeal denied at 480 Mich 951. Court of Appeals No. 273714.

PEOPLE v BRIAN JONES, No. 134494. Leave to appeal denied at 480 Mich 1003. Court of Appeals No. 274553.

PEOPLE v AMARO, No. 134530. Leave to appeal denied at 480 Mich 925. Court of Appeals No. 269692.

PEOPLE v SHELTON, No. 134546. Leave to appeal denied at 480 Mich 925. Court of Appeals No. 268078.

PEOPLE v CRAWFORD, No. 134579. Leave to appeal denied at 480 Mich 925. Court of Appeals No. 267728.

PEOPLE v HOUSTON, No. 134618. Leave to appeal denied at 480 Mich 1004. Court of Appeals No. 275644.

CITY OF MADISON HEIGHTS v ELGIN SWEEPER COMPANY, No. 134619. Leave to appeal denied at 480 Mich 1002. Court of Appeals No. 266333.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v MCNAMEE, No. 134710. Leave to appeal denied at 480 Mich 955. Court of Appeals No. 273736.

BURGESS v BERNHARDT, No. 134770. Leave to appeal denied at 480 Mich 956. Court of Appeals No. 268569.

PEOPLE v OHLENDORF, No. 134774. Leave to appeal denied at 480 Mich 956. Court of Appeals No. 278462.

PEOPLE v KEVIN YOUNG, No. 134786. Leave to appeal denied at 480 Mich 957. Court of Appeals No. 278889.

PEOPLE v JOHN COOPER, No. 134789. Leave to appeal denied at 480 Mich 957. Court of Appeals No. 276602.

PEOPLE v HEMP, No. 134794. Leave to appeal denied at 480 Mich 957. Court of Appeals No. 277171.

PEOPLE v PERRY DAVIS, No. 134800. Leave to appeal denied at 480 Mich 1005. Court of Appeals No. 274796.

SPENCER v DEPARTMENT OF CORRECTIONS, No. 134844. Leave to appeal denied at 480 Mich 958. Court of Appeals No. 278922.

PEOPLE v WALTONEN, No. 134862. Leave to appeal denied at 480 Mich 958. Court of Appeals No. 278851.

PEOPLE v CATHRON, No. 134884. Leave to appeal denied at 480 Mich 958. Court of Appeals No. 275974.

PEOPLE v DEANGELO JONES, No. 134931. Leave to appeal denied at 480 Mich 959. Court of Appeals No. 278624.

PEOPLE v SCOTT-PARKIN, No. 135002. Leave to appeal denied at 480 Mich 959. Court of Appeals No. 279315.

In re BORGHESE (BORGHESE v MICHIGAN CHILDREN'S INSTITUTE), No. 135134. Leave to appeal denied at 480 Mich 976. Court of Appeals No. 274337.

Leave to Appeal Denied February 27, 2008:

DETROIT FREE PRESS, INC v CITY OF DETROIT, No. 135841. The application for leave to appeal the February 13, 2008, order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The Wayne Circuit Court did not err in concluding that the Settlement Agreement (Deposition Exhibit 11) and the Notice of Rejection (Deposition Exhibit 10) were "public records," MCL 15.232(e), and subject to disclosure pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Plaintiff Detroit Free Press's FOIA requests were sufficiently specific, see MCL 15.233(1) and *Coblentz v Novi*, 475 Mich 558, 572-573 (2006), and there is no FOIA exemption for settlement agreements. See, e.g., *Coblentz*, *supra* at 561. Moreover, a public body may not contract away its obligations under the FOIA. *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff,* 463 Mich 353, 361 (2000). In addition, the circuit court did not abuse its discretion when it dissolved the nondisclosure provision in its previous order, and permitted, with one redaction, the disclosure of the deposition in question.

The motion for stay is granted to the extent that the Wayne Circuit Court's February 5, 2008, order granting the motion to disclose is stayed pending the return of the lower court record to that court. The motion to seal this Court's record is granted to the extent that this Court's file shall remain sealed until the release of documents as ordered by the trial court. Court of Appeals No. 283526.

KELLY, J. (*concurring*). I concur in the decision to deny leave to appeal. But I write separately to discuss the trial court's decision to disclose the deposition transcript.

Under MCR 2.411(C)(5) statements made during the course of mediation are confidential. In pertinent part, this rule provides:

> (5) Confidentiality. Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communica-

> tions between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties.

Here, at numerous points during the deposition, attorney Michael Stefani was specifically questioned about incidents that occurred during court-ordered facilitation. Because Stefani's detailed recounting of events included "statements made during mediation" and "communications between the parties or counsel," I believe certain parts of the deposition involved confidential communications under MCR 2.411(C)(5). But the city of Detroit did not argue for the redaction of this testimony. Instead, it asked the trial court to exempt the entire deposition from disclosure. Because most of the deposition testimony does not fall within the parameters of MCR 2.411(C)(5), the trial judge properly decided not to exempt the entire transcript from disclosure. And because the city did not specifically argue for redaction, I conclude that the trial judge did not abuse his discretion in not ordering redaction sua sponte.[1]

Summary Disposition March 5, 2008:

PEOPLE v MARK UNGER, No. 135860. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals because the criteria set forth in Administrative Order No. 2004-6, Standard 4, do not apply to criminal defendants who are represented by retained counsel, and we remand this case to the Court of Appeals for reconsideration, under the proper standard, of the defendant's motion for leave to file a supplemental brief (including a motion to remand for an evidentiary hearing) and his motion to adjourn oral argument. We do not retain jurisdiction. Court of Appeals No. 272591.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal March 7, 2008:

ZAVRADINOS v JTRB, INC, No. 135137. 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 address the following questions: (1) whether *DeYoung v Mesler*, 373 Mich 499 (1964), correctly construed MCL 557.151 to mean that there is a statutory presumption that property held jointly by a husband and wife is held by them as tenants by the entirety unless the title or conveyance expressly

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[1] The trial court ruled that the confidentiality requirement of MCR 2.411(C)(5) is subject to the crime-fraud exception discussed in *People v Paasche*, 207 Mich App 698, 705-706 (1994). I do not rely on the crime-fraud exception to conclude that the judge did not abuse his discretion in ordering disclosure of the deposition transcript. Hence, I offer no opinion on the applicability of the crime-fraud exception here.

provides otherwise, (2) if so, how the presumption of a tenancy by the entirety may be overcome, and (3) whether a provision in the title or conveyance specifically identifying the property owners as husband and wife affects the determination whether the presumption of a tenancy by the entirety has been overcome. The parties shall submit supplemental briefs within 42 days of the date of this order addressing these issues. The parties shall avoid submitting mere restatements of their application papers. Court of Appeals No. 268570.

Summary Dispositions March 7, 2008:

DOWNS V KEEBLER and DOWNS V NORTHERN MICHIGAN HOSPITALS INC, Nos. 132897 and 132898. By order of April 25, 2007, the application for leave to appeal the November 28, 2006, judgment of the Court of Appeals was held in abeyance for *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of the order in *Mullins* and our decision in *Kirkaldy v Rim*, 478 Mich 581 (2007). Court of Appeals Nos. 256422 and 256462.

BURRIS V ALLSTATE INSURANCE CO, No. 132949. On January 9, 2008, the Court heard oral argument on the application for leave to appeal the September 21, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Wayne Circuit Court's September 10, 2004, order granting judgment notwithstanding the verdict in part and the February 23, 2005, order for final judgment and for sanctions, because the plaintiff did not present sufficient evidence at trial that he incurred attendant-care expenses. The evidence failed to establish that the attendant-care providers expected compensation for their services. Therefore, the evidence failed to establish that the plaintiff "incurred" attendant-care expenses. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484 (2003). Court of Appeals No. 261505.

CORRIGAN, J. (*concurring*). I concur with the order reversing the judgment of the Court of Appeals and reinstating the trial court's order partially granting judgment notwithstanding the verdict (JNOV) and the order for final judgment and sanctions. I write separately to complete the picture plaintiff presented in this record and to respond to the dissents' legal arguments.

I. FACTS AND PROCEDURAL HISTORY

In 1978, plaintiff, who was then six years old, sustained severe and permanent injuries when he was struck by a drunken driver. After the accident, plaintiff underwent extensive medical treatment, including

multiple surgeries, all of which defendant covered under its no-fault policy. Despite plaintiff's physical limitations, he attended college, obtained employment, married, fathered a child, and performed routine activities, including driving. After plaintiff had an unsuccessful surgery in 2000, however, one of plaintiff's three treating physicians prescribed 24-hour attendant care. Defendant paid plaintiff's then-wife, Diane Vermette, for round-the-clock attendant-care services at the rate of $1,428 weekly. Vermette stopped furnishing attendant-care services just one month after plaintiff's surgery. Nevertheless, plaintiff continued to claim attendant-care services Vermette purportedly provided. He went to great lengths to hide his fraud from defendant. He instructed defendant to make the benefit checks payable to Vermette in her maiden name because plaintiff did not want defendant to know that it was paying his spouse to care for him. Plaintiff directed defendant to send the checks to his post office box. Plaintiff then cashed the checks, using Vermette's identification, and deposited the money into his bank account.

Plaintiff abused defendant's trust in other ways. Plaintiff submitted claims for several thousands of dollars for gym equipment and a special bed, neither of which plaintiff had actually purchased. Defendant paid these claims. Plaintiff also stole prescription pads from one of his treating physicians. He forged his name for the purpose of illegally obtaining prescription medication for which defendant paid. Plaintiff also forged a legitimate $50 receipt from a health-care provider to claim $1,200. Because of questions related to the forged receipt and a private investigator's observations during surveillance of plaintiff, defendant notified plaintiff to appear for an examination under oath, as the insurance policy provided. Plaintiff failed to appear for that examination. Defendant suspended the payment of all personal protection insurance benefits because of plaintiff's fraud, his violation of the terms of the insurance policy by failing to appear for the examination under oath, and a letter from one of plaintiff's doctors stating that he did not require 24-hour care.

Plaintiff and Vermette separated in November 2001 and later divorced. Plaintiff moved back to his parents' home. Three people cared for plaintiff while he was living at his parents' home: Richard Burris (plaintiff's father), Ryan Burris (plaintiff's brother), and Christopher Marcott (plaintiff's friend). All three acknowledged that they had no record of the dates and times they allegedly cared for plaintiff and never submitted a claim to defendant for payment of those services. Further, none of them ever asked plaintiff for any payment for their services, and plaintiff never promised them payment. Ryan and Christopher further testified that they did not expect to be paid for their services. Ryan testified that he just wanted to help his brother ("This is my brother, it's not about money."), and Christopher testified that he just wanted to "hang out" with his best friend ("[It's] not a job, he's my friend.").

In 2002, plaintiff filed this first-party no-fault action, seeking payment of attendant-care benefits and unpaid medical expenses. Plaintiff sought an award of $156,376 in attendant-care expenses (approximately $8.50 an hour, 24 hours a day for 761 days). The primary issue at the jury trial was whether defendant was obligated to pay for attendant-care

services allegedly provided by Richard, Ryan, and Christopher after plaintiff moved back into his parents' home in December 2001. The jury awarded plaintiff $7,610.98 in medical expenses and $78,438 in attendant-care expenses ($26,146 for Richard, $6,536.50 for Ryan, and $45,755.50 for Christopher).[1] The verdict was about half the amount plaintiff sought. The jury thus rejected plaintiff's exaggerated claims.

The trial court thereafter granted defendant's motion for JNOV and vacated the jury's award of attendant-care expenses. The court ruled that plaintiff had failed to provide sufficient evidence that he had incurred such expenses:

> With regard to the attendant care circumstances, I understand that there are some cases that say that there is some leeway with regard to family members. But in this case, they [Richard, Ryan, and Christopher] couldn't say what they did. They couldn't specify the number of hours. They couldn't even manage to say that they expected reimbursement. They went so far as to say they didn't expect to get anything. And with regard to Mr. Marcott, it's all the worse because he's not a family member.
>
> The motion is granted with regard to the attendant care expenses awarded with regard to Richard Burris, Ryan Burris and Christopher Marcott. These didn't come close to being reimbursable. And the verdict is affirmed in all other regards.[2]

The Court of Appeals reversed and reinstated the jury verdict in an unpublished opinion per curiam.

II. RESPONSE TO THE DISSENTS

MCL 500.3107(1) provides, in pertinent part:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges *incurred* for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. [Emphasis added.]

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[1] The trial court entered a judgment of $133,013.28 in plaintiff's favor. The judgment included the jury verdict of $86,048.98, taxable costs of $8,292.53, case-evaluation sanctions of $27,750, and accrued interest of $10,921.77.

[2] As a result of the trial court's ruling on defendant's motion for JNOV, defendant became the prevailing party and was, therefore, entitled to an award of case-evaluation sanctions. Accordingly, the trial court entered an order awarding defendant a net judgment of $10,000.

MCL 500.3110(4) provides that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is *incurred*." (Emphasis added.) In *Nasser v Auto Club Ins Ass'n*, 435 Mich 33 (1990), this Court stated the elements of an "allowable expense" under the no-fault act:

> "The statute requires that three factors be met before an item is an 'allowable expense': 1) the charge must be reasonable, 2) the expense must be reasonably necessary, and 3) *the expense must be incurred*. These are the standard requirements for recovery of such expenses under all no-fault plans . . . ." [*Id.* at 50, quoting *Manley v DAIIE*, 425 Mich 140, 169 (1986) (BOYLE, J., concurring in part and dissenting in part) (emphasis added).]

The issue in the instant case is whether plaintiff incurred any expenses for attendant-care services.

Justice WEAVER argues in her dissent that *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476 (2003), is distinguishable because there the plaintiff sought advance payment for future expenses, rather than reimbursement for an expense for a service that had already been provided, as in the instant case. This factual distinction, however, is irrelevant to the *Proudfoot* Court's discussion of the meaning of the term "incur." In *Proudfoot*, *supra* at 484, this Court adopted the following dictionary definition of "incur": "[t]o become liable or subject to, [especially] because of one's own actions." "Liable" means "obligated according to law or equity: responsible." *Webster's Ninth New Collegiate Dictionary* (1987). Thus, the definition of "incur" adopted in *Proudfoot* requires a legal or equitable obligation to pay. In *Proudfoot*, this Court elaborated on this definition of "incur" in a footnote:

> An insured could be liable for costs by various means, including paying for costs out of pocket or signing a contract for products or services. Should the insured present a contract for products or services rather than a paid bill, the insurance company may, in order to protect itself, make its check payable to the insured and the contractor. [*Proudfoot*, *supra* at 484 n 4.][3]

Under *Proudfoot*, the term "incur" does not mean that an insured must necessarily enter contracts with the care provider to be entitled to

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[3] Justice WEAVER adopts sections of the Court of Appeals opinion that do not mention *Proudfoot*. The Court of Appeals analysis was based on Court of Appeals cases decided before *Proudfoot* that are now of questionable validity. *Booth v Auto-Owners Ins Co*, 224 Mich App 724 (1997), and its predecessors are no longer controlling to the extent that they are inconsistent with *Proudfoot*'s definition of "incur," which requires that the insured be liable for payment.

reimbursement for attendant-care expenses ("liable" means "obligated according to law *or equity*"). Nor does it mean that an insured must necessarily present a formal bill establishing that the attendant-care services were provided. It merely means that the insured must have an obligation to pay the attendant-care-service providers for their services. I agree with Justice KELLY that in determining allowable attendant-care expenses, there is no basis to treat family members differently than hired attendant-care-service workers. But to incur an expense for attendant-care services, the insured's family members and friends, just like any other provider, must perform the services with a reasonable expectation of payment.

Plaintiff furnished no evidence that he was liable for any attendant-care expenses. Plaintiff did not pay Richard, Ryan, or Christopher for their services. Further, these three witnesses testified that they did not expect to be paid. Plaintiff does not even argue that he was liable or obligated in any way to pay anything to his family or friend for taking care of him. "Where a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product or service, there can be no finding of a breach of the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense." *Nasser*, *supra* at 50. Because plaintiff furnished no evidence that he incurred charges for the assistance of his family members and friend, the trial court properly granted JNOV on the attendant-care-expenses portion of the jury's verdict.[4]

WEAVER, J. (*dissenting*). I dissent from the order reversing the judgment of the Court of Appeals and reinstating the Wayne Circuit Court's September 10, 2004, order partially granting judgment notwithstanding the verdict and the February 23, 2005, order for final judgment and for sanctions. I would deny the application for leave to appeal, thereby leaving in place the Court of Appeals judgment reinstating the jury's award of $78,438 for expenses incurred by plaintiff for attendant-care

[4] Justice WEAVER presents the following hypothetical example in support of her argument that plaintiff incurred attendant-care expenses: "[*H*]*ad* the providers requested payment, they *would have been* entitled to payment from defendant for their services." (Emphasis added.) In fact, however, the providers did *not* request payment. Therefore, plaintiff was *not* obligated to pay them for their services. Accordingly, defendant had no statutory duty to pay plaintiff for expenses he did not incur.

Additionally, Justice WEAVER argues that defendant had an obligation to pay Richard, Ryan, and Christopher for their services. Justice WEAVER overlooks that defendant pays personal protection insurance benefits to plaintiff, not his attendant-care providers. Even under Justice WEAVER's position, the providers would not be guaranteed to receive any compensation, because the jury's verdict awarded the attendant-care expenses solely to plaintiff. Under Justice WEAVER's argument, plaintiff would receive payment for the attendant-care services without any obligation to forward the payment to those who performed the services.

services. A jury found that plaintiff presented sufficient evidence establishing that the plaintiff's physician prescribed 24-hour attendant care for plaintiff and that plaintiff in fact received attendant care from family members and a close family friend. I agree with the Court of Appeals that, as construed under MCL 500.3107(1)(a), plaintiff presented sufficient evidence that he "incurred" expenses for the attendant-care services provided to him. Further, I disagree with the majority's application of the holding in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476 (2003), to this case given the marked factual distinctions between this case and *Proudfoot*.

Plaintiff, Randy Burris, was six years old when he was struck by a car being driven by a drunken driver. Mr. Burris was seriously injured and suffered both orthopedic and internal injuries, including a traumatic brain injury. He was in a coma for several months and then suffered a stroke. His injuries have left him with significant and permanent weakness in his left extremities such that his left arm and leg are nearly nonfunctional. Mr. Burris has had numerous surgeries since the accident, the most recent being a cervical spinal fusion to repair a herniated cervical disc. Mr. Burris was unable to work after the neck surgery and has been permanently disabled since approximately 2000.

As a result of this permanent disability, a physician prescribed 24-hour care for Mr. Burris. Thereafter, pursuant to its duty to pay personal protection insurance (PIP) benefits, MCL 500.3107(1), defendant, Allstate Insurance Company, paid Mr. Burris's wife for 24-hour attendant-care services she provided to Mr. Burris until December 4, 2001.[1]

In November 2001, Mr. Burris and his wife separated, and Mr. Burris moved to his parents' house. For approximately two years, while he lived with his parents, Mr. Burris received attendant-care services from his father and brother, Richard and Ryan Burris, respectively, and from a close family friend, Christopher Marcott. Mr. Burris needed help with dressing, bathing, cooking, laundry, and shopping and general supervisory care to assist him because of his cognitive and physical limitations. While Mr. Burris never received a formal bill for the provision of such services, and while none of the care providers kept track of the exact number of hours of care they provided, nor did they expect to be paid, Mr. Burris presented evidence that he both required and received attendant care from these three individuals.[2]

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[1] In December 2001, Allstate suspended PIP payments after it determined that Mr. Burris had altered a receipt from a health-care provider to make it appear that he was entitled to reimbursement in the amount $1,200 instead of $50.

[2] During closing argument, counsel for the plaintiff noted that Allstate had previously paid the plaintiff's wife $8.50 an hour for attendant-care services and that 761 days had elapsed since the plaintiff's family and friend had provided attendant care. Acting on his counsel's calculations, plaintiff sought $156,376 from Allstate for the attendant-care services provided to him.

The jury, after hearing testimony from the plaintiff, his physician, and the plaintiff's care providers, evidently concluded that Mr. Burris had incurred allowable expenses entitling him to PIP benefits given that the expenses for attendant care were "reasonable" and were "reasonably necessary," and that such expenses were in fact "incurred."[3] And while there may have been some question as to the appropriateness of the amount Mr. Burris sought, the jury nevertheless awarded him $78,438 in attendant-care expenses, roughly half of the amount he had requested.

MCL 500.3107(1)(a) states that personal protection insurance benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." To be considered an "allowable expense" under § 3107, the expense must be (1) reasonable, (2) reasonably necessary, and (3) incurred.[4] As the Court of Appeals correctly noted, the only issue in dispute was whether the expenses for attendant-care services were "incurred."

Defendant argues that under *Proudfoot*, an expense is not "incurred" until the recipient of such services "become[s] liable or subject to, [especially] because of one's own actions." The pertinent passage from *Proudfoot*, *supra* at 483-484 states:

> *MCL 500.3110(4)* provides that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss *is incurred*" (emphasis added).
>
> To "incur" means "[t]o become liable or subject to, [especially] because of one's own actions."[4] A trial court may enter "a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed [, but s]uch a declaration does not oblige a no-fault insurer to pay for an expense until it is actually incurred." At the time of the judgment, plaintiff had not yet taken action to become liable for the costs of the proposed home modifications. Because the expenses in question were not yet "incurred," the Court of Appeals erred in ordering defendant to pay the total amount to the trial court. [Citations omitted; emphasis added.]

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[4] *Webster's II New College Dictionary* (2001). An insured could be liable for costs by various means, including paying for costs out of pocket or signing a contract for products or services. Should the insured present a contract for products or services rather than a paid bill, the insurance company may, in order to protect itself, make its check payable to the insured and the contractor.

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[3] See MCL 500.3107(1)(a).

[4] *Owens v Auto Club Ins Ass'n,* 444 Mich 314, 323 (1993); *Davis v Citizens Ins Co of America,* 195 Mich App 323, 326 (1992).

Defendant asserts that because Mr. Burris's family members and Mr. Marcott did not keep track of their hours, submit a written bill for their services, or even expect to be paid at all, no expenses were "incurred" as interpreted by this Court in *Proudfoot.* In making this argument, the defendant relies heavily on the *Webster's II New College Dictionary* (2002) definition of "incur" as a legal obligation, and asserts that under *Proudfoot*, there must be some "legal obligation to pay." Defendant's assertion is that because the care providers in this case did not ask or expect to be paid for their services, there was no "legal obligation to pay" for such services; hence, no expenses were "incurred."

However, when viewed in its proper context, that definition of "incurred" has only a limited application to the facts presented in *Proudfoot*. I therefore disagree with the majority's adoption of the defendant's strained interpretation of *Proudfoot*. In *Proudfoot*, the issue was whether an insurer was responsible for *future* home modifications desired by the plaintiff to assist her in accessing her house in a wheelchair. This Court agreed with dissenting Court of Appeals Judge DANHOF that an insurer could not be held liable for *future* PIP expenses that had not even been "incurred" yet.

The point of distinction in *Proudfoot* is that the plaintiff was seeking payment in advance for a future expense, not reimbursement for an expense for a service that had already been provided, that is, incurred. The language cited by this Court that is critical to understanding the context in which that case was decided states:

> At the time of the judgment, plaintiff had not yet taken action to become liable for the costs of the proposed home modifications. Because the expenses in question were not yet "incurred," the Court of Appeals erred in ordering defendant to pay the total amount to the trial court. [*Proudfoot*, *supra* at 484.]

In other words, because the plaintiff "had not yet taken action" to install home modifications, the plaintiff was not "liable" for any costs for which he might seek PIP coverage. Had the home modifications already been made, the plaintiff would have been liable for such modifications because they would have been "incurred." Thus, the application of *Proudfoot* to this case is inappropriate as there is no question that Mr. Burris's expenses were "incurred" because the attendant-care services *were not future expenses for which Mr. Burris sought advance payment.* The services in question *had already been provided* to plaintiff.

In her concurrence to the order, Justice CORRIGAN insists that *Proudfoot* is not distinguishable because Mr. Burris failed to establish that he "incurred" any attendant-care expenses given that there was no expectation of payment from the care providers. However, the fact is that Mr. Burris did present evidence that he received such care, and, had the providers requested payment, they would have been entitled to payment from defendant for their services. Thus, the true "obligation" to pay for attendant-care expenses belongs to defendant. Once the care was pro-

vided, whether or not the care providers were even aware of their right to compensation, the defendant had a statutory duty to pay for attendant-care services.[5]

Moreover, as the Court of Appeals wisely noted, the *Proudfoot* definition of "incur" as to "become liable or subject to, [especially] because of one's own actions," does not equate to a "legal obligation to pay." One can be "subject to" a claim for reimbursement simply on the basis of the provision of a service, even without the preparation or receipt of a formal bill establishing that the service was provided. In that regard, I would affirm the Court of Appeals judgment and adopt that court's analysis as set forth below:

> [T]his Court has addressed this issue, at least implicitly, on several occasions but particularly instructive is *Booth v Auto-Owners Ins Co*, 224 Mich App 724; 569 NW2d 903 (1997). In *Booth*, the plaintiff was severely injured in an automobile accident and required attendant care from her parents on a continual basis. After the defendant insurer refused to pay the parents for the 24-hour a day attendant care that they provided, the plaintiff filed suit. *Id*. at 726. The trial court granted the defendant summary disposition, ruling that the plaintiff failed to submit evidence establishing that she incurred expenses because her parents did not charge her for their services. *Id.* at 726-727. This Court reversed the trial court's ruling, holding that the plaintiff was not required to actually be billed by her family in order to establish that she "incurred" the expense of their attendant care services. *Id.* at 730. Further, relying on *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127, 143; 489 NW2d 137 (1992), this Court held that "whether the plaintiff was entitled to collect the value of the services and the determination of the value are matters properly left for the jury to decide." *Booth*, *supra*.
>
> Here, plaintiff produced evidence that his family and a friend began providing 24-hour attendant care in December 2001, after plaintiff was divorced and moved back into his parents' house. Plaintiff[']s] father, Richard Burris, plaintiff's brother, Ryan Burris, and plaintiff's friend, Christopher Marcott, all testified that plaintiff required, and they provided, significant attendant

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[5] MCL 500.3107(1) provides, in pertinent part:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of *all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation*. [Emphasis added.]

> care services. Dr. Maryann Guyon testified that plaintiff required 24-hour attendant care services as a result of the injuries plaintiff suffered in the 1978 automobile accident and wrote a prescription for the same. Defendant's claims adjuster, Kimberly Dotson, testified she had previously paid attendant care at $ 8.50 per hour. Thus, unlike the factual scenario presented in *Moghis v Citizens Ins Co of America*, 187 Mich App 245, 247; 466 NW2d 290 (1990), plaintiff produced evidence that attendant care services were actually provided to him since December 2001. Plaintiff was not required to actually be billed by his family and friend in order to establish that he "incurred" the expense of their attendant care services; thus, it was for the jury to decide whether he was entitled to collect the value of the services and to make the determination of the value. See *Booth*, *supra*. Accordingly, the trial court's order granting defendant's motion for [judgment notwithstanding the verdict] on the ground that there was insufficient evidence presented to create an issue for the jury as to whether plaintiff "incurred" the expense is reversed. [*Burris v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 261505), p 2.]

Thus, I dissent from the order reversing the judgment of the Court of Appeals and reinstating the Wayne Circuit Court's September 10, 2004, order partially granting judgment notwithstanding the verdict and the February 23, 2005, order for final judgment and for sanctions. I would deny the application for leave to appeal, thereby leaving in place the Court of Appeals judgment reinstating the jury's award of $78,438 for expenses incurred by plaintiff for attendant-care services.

CAVANAGH, J. I join the statement of Justice WEAVER.

KELLY, J. (*dissenting*). I concur in Justice WEAVER's dissenting statement. I write separately to note that the no-fault insurer would be liable if attendant care were provided by a hired home-care agency. Family attendant care is a cheaper, more informal alternative to such hired care. The determinative question should be whether the attendant care was provided, not whether the care was provided with the same or similar level of formality. The majority does not conclude that the evidence was insufficient to establish that the attendant care here was provided. Because the care was provided, expenses were incurred—whether by the insured or by the insurer who is ultimately responsible to pay for attendant-care services.

RAMANATHAN v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS, No. 133170. On December 5, 2007, the Court heard oral argument on the application for leave to appeal the January 4, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the

Wayne Circuit Court for further proceedings consistent with this order. As the Court of Appeals correctly ruled, the plaintiff's sole actionable claim, by operation of the applicable statute of limitations, is the decision of the provost of Wayne State University to deny the plaintiff's request for tenure. MCL 600.5805(1); *Garg v Macomb Co Community Mental Health Services,* 472 Mich 263 (2005), amended 473 Mich 1205 (2005). The plaintiff presented no evidence that the provost harbored any national origin or racial animus toward the plaintiff in reaching her tenure decision. *Dep't of Civil Rights ex rel Burnside v Fashion Bug of Detroit,* 473 Mich 863 (2005). The plaintiff cannot show any relevant connection between the identified comments of the dean of the School of Social Work in 1993 and the provost's tenure decision in 1995. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124 (2003). The plaintiff has not presented a genuine issue of material fact to sustain his claim of racial or national origin discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.* On remand, the circuit court shall only proceed on the plaintiff's claim that the provost, by denying tenure to the plaintiff, unlawfully retaliated against the plaintiff for the exercise of his rights under the Civil Rights Act. Court of Appeals No. 266238.

CAVANAGH, WEAVER, and KELLY, JJ. We would affirm the judgment of the Court of Appeals in all respects.

MARKMAN, J. (*dissenting*). I respectfully dissent. Plaintiff alleges that a dean of the university where he taught retaliated against him for filing a racial discrimination complaint with the university, resulting in the denial of his tenure application. In my judgment, plaintiff has failed to demonstrate the requisite causal connection between his complaint and the university's denial of tenure, because plaintiff has not shown that the dean harbored any retaliatory animus toward plaintiff. Moreover, plaintiff has failed to demonstrate that any alleged retaliatory motive on the part of a dean of the university should be imputed to the ultimate decision-maker, the university provost. For these reasons, I would reverse the judgment of the Court of Appeals and order summary disposition for defendant university.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, who is of Asian-Indian descent, was hired in 1992 to teach at Wayne State University's School of Social Work. In the spring of 1993, plaintiff's work was favorably reviewed by the dean of the School of Social Work, Leon Chestang, who gave plaintiff a "1" rating, the highest rating possible. In October 1993, plaintiff met with the dean and expressed concerns that another professor had made discriminatory remarks to plaintiff regarding plaintiff's race. Plaintiff then made an informal complaint to the university's Equal Opportunity Office (EOO) regarding the alleged discrimination.

Plaintiff alleges that after this informal complaint was filed, the dean's attitude toward him dramatically worsened. At a faculty meeting in the fall of 1993, the dean compared what he viewed as an outdated concept of social work to the sitar, an Indian musical instrument that the dean considered to be equally outdated. In December 1993, the dean

stated in response to criticisms directed at him at a different faculty meeting, "I don't mind being the sacrificial lamb, I just hope I'm not curried."

In December 1993, the dean renewed plaintiff's contract; the initial renewal was for six months. Several professors testified that this six-month period was unusually short and in violation of a union contract with the university. In April 1994, the contract was renewed for one year. In May 1994, plaintiff filed a formal complaint with the EOO, again alleging racial discrimination, as well as retaliation by the dean in response to plaintiff's informal complaint. In September 1994, the EOO concluded that no evidence of discrimination or retaliation existed.

On October 31, 1994, plaintiff applied for tenure. The dean recommended that it be denied. The School of Social Work Promotion and Tenure Committee recommended that the application be granted. The University Promotion and Tenure Committee recommended that it be denied. The university also received nine external review letters: six of these reviewers recommended in favor of granting tenure, two of these reviewers recommended against granting tenure, and one of the reviewers was neutral. The ultimate decision regarding plaintiff's tenure application was made by the university provost. The provost received the recommendations of the dean, the two committees, and the external reviewers, as well as documents related to plaintiff's application, and undertook a de novo review of the application. On April 27, 1995, the provost denied plaintiff's application for tenure.

On April 8, 1998, plaintiff filed the instant lawsuit against the dean and defendant university, alleging racial discrimination, retaliation, and tortious interference with a contractual relationship. The trial court granted summary disposition to defendant on the tortious interference claim. Defendant then moved for summary disposition of the remaining claims, arguing that those claims were barred by the three-year statute of limitations and that plaintiff had not submitted sufficient evidence to support his claims. The trial court granted summary disposition to defendant.

The Court of Appeals reversed, concluding that plaintiff had submitted sufficient evidence to support both the racial discrimination and retaliation claims. Unpublished opinion per curiam, issued April 12, 2002 (Docket No. 227726). The Court also concluded that plaintiff's claims were timely under the "continuing violations" doctrine of *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986).

Following the initial decision of the Court of Appeals, this Court overruled *Sumner* in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263 (2005). Defendant filed a new motion for summary disposition, arguing that under *Garg* plaintiff's claims were time-barred. Defendant further argued that under *Garg*, events occurring outside the statute of limitations period could not be considered as evidence to prove discrimination in regards to a timely claim. The trial court granted summary disposition to defendant, ruling that absent evidence of events outside the statute of limitations period, plaintiff had not presented sufficient evidence to support his claims.

Subsequently, this Court, on motion for reconsideration, modified *Garg* by removing footnote 14.[1] 473 Mich 1205 (2005). On this basis, the trial court then granted plaintiff's motion for reconsideration and reinstated plaintiff's case, and the Court of Appeals affirmed. Unpublished opinion per curiam, issued January 4, 2007 (Docket No. 266238).

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." *Vega v Lakeland Hospitals*, 479 Mich 243, 245 (2007). A court considering a motion for summary disposition under MCR 2.116(C)(10) must review the evidence "submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552 (2007). "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." *Id*. at 552.

III. ANALYSIS

A. GENERAL PRINCIPLES

Plaintiff argues that the dean retaliated against him for making the EOO complaint, resulting in the denial of tenure. In order to establish a prima facie claim of retaliation, a plaintiff must show

> "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." [*Garg*, *supra* at 273, quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436 (1997).]

In this case, plaintiff's informal complaint to the EOO constituted a "protected activity." Moreover, the denial of tenure constituted an adverse employment action. It is clear that the dean was aware of the EOO complaint. However, even assuming that the *provost* was aware of the complaint, plaintiff's retaliation claim fails because plaintiff, in my judgment, has not shown the requisite causal connection between the protected activity and the denial of tenure.

B. DEAN

Plaintiff has not submitted sufficient proof to demonstrate that the dean retaliated against plaintiff for making the EOO complaint. The bulk

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[1] Footnote 14 stated that "acts falling outside the period of limitations" were inadmissible evidence even "in support of a timely claim."

of plaintiff's evidence concerns the dean's alleged change in attitude toward plaintiff. Plaintiff argues that because the dean rated plaintiff highly before the EOO complaint but criticized plaintiff's performance afterwards in his recommendation against tenure, the only inference that may be drawn is that the dean criticized plaintiff's performance simply to retaliate for the EOO complaint. Moreover, plaintiff also ascribes a retaliatory motive to the shortened contract offered by the dean in December 1993. However, this Court has stated that "[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West v Gen Motors Corp*, 469 Mich 177, 186 (2003). In other words, the law permits a decision-maker to change his mind about an employee's performance, even after that employee has submitted a complaint regarding racial discrimination. To hold otherwise would be to inoculate an employee who makes such a complaint from ever suffering an adverse employment action. "The fact that a plaintiff engages in a 'protected activity' . . . does not immunize him from an otherwise legitimate, or unrelated, adverse job action." *Id*. at 187. *West* observed that a person could demonstrate the requisite causal connection by "present[ing] evidence that his superior expressed clear displeasure with the protected activity engaged in by the plaintiff." *Id*. at 186-187. Thus, plaintiff could demonstrate that the dean harbored retaliatory animus, either by some "expression" of "clear displeasure" in regards to the complaint or by other evidence from which a reasonable juror could conclude that the dean was displeased by the complaint.

In this case, plaintiff attempts to forge the necessary causal connection by focusing on the dean's comments in faculty meetings regarding a "sitar" and "curried lamb." Plaintiff argues that these comments constitute direct evidence of discriminatory animus by the dean; alternatively, he argues that, even if these comments are merely "stray remarks," *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 136 (2003), they constitute circumstantial evidence of bias.[2]

In my judgment, these comments neither constitute direct evidence of discriminatory bias nor rise even to the level of "stray remarks" of bias. This Court has stated:

> Factors to consider in assessing whether statements are "stray remarks" include: (1) whether they were made by a decision maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were

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[2] It is unnecessary to determine here whether under Michigan's antidiscrimination laws "stray remarks" are admissible as circumstantial evidence of discrimination or whether such remarks are inadmissible as lacking relevance, see *Krohn v Sedgwick James of Michigan*, 244 Mich App 289, 302 (2001) (concluding that "stray remarks" were properly excluded as evidence because such remarks were "irrelevant"). This is because, at least in my judgment, the comments in this case do not rise to the level of reasonably suggesting discriminatory bias.

> vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. [*Sniecinski*, *supra* at 136 n 8.]

Although the dean had a role in the decision-making process of the university, the other factors are not implicated here. The "sitar" and "curried lamb" comments were not made in relationship to the tenure decision; rather, these comments came in the midst of lengthy faculty meetings on unrelated subjects and they were not directed toward plaintiff. These comments were isolated and limited to these two meetings. Moreover, they took place over a year before the ultimate tenure decision was made. Most importantly, these comments are altogether irrelevant in suggesting animus or bias on the part of the dean; rather, they are mere cultural references made to elucidate general points having nothing to do with plaintiff or his tenure, and they indicate no hostility toward persons of Asian-Indian descent or any other ethnic heritage.[3] Accordingly, the "sitar" and "curried lamb" remarks are neither direct nor circumstantial evidence of the dean's alleged discriminatory bias.

Moreover, even if these comments could be reasonably construed to indicate discriminatory animus—which I do not believe to be so—they must still be evaluated in light of whether they suggest any *retaliatory* animus on the part of the dean. That is, the only pertinent question here is whether the dean disdained plaintiff specifically for making the EOO complaint and responded adversely as a result. Absent such evidence—and there is none—plaintiff's claim of retaliation depends entirely on the temporal connection between the EOO complaint and the dean's change in attitude. Consequently, plaintiff cannot make a prima facie case of retaliation.

C. PROVOST

Even if plaintiff could demonstrate that the dean intended to retaliate against plaintiff for filing the EOO complaint, plaintiff, in my judgment,

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[3] One can only speculate about the ways in which employers' vocabulary will have to be sanitized in order to avoid raising inferences of discriminatory bias to overly sensitive employees and judges. Needless to say, references to "Chinese walls" in describing security systems, "kamikaze" competitive tactics, sending "smoke signals" to potential customers, "putting one's finger in the dike" in addressing emergencies, and avoiding "siestas" until a project has been completed, should, as a start, be expunged from one's vocabulary lest such references later be relied on as evidence of civil rights violations. Particular care should also be taken to avoid references or allusions to the cuisine, customs, cultural artifacts, historical figures, and mythologies of particular ethnic groups and nationalities.

still has not submitted sufficient evidence to create a jury question regarding causation. That is, with regard to the tenure decision, the dean was not the ultimate decision-maker; the provost was. Thus, plaintiff must argue either that the dean's animus may be imputed to the provost or that the dean's approval was necessary for tenure to be granted, thereby making him the de facto decision-maker.

This Court has held that a plaintiff cannot bring a valid claim of discrimination where he has failed to "establish[] that the ultimate decision maker harbored any racial animus toward [the plaintiff]." *Dep't of Civil Rights ex rel Burnside v Fashion Bug*, 473 Mich 863 (2005). However, under some circumstances, courts have imputed the bias of non-decision-makers to the ultimate decision-maker. See, e.g., *Harrison v Olde Financial Corp*, 225 Mich App 601, 609 n 7 (1997). The United States Court of Appeals for the Seventh Circuit has stated that bias may be imputed when the "decision makers themselves, or those who provide input into the decision, express such feelings (1) around the time of, and (2) in reference to, the adverse employment action complained of." *Hunt v City of Markham*, 219 F3d 649, 652 (CA 7, 2000). In such circumstances, "it may be possible to infer that the decision makers were influenced by those feelings in making their decision." *Id*. at 653. On the other hand, discriminatory intent should not be imputed to the ultimate decision-maker when that decision-maker consulted various persons in making the decision, one of whom had allegedly uttered a discriminatory remark, because generally "[s]tatements made by inferior employees are not probative of an intent to discriminate by the decisionmaker." *Aungst v Westinghouse Electric Corp*, 937 F2d 1216, 1221 (CA 7, 1991).

Here, plaintiff has not produced evidence that the dean made any allegedly retaliatory remarks about plaintiff to the provost "around the time of" the tenure decision. The comments about the "sitar" and "curried lamb" were made over a year before the provost's decision, were not in reference to the tenure decision, and were not made to or in the vicinity of the provost. Moreover, defendant produced considerable evidence that the provost's decision was based not only on the dean's recommendation, but also on the recommendations of two separate committees, as well as outside recommendations from solicited reviewers and other independent materials. Hence, any retaliatory bias on the part of the dean may not be properly imputed to the provost.

Nor is there evidence that the provost here "acts merely as a cat's paw for or rubber-stamps a decision, report, or recommendation actually made by a subordinate," or that the dean is "the actual decisionmaker or the one principally responsible for the contested employment decision." *Hill v Lockheed Martin Logistics Management, Inc*, 354 F3d 277, 290 (CA 4, 2004). Plaintiff asserts that because the provost could not remember a specific faculty member who was given tenure over a dean's recommendation of denial (although the provost testified that it had occurred), sufficient evidence has been presented that the dean was the actual decision-maker. However, it is not defendant's burden to produce some statistical minimum of cases in which tenure decisions have been made by the provost over the dean's objections. Simply put, there is no obligation on the part of a decision-maker to show some minimum

number of disagreements with a subordinate in order to demonstrate that she, and not the subordinate, is, in fact, the decision-maker. Here, the provost stands in a clearly superior decision-making position in defendant's hierarchy relative to the dean; it is uncontradicted that the provost considered recommendations of persons and committees from other than the dean, and it is uncontradicted that the provost conducted a de novo review of each tenure application and reached an ultimate conclusion based on all the material submitted to her. Under these circumstances, I do not believe that plaintiff has created a genuine issue of material fact regarding whether the provost was the "actual decision-maker" with regard to his failure to achieve tenure.

D. AMENDMENT OF *GARG*

Defendant also asserts that, even if plaintiff's claims are allowed to proceed to trial, plaintiff may not present evidence of events that occurred outside the statute of limitations period under *Garg*. Unfortunately, the majority simply ignores this issue. The significance of this Court's action in *Garg* in granting plaintiff's motion for reconsideration and striking the original footnote 14 is squarely implicated in this case if it must proceed to trial, as required by the majority. I agree with the Court of Appeals that "the implications of *Garg* are unclear with respect to the admission of evidence." This Court should not require this trial to proceed where the scope of admissible evidence is unclear and where this issue has squarely been presented to this Court. It makes no sense for this trial to proceed before its ground rules can be determined.

IV. CONCLUSION

The practical effect of the majority's order will be: (a) to increasingly immunize persons who have filed complaints of discrimination from subsequent adverse employment actions and thereby encourage baseless filings of discrimination by giving greater weight to mere temporal relationships in assessing whether discrimination has occurred; (b) to inject courts more deeply into the business of monitoring what is, at most, insensitive speech rather than speech evidencing discriminatory bias; (c) to throw into confusion the identity of the actual decision-maker in the employment process upon whom evidence of bias must be focused; and (d) to cast doubt upon the integrity of a growing number of discrimination trials by failing to clarify under *Garg* the proper scope of admissible evidence in such trials. The decisions of this Court have consequences and such consequences cannot be disclaimed by the majority simply because a decision is issued by order rather than by opinion.

For the reasons set forth in this statement, I would reverse the judgment of the Court of Appeals and dismiss the remaining claims against defendant.

COMMUNITY RESOURCE CONSULTANTS, INC v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 133416. On December 5, 2007, the Court heard oral

argument on the application for leave to appeal the February 1, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Under the Michigan no-fault act, MCL 500.3101 *et seq*., when defendant made partial payments and refused to pay for specific services in plaintiff's invoices, plaintiff could not insulate those services from the one-year-back rule, MCL 500.3145(1), by unilaterally applying defendant's subsequent payments to the remainder of the overdue invoices. Defendant produced evidence that it explicitly allocated payments to specific invoices, leaving specific portions unpaid. Plaintiff failed to meet its burden under MCR 2.116(C)(10) to produce evidence that either refuted defendant's evidence or demonstrated defendant's assent to plaintiff's accounting practice. *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). Plaintiff's remedy for defendant's refusal to pay was provided by statute. A payment is overdue "if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Overdue payments are assessed a penalty of "simple interest at the rate of 12% per annum." MCL 500.3142(3). Plaintiff was required to file an action for the overdue payments within 1 year of when the losses were incurred. MCL 500.3145(1). "Incurred" means " '[t]o become liable or subject to, [especially] because of one's own actions.' " *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484 (2003), quoting *Webster's II New College Dictionary* (2001). "Liable" is defined as "legally responsible[.]" *Random House Webster's College Dictionary* (1991). Generally, one becomes liable for the payment of services once those services have been rendered. " '[P]laintiff became liable for her medical expenses when she accepted medical treatment.' " *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536, 542 (2001), quoting *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 638 (1996). As this Court explained in *Proudfoot*, *supra* at 484 n 4, "[a]n insured could [become] liable for costs by various means, including . . . signing a contract for products or services." In this case, the expenses for services were "incurred" when the services were rendered. We remand this case to the Ingham Circuit Court for entry of partial summary judgment in favor of defendant, and for further proceedings not inconsistent with this order. Court of Appeals No. 269726.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent and would deny leave to appeal because I am not persuaded that the Court of Appeals judgment in this matter should be peremptorily reversed.

KELLY, J. (*dissenting*). In peremptorily reversing the judgment of the Court of Appeals, the majority fails to address the trial court's conclusion regarding open accounts. The Court of Appeals noted with approval the trial court's determination that open accounts are commonly used in "many commercial contexts." That fact may constitute usage-of-trade evidence that defendant was on notice of plaintiff's accounting practice.

Additionally, the majority suggests that plaintiff should file a lawsuit whenever full payment is delayed in order to protect its claim to payment. This ignores the practical benefits of having an open account for continuing services.

The majority resolves in a peremptory fashion the legal issue of when losses are incurred for purposes of MCL 500.3145(1). It concludes that losses are incurred at the time medical services are rendered. Because this conclusion has wide-reaching effect, it should not be made in a peremptory fashion. Rather, we should grant leave to appeal to fully consider when losses are incurred in the context of medical services and, more specifically, in the context of continuing medical services.

For these reasons, I dissent from the order.

KALLMAN V SUNSEEKERS PROPERTY OWNERS ASSOCIATION, LLC, No. 133923. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Roscommon Circuit Court for further proceedings.

The Court of Appeals erred when it reversed the trial court's holding regarding nuisance in fact. The trial court did not err when it concluded that the defendant's 184-foot dock, with six mooring sites on a piece of property with 25 feet of lake frontage, and its use of its property as a "keyhole" or "funnel" lot for its unlimited membership substantially interfered with plaintiff Kallman's use of her property, amounting to a nuisance in fact.

The Court of Appeals properly raised sua sponte the issue of the plaintiffs' standing to pursue their nuisance per se claim under MCL 125.294. See *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 291-294 (2007) (discussing the importance of standing to the proper exercise of the judicial power); *People v Smith*, 420 Mich 1, 11 n 3 (1984). The plaintiffs, however, were not required to prove standing during or prior to trial absent a challenge by the defendant. See *Lujan v Defenders of Wildlife*, 504 US 555, 564 (1992) (noting that facts supporting standing must be produced at trial "if controverted"). When the trial court has not made findings with regard to standing because standing was never challenged in that court, the proper course of action is to remand for a hearing on the issue of standing. See *Smith*, *supra* at 28-29. On remand, the plaintiffs must show that they have a substantial interest that would be detrimentally affected in a manner different from the citizenry at large. *Nestlé Waters*, *supra* at 294. Standing may be proven by showing that the "defendant's activities directly affected the plaintiff[s'] recreational, aesthetic, or economic interests." *Id*. at 296. Court of Appeals No. 263633.

WEAVER, J. (*concurring*). I concur only in the order reversing the Court of Appeals judgment and remanding this case to the trial court for further proceedings.

I write separately because I disagree with the order's discussion of the majority of four's (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) erroneously created standing test in *Lee v Macomb Co Bd of Comm'rs*,[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[2] *Rohde*

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[1] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004).

v Ann Arbor Pub Schools,[3] and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*.[4] In those cases, the majority of four systematically dismantled Michigan's law on standing and replaced years of precedent with its own test that denies Michigan citizens access to the courts.[5]

On remand, I would ask the plaintiffs to show whether they have standing under the pre-*Lee* prudential test for standing by showing whether the plaintiffs can demonstrate "that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker v State Administrative Bd*, 441 Mich 547, 554 (1993).

CAVANAGH, J. I would deny leave to appeal.

MANESS v CARLTON PHARMACY, LLC, No. 134526. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that Krystal Kleen Cleaning Company and Vickie Asher's motion for summary disposition should be granted, and reinstate the July 7, 2006, order of the Monroe Circuit Court denying Krystal Kleen and Asher's motion for summary disposition. Although the Court of Appeals correctly determined that Krystal Kleen and Asher are not entitled to summary disposition on the basis of the open and obvious danger doctrine, the panel erred in holding that these defendants are entitled to summary disposition on other grounds. Whether the plaintiff established a genuine issue of material fact regarding her ordinary negligence claim against Krystal Kleen and Asher was neither raised by Krystal Kleen and Asher in their motion for summary disposition regarding the applicability of the open and obvious danger doctrine, nor considered by the trial court. We remand this case to the Monroe Circuit Court for further proceedings not inconsistent with this order. Court of Appeals No. 271976.

MARKMAN, J. (*dissenting*). I would deny leave to appeal. A surveillance video shows clearly that plaintiff was walking directly toward a "wet floor" sign but was looking in another direction when she fell. The Court of Appeals reversed the trial court's order denying summary disposition to defendant Carleton Pharmacy, holding that the wet floor constituted an "open and obvious" condition, plaintiff's distraction did not nullify the "open and obvious" nature of the condition, and there was no "special aspect" that would render the condition unreasonably dangerous. The Court of Appeals did not believe that the "open and obvious" doctrine also applied to defendant contractors Krystal Kleen and Vickie Asher, but

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[3] *Rohde v Ann Arbor Pub Schools*, 479 Mich 336 (2007).

[4] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007).

[5] See my opinions chronicling the majority of four's assault on standing in *Lee*, 464 Mich at 742; *Nat'l Wildlife*, 471 Mich at 651; *Rohde*, 479 Mich at 366; and *Michigan Citizens*, 479 Mich at 310.

held that summary disposition should have been granted to these parties under a general negligence standard.

I agree with the Court of Appeals. Although the parties may not have fully briefed the issue of general negligence, this was a general negligence case from the start, and the Court of Appeals did not err in finding that, as a matter of law, Krystal Kleen and Asher did not breach their duty to plaintiff. The determination by the Court of Appeals that the "wet floor" sign made the condition of the floor "open and obvious" for Carleton Pharmacy's purposes necessarily demonstrates that Krystal Kleen and Asher performed their duty to warn of the condition. Therefore, this issue has effectively been decided, and further factual development is unnecessary. All parties have been deposed, and a video clearly shows the details of the incident. It is a waste of legal and judicial resources to remand under these circumstances. There is simply no remaining genuine issue of material fact.

PEOPLE V HERNANDEZ-ORTA, No. 134756. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Clinton Circuit Court for proceedings consistent with this order. MCL 770.16(1) does not limit requests for DNA testing to those cases in which the biological material itself leads to the defendant's conviction. Rather, MCL 770.16(1) requires simply that the biological material which the defendant seeks to be tested has been identified during the investigation that led to his or her conviction. The defendant in this case has presented prima facie proof that "the evidence sought to be tested is material to the issue of" his identity as the perpetrator under MCL 770.16(3)(a). If the DNA from semen found in the victim's body shortly after the assault does not match the defendant's DNA profile, this evidence has a tendency to show that defendant is not the perpetrator—particularly if the DNA also does not match that of the victim's boyfriend, with whom the victim acknowledged having sexual relations two days before the alleged offense. We do not retain jurisdiction. Court of Appeals No. 267971.

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 injustice in this case.

YOUNG, J. (*dissenting*). I would deny leave to appeal. Defendant filed a petition seeking DNA testing pursuant to MCL 770.16 in October 2002. The petition was granted in part and denied in part in April 2003. The trial court granted testing of the fingernail clippings, but unequivocally denied testing of the semen samples. In November 2003, the laboratory reported that the fingernail specimens were insufficient for testing. Sixteen months later, on March 22, 2005, defendant filed a second petition for DNA testing of the semen specimens, seeking to relitigate the identical issue that had been conclusively decided against the defendant two years previously.

When a petition for DNA testing has been denied, the statute provides *only one* avenue of recourse—an appeal to the Court of Appeals by leave granted. See MCL 770.16(9). Defendant was required to appeal the denial of his petition within 12 months of the entry of the denial order pursuant

to MCR 7.205(F)(3). Thus, the opportunity for the Court of Appeals to review the trial court's order denying the motion for testing of the semen samples was conclusively closed after April 25, 2004.

Contrary to what occurred in this case, nothing in the statute permits the filing of serial petitions for DNA testing as a remedy for the denial of a previously filed petition. Because defendant has not complied with the only remedy provided by the statute, I conclude that defendant has waived appellate review of the issue. Additionally, I believe that permitting the filing of sequential petitions erroneously permits the relitigation of previously decided issues in contravention of our rules that preclude serial challenges of issues previously decided.

For these reasons, I would deny leave to appeal.

CORRIGAN, J. I join the statement of Justice YOUNG.

Leave to Appeal Denied March 7, 2008:

PEOPLE v FONZA JACKSON, No. 132060. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 268470

KELLY, J. (*dissenting*). I would remand this case to the Wayne Circuit Court for an evidentiary hearing to determine whether an appeal was taken from the Wayne County Probate Court, Juvenile Division, order waiving jurisdiction over defendant to the Detroit Recorder's Court.

In 1982, at the age of 16, defendant was tried as an adult and convicted of first-degree murder. The Court of Appeals affirmed the conviction, and this Court denied leave to appeal. Defendant moved for relief from judgment,[1] claiming that his counsel never appealed his juvenile court waiver as defendant requested. The prosecutor has determined that the pertinent juvenile court records were destroyed. Thus, it remains unclear whether an appeal of the waiver decision ever occurred.

Generally, the burden is on defendant to prove his entitlement to relief. We would expect defendant to support his position through the official court records. However, here, the records were destroyed. It is difficult for defendant to meet his burden without the opportunity to make a supplemental record. At an evidentiary hearing, defendant might produce witnesses who could verify his position, notably his previous attorneys.

Defendant has not shown that an appeal of the waiver decision would have succeeded. However, if his counsel failed to file a notice of appeal when requested to do so, defendant was denied the effective assistance of counsel. He would be entitled to a new appeal without a showing that his appeal would have been meritorious. *Roe v Flores-Ortega*, 528 US 470, 477 (2000). The United States Supreme Court has ruled that a defendant cannot be required to show that he or she was prejudiced by such a deprivation. *Peguero v United States*, 526 US 23, 28 (1999). Thus, the fact that defendant has not shown that an appeal of the waiver would have been successful does not control whether he was denied the effective assistance of counsel.

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[1] MCR 6.508.

Accordingly, I would remand this case for an evidentiary hearing to determine if an appeal was taken from the waiver decision.

DOWNS v NORTHERN MICHIGAN HOSPITALS, INC, No. 132888. By order of April 4, 2007, the application for leave to appeal the November 28, 2006, judgment of the Court of Appeals was held in abeyance for *Mullins v St Joseph Mercy Hospital* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 253611.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal because I agree with the Court of Appeals that defendant hospital waived its right to contest the sufficiency of plaintiff's notices of intent to file suit. The letter that defendant sent to plaintiff clearly indicates that defendant had no objections to the notices of intent, and, thus, defendant cannot now rely on the trial court's subsequent determination that the notices of intent are deficient.

I write separately to express my concern regarding the practice employed in this case by which a plaintiff purports to seek a judgment declaring notices of intent to be sufficient. MCL 600.2912b sets forth several different timing requirements or deadlines pertaining to notices of intent. For instance, pursuant to § 2912b(1), a medical malpractice plaintiff must file a notice of intent 182 days before filing a complaint. In addition, pursuant to § 2912b(3), the 182-day requirement can be shortened to 91 days if all the conditions set forth in § 2912b(3)(a) through (d) are satisfied. Further, pursuant to § 2912b(5), within 56 days after providing the notice of intent, the plaintiff must allow the defendant access to all the medical records related to the claim. Finally, pursuant to § 2912b(7), the defendant must provide the plaintiff with a written response within 154 days of receiving the notice of intent, and, pursuant to § 2912b(8), if the defendant fails to respond within 154 days to the notice of intent, the plaintiff can immediately file a complaint. However, the defendant is not required to allege any deficiencies in the notice of intent in this written response. MCL 600.2912b(7). Instead, as this Court explained in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 (2002), "nowhere does the statute provide that a defendant must object to any deficiencies in a notice of intent before the complaint is filed."[1] Given that § 2912b sets forth several specific timing requirements pertaining to notices of intent, but does not set forth a timing requirement with regard to when the defendant must object to any deficiencies in the notice of intent, and given this Court's decision in *Roberts*, I question whether a

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[1] "[S]tatute of limitations [is] an affirmative defense that must be pleaded in defendants' motion for summary disposition or first responsive pleading. Once the statute of limitations is asserted as a defense . . . then a plaintiff is free to argue that the statute was tolled under [MCL 600.5856(d)]. It is only at this point that a defendant is obligated to object to the adequacy of plaintiff's notice under § 2912b." [*Roberts*, *supra* at 70 n 7.]

plaintiff can seek a declaratory judgment regarding the sufficiency of notices of intent, thereby requiring the defendant to object to any deficiencies in the notices of intent *before the defendant would otherwise be required to do so under the statute*.

Although it is unnecessary to answer this question in the instant case because defendant waived any objections to the sufficiency of the notices of intent, I nevertheless wish to express my concern about such a procedure.

DOWNS v KEEBLER, No. 132893. By order of April 4, 2007, the application for leave to appeal the November 28, 2006 judgment of the Court of Appeals was held in abeyance for *Mullins v St Joseph Mercy Hospital* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 253611.

KELLY, J. I would grant leave to appeal.

CRYDERMAN v VERBURG, No. 132895. By order of April 25, 2007, the application for leave to appeal the November 28, 2006, judgment of the Court of Appeals was held in abeyance for *Mullins v St Joseph Mercy Hospital* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 255045.

CITY OF LANSING v STATE OF MICHIGAN, No. 134213; reported below: 275 Mich App 423.

WEAVER, J. I would direct that oral argument be heard on the application for leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal. Defendant builder is attempting to construct a pipeline under several streets in plaintiff city. The Court of Appeals held that plaintiff's consent to this project was not required under MCL 247.183(2), and that Const 1963, art 7, § 29 did not necessitate a different result. *City of Lansing v Michigan*, 275 Mich App 423 (2007).

At issue is whether MCL 247.183(2) is consistent with the first sentence of Const 1963, art 7, § 29. MCL 247.183(2) states that, under the circumstances present here, a utility company "is not required to obtain the consent" of the affected city. However, the first sentence of art 7, § 29 states that a utility does not "have the right to the use of the highways [or] streets" of any city "without the consent" of that city. Also relevant is the second sentence of art 7, § 29, which states that a city possesses a right of "reasonable control" over its streets "[e]xcept as otherwise provided in this constitution."

The first sentence of the constitutional provision grants to cities the unqualified authority to refuse consent to utility projects, whereas the grant of "reasonable control" over city streets is qualified. This lack of qualification in the first sentence must be considered in light of the

express qualification in the very next sentence. Read together, the difference between these grants of authority arguably gives rise to an inference that a city's right to withhold consent to a utility project cannot be defeated by other constitutional provisions in the same fashion as a city's right of "reasonable control."

When construing two constitutional provisions, this Court must give "proper meaning and effect to both." *In re Request for Advisory Opinion*, 479 Mich 1, 35 n 90 (2007). The specific right in the first sentence of art 7, § 29, to refuse consent to utility projects, fits logically within the city's general right in the second sentence to exercise "reasonable control" over its streets. Therefore, to give meaning and effect to both sentences, it may be inferred that there is some difference in terms of the Legislature's authority to overrule the city with regard to its exercise of the more specific right in comparison with its exercise of the more general right. However, the Court of Appeals renders these rights indistinguishable in terms of the Legislature's overruling authority, treating the specific right to refuse consent in an identical manner as the general right of "reasonable control." Thus, the Court of Appeals arguably gives no effect at all to the first sentence of art 7, § 29.

Of course, the specific right of cities to refuse consent to utility projects may be limited by another constitutional provision. In this regard, the Court of Appeals relied on Const 1963, art 7, § 22, which states that a city may enact resolutions and ordinances "subject to the constitution and law." However, this begs the question of to *which* parts of the constitution and *which* laws are the city's actions properly subject. At least arguably, the specific grant of constitutional authority to cities to refuse consent to utility projects must control over the more general authority granted to the Legislature in art 7, § 22. See *Jones v Enertel*, 467 Mich 266, 271 (2002) ("[S]pecific provisions . . . prevail over any arguable inconsistency with the more general rule.").

I am cognizant of arguments concerning the wisdom of a single community being allowed to effectively veto a utility project designed to benefit many communities in Michigan. However, while some may wish to avoid facilitating such an anomalous result, the first obligation of this Court is to faithfully maintain our constitution. Plaintiff's arguments are not frivolous and merit full consideration by this Court so that the rights of cities under our constitution may be clearly understood.

POWELL v DOMINO'S PIZZA INTERNATIONAL, INC, and MILLER v DOMINO'S PIZZA INTERNATIONAL, INC, and BENNETT v DOMINO'S PIZZA INTERNATIONAL, INC, Nos. 135226, 135227, 135228; Court of Appeals Nos. 279079, 279083, 279084.

MARKMAN, J. (*dissenting*). I would remand to the Court of Appeals for consideration as on leave granted whether the admission of the delivery driver's conviction of killing in the course of dangerous driving under the Bahamas Road Traffic Act is barred by MCL 257.731 or MRE 403. MCL 257.731 prohibits the admission in a subsequent civil action of evidence of a conviction under the Michigan Vehicle Code or a "local ordinance pertaining to the use of a motor vehicle." In light of this provision's purpose to mitigate the "danger that the civil jury might, if permitted, consider the criminal conviction as evidence of negligence in the civil

action," *Elliott v AJ Smith Contracting Co, Inc*, 358 Mich 398, 413 (1960), the question whether "local ordinance" encompasses ordinances from other states or foreign countries is significant, in my judgment, and merits further review. Moreover, the question whether the probative value of a conviction of a *nonparty*, admitted against a defendant that was unable to contest it, as here, is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," MRE 403, is also significant and merits further review.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

YOUNT v YOUNT, No. 135663; Court of Appeals No. 278890.

In re WELSH (DEPARTMENT OF HUMAN SERVICES v WELSH), No. 135755; Court of Appeals No. 277258.

In re LAKIES (DEPARTMENT OF HUMAN SERVICES v LAKIES), No. 135876; Court of Appeals No. 279749.

Leave to Appeal Denied March 13, 2008:

PEOPLE v JAMES PERRY, No. 136005. Court of Appeals No. 284102.

WEAVER, J. (*dissenting*). I dissent from the order denying leave to appeal and would reverse that part of the trial court's order granting defendant's motion to exclude testimony the prosecutor sought to introduce under MCL 768.27a for the same reasons stated in Justice CORRIGAN's dissenting statement.

CORRIGAN, J. (*dissenting*). I dissent from the order denying leave to appeal. I would reverse that part of the trial court's order granting defendant's motion to exclude testimony the prosecution sought to introduce under MCL 768.27a. The evidence is admissible under the plain language of the statute. Even assuming that MRE 403 applies, the trial court abused its discretion in concluding that the proffered evidence should be excluded, because the defendant failed to establish that the "probative value" of the evidence "is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403.

MARKMAN, J. (*dissenting*). I would stay the trial court proceedings in order to allow this Court more than several hours to review the prosecutor's application for leave to appeal and to afford this Court the opportunity to address the relationship between MRE 403 and 404 and MCL 768.27a.

Summary Disposition March 14, 2008:

SCHMID v FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, No. 135941. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that trial court proceedings are stayed pending completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 282030.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied March 14, 2008:

In re BROWN (DEPARTMENT OF HUMAN SERVICES v NICKSON), No. 135881; Court of Appeals No. 277791.

Appeal Dismissed March 14, 2008:

ABAY v DAIMLERCHRYSLER CORPORATION, No. 135642. 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. 281924.

Summary Dispositions March 19, 2008:

RUBY & ASSOCIATES, PC v SHORE FINANCIAL SERVICES, No. 134033. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals insofar as that court concluded that plaintiff's lis pendens was invalid, and we affirm the Oakland Circuit Court's February 10, 2005, opinion and order granting summary disposition in defendants' favor. The circuit court correctly concluded that, regardless of the validity of the lis pendens, any rights that plaintiff held under the lis pendens merged into—and were extinguished by—the quitclaim deed. Accordingly, both lower courts correctly held that, because plaintiff failed to exercise its right of redemption, plaintiff's rights to the property were extinguished when the redemption period expired and the foreclosure became final. 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. 266312.

MONA SHORES BOARD OF EDUCATION v MONA SHORES TEACHERS EDUCATION ASSOCIATION, MEA/NEA, No. 134350. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion at pages 1-2. The plaintiffs have standing to seek declaratory relief concerning the validity of the early retirement provisions of the collective bargaining agreement under the standards articulated in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615 (2004), and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 295-296 (2007). We remand this case to the Court of Appeals for consideration of the remaining issues raised by the plaintiffs in that court. We do not retain jurisdiction. Court of Appeals No. 271592.

RED RIBBON PROPERTIES, LLC, v BRIGHTON TOWNSHIP, No. 134865. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and we reinstate the

October 28, 2004, order of the Livingston Circuit Court. We affirm the Court of Appeals ruling that the circuit court had jurisdiction to hear this dispute, but we reverse the appeals court's conclusion that a remand was necessary to consider other provisions of the Land Division Act (LDA), MCL 560.101 *et seq*., or to reconsider certain defendants' equitable claims. Under Section 227a(1) of the LDA, MCL 560.227a(1), the circuit court properly determined that the whole of the vacated drive in question should be vested in the rightful owners of the adjacent lots "within the subdivision covered by the plat . . ." and that the defendants Adler Enterprises Company, LLC, et al., do not own lots that are covered by the plat in question. Court of Appeals No. 259563.

PEOPLE V ACEVAL, No. 135149. 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 defendant was denied the right to counsel of his choice under *United States v Gonzalez-Lopez*, 548 US 140 (2006), and for consideration of whether the prosecution's acquiescence in the presentation of perjured testimony amounts to misconduct that deprived the defendant of due process such that retrial should be barred. 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. 279017.

PEOPLE V RATLIFF, No. 135395. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Manistee Circuit Court and remand this case to the trial court for resentencing. The trial court's assumption that the defendant would be required to serve additional prison time on his parole sentence before serving the instant sentence was not objective and verifiable, and in fact was erroneous. Furthermore, the possibility of a current prisoner or parolee serving a sentence in the county jail does not relate to the seriousness of the offense or the culpability of the offender, and is not a compelling reason to deny the defendant an intermediate sanction to which he is entitled by statute. MCL 769.34. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). 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. 281107.

Leave to Appeal Denied March 19, 2008:

RODRIGUEZ V ASE INDUSTRIES, INC, No. 133686. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of October 12, 2007. The application for leave to appeal the March 22, 2007, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Reported below: 275 Mich App 8.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

RAYBON v DP FOX FOOTBALL HOLDINGS, LLC, No. 134748. A decision by the Court of Appeals under MCR 7.215(D) not to publish its opinion is not reviewable by application for leave to appeal to this Court. Court of Appeals No. 268634.

GONZALEZ v ST JOHN HOSPITAL & MEDICAL CENTER, No. 134749; reported below: 275 Mich App 290.

CORRIGAN, J. (*dissenting*). I would reverse the Court of Appeals and reinstate the trial court's order granting summary disposition in defendants' favor. The Court of Appeals incorrectly concluded that a resident physician must be held to the standard of a specialist under MCL 600.2169(1)(a) and this Court's decision in *Woodard v Custer*, 476 Mich 545 (2006).

Plaintiff alleges that the defendant resident physician, Dr. Christopher Vashi, negligently failed to properly diagnose and treat plaintiff's decedent's acute intra-abdominal hemorrhage while the decedent was a patient at defendant St. John Hospital. Vashi was a third-year surgical resident who evaluated the decedent on June 7, 2003. Previously—on April 8 and May 9, 2003—the decedent had undergone two abdominal surgeries to treat colon cancer. He returned to the hospital on June 7 after discovering that he was bleeding from a post-surgical drainage tube. Defendants ultimately discovered a leak in the decedent's left iliac artery but, despite surgical intervention to repair the leak, the decedent died on June 8, 2003.

Plaintiff's sole expert was a board-certified specialist in surgery. Accordingly, the trial court granted summary disposition in defendants' favor, holding that a resident physician is neither a specialist nor held to the standards of a specialist. Rather, he is a general practitioner and, therefore, to establish the relevant standard of care a plaintiff must present the testimony of a general practitioner or someone who instructs students in the same health profession in which the resident is licensed. MCL 600.2169(1)(c).

The Court of Appeals initially affirmed the trial court but it reversed on reconsideration. *Gonzalez v St John Hosp & Med Ctr (On Reconsideration),* 275 Mich App 290 (2007). The panel concluded that, "[u]nder *Woodard*'s definition of specialist, any physician who can potentially become board-certified in a branch of medicine or surgery in which he or she practices is defined as a 'specialist' for purposes of MCL 600.2169(1)." *Gonzalez*, *supra* at 298. Accordingly, because Vashi is a physician "who limited his training to surgery, and who could potentially become board-certified on completion of his residency, at the time decedent died, Vashi would be considered a 'specialist.' " *Id.* at 298-299. The panel also held that *Woodard* overruled the contrary holding of the Court of Appeals in *Bahr v Harper-Grace Hosps,* 198 Mich App 31, 34 (1993), rev'd on other grounds 448 Mich 135 (1995) ("It is clear that interns and residents are not 'specialists,' and, therefore, . . . the applicable standard of care for such persons is that of the local community or similar communities.").

I disagree with the Court of Appeals conclusion because it misinterprets both *Woodard* and the relevant statutory language. The distinction between specialists and general practitioners is significant because specialists and general practitioners are subject to different standards under Michigan's malpractice statutes. If a defendant is a general practitioner, a medical malpractice plaintiff must show that he "failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community . . . ." MCL 600.2912a(1)(a). If the defendant is a specialist, a plaintiff must show that he "failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances . . . ." MCL 600.2912a(1)(b).

In *Woodard*, we considered the definition of "specialist," which is not defined by the relevant statutes. We concluded:

> *Dorland's Illustrated Medical Dictionary* (28th ed) defines a "specialist" as "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." . . . Both the dictionary definition of "specialist" and the plain language of § 2169(1)(a) make it clear that a physician can be a specialist who is not board certified. They also make it clear that a "specialist" is somebody who can potentially become board certified. Therefore, a "specialty" is a particular branch of medicine or surgery in which one can potentially become board certified. Accordingly, if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery. [*Woodard*, *supra* at 561-562.]

Woodard addressed the meaning of "specialist" for purposes of determining how the term applies when a defendant physician practices in a specialty or subspecialty but is not board-certified as a specialist. *Id.* at 560-562. In light of this context, the Court of Appeals applies *Woodard* too broadly in this case to mean that the term "specialist" includes *any* physician who practices a particular branch of medicine "in which one can potentially become board certified." *Id.* at 561-562; *Gonzalez*, *supra* at 298-299. The more relevant definition, for our purposes, is the basic definition of "specialist" as "a physician whose *practice* is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." *Woodard*, *supra* at 561, quoting *Dorland's Illustrated Medical Dictionary* (28th ed). A resident physician simply does not qualify under this definition. Indeed, *Dorland's* separately defines "resident" as "a graduate and licensed physician *receiving training in a specialty* in a hospital." *Dorland's Illustrated Medical Dictionary* (29th

ed) (emphasis added). Because a resident is *receiving training* in a specialty, by definition he is not yet a specialist. Further, such an overbroad application of *Woodard* would largely eliminate the statutory distinction between specialists and general practitioners altogether; any general practitioner who has the "potential" to become board-certified will automatically qualify as a specialist.

Therefore, I agree with the trial court that Vashi must be considered a general practitioner because he was still a resident at the time of the alleged malpractice. Accordingly, plaintiff was required to present an expert on the standard of care who,

> during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) Active clinical practice as a general practitioner.
>
> (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed. [MCL 600.2169(1)(c).]

Because plaintiff's expert did not meet either of these criteria, the trial court properly granted summary disposition in defendants' favor.

ADAMS V ADAMS, No. 135202; reported below: 276 Mich App 704.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal March 20, 2008:

PEOPLE V LAMORAND, No. 135247. 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 requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains is coercive; (2) whether the defendant's claims of innocence together with the claims of coercion, brought before sentencing, provide sufficient reasons under the standard of review for plea withdrawal before sentencing to support a grant of his motion; (3) whether an evidentiary hearing is required to explore this matter; and (4) whether, if the defendant is allowed to withdraw his plea, the prosecution will be prejudiced and, if so, in what manner. We further order the Macomb Circuit Court, in accordance with Administrative Order No. 2003-3, to determine no later than April 2, 2008, whether the defendant is indigent and, if so, to appoint attorney Mitchell T. Foster, if feasible, to represent the defendant in this Court. If the defendant is not indigent, he must retain his own counsel. Oral argument in this case will take place in the Barry County Courthouse in Hastings, Michigan, at 3:00 p.m. on Wednesday, May 14, 2008. The

parties shall file supplemental briefs no later than April 30, 2008, but they should not submit mere restatements of their application papers. Court of Appeals No. 279776.

CORRIGAN, J. (*concurring*). I concur in the order scheduling oral argument on whether to grant the application or take other peremptory action. I write to describe the underlying facts and issues. In this case, defendant, his mother, stepfather, brother, and half-brother were all charged with manufacturing marijuana, which is a felony. The prosecutor offered to allow every one except defendant's brother to plead guilty of the misdemeanor offense of maintaining a drug house. No plea offer was extended to defendant's brother because he had already admitted manufacturing marijuana. A condition of the plea was that if any one of the family members declined to accept the plea agreement, none of the other family members would be permitted to plead.

Each of defendant's family members accepted the offers and pleaded guilty of maintaining a drug house. Defendant's brother pleaded guilty of manufacturing marijuana. At the guilty plea hearing, defendant made the following statements in response to questions from the court:

> *The Court*: Have there been any other promises, threats, inducement or coercion to get you to plead guilty today?
>
> *Defendant*: No.

Defendant testified that he was tendering the plea of his own free will and choice. He testified that he understood that if the court accepted his plea, he could not later claim the existence of other promises, threats, inducement or coercion. Then defendant testified as follows:

> *The Court*: Brian Lamorand, tell the Court what it is you did on or about February 18, 2006 in the Township of Clinton. What did you do?
>
> *Defendant*: I kept my driver's license at 35618 Rutherford where marijuana was kept.
>
> *The Court*: And the purpose of that residence at least in part was to be maintained for the maintaining of the marijuana.
>
> *Defendant*: Yes.
>
> * * *
>
> *The Court*: Then to the charge of maintaining a drug house, how is it you wish to plead?
>
> *Defendant*: Guilty.

Defendant and his family members were all scheduled to be sentenced at the same hearing. At the sentencing hearing, after each of his family members had been sentenced, defendant sought a one-week adjournment to discuss "the condition of his plea." One week later he moved to

withdraw his plea, alleging that he had been coerced into accepting the plea agreement. Defendant's attorney summarized defendant's argument at the hearing to withdraw defendant's plea:

> I think in all fairness that my client had a coercion in regard to the fact that it was a take it or leave it situation in regard to all the co-defendants and he felt that he would be doing a severe injustice to his family if left in the position whereas he would not take the plea and to have to have his family go through the entire process of a trial in this matter.

The trial court denied defendant's motion. The Court of Appeals denied leave to appeal for lack of merit in the grounds presented. *People v Lamorand*, unpublished order, issued September 17, 2007 (Docket No. 279776).

Defendant alleges in this Court that his guilty plea was coerced because his family's plea agreements were contingent on his guilty plea to a charge of maintaining a drug house. The Court of Appeals has observed that "a promise of leniency for a relative is not, of itself, coercive enough to vitiate a guilty plea as a matter of law. Instead, the question in each case is whether the inducement for the guilty plea was one which necessarily overcame the defendant's ability to make a voluntary decision." *People v Forrest*, 45 Mich App 466, 469 (1973); see also *People v James*, 52 Mich App 422 (1974), and *People v Walker*, 75 Mich App 552 (1977).

Federal authorities also adopt the principle that plea agreements entered into as a result of pressure from codefendants or family members are not inherently coercive. In *Stano v Dugger*, 921 F2d 1125, 1142 (CA 11, 1991), the court explained that "[u]navoidable influence or pressure from sources such as codefendants, friends or family does not make a plea involuntary." In *Miles v Dorsey*, 61 F3d 1459, 1468 (CA 10, 1995), the court explained:

> Because almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea, we have ruled that a plea is not per se involuntary if entered under a plea agreement that includes leniency for a third party. Instead, a third party benefit in a plea agreement presents a factor for the court to consider when evaluating the voluntariness of the defendant's plea. Because such bargaining can pose a danger of coercion and increase the leverage possessed by prosecutors, the government must abide by a high standard of good faith in its use of such tactics. The government acts in good faith when it offers leniency for an indicted third party or threatens to prosecute an unindicted third party in exchange for a defendant's plea when the government has probable cause to prosecute the third party. Consequently, so long as the government has prosecuted or threatened to prosecute a defendant's relative in good faith, the defen-

> dant's plea, entered to obtain leniency for the relative, is not involuntary. [Internal citations and quotations omitted.]

See also United States v Hernandez, 912 F2d 464 (CA 4, 1990) (applying the same rationale as *Miles*).

The question is whether defendant's belated allegation of coercion can overcome his sworn testimony at the plea hearing that his plea was voluntary and was not coerced. Courts have held that a "[d]efendant's claim of coercion should not be accorded greater weight than his statement at the time of the plea." *People v Roy*, 131 Mich App 611, 613 (1983); *see also Blackledge v Allison*, 431 US 63, 73-74 (1977) ("[T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."). See also *United States v Holland*, 326 US App DC 35, 40 (1997) (citation omitted) (explaining that a court does not need to " 'undertake a special voluntariness inquiry' " when a plea is tied to the plea agreement of a family member as long as the defendant's statements on the record indicate that the plea was voluntary).

Finally, Michigan's governing court rule, MCR 6.310, is also relevant. MCR 6.310(B)(1) mandates that a plea "may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." Accordingly, here, the prosecution argues that it will suffer substantial prejudice because all of defendant's family members have already pleaded guilty to, and have been sentenced for, the reduced misdemeanor charge of maintaining a drug house; thus, the prosecution may no longer pursue the original felony convictions for manufacturing marijuana, which would carry significantly greater penalties. The prosecution asserts that it would not have offered defendant's family members these pleas if defendant had rejected the plea offer. The prosecution also argues that, if defendant is allowed to withdraw his plea, the prosecution will be denied the benefit of its bargain because the prosecution will not be able to adequately defend against claims made by defendant that the other members of his family, who had previously pleaded guilty, were solely responsible for the marijuana manufacturing. Moreover, the prosecution would have to try defendant for the felony offense of marijuana manufacturing two years after the fact. The prosecution claims that defendant deliberately attempted to circumvent the plea agreement offered by the prosecution to defendant and his family and, therefore, that allowing defendant to withdraw his plea would both prejudice the prosecution and be against the interest of justice.

In my judgment, these are the facts and issues that are relevant to the Court's decisional process.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal March 21, 2008:

PEOPLE v ANDRE BOND, No. 135402. 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 the interpretation and application of the "use of authority" language in the criminal sexual conduct statutes, MCL 750.520 *et seq*. 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 file briefs amicus curiae. Other persons or groups interested in the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 267679.

Summary Dispositions March 21, 2008:

MANZELLA V STATE FARM MUTUAL AUTOMOBILE INSURANCE, No. 133620. On January 9, 2008, the Court heard oral argument on the application for leave to appeal the January 4, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the Van Buren Circuit Court's orders of March 27, 2006, and May 22, 2006, granting State Farm Mutual Automobile Insurance Company's motions for summary disposition. Court of Appeals No. 271365.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I would deny leave to appeal and dissent from the peremptory order reversing the judgment of the Court of Appeals for the reasons stated in the Court of Appeals majority opinion, *Manzella v State Farm Mut Ins Automobile Ins Co,* unpublished opinion per curiam, issued January 4, 2007 (Docket No. 271365), as follows:

> Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant State Farm Mutual Automobile Insurance Company (hereafter defendant) with regard to plaintiffs' claim for uninsured motorist coverage. We reverse. This appeal is being decided without oral argument under MCR 7.214(E).
>
> We review a grant of summary disposition de novo. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 713; 706 NW2d 426 (2005). Also, because the essential facts of this case are undisputed, its resolution turns on interpretation of the relevant insurance policy. Interpretation of an insurance policy is likewise reviewed de novo. *Id*.
>
> Because uninsured motorist coverage is not mandated by the no-fault act, the rights afforded by such coverage are purely contractual. *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Contractual language is given its ordinary and

plain meaning. *Royal Prop Group*, *supra* at 715. However, "an insurance contract should be read as a whole and meaning should be given to all terms." *Id*. Such a contract "must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Id*.

This case arose out of an automobile accident on October 4, 2003. Apparently, plaintiff Renie Manzella was driving behind a vehicle driven by Israel Morado and owned by Fernando Miranda, neither of whom had automobile insurance for that vehicle. Morado drove his vehicle into the rear of another vehicle, and Renie drove into the rear of the Morado/Miranda vehicle. Defendant denied plaintiffs' claim for uninsured motorist coverage, and plaintiffs commenced this suit, alleging (1) claims against Morado and Miranda based on Morado's negligence in causing the accident, and (2) claims against defendant based on the allegation that it was obligated to provide uninsured motorist coverage. Defendant denied liability on the ground that Renie's own negligence was more than 50 percent the cause of the accident. The trial court granted summary disposition under MCR 2.116(C)(10) to defendant on that basis. The trial court also entered a default judgment against Morado and Miranda, neither of whom participated in the trial.

Plaintiffs argue that because of the default and default judgment, the language of the relevant uninsured motorist policy entitles them to coverage. Plaintiffs therefore contend that the trial court should never have reached the issue of whether Renie was actually more than 50 percent at fault for the accident.

The "uninsured motor vehicle" coverage portion of the relevant insurance policy includes the following language:

"We [defendant] will pay damages for ***bodily injury*** an ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle.*** The ***bodily injury*** must be sustained by an ***insured*** and caused by accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle.*** [Emphasis in original.]"

It is not disputed that Renie is an "insured" who suffered "bodily injury" as a result of an accident arising out of operation of an "uninsured motor vehicle." Moreover, the default judgment legally entitles plaintiffs to collect damages from the owner and driver of that uninsured motor vehicle based on the bodily injury. It therefore appears manifest that defendant must pay damages to plaintiffs in this case.

While conceding that the above language supports plaintiffs' position, defendant relies on another portion of the uninsured motor vehicle policy under a subheading titled, "Deciding Fault and Amount" provides:

"Two questions must be decided by agreement between the ***insured*** and us:

1. Is the ***insured*** legally entitled to collect damages from the owner or driver of the ***uninsured motor vehicle;*** **and**

2. If so, in what amount? [Emphasis in original.]"

This subheading then provides options "if there is no agreement." The first provides that the parties may consent to arbitration, which did not take place here. In the alternative, the insured shall file a lawsuit against the insurer (defendant) and the owner or operator of the uninsured motor vehicle, provide defendant with copies of the summons and complaint, and secure a judgment in that action. This is precisely what plaintiffs did.

Defendant points out that the contract provides that the judgment "must be the final result of an actual trial and an appeal, if an appeal is taken." Defendant argues that a default judgment, although a legal entitlement to damages, is not "the final result of an actual trial." We believe this is a tortured reading of the contract. When the contract is viewed as a whole, as it must be, it clearly refers to the distinction between litigation and settlement, rather than how the litigation proceeds to judgment. The contract explicitly, and in notably prominent type, precludes coverage in the event of a settlement without defendant's permission. Furthermore, a judgment obtained as a result of summary disposition would, by defendant's definition, not be "the final result of an actual trial." The more sensible and consistent interpretation is that the judgment discussed in the contract may not be a consent judgment or other agreement between the parties, and it must be reasonably immune to being attacked or set aside. A default judgment is a final judgment, and it appears that the time limits within which to challenge it have long since past. See *Allied Electrical Supply Co, Inc v Tenaglia*, 461 Mich 285, 288-289; 602 NW2d 572 (1999). We are satisfied that this condition in the contract has been met.

Defendant also points out that that the contract explicitly reserves to defendant "the right to defend on the issues of the legal liability of and the damages owed by" the uninsured owner or driver, and further states that defendant is "not bound by any judgment against any person or organization obtained without [defendant's] written consent." We agree with defendant that this language does not impose an *obligation* to defend. However,

defendant's construction, that it may ignore a judgment entered by a court simply because defendant did not consent to the judgment, also appears to be a tortured reading of the contract. Such a construction could create an inconceivable situation wherein defendant could defend the uninsured motorist unsuccessfully and then claim not to be bound by the resulting judgment. Moreover, it would render entirely nugatory the provisions for the insured filing suit against the uninsured owner or motorist and against defendant, in the event defendant and the insured fail to agree on the insured's legal entitlement to collect damages. Rather, when this language is read in context with the rest of the provisions, it enforces the procedure an insured must follow: namely, joining defendant to the suit. In other words, an insured could not simply file suit against the uninsured motorist only without joining defendant and providing to defendant a copy of the summons and complaint; doing so would deprive defendant of its contractual right to defend, and defendant therefore reasonably would not wish to be bound by such a judgment. Having been properly joined as a party, and having elected not to defend in this case, the language defendant relies on has no application here.

We note that plaintiffs discuss at some length dicta from *American Family Mut Ins Co v Petersen*, 679 NW2d 571 (Iowa, 2004). However, because our application of Michigan case law to the relevant contractual language is dispositive, we need not address this foreign authority.

Reversed.

PEOPLE v BENNETT, No. 134576. 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 defendant's sentence is invalid, see MCR 6.508(D)(3)(b)(iv); *People v Kimble*, 470 Mich 305, 314 n 6 (2004); and *People v Babcock*, 469 Mich 247 (2003). Court of Appeals No. 277682.

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 injustice in this case.

CORRIGAN, J. I would deny leave to appeal. See *People v Bennett*, lv den 471 Mich 877 (2004).

GOODMAN v DAHRINGER, No. 134696. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to provide an explanation, to be filed with the clerk of this Court within 42 days of the date of this order, of why it has jurisdiction over this case, given its procedural history. We retain jurisdiction. Court of Appeals No. 273680.

Leave to Appeal Denied March 21, 2008:

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 132986, 132987, 132988; reported below: 273 Mich App 342.

MARKMAN, J. (*concurring*). The "inherent powers" doctrine provides trial courts with the authority to bring a funding claim against the legislative branch where "a statutory function, the overall operation of the court, or a constitutional function is in jeopardy." *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705, 717-719 (1985). Bringing such a claim necessarily includes employing attorneys, and it is obvious that courts themselves have no independent means of obtaining funds for this purpose. Therefore, counties are the only funding source available.

I write separately only to highlight this reality, while recognizing that the outcome in this case may appear anomalous or unfair to the taxpayers of defendant counties who now have to pay the costs of a lawsuit in which they have *prevailed*. However, once an "inherent powers" lawsuit has been initiated by a trial court, as occurred here, I do not see any alternative outcome.

Thus, it is to point out the obvious: where an "inherent powers" case looms imminent, it is incumbent upon the people themselves to urge upon their elected officials—both legislative and judicial—that they avoid litigation by making appropriate accommodations with each other. For if this fails, and if a lawsuit is initiated, whatever its eventual outcome, the taxpayers will be responsible for attorney fees on both sides. That is, in the context of an "inherent powers" dispute, there is simply no alternative to an assertion of direct self-government for avoiding a substantial attorney-fee burden upon the taxpayers. There is simply no alternative to the people communicating to their elected officials their views about whether litigation should be initiated by these officials ostensibly on their behalf.

The significance of this Court's decision in the underlying case, *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 149-150 (2006), is that a very high standard must be satisfied before a trial court can prevail in an "inherent powers" claim and compel additional funding by the county. Presumably, this standard will deter the filing of all but the most constitutionally compelling "inherent powers" lawsuits, those in which the court simply cannot perform its most essential judicial functions. *Id*. at 160.

While this new and stronger standard may be of modest consolation to the taxpayers in the three defendant counties, I believe this case, which restores proper constitutional standards, will help taxpayers in other counties to avoid a similar situation in the future.

KELLY, J. I would grant leave to appeal.

PEOPLE v JOSEPH JOHNSON, No. 133736; Court of Appeals No. 275609.

YOUNG, J. (*concurring*). I concur in the order and write solely to respond to Justice KELLY's dissent. This defendant has appealed to this Court and the Court of Appeals a number of times over the years since his conviction. The current application for leave to appeal is from defendant's *fourth* motion for relief from judgment. Considering the defendant's relative youth when he committed and was convicted of assault with intent to commit armed robbery, several justices have wondered why

defendant has been incarcerated for so long.[1] This is a humane and understandable impulse but one that now trenches upon the discretionary authority of the Department of Corrections, which alone has the authority to determine when convicted felons will be paroled. This Court recently requested that the prosecutor provide an explanation "as to what has led the Department of Corrections to exercise its discretion to keep the defendant incarcerated until now." *People v Johnson*, 740 NW2d 310. As it turns out, this defendant has a lengthy and substantial record of prison violations, including violent assaults. So that the public will be able to assess the arguments Justice KELLY makes on his behalf, I attach hereto the summary of defendant's prison record provided by the prosecutor. [Attachment at the end of the order.]

KELLY, J. (*dissenting*). In August 1980, defendant and an accomplice used an air rifle to rob an ice cream vendor of a small amount of cash and several ice cream bars. Both men were 19 years old at the time of the crime. Defendant held the air rifle while his codefendant took the money. No shots were fired. Both men pleaded guilty of assault with intent to rob while armed. The codefendant received a sentence of six months in the county jail with work release. Defendant was sentenced to a "parolable" life sentence. He is still in prison serving that sentence 28 years later.

Since his conviction, defendant has repeatedly applied for relief in this Court. Numerous members of this Court have expressed concern over the sentence imposed. In 1985, Justice RYAN, dissenting from an order denying leave to appeal, stated that he would direct the appointment of counsel to enable this Court to consider whether defendant's sentence was "so shocking to the conscience of the Court" that relief should be granted.[1] On defendant's motion for reconsideration, Justices LEVIN and ARCHER wrote that they would grant the motion.[2] Twenty years later, Justice CAVANAGH echoed similar concerns in a dissenting statement of his own.[3] He stated that he would grant leave to appeal to explore what relief

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[1] Justice KELLY is correct that "[i]n this country, we sentence defendants for the acts for which they have been convicted." *Post* at 1121 n 9. As noted, this defendant was convicted of assault with intent to commit armed robbery. In 1980, just like today, that crime was "punishable by imprisonment in the state prison for life, or any term of years." MCL 750.89; *People v Johnson*, 130 Mich App 26, 29-30 (1983). On direct appeal, the Court of Appeals upheld defendant's conviction and sentence, and after remand, this Court denied defendant's application for leave to appeal. In this successive motion for relief from judgment, defendant has not raised "a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion" that would justify upsetting his conviction or sentence. MCR 6.502(G)(2).

[1] *People v Johnson*, 422 Mich 897 (1985).

[2] *Id.*

[3] *People v Johnson*, 474 Mich 924 (2005).

this Court could afford defendant.[4] Both Justice MARKMAN and I have indicated that we would grant leave to appeal to further consider defendant's case.[5]

Today, defendant again applies for leave to appeal in this Court. After directing the prosecutor to respond, this Court denies relief. I strongly object. Appellate counsel should be appointed for defendant and oral argument should be heard on the application, with the parties directed to address what, if any, relief this Court could afford defendant.

Argument on the application is particularly appropriate because numerous issues exist that may entitle defendant to relief. First, although he and his codefendant engaged in the same behavior and pleaded guilty of the same crime, defendant remains in prison whereas his codefendant spent six months in jail with work release. Because two such drastically different sentences were imposed for the same behavior, serious concerns arise about the validity of defendant's sentence. It seems a miscarriage of justice to sentence one man to life in prison and another to six months in jail for the same behavior. If our system of justice is to retain its valued place in society, people must be treated equally. That appears not to have happened here. Another possible theory for relief is that defendant's trial counsel may have been ineffective in failing to obtain a proportionate sentence for his client.

Finally, defendant's sentence may be unconstitutional in light of the recent decision in *Foster-Bey v Rubitschun*.[6] There, Judge Battani held that changes to Michigan's parole law and polices in 1992 and 1999 violate the Ex Post Facto Clause of the United States Constitution.[7] As I have noted previously, I believe that serious concerns exist regarding the constitutionality of this state's parole system for those sentenced to parolable life terms before 1992.[8] This case presents an excellent opportunity for this Court to consider this jurisprudentially significant issue.

In sum, the Court should appoint counsel for defendant and hear argument on his application so it can decide what, if any, relief is available to defendant.[9]

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[4] *Id.*

[5] *Id.*

[6] *Foster-Bey v Rubitschun*, unpublished opinion of the District Court for the Eastern District of Michigan, issued October 23, 2007 (Docket No. 05-71318).

[7] US Const, art I, § 10.

[8] E.g., *People v Scott*, 480 Mich 1019 (2008).

[9] Justice YOUNG responds to my statement by pointing to defendant's prison record. In this country, we sentence defendants for the acts for which they have been convicted. Therefore, it is inappropriate to consider their later behavior in prison when reviewing the appropriateness of the sentence. The relevant question before us is whether the sentence was valid when it was handed down. Accordingly, anything this defendant has done since sentencing is irrelevant in deciding whether his sentence, life in prison for stealing a small sum of money and some ice cream bars, is proper.

Date:	MDOC Document Name:	Exhibit page
5-12-03	Memorandum: "Johnson was found guilty of a substance abuse misconduct, 5-12-03."	p 7
3-11-07	Administrative Hearing Report: "He had 2 yellow photo tickets that were either stolen from the prisoner store or they were smuggled in from a visit."	p 14
2-6-07	Prisoner Program and Work Assignment Evaluation: "Termination required based on Guilty finding of ticket."	p 15
1-27-07	**Major Misconduct Hearing Report:** Insolence; Disobeying a Direct Order, Found Guilty	p 17
11-2-06	Prisoner Program and Work Assignment Evaluation: "Inmate Johnson, had a few issues always missing work or leaving early. (out of place ticket 12-30)."	p 19
7-31-06	Security Reclassification Notice: "Misconduct charges; Fighting, 5-16-06; Out of Place, 2-10-06."	p 26
7-18-06	Notice of Intent to Classify to Segregation; "Pris Johnson approached me and stated that he needed to lockup for protection He said that he owed money from gambling debts he bad incurred at a gambling table run by an inmate."	p 27
5-16-26	**Major Misconduct Hearing Report:** Fighting Found Guilty	p 30
1-25-06	**Major Misconduct Hearing Report:** Out of Place Found Guilty	p 37
8-6-05	**Major Misconduct Hearing Report:** Creating a Disturbance Found Guilty	p 48
11-8-04	Security Reclassification Notice: "Subject placed in Temp Seg due to a NOI for possibly being involved in attempted assault on another prisoner which may have involved a weapon	p 63
4-12-04	**Major Misconduct Hearing Report:** Out of Place Found Guilty	p 68
1-15-04	Notice of Intent to Conduct an Administrative Hearing: Contraband	p 71

6-6-03	**Major Misconduct Hearing Report:** Out of Place Found Guilty	p 78
5-17-03	**Major Misconduct Hearing Report:** Out of Place Found Guilty	p 80
4-20-03	**Major Misconduct Hearing Report:** Substance Abuse Found Guilty	p 82
9-5-01	Special Problem Offender Notice: Assaulting an Employee or Escape Jail: "Prisoner Phillips stated that he was assaulted by prisoner Johnson and Johnson was found guilty of the assault."	p 112
8-29-01	**Major Misconduct Hearing Report:** Assaulting Resulting in Serious Physical Injury: Found Guilty	p 113
10-27-00	**Major Misconduct Hearing Report:** Threatening Behavior Found Guilty	p 124
4-1-00	Prisoner Program and Work Assignment Evaluation: "Johnson has been warned several times about loitering while Working. Johnson cannot work without constant supervision"	p 130
1-18-00	**Major Misconduct Hearing Report:** Insolence Found Guilty	p 132
12-8-00	Parole Board Notice of Action- No interest	p 134
12-17-99	Notice of Intent to Conduct an Administrative Hearing Contraband: "During a complete Unit Shakedown on 12/17/99, Prisoner Johnson was found to have the following contraband in his area of control: plastic spoon, bottles of med., old store card, altered adaptor."	p 142
4-2-98	**Major Misconduct Hearing Report:** Disobeying a Direct Order Found Guilty	p 165
3-12-98	Special Problem Offender Notice: "On 7-30-97, a major Misconduct ticket was written on Johnson for Assault & Battery On Inmate Hamilton."	p 171
9-30-97	Visitor Restriction: "The decision to restrict your visits was based on the following major misconduct guilty findings for Substance Abuse. 8-31-95 (alcohol), 1-14-96 (cocaine), 8-23-96 (alcohol), 7-29-97 (alcohol)."	p 178

10-28-97	Security Reclassification Notice: Misconduct Charge, AssIt & Batt 8-11-97, Substance abuse 8-18-97. "Demonstrate inability to be managed with group privileges. Show that this prisoner is a serious threat to the physical safety of staff and/or other prisoners."	p 181
7-29-97	**Major Misconduct Hearing Report:** Substance Abuse Found Guilty	p 182
7-30-97	**Major Misconduct Hearing Report:** Assault and Battery Found Guilty	p 184
7-30-97	**Major Misconduct Hearing Report:** Disobeying a Direct Order Found Guilty	p 189
7-31-97	**Major Misconduct Hearing Report:** Theft: Possession of Stolen Property: Found Guilty	p 191
5-18-97	**Major Misconduct Hearing Report:** Creating a Disturbance Found Guilty	p 194
3-4-97	Prisoner Program and Work Assignment Evaluation: "Johnson is threat to safety of stewards in main kitchen."	p 199
2-17-97	**Major Misconduct Hearing Report:** insolence Found Guilty	p 200
10-19-97	**Major Misconduct Hearing Report:** Disobeying a Direct Order: Found Guilty	p 204, 216
11-25-97	Memorandum: "Prisoner Johnson was classified to Administrative Segregation on 10-28-97 by the Security due to an Assault & Battery On inmate misconduct.	p 207
1-6-98	**Major Misconduct Hearing Report:** Insolence Found Guilty	p 211
8-23-96	Prisoner Program and Work Assignment Evaluation: "Laid in for Substance abuse (alcohol while on assignment) Porter Johnson had a problem staying on his assignment would be seen on galleries he wasn't to be on without authorization, failed to keep showers clean at all times due to his running around, passing items to other prisoner such as cigarettes. Guilty."	p 220
8-23-96	**Major Misconduct Hearing Report:** Substance Abuse Found Guilty	p 222

4-14-96	Notice of Intent to Classify to Administrative Segregation	p 226
1-14-96	**Major Misconduct Hearing Report:** Substance Abuse Found Guilty	p 231
10-31-00	Notice of Action/Parole Board: "No interest in taking action"	p 233
8-31-95	**Major Misconduct Hearing Report:** Substance Abuse Found Guilty	p 236
4-17-95	Administrative Segregation Interview Report: "observed with shank in hand, attempting to pass to another prisoner."	p 242
2-27-95	Security Reclassification Notice: "Misconduct Charge, Possession of Dangerous Contraband."	p 250
2-18-95	**Major Misconduct Hearing Report:** Possession of Dangerous Contraband: Found Guilty	p 252
12-6-94	Administrative Segregation Interview Report: "hit prisoner in jaw."	p 255
11-18-94	Administrative Segregation Interview Report: "Prisoner has a lengthy consistent behavior of violent/assaultive behavior."	p 258
7-14-94	**Major Misconduct Hearing Report:** Assault and Battery Found Guilty	p 267
2-20-94	**Major Misconduct Hearing Report:** Possession of Forged Documents: Found Guilty	p 277
2-94	Prisoner Program and Work Assignment Evaluation: "Johnson needs to stay in his own area, and refrain from horse playing in the kitchen."	p 279
10-5-93	**Major Misconduct Hearing Report:** Fighting Found Guilty	p 283
9-30-93	Prisoner Program and Work Assignment Evaluation: "Worker seems to want to horseplay, instead of working at the proper time. Has been verbally told about horse playing on several occasions."	p 287
8-16-84	Administrative Segregation Interview Report: "Reason for segregation classification; Prevent/control prisoners unmanageable assaultive behavior."	p 290

9-10-93	Security Classification Screen-Review: "History of serious management problems indicates the need to gradually reduce security levels."	p 294
8-18-93	Security Classification Screen-Review: "History of stabbing other prisoners."	p 295
12-7-92	Program Classification Report: "Due to a lengthy history of assaultive behavior, he is being retained at a level V security."	p 303
7-9-91	**Major Misconduct Hearing Report:** Fighting Found Guilty	p 316
4-4-91	Administrative Segregation Interview Report: Notice of Intent upheld stabbed another prisoner	p 323
3-18-91	Special Problem Offender Notice: "On 3-1-91 prisoner Johnson stabbed prisoner Hammond in the chest and back while being held by prisoner Goodman."	p 324
7-11-90	Transfer Order: "Prisoner demonstrates the inability to be managed with group privileges, is a threat to the physical safety of staff and/or other prisoners."	p 328
6-1-90	Special Problem Offender Notice: "Prisoner Neely was stabbed by prisoner Johnson. The stabbing was done in the institutions Barber Shop with a pair of scissors."	p 340
6-13-90	Security Reclassification Notice: "Misconduct charge; Assault & Battery (5-30-90); Gambling (1-10-90)."	p 342
5-25-90	**Major Misconduct Hearing Report:** Theft; Possession of Stolen Property: Found Guilty	p 343
5-25-90	**Major Misconduct Hearing Report:** Assault and Battery Found Guilty: Johnson stabbed Neely with scissors in Barber Shop	p 345
12-28-89	**Major Misconduct Hearing Report:** Gambling; Possession of gambling paraphernalia: Found Guilty.	p 358
8-10-89	Transfer Order: "Since arriving at TCF he has incurred the following major misconducts: Destruction or Misuse of State Property (8-1-88); Possession of Money (8-24-89); Insolence (10-10-88); Interference with Administration of Rules (10-26-88); Theft; Possession of Stolen Property (10-26-88); Fighting (1-11-89)."	p 367

5-2-89	Administrative Hearing Report: Disposition of Property "contains illegal numbers (credit numbers). Cover to be destroyed."	p 374
1-24-89	Security Reclassification Notice: "Misconduct charge; Fighting (1-11-89); Theft; Possession of Stolen Property (10-26-89); Interference with Admin. of Rules (10-26-88); Insolence (10-10-88); Possession of Money (8-24-88); Dest or Misuse of State Property (8-1-88).	p 377
1-5-89	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 378
12-22-88	Notice of Action/Parole Board: "The Parole Board has reviewed your case following your most recent interview and has no interest in taking action at this time."	p 380
10-15-88	**Major Misconduct Hearing Report:** Theft; Possession of Stolen Property: Found Guilty	p 383
10-15-88	**Major Misconduct Hearing Report:** Interference with the Administration of rules: Found Guilty	p 383
9-30-88	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 391
5-25-90	**Major Misconduct Hearing Report:** Theft; Possession of Stolen Property: Found Guilty	p 343
8-14-88	**Major Misconduct Hearing Report:** Possession of Money: Found Guilty	p 394
7-5-88	Notice of Intent to Conduct an Administrative Hearing: "Contraband in property when he came in."	p 397
7-17-88	**Major Misconduct Hearing Report:** Destruction or misuse of property with value of $10 or more: Found Guilty	p 399
12-18-87	Transfer Order: "Johnson-El has been found guilty of the Following major misconducts: Insolence (10-5-87), (10-12-87), and (11-9-87); Fighting (10-7-87). Currently Johnson has 2 assault charges pending."	p 415
11-19-87	**Major Misconduct Hearing Report:** Assault and Battery: Found Guilty	p 416

6-29-84	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 418
11-19-87	**Major Misconduct Hearing Report:** Assault and Battery: Found Guilty	p 431
12-2-87	Administrative Hearing Report: "Johnson-El received a ticket for Assault and a ticket for Fighting. He has received misconducts for Insolence (2); Out of Place and Fighting (2)."	p 434
10-24-87	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 435
10-2-87	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 438
9-25-87	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 440
7-30-87	**Major Misconduct Hearing Report:** Out of Place: Found Guilty	p 442
9-14-87	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 444
7-1-86	Memorandum: "His adjustment at MIPC has been less than satisfactory. Since 4-10-85 Johnson has been found guilty of Threatening Behavior, Assault and Battery, Dangerous Contraband, Fighting, Disobeying a Direct Order, Assault and Battery, Insolence, And Threatening Behavior."	p 470
5-19-86	**Major Misconduct Hearing Report:** Threatening Behavior, Insolence: Found Guilty	p 475
5-1-86	**Major Misconduct Hearing Report: Insolence:**Found Guilty	p 477
3-4-86	**Major Misconduct Hearing Report: Assault and Battery:** Found Guilty	p 479
1-25-86	Michigan Intensive Program Center: Final Report: "Negative Behaviors: He has incurred the following major misconducts while at MIPC (9 months), A. 4-10-85 Inciting to Riot or Strike, B.7-15-85 Assault and Battery (Inmate), Possession of Contraband, C. 7-20-85 Fighting, D. 8-1-1-85 Assault and Battery (Inmate), E. 8-27-85 Disobeying a Direct Order, F. 1-18-85 Fighting."	p 481

8-27-85	**Major Misconduct Hearing Report:** Disobeying a Direct Order: Found Guilty	p 488
1-18-86	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 503
1-5-86	**Major Misconduct Hearing Report:** Disobeying a Direct Order: Found Guilty	p 505
8-11-85	**Major Misconduct Hearing Report:** Assault and Battery: Found Guilty	p 509
7-20-85	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 511
7-15-85	**Major Misconduct Hearing Report:** Assault and Battery, Possession of Dangerous Contraband: Found Guilty	p 513
4-10-85	**Major Misconduct Hearing Report:** Incite to Riot or Strike, Threatening Behavior: Found Guilty	p 521
3-18-85	Transfer Recommendation & Order: "His adjustment in B Unit has been poor (disobeying a direct order, insolence and assault and battery (resident)."	p 525
2-27-85	Administrative Segregation Interview Report: "Prisoners inability to be managed with group privileges is a threat to the order and security of this facility."	p 527
3-7-85	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 529
2-11-85	**Major Misconduct Hearing Report:** Disobeying a Direct Order, Insolence: Found Guilty	p 542
1-17-85	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 546
12-31-84	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 550
9-19-84	**Major Misconduct Hearing Report:** Insolence: Found Guilty	p 558
6-5-84	Presentence Investigation Report: (Prepared for Jackson County Circuit Court) Prison Adjustment (Misconducts):	p 563-574 p 568

11-10-81	Assault	6 days detention
12-6-81	Insolence	3 days toplock
12-23-81	Destruction of State Property Over $10.00	4 days detention
1-7-82	Insolence	3 days toplock
1-13-82	Disobeying a Direct Order	3 days detention
1-28-82	Fighting	7 days detention
2-15-82	Disobeying a Direct Order	2 days toplock
3-3-82	Disobeying a Direct Order	1 day detention
3-2-82	Insolence	2 days detention
3-3-82	Disobeying a Direct Order	2 days detention
4-3-82	Fighting	6 days detention
4-22-82	Disobeying a Direct Order	3 days detention
7-1-82	Possession of Dangerous Contraband	7 days detention
6-26-82	Disobeying a Direct Order	2 days detention
11-3-82	Out of Place	2 days toplock
11-24-82	Possession of Dangerous Contraband	7 days detention
	Substance Abuse	
	Possession of Gambling Paraphernalia	
11-24-82	Destruction of State Property Over $10.00	Restitution
1-11-83	Possession of Non-Dangerous Contraband	confiscated
1-16-83	Misuse or Destruction of State Property	2 days detention
1-21-83	Assault and Battery	7 days detention
8-21-82	Threatening Behavior	7 days detention
8-1-83	Possession of Non-Dangerous Contraband	confiscated
1-4-84	Possession of Non-Dangerous Contraband	confiscated
1-6-84	Disobeying a Direct Order	5 days detention
1-18-84	Assault and Battery	7 days detention
1-18-84	Assault and Battery	7 days detention
	Disobeying a Direct Order	
3-12-84	Disobeying a Direct Order	8 days loss of priv.
3-14-84	Possession of Non-Dangerous Contraband	confiscated
3-8-84	Sexual Misconduct	3 days detention
3-31-84	Destruction or Misuse of State Property	10 days loss of priv.
5-1-84	Fighting	5 days detention
5-9-84	Assault on Staff	7 days detention

1-18-84	Basic Information Report (Assaulting a Prison Employee	p 564
5-30-84	Sentence Recommendation: Jackson Co 84-33577-FH "Original Charge: Assault Prison Employee (Two Counts) /Second Felony. Conviction Charge: Assault Prison Employee (48 months max.). Plea Agreement: Plead guilty to Count I. After sentencing, Count H and the Supplemental Information will be dismissed. Also, no prosecution will be forthcoming on incident No. 41-1006-84." Defendant was sentenced on 6-14-84 to 2 to 4 years	p 574
5-9-84	**Major Misconduct Hearing Report:** Assault and Battery: Found Guilty	p 579
5-1-84	**Major Misconduct Hearing Report:** Fighting: Found Guilty	p 582
3-31-84	**Major Misconduct Hearing Report:** Destruction or Misuse of: of Property with a value of $10.00 or more: Found Guilty	p 585
3-12-84	**Major Misconduct Report:** Assault and Battery, Disobeying a Direct Order	p 589
3-12-84	**Major Misconduct Report:** Possession of Dangerous Contraband:	p 590
1-18-84	**Major Misconduct Hearing Report:** Assault and Battery, Disobeying a Direct Order: Found Guilty of both counts.	p 594
1-18-84	**Major Misconduct Hearing Report:** Assault and Battery: Found Guilty	p 599
1-6-84	**Major Misconduct Hearing Report:** Disobeying Order: Found Guilty	p 602
8-21-83	**Major Misconduct Hearing Report:** Threatening Behavior: Found Guilty	p 609
11-24-82	**Misconduct Hearing Report:** Dangerous Contraband, Substance, Gambling Paraphernalia: Found Guilty of all three counts	p 622
11-2-82	**Misconduct Hearing Report:** Out of Place: Found Guilty	p 625
6-26-82	Misconduct Report: Disobeying a Direct Order	p 632

7-6-82	Security Reclassification: "Misconduct charge; Dangerous Contraband	p 633
4-3-82	**Misconduct Hearing Report:** Fighting: Found Guilty	p 634
3-3-82	**Misconduct Hearing Report:** Disobeying a Direct Order, Out of Place: Found Guilty	p 641
3-2-82	**Misconduct Hearing Report:** Insolence: Found Guilty	p 643
3-3-82	**Misconduct Hearing Report:** Disobeying a Direct Order: Found Guilty	p 645
2-15-82	**Misconduct Hearing Report:** Disobeying a Direct Order: Found Guilty	p 647
1-28-82	**Misconduct Hearing Report:** Fighting: Found Guilty	p 649
1-13-82	**Misconduct Hearing Report:** Disobeying a Direct Order: Found Guilty	p 651
1-7-82	**Misconduct Hearing Report:** Insolence: Found Guilty	p 654
12-23-81	**Misconduct Hearing Report:** Destruction of State Property: Found Guilty	p 656
12-6-81	**Misconduct Hearing Report:** Insolence: Found Guilty	p 658
11-10-81	**Misconduct Hearing Report:** Assault: Found Guilty	p 665

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, Nos. 133759, 133760, 134092, 134564; reported below: 275 Mich App 82.

KELLY, J. I would grant leave to appeal.

CRAWFORD COUNTY v OTSEGO COUNTY, No. 134320; reported below: 275 Mich App 82.

KELLY, J. I would grant leave to appeal.

Reconsideration Granted March 21, 2008:

HA SMITH LUMBER & HARDWARE CO v DECINA, No. 128560. On reconsideration, we remand this case to the Oakland Circuit Court to determine whether plaintiff H.A. Smith Lumber & Hardware Company can recover attorney fees under its contract with defendant John Decina. Although attorney fees were not recoverable under the Construction Lien Act (CLA),

MCL 570.1101 *et seq*., as held in our decision in this case, 480 Mich 987 (2007), they may be recoverable under the contract between the parties. Summary disposition entered at 480 Mich 987. Reported below: 265 Mich App 380.

KELLY, J. (*concurring*). I concur in the decision to grant the motion for reconsideration. But I dissent from the decision to remand the case to the trial court to consider whether plaintiff H.A. Smith Lumber & Hardware Company can recover attorney fees. I would reinstate the award of attorney fees for the reasons stated in Justice CAVANAGH's dissenting statement in this case, 480 Mich 987, 988 (2007).

CAVANAGH, J. I join the statement of Justice KELLY.

WEAVER, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Summary Dispositions March 24, 2008:

In re LAGER ESTATE, No. 135346. 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 probate court had jurisdiction to determine the disposition of the decedent's General Motors personal savings plan (PSP) and, if so, whether the respondent, as the surviving wife of the decedent, is entitled to the proceeds of the PSP pursuant to 29 USC 1055(c). On remand, the Court of Appeals may, while retaining jurisdiction, remand this case to the Genesee County Probate Court for any necessary additional proceedings or hearings. Court of Appeals No. 276843.

HOBDY V HARPER UNIVERSITY HOSPITAL, Nos. 135352, 135353, 135354. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals as to Wayne Circuit Court Docket No. 03-331642-NH and reinstate the order of the Wayne Circuit Court denying the defendants' motion for summary disposition in that case because the first personal representative is within the class of plaintiffs identified in this Court's order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). We remand this case to the Court of Appeals for consideration of the defendants' other issues that were not addressed in its opinion. 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 Nos. 258114, 260666, 270471.

PEOPLE V DANNY GOULD, No. 135411. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court erred in scoring both offense variables 9 and 12 in connection with the defendant's conviction for resisting and obstructing a police officer. 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. 280804.

Leave to Appeal Denied March 24, 2008:

PEOPLE v MARSH, No. 134065. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272667.

PEOPLE v JEFFERY BARNES, No. 134491; Court of Appeals No. 266170.

PEOPLE v AARON, No. 134514; Court of Appeals No. 268040.

PEOPLE v RONALD MATHIS, No. 134623; Court of Appeals No. 268082.

PEOPLE v STEED, No. 134648. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276005.

PEOPLE v DEBERRY, No. 134747; Court of Appeals No. 267263.

PEOPLE v METCALF, No. 134802. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277704.

PEOPLE v FAVORS, No. 134835. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 275048.

PEOPLE v HOGAN, No. 134859. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277727.

GALLANT v GALLANT, No. 134902; Court of Appeals No. 265396.

PEOPLE v ERIC FERGUSON, No. 134917. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278225.

HRT ENTERPRISES v CITY OF DETROIT, No. 135100; Court of Appeals No. 268285.

PEOPLE v CLINE, No. 135191; reported below: 276 Mich App 634.

PEOPLE v GOODELL, No. 135200; Court of Appeals No. 268772.

PEOPLE v WILLIAM JENKINS, No. 135242; Court of Appeals No. 279669.

In re TRUITT ESTATE (KIENITZ v EISENZOPH), No. 135260; Court of Appeals No. 269807.

PEOPLE v KHALIFE, No. 135264; Court of Appeals No. 272174.

PEOPLE v VARNER, No. 135287; Court of Appeals No. 280449.

GUOAN v DEPARTMENT OF CORRECTIONS, No. 135289; Court of Appeals No. 277823.

TAYLOR v DAVIS, No. 135300; Court of Appeals No. 274795.

HAMILTON v GROSS, No. 135301; Court of Appeals No. 267522.

PEOPLE v DEMANN, No. 135331; Court of Appeals No. 268657.

BRINKLEY v BRINKLEY, No. 135339; reported below: 277 Mich App 23.

CROMWELL v WEST BRANCH REGIONAL MEDICAL CENTER, No. 135345; Court of Appeals No. 279755.

BENNETT v LAKE MICHIGAN PACKAGING PRODUCTS, INC, No. 135350; Court of Appeals No. 278089.

PEOPLE v ASHFORD, No. 135361; Court of Appeals No. 271925.

PEOPLE v TOLSON, No. 135362; Court of Appeals No. 272781.

PEOPLE v LOTTS, No. 135373; Court of Appeals No. 270254.

WASHINGTON v JACKSON, No. 135376; Court of Appeals No. 258691.

MCLEOD v DEPARTMENT OF TREASURY, No. 135380; Court of Appeals No. 280282.

LANPHAR v SHISLER, No. 135388; Court of Appeals No. 275124.

PEOPLE v TONY MOORE, No. 135390; Court of Appeals No. 270828.

CADLE COMPANY II, INC v PM GROUP, INC, No. 135394; Court of Appeals No. 275099.

PEOPLE v JAQUAVIS TAYLOR, No. 135396; Court of Appeals No. 271635.

PEOPLE v WARNE, No. 135401; Court of Appeals No. 281000.

PEOPLE v AARON BROWN, No. 135409; Court of Appeals No. 272784.

PEOPLE v ZAMORA, No. 135414; Court of Appeals No. 280516.

PEOPLE v BRADLY MEADOWS, No. 135416; Court of Appeals No. 272394.

PEOPLE v KATONA, No. 135419; Court of Appeals No. 280713.

PEOPLE v ALVIN JONES, No. 135423; Court of Appeals No. 271039.

PEOPLE v EDWIN FORD, III, No. 135431; Court of Appeals No. 272940.

PEOPLE v MOODY, No. 135436; Court of Appeals No. 280321.

PEOPLE v TIMOTHY WILLIAMS, No. 135437; Court of Appeals No. 271791.

MCMAHON v MCMAHON, No. 135438; Court of Appeals No. 270477.

PEOPLE v MATTOON, No. 135442; Court of Appeals No. 272549.

PEOPLE v FREDERICK SPENCER, No. 135444; Court of Appeals No. 271844.

PEOPLE v SHORT, No. 135448; Court of Appeals No. 266368.

PEOPLE v GIBBONS, No. 135449. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277910.

PEOPLE v JARROD COLLINS, No. 135450; Court of Appeals No. 280560.

PEOPLE v HAHN, No. 135451; Court of Appeals No. 280513.

PEOPLE v DOUGLAS WILLIAMS, No. 135452; Court of Appeals No. 280583.

LABARGE v WALGREEN CO, No. 135456; Court of Appeals No. 281366.

PEOPLE v HEATH, Nos. 135463, 135464; Court of Appeals Nos. 270192, 270193.

PEOPLE v NEWTON, No. 135467; Court of Appeals No. 273318.

PEOPLE v TYRONE DORSEY, No. 135469; Court of Appeals No. 273181.

PEOPLE v FONVILLE, No. 135471; Court of Appeals No. 280968.

PEOPLE v CHARI HARVEY, No. 135474; Court of Appeals No. 280489.

PEOPLE v JAAFAR, No. 135476; Court of Appeals No. 272586.

PEOPLE v CLEMENTS, No. 135477; Court of Appeals No. 271808.

PEOPLE v LINDSEY, No. 135478; Court of Appeals No. 268494.

PEOPLE v GEORGE MOORE, No. 135479; Court of Appeals No. 281239.

PEOPLE v ROYAL, No. 135480; Court of Appeals No. 272340.

REAGAN v DEPARTMENT OF CORRECTIONS, No. 135484; Court of Appeals No. 279089.

PEOPLE v WISE, No. 135486; Court of Appeals No. 267897.

PEOPLE v DELANO EVANS, No. 135487; Court of Appeals No. 279396.

PEOPLE v ANTHONY MAY, No. 135489; Court of Appeals No. 270047.

PEOPLE v TYRELL RICHARDSON, No. 135490; Court of Appeals No. 270606.

LEESE v LEESE, No. 135493; Court of Appeals No. 277289.

PEOPLE v JOHN SMITH, No. 135498; Court of Appeals No. 272821.

PEOPLE v FARROW, No. 135499; Court of Appeals No. 272596.

RILEY v STEELE, No. 135502; Court of Appeals No. 279307.

ZANGKAS v BIRMINGHAM PUBLIC SCHOOLS BOARD OF EDUCATION, No. 135503; Court of Appeals No. 277056.

PEOPLE v LASENBY, No. 135504; Court of Appeals No. 273753.

PEOPLE v RUCKER, No. 135505; Court of Appeals No. 280830.

CARUSO v CAMBRIDGE INVESTMENT GROUP, INC, No. 135508; Court of Appeals No. 269279.

SWEENEY v EDDIE'S INTERNATIONAL TOUCHLESS CAR WASH, No. 135511; Court of Appeals No. 278586.

KETELHUT v KETELHUT, No. 135513; Court of Appeals No. 270733.

STATE TREASURER v FERGUSON, No. 135515; Court of Appeals No. 269669.

PEOPLE v ANTHONY JOHNSON, No. 135517; Court of Appeals No. 272823.

CREHAN v BANCROFT, No. 135518; Court of Appeals No. 268027.

PEOPLE v MARTINDALE, No. 135523; Court of Appeals No. 279210.

PEOPLE v COREY MCCALL, No. 135525; Court of Appeals No. 267764.

PEOPLE v WEATHERSPOON, No. 135526; Court of Appeals No. 281347.

PEOPLE v WHORTON, No. 135527; Court of Appeals No. 270607.

PEOPLE v JERALD JAMES, No. 135528; Court of Appeals No. 271086.

PEOPLE v BEATRICE TAYLOR, No. 135531; Court of Appeals No. 273444.

PEOPLE v BELSER, No. 135532; Court of Appeals No. 279483.

PEOPLE v GIACOLONE, No. 135537; Court of Appeals No. 277600.

PEOPLE v CARPENTER, No. 135549; Court of Appeals No. 280930.

ARSENAULT v MUNSON MEDICAL CENTER, No. 135550; Court of Appeals No. 278749.

KAUFFMAN v PRESTON, No. 135551; Court of Appeals No. 271327.

ESTATE DEVELOPMENT COMPANY v OAKLAND COUNTY ROAD COMMISSION, No. 135554; Court of Appeals No. 273383.

SAGINAW INTERMEDIATE SCHOOL DISTRICT v COLEMAN COMMUNITY SCHOOLS, No. 135555; Court of Appeals No. 270098.

CITY OF SOUTHFIELD v COVENSKY, No. 135556; Court of Appeals No. 273101.

TYSON FOODS, INC v DEPARTMENT OF TREASURY, No. 135557; reported below: 276 Mich App 678.

PEOPLE v JAMES CUNNINGHAM, No. 135561; Court of Appeals No. 270990.

PEOPLE v OLSEN, No. 135563; Court of Appeals No. 271267.

PEOPLE v MAJOR, No. 135572; Court of Appeals No. 271902.

PEOPLE v CAGE, No. 135573; Court of Appeals No. 281572.

PEOPLE v MICHAEL JOHNSON, No. 135574; Court of Appeals No. 281163.

PEOPLE v TERRENCE WILLIAMS, No. 135575; Court of Appeals No. 266084.

PEOPLE v PAUL MAY, No. 135583; Court of Appeals No. 272990.

PEOPLE v FRAILEY, No. 135584; Court of Appeals No. 272241.

PEOPLE v BOWMAN, No. 135585; Court of Appeals No. 270443.

PEOPLE v PASSAGE, No. 135587; reported below: 277 Mich App 175.

PEOPLE v RAUSCH, No. 135590; Court of Appeals No. 281106.

PEOPLE v SHANE STEELE, No. 135593; Court of Appeals No. 280399.

PEOPLE v DION CUNNINGHAM, No. 135595; Court of Appeals No. 272545.

PEOPLE v MONTREY DAVIS, No. 135599; Court of Appeals No. 281042.

PEOPLE v FELICIANO, No. 135602; Court of Appeals No. 271085.

PEOPLE v DERRICK CLAYTON, No. 135605; Court of Appeals No. 273056.

SURMAN v SURMAN, No. 135607; reported below: 277 Mich App 287.

BOLOGNA v PEVARNEK, No. 135608; Court of Appeals No. 267244.

PEOPLE v KEVIN BOND, No. 135609; Court of Appeals No. 270091.

PEOPLE v CHAD WILLIAMS, No. 135616; Court of Appeals No. 270729.

PEOPLE v BOTELLO, No. 135619; Court of Appeals No. 281394.

PEOPLE v ANTHONY D JAMES, No. 135620; Court of Appeals No. 281639.

PEOPLE v DELEON-PUENTES, No. 135622; Court of Appeals No. 281345.

PEOPLE v ROUMMEL INGRAM, No. 135623; Court of Appeals No. 273086.

PEOPLE v WHETSTONE, No. 135625; Court of Appeals No. 271838.

PEOPLE v WILLIAM TAYLOR, No. 135629; Court of Appeals No. 272401.

PEOPLE v JESSE MOORE, JR, No. 135633; Court of Appeals No. 271037.

LJULJDJURAJ v CITY OF STERLING HEIGHTS, No. 135636; Court of Appeals No. 275317.

PEOPLE v LAWRENCE BAKER, JR, No. 135639; Court of Appeals No. 267241.

PEOPLE v SEARIGHT, No. 135641; Court of Appeals No. 281536.

PEOPLE v BARLOW, No. 135643; Court of Appeals No. 272534.

ALTON v ALTON, No. 135644; Court of Appeals No. 267802.

PEOPLE v TIMOTHY SANDERS, No. 135651; Court of Appeals No. 281314.

PEOPLE v JESSIE GILBERT, No. 135653; Court of Appeals No. 281109.

PEOPLE v DEMOND MCDONALD, No. 135655; Court of Appeals No. 281749.

PEOPLE v SAVOY, No. 135659; Court of Appeals No. 269813.

PEOPLE v BUCHAN, No. 135660; Court of Appeals No. 273904.

PEOPLE v FAIRLEY, No. 135662; Court of Appeals No. 271965.

PEOPLE v SPACHER, No. 135665; Court of Appeals No. 273408.

PEOPLE v MARQUIS JENKINS, No. 135673; Court of Appeals No. 272217.

PEOPLE v JAMES MARTINDALE, No. 135699; Court of Appeals No. 272086.

MULLINS v STANFORD, No. 135700; Court of Appeals No. 275340.

PEOPLE v MORRISON, No. 135703; Court of Appeals No. 281985.

PEOPLE v PROFFITT, No. 135720; Court of Appeals No. 265704.

Reconsideration Granted March 24, 2008:

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE (WAYNE COUNTY TREASURER v WATSON), No. 134608. On reconsideration, we modify our order dated December 14, 2007. For the reasons stated in that order, the Court of Appeals erred in reversing the Wayne Circuit Court's decision setting aside the foreclosure sale. But rather than reinstate the circuit court's order, we remand this case to the Court of Appeals for consideration of the remaining issues raised by the respondent in that court but not addressed, in light of its prior disposition. We do not retain jurisdiction. Summary Disposition entered at 480 Mich 981. Court of Appeals No. 265426.

MARKMAN, J. I would deny leave to appeal for the reasons set forth in my dissenting statement in this case, 480 Mich 981 (2007).

Reconsiderations Denied March 24, 2008:

DETROIT BUILDING AUTHORITY v WAYNE COUNTY TREASURER, No. 129743. Summary disposition entered at 480 Mich 897. Court of Appeals No. 253479.

FIEGER v COX, Nos. 133961, 133962. Leave to appeal denied at 480 Mich 874. Reported below: 274 Mich App 449.

CAVANAGH, J. I cannot participate in the reconsideration of the decision regarding the motion for recusal, but reiterate my position as stated in this Court's September 14, 2007, order in this case, 480 Mich 874 (2007).

WEAVER, J. I dissent from the participation of Chief Justice TAYLOR and Justices CORRIGAN and YOUNG for the reasons stated in my dissent from the September 14, 2007, order in this case, 480 Mich 874 (2007).

KELLY, J. I cannot participate in the reconsideration of the decision regarding the motion for recusal, but reiterate my position as stated in this Court's September 14, 2007, order in this case, 480 Mich 874 (2007).

MARKMAN, J. I will not participate in this case because it directly pertains to the Attorney General's investigation of petitioners' financial conduct undertaken in connection with my reelection campaign in 2004.

PEOPLE v TIMOTHY MOORE, No. 134142. Leave to appeal denied at 480 Mich 1036. Court of Appeals No. 267663.

AUSLANDER v CHERNICK, No. 134147. Summary disposition entered at 480 Mich 910. Court of Appeals No. 274079.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

KLOIAN v VAN FOSSEN, No. 134321. Leave to appeal denied at 480 Mich 1003. Court of Appeals No. 262953.

PEOPLE v DICKSON, No. 134386. Leave to appeal denied at 480 Mich 1003. Court of Appeals No. 272952.

PEOPLE v EFFINGER, No. 134410. Leave to appeal denied at 480 Mich 1003. Court of Appeals No. 275787.

LEWIS v BRIDGMAN PUBLIC SCHOOLS, No. 134631. Summary disposition entered at 480 Mich 1000. Reported below: 275 Mich App 435.

PEOPLE v DWAYNE JONES, No. 134695. Leave to appeal denied at 480 Mich 1005. Court of Appeals No. 277504.

PEOPLE v AMBROSE, No. 134777. Leave to appeal denied at 480 Mich 1005. Court of Appeals No. 275571.

PEOPLE v SWANSON, No. 134919. Leave to appeal denied at 480 Mich 1008. Court of Appeals No. 270995.

PEOPLE v SEID, No. 134982. Leave to appeal denied at 480 Mich 1009. Court of Appeals No. 267900.

Summary Dispositions March 26, 2008:

PEOPLE v GRISSOM, No. 134733. 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. On remand, the Court of Appeals is to consider whether defendant has a reasonably likely chance of acquittal in light of the newly discovered evidence and in light of the evidence presented against defendant that did not involve the complainant's credibility. Court of Appeals No. 274148.

In re JACKSON (DEPARTMENT OF HUMAN SERVICES v JACKSON), No. 135918. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the November 21, 2007, and January 31, 2008, orders of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration of whether the Court of Appeals lacked jurisdiction over the respondent's claim of appeal. On remand, the Court of Appeals shall address the Macomb Circuit Court's decision to mail notice of the termination of the respondent's parental rights and the advice of appellate rights form to respondent's attorney, rather than to respondent, as required by MCR 3.977(I)(1). We do not retain jurisdiction. Court of Appeals No. 281594.

KELLY, J. I would reverse and remand to reinstate the appeal because MCR 3.997(I)(1) was violated.

Leave to Appeal Denied March 26, 2008:

DEPARTMENT OF TRANSPORTATION v SEHN FAMILY NOVI LIMITED PARTNERSHIP, No. 134275; Court of Appeals No. 263934.

SCHILS v WASHTENAW COUNTY, No. 135089. As plaintiff Michael Schils has repeatedly abused the court system, we direct the clerks of this Court, the Court of Appeals, and the Washtenaw Circuit Court not to accept any further filings in noncriminal matters arising from Schils's discharge from his employment with Washtenaw County unless he has paid all necessary fees and submitted his filings in full compliance with the court rules. Court of Appeals No. 277750.

PEOPLE v LIGON, No. 135114; Court of Appeals No. 267806.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal regarding the accomplice instruction issue, for the reasons set forth in my concurring opinion in *People v Young*, 472 Mich 130, 144 (2005).

PEOPLE v ODOM, No. 135162; reported below: 276 Mich App 407.

KELLY, J. I would grant leave to appeal.

URSERY v OPTION ONE MORTGAGE CORPORATION, No. 135164; Court of Appeals No. 271560.

KELLY, J. I would grant leave to appeal.

PEOPLE v DELEON, No. 135234; Court of Appeals No. 269574.

PEOPLE v MACLEAN, No. 135245; Court of Appeals No. 270525.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MARTELL, No. 135279; Court of Appeals No. 280902.

FORNER v ROBINSON TOWNSHIP, No. 135306; Court of Appeals No. 269127.

MATHIS v DEPARTMENT OF CORRECTIONS, No. 135316; Court of Appeals No. 277686.

KELLY, J. I would grant leave to appeal.

PEOPLE v RUSHMORE, No. 135317; Court of Appeals No. 269540.

PEOPLE v HATTER, No. 135328; Court of Appeals No. 275944.

PEOPLE v WORDELL, No. 135386; Court of Appeals No. 280683.

KELLY, J. I would remand this case to the Court of Appeals to decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2).

MULCAHY v VERHINES, No. 135510; reported below: 276 Mich App 693.

Reconsideration Denied March 26, 2008:

MCELHANEY V HARPER-HUTZEL HOSPITAL, No. 130916. Leave to appeal denied at 480 Mich 853. Reported below: 269 Mich App 488.

KELLY, J. I would grant reconsideration.

Summary Disposition March 27, 2008:

CEMETERY COMMISSIONER V ALBION MEMORY GARDENS, No. 136037. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and we remand this case to the Court of Appeals for entry of an order granting the plaintiffs' motion to dismiss the claim of appeal. St. Augustine's National Foundation has not shown that it has standing to appeal the order entered in the circuit court proceeding to which it was not a party. Court of Appeals No. 283984.

Summary Dispositions March 28, 2008:

MONA SHORES BOARD OF EDUCATION V MONA SHORES TEACHERS EDUCATION ASSOCIATION, MEA/NEA, No. 134350. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion at pages 1-2. The plaintiffs have standing to seek declaratory relief concerning the validity of the early retirement provisions of the collective bargaining agreement under the standards articulated in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615 (2004), and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 295-296 (2007). We remand this case to the Court of Appeals for consideration of the remaining issues raised by the plaintiffs in that court. We do not retain jurisdiction. Court of Appeals No. 271592.

WEAVER, J. (*concurring*). I concur in the order reversing the Court of Appeals judgment and remanding this case to the Court of Appeals for consideration of the plaintiffs' remaining issues, because I agree that the plaintiffs have standing to seek declaratory relief concerning the validity of the early retirement provisions of the collective bargaining agreement.

I write separately because I disagree with the application of the majority of four's (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) erroneously created standing test in *Lee v Macomb Co Bd of Comm'rs*,[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[2] *Rohde v Ann Arbor Pub Schools*,[3] and *Michigan Citizens for Water Conservation*

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[1] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004).

[3] *Rohde v Ann Arbor Pub Schools*, 479 Mich 336 (2007).

v Nestlé Waters North America Inc.[4] In those cases, the majority of four systematically dismantled Michigan's standing law and replaced years of precedent with its own test that denies Michigan citizens access to the courts.[5]

I would hold that the plaintiffs have standing under the pre-*Lee* prudential test for standing because the plaintiffs have demonstrated "that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker v State Administrative Bd*, 441 Mich 547, 554 (1993).

KELLY, J. I would grant leave to appeal.

SHEPHERD MONTESSORI CENTER MILAN v ANN ARBOR CHARTER TOWNSHIP. Nos. 134739, 134978. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the May 22, 2007, judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson,* 478 Mich 373 (2007). In particular, the Court of Appeals should reconsider whether the denial of the zoning variance imposed a "substantial burden" on the plaintiff's religious exercise, i.e., whether the denial of the variance "coerce[s] individuals into acting contrary to their religious beliefs." *Id.* at 401. (internal quotation marks and citation omitted). "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.' " *Id.* In addition, we reverse the August 21, 2007, order of the Court of Appeals awarding plaintiff sanctions for a vexatious motion for reconsideration. Given the facts and the law at issue in this case, the Court of Appeals clearly erred in imposing such sanctions. Reported below 275 Mich App 597.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I would not remand this case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*,[1] for the reasons stated in my concurrence in that case. Rather, I would grant leave to appeal to consider whether the denial of a variance implicates the Religious Land Use and Institutionalized Persons Act.[2] If it does, we should determine whether it imposes a substantial burden on plaintiff's exercise of its religious beliefs.

In re ZIMMERMAN (JOHNSON v BYRON), No. 135812. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the Court of Appeals judgment addressing "The Grant of Immediate Custody to Byron [respondent]," and we remand this case to the Ottawa

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[4] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007).

[5] See my opinions chronicling the majority of four's assault on standing in *Lee*, 464 Mich at 742; *Nat'l Wildlife*, 471 Mich at 651; *Rohde*, 479 Mich at 366; and *Michigan Citizens*, 479 Mich at 310.

[1] 478 Mich 373 (2007).

[2] 42 USC 2000cc *et seq*.

Circuit Court, Family Division. The Court of Appeals erred in reviewing the circuit court's order as one that gave respondent *custody* of the minor child. Instead, the circuit court ruled that it was awarding "temporary *placement*" of the child with respondent and further urged the parties to act quickly to settle the custody issue. We affirm that ruling and direct that court to resolve the custody dispute in an expeditious manner, if that has not already occurred. In all other respects, the Court of Appeals judgment is affirmed. 277 Mich App 470.

Leave to Appeal Denied March 28, 2008:

PULTE LAND COMPANY, LLC v ALPINE TOWNSHIP, No. 132315; Court of Appeals No. 259759.

WEAVER and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether there was a "taking" of property here and, if not, whether a zoning referendum is properly reversed by a consent judgment entered without the involvement of the local zoning commission.

Plaintiffs Margaret Brechting and Pulte Land Company entered into a purchase agreement for property contingent on securing zoning for residential development. Pulte applied to rezone the property, and the township approved. However, a referendum to defeat the rezoning was successful. Pulte then applied for a variance, which was denied, and subsequently brought suit against the township.

The trial court approved a partial consent judgment in which the township agreed not to oppose the relief sought by plaintiffs. The court ruled that the agricultural zoning classification of the property constituted a "taking" and ordered a rezoning to residential development. The Court of Appeals, in an unpublished opinion per curiam, issued September 12, 2006 (Docket No. 259759), affirmed, but remanded for the trial court to enjoin zoning enforcement rather than order rezoning. Judge SCHUETTE in a concurrence raised concerns about the constitutionality of employing a consent judgment to override the results of a referendum.

First, I would further consider whether the current zoning classification constitutes a "taking." Although plaintiff Brechting received no offers from farmers to purchase the land, she never offered it for sale at the market price for its classification. In addition, Pulte agreed to the removal of the rezoning contingency from the purchase agreement with knowledge of its current zoning status. In fact, Pulte signed the amended purchase agreement *without* the zoning contingency, *after* the referendum had defeated the rezoning, and *after* the township had denied a use variance. The reasonableness of Pulte's investment and financial expectations is disputable. Moreover, the regulation applied over a large area of land and hardly can be said to single out plaintiffs to "bear the burden for the public good . . . ." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 (2005).

If the zoning does not constitute a "taking," the question becomes whether the trial court overstepped its authority when it allowed the township board to enter into a consent judgment that superseded the

referendum. The Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. (formerly MCL 125.271 *et seq*. with regard to townships), provides for the enactment and administration of zoning ordinances. The legislative body of a local government, through the recommendations of its *zoning commission*, has the authority to enact, amend, and enforce zoning ordinances. MCL 125.3211; MCL 125.3305. There is nothing in the act that clearly addresses whether a township board may unilaterally grant relief from a zoning ordinance, in particular after the same relief has earlier been reversed by referendum and a use variance has been denied. An amendment of a zoning ordinance is made in the same manner as the enactment of the original ordinance. MCL 125.3202. By entering the consent judgment, the trial court arguably allowed the township board to circumvent this statutory process.

The issue whether the trial court overstepped its authority in allowing a consent judgment to be entered without the involvement of the local zoning commission and to supersede a popular referendum raises an important separation of powers issue. The issue whether the current zoning classification constitutes a "taking" raises an equally important question concerning the standards that Michigan courts are prepared to apply in assessing seemingly ordinary local zoning decisions. For these reasons, I would grant leave to appeal.

VORIS v DEPARTMENT OF HUMAN SERVICES, No. 134465; Court of Appeals No. 273255.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). This case has its genesis in the proceedings for the termination of parental rights to Corbyn Voris. These proceedings were initially filed against Corbyn's biological parents, plaintiff Douglas Voris and Heather Cooper. After it was determined that, at the time of Corbyn's birth, Heather had been married to another man, Justin Cooper, the matter was amended to name Heather and Justin as the parents.

Plaintiff attempted to intervene. To do so, he had to rebut the presumption that Justin was the father. Plaintiff planned on rebutting the presumption by eliciting from Heather testimony about their affair. However, before the testimony could be taken, the prosecutor threatened Heather with prosecution for adultery if she testified that she had had sex with plaintiff while married to Justin. Accordingly, Heather invoked her Fifth Amendment rights and refused to answer plaintiff's questions. Plaintiff was unable to rebut the presumption. The court stated that, if Heather had testified that plaintiff was Corbyn's biological father, plaintiff could have intervened.

After their parental rights to Corbyn were terminated, Heather and Justin divorced. In the divorce case, Justin claimed that he was not Corbyn's father. The trial judge agreed and ruled accordingly.

Following the entry of the divorce judgment, plaintiff brought this action under the Paternity Act[1] seeking a determination that he is Corbyn's father. Defendant Department of Human Services moved for

[1] MCL 722.711 *et seq*.

summary disposition, arguing that plaintiff lacks standing. The trial court denied the motion, and defendant appealed. While the appeal was pending, the trial court granted summary disposition, ruling that plaintiff was Corbyn's father. But, the Court of Appeals reversed that determination, holding that plaintiff did not have standing to bring the paternity action. Plaintiff challenged that decision in this Court. A majority of the Court has decided to deny leave to appeal.

I disagree with that decision. My reasoning is as follows: The Paternity Act confers standing on the biological father of a child born out of wedlock.[2] By statute, a child born out of wedlock is "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."[3] Accordingly, a biological father has standing to establish the paternity of a child born during a marriage where a prior determination was made that the mother's husband is not the father.[4]

Here, there is no issue about whether plaintiff is the biological father of Corbyn. But the Court of Appeals held that because plaintiff did not rebut the presumption that Justin was Corbyn's father in the termination proceedings, plaintiff cannot establish standing in the paternity proceedings. This Court should grant leave to appeal to consider whether the Court of Appeals made the correct decision.

No appeal was taken from the determination in the divorce proceeding that plaintiff was Corbyn's father. Hence, there was a prior court determination that Justin is not the father. This is all that Michigan law requires for plaintiff to establish standing under the Paternity Act. On the other hand, in the divorce proceeding it was unnecessary for the court to determine the identity of Corbyn's father because Heather and Justin's parental rights had already been terminated. The court may not have had jurisdiction to decide whether Justin was Corbyn's father. I would grant leave to appeal to fully consider the strong arguments on both sides of this issue.

PEOPLE V GERMAIN BURNETT, No. 134496. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276407.

CORRIGAN, J. (*concurring*). I join the order denying leave to appeal. I write separately only to observe that the Attorney Grievance Commission (AGC) may wish to investigate the conduct of defendant's appellate counsel. On August 4, 2005, the Court of Appeals dismissed defendant's application for leave to appeal as untimely. The Court of Appeals noted on reconsideration that appellate counsel was ineffective for failing to timely file defendant's application. This finding by the Court of Appeals warrants AGC scrutiny.

PEOPLE V CALBERT, No. 134827; Court of Appeals No. 277832.

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[2] *In re KH*, 469 Mich 621, 631-632 (2004).

[3] MCL 722.711(a).

[4] *In re KH*, 469 Mich at 632.

KELLY, J. (*dissenting*). Defendant has shown that he delivered his application for leave to appeal to the prison authorities for mailing on the day before the deadline for filing in the Court of Appeals. The prison authorities neglected to ensure that the Court of Appeals received it the next day. The Court of Appeals deemed the appeal untimely and dismissed it. Without contest, it was because of his incarceration that defendant was unable to ensure that the application was filed with the Court of Appeals on time. Defendant complied with the court rules to the best of his ability by placing the application in the hands of the prison authorities before the time for appeal expired. For that reason, we should determine that his application was timely filed and we should remand this case to the Court of Appeals for consideration as on leave granted.

WILSON v ELDON L AUCKER ASSOCIATES, No. 135161. Costs of $250 are assessed against the plaintiff in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiff is barred from submitting additional filings in this Court until he offers proof that he has paid any outstanding court-imposed sanctions. Court of Appeals No. 277274.

KELLY, J. I would simply deny leave to appeal.

PEOPLE v APPENZELLER, No. 135282; Court of Appeals No. 280851.

CORRIGAN, J. (*concurring*). I join the order denying leave to appeal. I write separately only to observe that the Attorney Grievance Commission and the Michigan Appellate Assigned Counsel System may wish to investigate defendant's allegations in this case. In 2002, defense counsel was appointed to represent defendant in his direct appeal. Defendant essentially alleges that counsel abandoned him. He was unaware of counsel's appointment; counsel never contacted him, never pursued an appeal, and never sought to withdraw as counsel. These allegations warrant scrutiny by the grievance commission.

WILSON v GENESEE COUNTY CONCEALED WEAPONS BOARD, No. 135344. Costs of $250 are assessed against the plaintiff in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiff is barred from submitting additional filings in this Court until he offers proof that he has paid any outstanding court-imposed sanctions. Court of Appeals No. 281069.

KELLY, J. I would simply deny leave to appeal.

Appeal Dismissed March 28, 2008:

BERMUDEZ v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 134940. 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. 276133.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 2, 2008:

BRACKETT v FOCUS HOPE, No. 135375. We direct the clerk to schedule

oral argument on May 7, 2008, on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether plaintiff's injury resulted from her willful misconduct. MCL 418.305. The parties may file supplemental briefs no later than April 29, 2008, but they should not submit mere restatements of their application papers. Court of Appeals No. 274078.

PEOPLE v MERCER, No. 135811. We direct the clerk to schedule oral argument on May 7, 2008, 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 constitutional due process standard for dismissal of a criminal prosecution based on prearrest delay requires a showing by the criminal defendant of both (1) actual and substantial prejudice due to the delay and (2) the intent by the prosecution to gain a tactical advantage by means of the delay, and, if not, whether and how a balancing test should be employed to consider these two factors. The parties may file supplemental briefs no later than April 25, 2008, but they should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae no later than April 25, 2008. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 281006.

Leave to Appeal Denied April 2, 2008:

STAPLETON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 134782; Court of Appeals No. 273392.

PEOPLE v KENDRICK ROSS, No. 135342; Court of Appeals No. 279291.

KELLY, J. I would remand this case to the trial court for the appointment of counsel.

PEOPLE v ELIZABETH SMITH, No. 135407; Court of Appeals No. 281240.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MICHAEL DAVIS, No. 135652; Court of Appeals No. 280882.

Summary Dispositions April 4, 2008:

In re KADZBAN (PEOPLE v KADZBAN), No. 134389. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee County Probate Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the respondent's appellate counsel, David Merchant and Michael Maddaloni, were ineffective for failing to raise on appeal the issue whether the respondent's conviction for second-degree criminal sexual conduct was improper under *People v Cornell*, 466 Mich 335, 355 (2002). See *People v Nyx*, 479 Mich 112 (2007). Although the decision in *Cornell* was

issued on June 18, 2002, while the respondent's appeal was pending in the Court of Appeals, attorney merchant did not file a supplemental brief on appeal and attorney Maddaloni failed to cite *Cornell* in defendant's application for leave to appeal in this Court. 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. We do not retain jurisdiction. Court of Appeals No. 273558.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case for an evidentiary hearing. I would deny the defendant's application for leave to appeal for the reasons stated in Justice CORRIGAN's and Justice YOUNG's dissenting statements.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order remanding for an evidentiary hearing to determine whether defendant's appellate counsel was ineffective for failing to raise the issue whether defendant's second-degree criminal sexual conduct conviction was improper under *People v Cornell*, 466 Mich 335, 355 (2002). I would deny leave to appeal because defendant's successive motion for relief from judgment is prohibited by MCR 6.502(G).

Defendant was charged with first-degree criminal sexual conduct for digitally penetrating a four-year-old girl's vagina. The trial court instructed the jury on the lesser offense of second-degree criminal sexual assault (CSC II), and the jury found him guilty of that lesser offense. On direct review, the Court of Appeals affirmed defendant's conviction, *In re Kadzban*, unpublished opinion per curiam, issued October 22, 2002 (Docket No. 233391), and this Court denied leave to appeal. 468 Mich 926 (2003). Defendant filed two earlier motions for relief from judgment, which the trial court denied. Defendant then filed the current motion for relief from judgment, which the trial court denied. The Court of Appeals denied leave to appeal. *In re Kadzban*, unpublished order, entered May 18, 2007 (Docket No. 273558). Defendant now seeks leave to appeal to this Court.

MCR 6.502(G) limits a defendant to one motion for relief from judgment after August 1, 1995. The rule permits a subsequent motion only where: (1) a retroactive change in law occurred *after the first motion for relief from judgment*; or (2) a claim of new evidence was not discovered before the first motion. MCR 6.502(G)(2).

This Court's order remanding to the trial court to consider whether appellate counsel was ineffective for failing to raise a *Cornell* issue is unwarranted because:

(1) Defendant has not raised this issue.

(2) Appellate counsel was not ineffective for failing to raise a *Cornell* issue given that *Cornell* did not address formally degreed lesser offenses such as CSC II. It was not until *People v Nyx*, 479 Mich 112 (2007), that this Court extended the *Cornell* holding to formally degreed lesser offenses. *Nyx* was decided *after defendant's conviction became final* and thus does not apply retroactively in this collateral proceeding.[1]

[1] In *Cornell*, we limited the retroactive effect of our holding to cases pending on appeal where the issue had been raised and preserved. *Cornell*, *supra* at 367. No principled reason exists to accord a broader

(3) Even if *Cornell* had addressed formally degreed offenses, MCR 6.502(G)(2) would bar defendant's successive motion because *Cornell* was decided *before* defendant's first motion for relief from judgment. MCR 6.502(G)(2) permits a successive motion only where the retroactive change in law occurs *after* the first motion.

(4) Finally, defendant failed to raise the *Cornell* issue in his *earlier* motions for relief from judgment. Thus, it was defendant's *own* failure to raise the issue in his first motion that has led to the application of MCR 6.502(G) barring his *successive* motion.

For these reasons, I would deny leave to appeal because MCR 6.502(G) prohibits defendant's successive motion for relief from judgment.

YOUNG, J. (*dissenting*). Because this motion is a successive motion for relief from judgment, it is governed by MCR 6.502(G). That rule bars successive motions for relief from judgment unless the motion qualifies under MCR 6.502(G)(2). Under that subsection, "[a] defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(2). The majority has remanded for an evidentiary hearing under *People v Ginther*, 390 Mich 436 (1973), to determine whether respondent's appellate counsel was ineffective. I am uncertain how that hearing will lead to information that will allow respondent to pursue a successive motion for relief from judgment. Assuming that the court finds that respondent's appellate counsel was ineffective, which Justice CORRIGAN correctly notes is highly unlikely, there is no reason why such ineffectiveness could not have been discovered before respondent's first motion for relief from judgment. Therefore, the rule bars a successive motion for relief from judgment based on the alleged ineffectiveness of appellate counsel. Because respondent's successive motion for relief from judgment is barred by MCR 6.502, I would deny his application for leave to appeal.

PEOPLE V CARLOS GONZALEZ, No. 135133. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, vacate the defendant's sentence for first-degree criminal sexual conduct, and remand this case to the Macomb Circuit Court for resentencing under properly scored sentencing guidelines. *People v Kimble,* 470 Mich 305 (2004); *People v Francisco,* 474 Mich 82 (2006). The defendant should have been scored zero points for prior record variable 1 where there was no evidence to support a finding that he had been convicted of one prior high-severity felony. 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. 269631.

WEAVER, J. (*dissenting*). I would deny the defendant's application for leave to appeal because I am not persuaded that the decision of the Court

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retroactive effect to *Nyx* than to *Cornell* itself, given that *Nyx* merely applied the *Cornell* holding to formally degreed offenses. Thus, *Nyx* cannot apply retroactively here because defendant's conviction had already become final when *Nyx* was decided.

of Appeals was clearly erroneous or that defendant has suffered any injustice in this case. Further, my reasons for a denial here are the same as those stated in Justice CORRIGAN's dissenting statement in *People v Francisco,* 474 Mich 82, 93-95 (2006), which I joined.

CORRIGAN, J. (*dissenting*). I would deny defendant's application for leave to appeal. At sentencing, defendant did not challenge the court's determination that he had one prior conviction for a high-severity felony. Rather, defense counsel specifically approved the court's scoring decisions and the resulting minimum guidelines range. On appeal, defendant presents no evidence concerning the nature of the Texas conviction, listed only as "assault threatening bodily injury," or why that conviction does not qualify as one for a high-severity felony. Further, if we accept defendant's belated, unsupported claim that he should not have received 25 points for prior record variable 1, his guidelines minimum-sentence range changes only slightly, from 135-225 months to 126-210 months. Significantly, his minimum sentence of 180 months' imprisonment falls into the corrected, lower range. Accordingly, this case exemplifies the waste of judicial resources occasioned by this Court's opinion in *People v Francisco,* 474 Mich 82 (2006), which requires resentencing whenever correction of a scoring error changes the guidelines minimum-sentence range, even if the defendant's minimum sentence falls into the corrected range. I reiterate my dissenting position in *Francisco*, *supra* at 93-95, that a remand is not required by MCL 769.34(10) under these circumstances.

In re KYLE (DEPARTMENT OF HUMAN SERVICES V KYLE), No. 135465. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court, Family Division, for a trial on the petition pursuant to MCR 3.972 and MCL 712A.17. The circuit court is permitted to conduct a "preliminary inquiry" off the record "[w]hen a petition is not accompanied by a request for placement of the child and the child is not in temporary custody." MCR 3.962(A). The permissible actions following a preliminary inquiry are limited to granting or denying authorization to file the petition, or referring the matter to "alternative services." See MCR 3.962(B)(1)-(3). Granting permission to file the petition is merely a determination that the petition is sufficient to be "delivered to, and accepted by, the clerk of the court." See MCR 3.903(A)(20) (defining "Petition authorized to be filed") and MCR 3.903(A)(9) (defining when a petition is deemed "filed"). Referring the matter to "alternative services" does not include granting the only relief sought by the petition. Although the Court of Appeals was aware that a medical examination "was the sole focus of the petition and the only demand sought by petitioner," it concluded that the circuit court was in "compliance" with MCR 3.962(B)(2) and (3) when it ordered the medical examination without a trial on the petition. The Court of Appeals erred in concluding that the preliminary inquiry procedure provided authority for granting the relief sought by the petition without a trial pursuant to MCR 3.972 and MCL 712A.17. Accordingly, we reverse the judgment of Court of Appeals and

remand this case to the Wayne Circuit Court, Family Division, for further proceedings consistent with this order. We do not retain jurisdiction. Court of Appeals No. 271320.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. I would grant leave to appeal.

PEOPLE V JERRY MOORE, No. 135576. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part the judgment of the Court of Appeals finding insufficient evidence that the defendant possessed a firearm and overturning his conviction for being a felon in possession of a firearm. The jury could reasonably infer that the defendant exercised control over the firearm by eluding the police until his passenger could dispose of the firearm. *People v Hill*, 433 Mich 464 (1989). We remand this case to the Court of Appeals for further proceedings not inconsistent with this order, including consideration of other issues raised by the defendant in his appeal of right. 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. 271928.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the majority's decision to reinstate defendant's conviction of being a felon in possession of a firearm on the basis that the evidence was sufficient that defendant possessed a firearm. I dissent, however, from the majority's decision to deny the part of the prosecution's application for leave to appeal arguing that the Court of Appeals erred in remanding the case for resentencing.

Defendant was convicted of third-degree fleeing and eluding a police officer and felon in possession of a firearm. At sentencing, the trial court incorrectly stated that it had the power to impose consecutive sentences. Defendant did not object to this statement. Despite the trial court's statement, it nonetheless imposed concurrent sentences that were within the sentencing guidelines range. The Court of Appeals held that defendant was entitled to resentencing because his sentence was based on inaccurate information (i.e., the trial court's mere belief that it could impose consecutive sentences). This case truly presents a textbook example of harmless error.

In my opinion, the Court of Appeals incorrectly held that defendant was entitled to resentencing because of inaccurate information. If a sentence is within the appropriate guidelines range (as defendant's was), a defendant is precluded from raising on appeal an issue challenging the accuracy of the information relied upon in sentencing unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10)[1]; *People v Francisco*, 474 Mich 82, 88-89 (2006), citing *People v Kimble*, 470 Mich 305, 310-311 (2004). If

[1] MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the

the sentence is within the appropriate guidelines range and the defendant failed to previously raise the sentencing error, "the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel." *Francisco*, *supra* at 90 n 8.

Defendant does not dispute that the trial court sentenced defendant within the appropriate guidelines range. Therefore, under MCL 769.34(10), defendant could argue on appeal that his sentence was based on inaccurate information only if he properly preserved the issue by raising the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals. Defendant failed to take the statutorily required steps to preserve this issue. Defendant did not object at sentencing to the trial court's statement that he was subject to consecutive sentencing. Although defendant raised the issue in a motion for resentencing[2] in the trial court and a motion to remand in the Court of Appeals, both motions were late. See MCR 6.429(B)(2).[3] In fact, defendant filed these motions *after* he filed his claim of appeal in the Court of Appeals. Because the motions were untimely, defendant did not preserve the issue by raising it in a *proper* motion for resentencing or a *proper* motion to remand. See *People v Walker*, 428 Mich 261, 266 (1987) (to preserve a scoring issue for appeal, a defendant's motion to remand in the Court of Appeals must be timely). Thus, defendant is precluded under MCL 769.34(10) from challenging the accuracy of the information relied on in imposing his sentence.[4] I would reverse the Court of Appeals holding that defendant is entitled to resentencing.

KELLY, J., would deny leave to appeal.

> sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. *A party shall not raise on appeal an issue* challenging the scoring of the sentencing guidelines or *challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals*. [Emphasis added.]

[2] Defendant actually wrote the trial judge a letter, but the trial court treated the letter as a motion to correct the presentence investigation report.

[3] MCR 6.429(B)(2) provides, "If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1)." Both defendant's motion for resentencing and motion for remand were late under MCR 6.429(B)(2).

[4] This case is distinguishable from *Francisco*. In *Francisco*, *supra* at 89, this Court considered the defendant's challenge to the offense variables because the defendant preserved the issue at sentencing. In the instant case, defendant did not preserve the sentencing issue. Further, in *Francisco*, this Court remanded for resentencing because the trial court's scoring error affected the guidelines range. In the instant case, the trial court's erroneous belief that defendant was subject to consecutive sentencing did not affect the guidelines range.

Leave to Appeal Denied April 4, 2008:

In re STIENKE (DEPARTMENT OF HUMAN SERVICES v DELANO), Nos. 136046, 136047. Court of Appeals Nos. 279185, 279212.

Summary Dispositions April 9, 2008:

GEE v ARTHUR B MYR INDUSTRIES, INC, No. 133762. On January 9, 2008, the Court heard oral argument on the application for leave to appeal the March 15, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals that res judicata did not bar the plaintiff's second application for attendant care benefits. The Workers' Compensation Appellate Commission (WCAC) denied the plaintiff's initial claim because the plaintiff failed to present proof on a required element of that claim. This decision of the WCAC became a final order. In his second application, the plaintiff did not claim and the WCAC did not find that the plaintiff's condition had changed for the worse. As a result, the Court of Appeals erred in concluding that the plaintiff's claim of attendant care benefits "was not an issue that was, or even could have been adjudicated in the initial proceeding." In addition, the Court of Appeals erred by concluding that this case is governed by *Ivezaj v Federal Mogul (On Remand)*, 197 Mich App 462 (1992). The record shows that the award of attendant care benefits was based on an application by the plaintiff and not the providers of care. First, the record shows that although the care providers filed their applications 11 days before the hearing on the plaintiff's second application, defendant was not served with the care providers-applications until November 18, 2003, two months after the magistrate's decision was mailed on September 11, 2003. Second, the magistrate's award was made retroactive to one year before plaintiff's application was filed, not one year before the care providers' applications were filed. See MCL 418.381(3). And third, none of the case captions in the lower courts have listed the care providers as parties, and the care providers did not testify at the hearing on the plaintiff's second application. As a result, the plaintiff's second claim is barred by res judicata. Court of Appeals No. 269351.

WEAVER, J. (*dissenting*). I would deny leave to appeal and dissent from the peremptory order reversing the judgment of the Court of Appeals for the reasons stated in the Court of Appeals opinion, *Gee v Arthur B. Myr Industries, Inc*, unpublished opinion per curiam, issued March 15, 2007 (Docket No. 269351):

> This case comes to this Court on remand from our Supreme Court. Defendant appeals an April 12, 2005, order of the Worker's Compensation Appellate Commission ("WCAC") that affirmed a magistrate's award of attendant care benefits. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).
>
> The WCAC summarized the procedural history of this case as follows:
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> "Plaintiff initially injured his low back in the course of his employment with defendant on August 10, 1992. Benefits for that injury were paid voluntarily. Plaintiff filed an Application for Mediation or Hearing with the Bureau on March 27, 2000, claiming that he

was totally and permanently disabled due to the residuals of the low back injury. By decision mailed July 9, 2001, Magistrate Barney found an injury date of August 10, 1992, ongoing disability resulting therefrom, further finding reflex sympathetic dystrophy (RSD) to be related to the 8/10/92 injury and awarded total and permanent disability benefits (T&P). The magistrate also ordered 'reasonable medical treatment related to plaintiff's injury.' Testimony on this issue of attendant care was taken at that time. However, the magistrate made no specific findings pertaining to attendant care.

"Both parties appealed the magistrate's July 9, 2001 decision to the Commission. The main issue of that appeal was attendant care. Then-Commissioner Pryzbylo framed the arguments raised by the parties thusly:

'Plaintiff and defendant appeal the decision of Magistrate Michael Barney, mailed July 9, 2001, granting plaintiff total and permanent disability benefits for his various conditions. Both parties present issues related to attendant care benefits. Plaintiff argues that the magistrate erred when he failed to include a ruling on plaintiff's request for attendant care benefits. To rectify the alleged error, plaintiff requests a remand that includes the opportunity to present further proof on the issue. Defendant responds arguing that plaintiff failed to enter any proofs of an appropriate rate for attendant care and that the magistrate properly refused to order benefits because of that failure.'

"Noting that the magistrate 'did not directly rule on plaintiff's request for attendant care benefits,' the Commission provided the following rationale defending the magistrate's treatment of this issue:

'We find no error in the magistrate's procedure. Section 315 requires plaintiff to prove the reasonableness of any medical expense. Reasonableness includes an evaluation of the dollar amount involved. As the magistrate noted, plaintiff provided no proof of the cost. Without that proof, the magistrate properly excluded attendant care benefits. Recognizing his failure in proving the reasonableness of the attendant care, plaintiff requests a remand that allows him to enter the necessary proofs. Such remand would improperly advantage plaintiff and disadvantage defendant. We cannot ignore the legal consequence of plaintiff resting on his proofs at the conclusion of all hearings.'

"Both the Court of Appeals and Supreme Court denied plaintiff's subsequent Applications for leave to appeal the Commission's opinion. [*Gee v Arthur B. Myr Industries, Inc*, 2005 Mich ACO 101, p 2-3 (footnotes omitted).]"

Subsequently, plaintiff, his wife, and his mother filed applications seeking attendant care benefits. At a hearing on those applications, plaintiff presented the testimony of a registered nurse who opined that plaintiff needed 56 hours of attendant care per week to assist with bathing, grooming, meal preparation, and mobility. Plaintiff

testified that his condition had progressively deteriorated since the initial proceedings, and that he spent virtually all of his time in the house, and 90% of that time in his bed, due to a lack of mobility. Plaintiff indicated that he did not want strangers in his home, and requested that the care his mother, wife, and daughter provided be recognized as compensable attendant care. Defendant presented the testimony of a registered nurse who opined that plaintiff was in need of attendant care services, but not necessarily for eight hours per day.

The magistrate concluded that, contrary to defendant's contention, the applications for attendant care benefits were not barred by res judicata. On the res judicata issue, the magistrate considered *Barnowsky v General Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2001 (Docket No. 231169), to be "instructive," and *Ivezaj v Federal Mogul Corporation (On Remand)*, 197 Mich App 462, 464; 495 NW2d 800 (1992), to be "controlling." The magistrate concluded that plaintiff was entitled to attendant care benefits.

Defendant appealed the magistrate's award of attendant care benefits to the WCAC, and argued that the petitions for attendant care benefits were barred by res judicata. The WCAC disagreed and concluded that the magistrate's analysis and conclusions were proper.

Defendant sought leave to appeal to this Court, raising, among other things, a res judicata issue. Defendant's application for leave to appeal was denied for lack of merit in the grounds presented.[1]

Defendant then filed an application for leave to appeal to our Supreme Court. Our Supreme Court issued the following order:

"[P]ursuant 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 current claim for attendant care benefits under MCL 418.315(1) is barred by the doctrine of res judicata. 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. [*Gee v Arthur B Myr Industries, Inc*., 474 Mich 1098; 711 NW2d 75 (2006).]"

The issue of whether res judicata is applicable is a question of law that we review de novo. See *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229; 720 NW2d 756 (2006). In *Banks*, *supra* at 229-230, this Court discussed res judicata as it applied to worker's compensation cases:

"The doctrine of res judicata applies to workers' compensation awards, because requiring the worker to 'present all of his available claims in a single proceeding is consistent with this purpose of adjudicating the worker's needs.' *Gose v Monroe Auto Equip Co*, 409 Mich 147, 162; 294 NW2d 165 (1980). A workers' compensation award is generally considered an adjudication of the injured worker's condition at the time it is entered, and it is ' "conclusive of all matters adjudicable at that time . . . ." ' *Hlady v Wolverine Bolt Co*, 393 Mich 368, 375-376; 224 NW2d 856 (1975), quoting 58 Am Jur,

Workmen's Compensation, § 508. However, a claimant may later raise a different claim or modify an existing award if the employee's physical condition worsens. *Hlady*, *supra* at 376. These rules presuppose that some claims, although originating before the final award, are not 'adjudicable' or 'available' to the litigant in one, initial adjudication."

We find no error warranting reversal. First, as noted by the magistrate and the WCAC, this Court has recognized that where a family member of an injured employee files a claim for reimbursement for nursing services provided to the injured employee in his or her own name, and not as a subrogee of the injured employee, res judicata is inapplicable. *Ivezaj*, *supra* at 464. In this case, plaintiff's wife and mother each filed her own application for attendant care benefits. As a result, under *Ivezaj*, *supra*, we find no legal error in the WCAC's conclusion that the doctrine of res judicata was inapplicable to the magistrate's granting of payment for attendant care to plaintiff's wife and mother.

Furthermore, the holding in *Ivezaj*, *supra*, notwithstanding, we find res judicata to be inapplicable because there has been a change in plaintiff's condition since the initial proceedings. As noted in *Banks*, *supra*, a claimant may later raise a different claim or modify an existing award if the employee's physical condition worsens. This is consistent with the general principle that res judicata is not a bar to a subsequent action where facts change or new facts develop. See *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997), overruled in part on other grounds, 462 Mich 341 (2000). Here, plaintiff testified that his condition had worsened since 2001, and that was less able to care for himself than he was the last time he testified. Therefore, due to a change in facts, specifically the worsening of plaintiff's condition, the issue of plaintiff's current need for attendant care was not an issue that was, or even could have been, adjudicated in the initial proceedings.[2]

Affirmed.

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[1] *Gee v Arthur B. Myr Industries, Inc*, unpublished order of the Court of Appeals, entered August 29, 2005 (Docket No. 262691).

[2] Defendant claims that the magistrate and the WCAC erred in relying upon *Barnowsky*, *supra*. However, because we find res judicata to be inapplicable notwithstanding *Barnowsky*, *supra*, we need not address this claim.

KELLY, J. (*dissenting*). The workers' compensation magistrate found that the award was based on the applications for attendant-care benefits filed by plaintiff's wife and mother. Not until it applied for leave in this Court did defendant argue that the magistrate erroneously relied on these applications. Therefore, I would not reverse on this basis. I would affirm the judgment of the Court of Appeals.

PEOPLE v ANTOINE THOMAS, No. 135195. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals and direct that court to decide whether to grant, deny, or order other relief in accordance with MCR 7.205(D)(2). In its August 21, 2007, order, the Court of Appeals "assume[ed]" that defendant's motion for resentencing was timely, in part, because the motion "was filed within 12 months of the last counsel's appointment." Thus, the court appears to have restarted the 12-month period prescribed by MCR 7.205(F)(3) from the date of appointment in light of defendant's otherwise untimely request for counsel under *Halbert v Michigan,* 545 US 605 (2005); the court similarly restarted the 12-month period from the date of appointment in *Halbert. People v Halbert,* unpublished order of the Court of Appeals, issued August 31, 2005 (Docket No. 244756) (granting a period of 12 months from the date of appointment "for filing any appropriate motions in the trial court or for filing an application for leave to appeal with the Court of Appeals"). Appellate counsel filed both the motion for resentencing and an application for late appeal within the 12-month period. Accordingly, counsel did not need to adhere to the requirements of MCR 7.205(F)(4), which outlines *exceptions* to subrule F(3) that *extend* the 12-month period for late appeal under certain circumstances. Because MCR 7.205(F)(4) was inapplicable in this case, the Court of Appeals erred by dismissing defendant's application for failure to meet the requirements of this rule. We do not retain jurisdiction. Court of Appeals No. 279702.

GREENWALD v GREENWALD, No. 135299. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment in part and remand this case to the Oakland Circuit Court for further proceedings consistent with this order. In addition to the factual issue identified by the Court of Appeals regarding the wrongful conduct doctrine, an issue of material fact exists regarding whether defendant's contact with UBS Financial Services, Inc., was justified. This Court has held that "the intentional and knowing inducement of a party to break his contract with another party is a wrongful act, and actionable as such, *unless* reasonable justification or excuse can be shown." *Bahr v Miller Bros Creamery*, 365 Mich 415, 422 (1961) (emphasis added). The Court of Appeals erred in holding that defendant's contact with UBS was per se wrongful. The Court of Appeals defined per se wrongful as "an act that is inherently wrongful or one that is never justified under any circumstances." *Formall v Comm Nat'l Bank*, 166 Mich App 772, 780 (1988). This Court has explained that "[n]o categorical answer can be made to the question of what will constitute justification, and it is usually held that this question is one for the jury." *Wilkinson v Powe*, 300 Mich 275, 283 (1942), citing cases cited in 84 ALR 43, 81. Justification exists where the defendant acted on an "equal or superior right." See 84 ALR 43, 80; *Feldman v Green*, 138 Mich App 360, 378 (1984); see also *Wilkinson*, *supra* at 283 (using "superior or absolute" right). A question of material fact exists regarding whether defendant was justified in contacting UBS and informing it of plaintiff's alleged fraudulent conduct to protect her own legal interests and/or to avoid or remedy harm to UBS. Accordingly, we reverse the portion of the Court of Appeals judgment holding that defendant's conduct was per se wrongful and remand this matter to the Oakland Circuit Court for further proceedings consistent with this order and with the remainder of the Court of Appeals opinion. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 265814.

Affirmance April 9, 2008:

BRAVERMAN v GARDEN CITY HOSPITAL, Nos. 134445, 134446. By order of September 26, 2007, we granted leave to appeal the June 5, 2007, judgment of the Court of Appeals conflict panel. Having considered the briefs and having heard oral arguments on January 8, 2008, we affirm the judgment of the Court of Appeals conflict panel. Plaintiff initially contends that *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007), saves her complaint. *Mullins*, however, does not apply to this case because the saving period did not expire "between the date that *Omelenchuk* [*v City of Warren*, 461 Mich 567 (2000)] was decided and within 182 days after *Waltz* [*v Wyse*, 469 Mich 642 (2004)] was decided." *Mullins*, *supra* at 948. Nevertheless, plaintiff's complaint, filed by the successor personal representative within two years of his appointment, was timely under *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29 (2003).[1] Moreover, plaintiff, as successor personal representative, may rely on the notice of intent filed by the previous personal representative because the office of personal representative is a "person" under MCL 600.2912b. *Res judicata* does not bar plaintiff's complaint because no lawsuit filed prior to the present case was dismissed with prejudice. Moreover, the subsequent lawsuit was dismissed solely because the present lawsuit was pending. *Washington v Sinai Hosp*, 478 Mich 412 (2007). 275 Mich App 705.

Reconsideration Denied April 9, 2008:

RODRIGUEZ v ASE INDUSTRIES, INC, No. 133686. Leave to appeal denied at 480 Mich 1108. Reported below: 275 Mich App 8.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

Leave to Appeal Denied April 9, 2008:

MATHER INVESTORS, LLC v LARSON, No. 131654. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of

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[1] Defendants argue that *Lindsey v Harper Hosp*, 455 Mich 56 (1997), should apply. However, *Lindsey* relied on the Revised Probate Code, and in particular on then-current MCL 700.179, which indicated that a temporary personal representative who was reappointed personal representative "shall be accountable as though he were the personal representative from the date of appointment as temporary personal representative." *Lindsey*, *supra* at 66. After *Lindsey* was decided, the Revised Probate Code was repealed and replaced by the Estates and Protected Individuals Code. MCL 700.8102(c). The Estates and Protected Individuals Code does not contain a provision similar to MCL 700.179. Therefore, the holding of *Lindsey*, which relied on this statutory provision, no longer controls.

the parties having been considered by the Court, we vacate our order of June 1, 2007. The application for leave to appeal the June 6, 2006, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Reported below: 271 Mich App 254.

MARKMAN, J. (*dissenting*).I respectfully dissent. The deceased debtor, Alice Maddock, owed approximately $53,000 for nursing services rendered at plaintiff's nursing home. While incurring this debt, Maddock transferred approximately $63,000 worth of real estate assets and bank-account funds to defendant, Maddock's nephew, for no consideration, thereby leaving Maddock unable to pay her bills. Plaintiff filed suit against the nephew, but failed to join the deceased debtor's estate, which had never been opened. The central issue in this case is whether a plaintiff creditor seeking to recover for a fraudulent transfer of assets must join the debtor as a defendant, or whether the creditor may file suit solely against the transferee. In my judgment, the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*., does not require a creditor to join the debtor in a suit filed against the transferee of a fraudulently transferred asset. Hence, the trial court and the Court of Appeals erred in concluding that the debtor's estate was a necessary party. For these reasons, I would reverse the Court of Appeals judgment and remand the case to the trial court for further proceedings.

Under UFTA, a creditor must establish that "[a] transfer made . . . by a debtor is fraudulent." MCL 566.34(1). A "debtor" is "a person who is *liable* on a claim." MCL 566.31(f) (emphasis added). We have stated that "one becomes liable for the payment of services once those services have been rendered." *Community Resource Consultants v Progressive Michigan Ins Co*, 480 Mich 1097, 1098 (2008). Here, because Maddock incurred $53,000 in costs for services at plaintiff's nursing home, Maddock was "liable" for those services, and hence Maddock qualifies as a "debtor" under UFTA.

Having established that Maddock is a "debtor," I next consider MCL 566.38(2), which indicates against whom a judgment under UFTA may be rendered:

> [T]o the extent a transfer is voidable in an action by a creditor under [MCL 566.37(1)(a)], the creditor may recover a judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against either of the following:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made.
>
> (b) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

MCL 566.38(2)(a) thus indicates that a creditor may pursue an action under UFTA solely against the "first transferee" of the asset. Moreover, MCL 566.31(c) defines the term "claim" as "a right to payment, whether or not the right is reduced to judgment . . . disputed [or] undisputed . . . ." Because a creditor may, before the right to payment is reduced to judgment, sue the transferee alone, these statutes indicate that a debtor is not a necessary party in a UFTA action.

This conclusion is bolstered by MCL 566.37, which states:

> (1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in section 8, may obtain 1 or more of the following:
>
> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
>
> (b) An attachment against the asset transferred or other property of the transferee to the extent authorized under section 4001 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4001, and applicable court rules.
>
> (c) Subject to applicable principles of equity and in accordance with applicable court rules and statutes, 1 or more of the following:
>
> (i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property.
>
> (ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee.
>
> (iii) Any other relief the court determines appropriate.
>
> (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

MCL 566.37(1) lays out the general relief that any party seeking relief under UFTA may obtain: for example, an avoidance of the transfer, an attachment, an injunction, or the appointment of a receiver. MCL 566.37(2) then establishes specific relief that is only available "[i]f a creditor has obtained a judgment on a claim against the debtor . . . ." This phrase indicates that the relief available under MCL 566.37(1) may be granted in the absence of a judgment against the debtor. Once a judgment against the debtor is secured, the creditor may then obtain the further relief of execution on the assets. Thus, the relief available under UFTA further evidences that a debtor is not a necessary party to a UFTA action.

The effect of the Court of Appeals decision will be to impose an unwarranted burden on creditors who are attempting to collect legitimate business debts. Given the fungibility of assets in modern commerce, the Legislature could have reasonably chosen to loosen the requirements for a creditor's suit when a debtor's assets have been fraudulently transferred. Thus, UFTA permits a creditor who believes that a fraudulent transfer has taken place to quickly obtain an attachment on the fraudulently transferred assets, before the transferee can dispose of the assets and further hamper the creditor's efforts to recover. Such a creditor may then subsequently bring a second action against the debtor on the underlying liability in order to obtain execution on the assets under MCL 566.37(2). This system is not overly burdensome on transferees, because if a creditor obtains an attachment under UFTA, but is unable to subsequently secure a judgment against the debtor, the

transferee may petition the trial court to void the attachment. Although this system may permit a creditor to cloud a transferee's title for some time, such an allocation of burdens is within the purview of the Legislature. Because the Legislature chose to allow a creditor to file a UFTA suit solely against a transferee, the duty of this Court lies in enforcing that legislative decision.

In my judgment, the relevant statutes clearly indicate that a debtor is not a necessary party to a UFTA action. Accordingly, I would reverse the contrary holding of the Court of Appeals and remand this case to the trial court for further proceedings.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE V LANCE HOPKINS, No. 134953; Court of Appeals No. 279281.

JOHNSON V SMITH, No. 135418; Court of Appeals No. 270906.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE V SEVERE, No. 135580; Court of Appeals No. 270913.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

Summary Dispositions April 11, 2008:

PEOPLE V MCDANIEL, No. 132805. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Oakland Circuit Court. The defendant began serving his sentence in this case no later than the date of his original sentencing proceeding on September 26, 2003. That sentence was later vacated as an unwarranted departure from the statutory sentencing guidelines. As a result, the court was required to grant the defendant credit for time served on the void sentence the defendant was serving while his appeal was pending, i.e., for time served between the date of the original sentencing and the date of the resentencing. MCL 769.11a; MCL 769.34(12). On remand, the circuit court shall determine the appropriate amount of credit due and amend the defendant's judgment of sentence to reflect the proper amount of credit for time served. We do not retain jurisdiction. Court of Appeals No. 264706.

KELLY, J. (*concurring in part and dissenting in part*). I would grant leave to appeal in this case. Defendant is clearly entitled to the relief available under MCL 769.11a and MCL 769.34(12). However, I believe this Court should address the broader sentencing questions raised in cases like this one involving prisoners who have committed a felony while on parole. The parole board has failed to determine how much of the remaining portion of the term of imprisonment imposed for the previous offense must be served by such a defendant. Justice MARKMAN and I explained in *People v Wright*[1] and *People v Conway*[2] that this leads to arbitrary and inconsis

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[1] *People v Wright,* 474 Mich 1138 (2006).

[2] *People v Conway,* 474 Mich 1140 (2006).

tent results. These issues are complicated, and confusion about them abounds among judges and members of the bar alike. We should take the opportunity presented here to explore these issues.

ORAM v ORAM, No. 134670. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse part III of the Court of Appeals judgment. "[D]ismissal of a case for failure to comply with the court's orders is . . . reviewed for an abuse of discretion." *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006). Such an abuse occurs "when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158 (2007). The plaintiff demonstrated that his attorney was unable to proceed to trial due to illness and that the circuit court's law clerk indicated to the attorney's doctor that the doctor's presence at the November 17, 2005, hearing was not required. In light of these facts, we conclude that dismissal of the plaintiff's case based on the doctor's failure to appear at the November 17, 2005, hearing was "outside the range of principled outcomes." We also reverse part VIII of the Court of Appeals judgment. Case evaluation sanctions were not properly entered because the dismissal order was not a "verdict" as defined by MCR 2.403(O)(4). We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 267077.

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the reversal of part VIII of the Court of Appeals judgment. I dissent from the reversal of part III of the Court of Appeals judgment for the reasons stated by the Court of Appeals in part III of its opinion.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in the reversal of part VIII of the Court of Appeals judgment because the dismissal order was not a "verdict" as defined in MCR 2.403(O)(4). I dissent from the reversal of part III of the Court of Appeals judgment. I would not overturn the Court of Appeals conclusion that the trial court did not abuse its discretion in dismissing the case where (1) plaintiff's counsel was unprepared for trial after numerous previous adjournments, (2) counsel failed to comply with the court's direct order to produce his doctor to testify regarding counsel's alleged incapacity, and (3) the litigation had already been significantly delayed.

Trial courts possess inherent authority to sanction litigants and their attorneys, including the power to dismiss a case. "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases." *Maldonado v Ford Motor Co*, 476 Mich 372, 376 (2006). Moreover, MCL 600.611 grants circuit courts "jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments," and MCR 2.504(B)(1) provides that if a plaintiff fails to comply with court rules or a court order, a defendant may move to dismiss the action.

A court's decision to dismiss a case is reviewed for an abuse of discretion. *Maldonado*, *supra* at 388. Such an abuse occurs "when the

decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158 (2007).

In *Vicencio v Ramirez,* 211 Mich App 501, 506 (1995), the Court of Appeals held that, before dismissing a case, a trial court must "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." Under *Vicencio*, a court must evaluate (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id*. at 507.

I find no basis for *Vicencio*'s qualifications on a court's authority to dismiss a case.[1] In any event, the Court of Appeals here adequately articulated why the dismissal fell within the range of principled outcomes:

> We acknowledge that the trial court did not specifically examine each of [the *Vicencio*] factors on the record. Nevertheless, in light of the unique facts of this case, we cannot conclude that the court abused its discretion in failing to do so. At the time of dismissal, there already existed a substantial history of deliberate delay. As noted, the parties had sought to adjourn the trial date numerous times, and it appears after a thorough review of the record that plaintiff was attempting to intentionally stall the proceedings so that he could gain certain advantages by driving up fees and interest. Moreover, plaintiff had already shown a pattern of failing to comply with court orders, most markedly by refusing to cooperate with the receiver and by continuing to seek vexing and increasingly cumulative discovery. Indeed, trial had been adjourned so many times that it seemed the parties no longer wanted to continue with this action. They had effectively fallen into a holding pattern, and little was accomplished in terms of actual litigation for months at a time. Any sanction less than dismissal would not have been useful, merely prolonging the sluggish evolution of this case and allowing the costs of litigation to mount. Finally, we cannot omit mention of the fact that the trial court gave plaintiff a second chance in this matter. The order of dismissal was not issued when plaintiff's counsel first failed to appear on November 15, 2005, but only after plaintiff violated the trial court's second order by failing to proceed with trial on

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[1] This Court's order does not cite or apply *Vicencio*. In an appropriate case, we should consider whether to accept or reject the *Vicencio* requirements.

November 17, 2005. [*Oram v Oram*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 267077), slip op at 12.]

I would not upset the Court of Appeals conclusion that the dismissal fell within the range of principled outcomes. After an already significant history of delay in this case, counsel failed to appear for trial and then passed on another opportunity two days later to either (1) try the case or (2) present his doctor to testify regarding his medical condition. Counsel instead came to court (1) unprepared to try the case and (2) without his doctor. On these facts, the dismissal fell within the range of principled outcomes.

It was not until after the dismissal, and on motion for reconsideration, that counsel's doctor provided a sworn statement that the court's law clerk had orally promised to call him if he needed to appear on the second trial date. Even accepting the doctor's uncorroborated statement, it does not excuse *counsel's* failure to comply with the court's written order. Moreover, no evidence of the law clerk's alleged oral promise to call the doctor was ever presented during the hearing preceding the dismissal. Rather, the doctor's sworn statement was taken only *after the court had already dismissed the case*.

Accordingly, in light of the substantial history of deliberate delay and plaintiff's counsel's failure to either try the case or produce his doctor, I would hold that the trial court did not abuse its discretion in dismissing the action.

Leave to Appeal Denied April 11, 2008:

In re CHURCH (DEPARTMENT OF HUMAN SERVICES v CHURCH) No. 1, No. 135962; Court of Appeals No. 276508.

In re SCHNEIDER (DEPARTMENT OF HUMAN SERVICES v SIKORA), No. 136100; Court of Appeals No. 278694.

MACOMB TOWNSHIP v MICHAELS, No 136134, Court of Appeals No. 284479.

Leave to Appeal Denied April 18, 2008:

PEOPLE v HOULIHAN, No. 128340. By order of December 16, 2005, the application for leave to appeal the February 10, 2005, order of the Court of Appeals was held in abeyance pending the decision in *Simmons v Metrish,* Docket No. 03-2609, which was pending in the United States Court of Appeals for the Sixth Circuit, on remand from the United States Supreme Court for reconsideration in light of *Halbert v Michigan,* 545 US 605 (2005). On order of the Court, the case having been decided on February 15, 2008, *Simmons v Kapture,* 516 F3d 450 (CA 6, 2008), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 256534.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). In December 2003, Mr. Houlihan filed a motion in the trial court for relief from his judgment of conviction. He argued that he was not required to show good cause for obtaining the relief because he was indigent and had been refused a court-appointed attorney to appeal his conviction. The trial court denied his motion, and the Court of Appeals denied his application for leave to appeal.[1] Defendant sought relief from the judgment in this Court. We heard argument on the application for the purpose of determining whether the United States Supreme Court's decision in *Halbert v Michigan*[2] applied retroactively to defendant's motion for relief from judgment.[3] *Halbert* held that indigent defendants who are convicted after pleading guilty or nolo contendere are entitled to appointed appellate counsel for first-tier review. *Halbert* overruled this Court's decisions in *People v Harris*[4] and *People v Bulger*.[5]

Following argument, we held this case in abeyance pending the Sixth Circuit Court of Appeals decision in *Simmons v Kapture*.[6] Initially, the panel in *Simmons* found that the *Halbert* decision applied retroactively to cases in which review is sought on a writ of habeas corpus.[7] However, after granting rehearing *en banc*, the court found that *Halbert* did not apply retroactively.[8] In reliance on that decision, a majority of this Court denies leave to appeal in this case. I disagree with the denial for two reasons.

First, the defendant in *Simmons* yet may file a petition for certiorari in the United States Supreme Court. This Court should hold Mr. Houlihan's case in abeyance until the time for filing the petition in *Simmons* has expired. If the defendant in *Simmons* files a petition for certiorari, this case should be held in abeyance until the United States Supreme Court acts on the petition. Because *Halbert* is an important decision that could afford relief to many defendants, whether it applies retroactively is a question of great significance. For that reason, there is a strong possibility that the United States Supreme Court will be asked to consider and will consider the *Simmons* case. Even if it does not, no harm will come from holding this case in abeyance pending the final resolution of *Simmons*.

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[1] Unpublished order of the Court of Appeals, issued February 10, 2005 (Docket No. 256534).

[2] *Halbert v Michigan,* 545 US 605, 609-610 (2005).

[3] 474 Mich 866 (2005).

[4] *People v Harris,* 470 Mich 882 (2004). I dissented from the Court's decision denying the appointment of appellate counsel.

[5] *People v Bulger,* 462 Mich 495 (2000). I joined Justice CAVANAGH's opinion dissenting from the majority decision.

[6] 474 Mich 958 (2005).

[7] 474 F3d 869 (CA 6, 2007).

[8] *Simmons v Kapture*, 516 F3d 450 (CA 6, 2008).

My second reason for disagreeing with the denial order in this matter is that I believe this Court should consider whether *Halbert* applies retroactively under Michigan law. This year in *Danforth v Minnesota*,[9] the United States Supreme Court held that the federal retroactivity standard "limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide" broader remedies for federal constitutional violations.[10] Clearly, the remedy a state court provides for violations of the federal constitution is a question of state law. Accordingly, regardless of whether the federal courts apply *Halbert* retroactively, we can apply the rule announced in *Halbert* retroactively if we so decide. We should grant leave to consider whether *Halbert* applies retroactively under Michigan law.[11]

Appeal Dismissed April 18, 2008:

MCLAIN V PORTELL, No. 135229. 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. 278005.

Leave to Appeal Granted April 23, 2008:

PEOPLE V LINCOLN WATKINS, No. 135787. The parties shall include among the issues to be briefed: (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, § 1 and § 5; (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b[1]), while mandating that propensity evidence "is admissible for any purpose for which it is relevant," violated defendant's due process right to a fair trial; (4) whether the Court should rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403; and (5) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae.

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[9] *Danforth v Minnesota*, ___ US ___; 128 S Ct 1029 (2008).

[10] *Id*. at 1042. This holding makes great sense because, as recognized by the *Danforth* Court, the federal retroactivity standard is based on an interpretation of the federal habeas statute.

[11] An April 1, 2008, report of the State Court Administrative Office indicates that many Michigan trial courts have been applying *Halbert* retroactively.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 277 Mich App 358.

Summary Dispositions April 23, 2008:

VANFAROWE V CASCADE CHARTER TOWNSHIP, No. 135507. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals stating that remand is required "[b]ecause the trial court proceeded to resolve the case on briefs without entertaining testimony regarding the usage and whether it falls within the applicable case law . . . ." This was an appeal to the circuit court under a zoning ordinance providing for no appeal to a zoning board of appeals from the decision of the township board, so the proper remand for further evidentiary proceedings is to the township board, not to the circuit court. *Macenas v Village of Michiana*, 433 Mich 380, 394-397 (1989); *Sportsman's Club v Exeter Twp*, 217 Mich App 195, 198-201, 202 (1996). To the extent that further evidentiary hearings are necessary on remand, such hearings must be held before the Township Board. See *Sportsman's Club*, *supra* at 199-200; MCL 125.290(1); MCL 125.293a(2). In all other respects, the application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 264189.

PATTERSON V DELPHI CORPORATION, No. 135689. 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. On remand, the Court of Appeals shall consider whether the Workers' Compensation Appellate Commission (WCAC) majority committed legal error by applying the wrong standard of proof and, if so, whether this error was nonetheless harmless. MCL 418.851 provides that "[a] claimant shall prove his or her entitlement to compensation and benefits under this act by a preponderance of the evidence." The Court of Appeals shall determine whether the WCAC evaluated the evidence from the perspective that, once a magistrate has determined that a claimant is suffering from a work-related disability for any period, the claimant remains entitled to workers' compensation benefits absent direct proof of recovery from that disability; if so, this would not describe the correct standard of proof. Simply because a claimant meets the burden of proof for one period does not mean that he or she necessarily meets that burden for all periods until proven otherwise. Rather, the claimant has the burden at all times of proving his or her entitlement to benefits by a preponderance of the evidence. Court of Appeals No. 278823.

Leave to Appeal Denied April 23, 2008:

PEOPLE V CHAHINE, No. 133685; Court of Appeals No. 263429.

DAWSON v SECRETARY OF STATE, No. 133761; reported below: 274 Mich App 723.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

DOBBELAERE v AUTO-OWNERS INSURANCE COMPANY, Nos. 134600, 134601; reported below: 275 Mich App 527.

PEOPLE v LEON JOHNSON, No. 135343; Court of Appeals No. 279086.

KELLY, J. I would hold this case in abeyance for *Melendez-Diaz v Massachusetts*, cert gtd __ US __; 76 USLW 3496; 2008 US LEXIS 2537 (March 17, 2008).

PEOPLE v SPENCER YOUNG, No. 135370; Court of Appeals No. 279222.

CAVANAGH and KELLY, JJ. We would remand this case to the trial court for DNA testing.

PEOPLE v BROWNRIGG, No. 135571; Court of Appeals No. 270303.

Reconsideration Denied April 23, 2008:

LAKE FOREST PARTNERS 2, INC v DEPARTMENT OF TREASURY, No. 132013. Summary disposition entered at 480 Mich 1046. Court of Appeals No. 257417.

CAVANAGH and KELLY, JJ. We would grant reconsideration.

Summary Dispositions April 25, 2008:

JONES v OLSON, No. 132385. On December 5, 2007, the Court heard oral argument on the application for leave to appeal the September 21, 2006, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Wexford Circuit Court granting the defendants' motion for summary disposition. The circuit court properly found that the plaintiff was generally able to lead his normal life in spite of his injuries. *Kreiner v Fischer*, 471 Mich 109 (2004). The plaintiff's injuries were substantially similar to those considered in *Kreiner*'s companion case, *Straub v Collette*. *Id*. Court of Appeals No. 268929.

CAVANAGH, J. (*dissenting*). Because I continue to believe that *Kreiner v Fischer*, 471 Mich 109 (2004), was wrongly decided, I join Justice WEAVER's dissenting statement attached to the majority's order. I concur with her opinion that *Kreiner* is a prime example of the judiciary's gavel being used as the legislative pen. Therefore, I would also grant leave in this case, so as to overrule *Kreiner*.

However, recognizing that my objections to the legal analysis in *Kreiner* are yet to be shared by a majority of this Court, I write additionally because, even under that opinion's flawed logic, the plaintiff in this case, Jones, presents a valid claim. I must also note my disagreement with this Court's recently evidenced proclivity for reaching out to

overturn this state's lower courts, especially when they diligently and faithfully apply this Court's binding precedent—as the Court of Appeals did in this case.[1]

APPLICATION OF *KREINER*

The majority opinion in *Kreiner* expressed several platitudes that seem to have been ignored in the majority's application of *Kreiner* to this case. The majority order in this case reinstates the grant of defendant's motion for summary disposition by the circuit court, which held that Jones's injury does not meet the statutory threshold of a "serious impairment of [a] body function," MCL 500.3135 (1), (7). The majority order simplistically states the basis for its holding: Jones's "injuries were substantially similar to those considered in *Kreiner*'s companion case, *Straub v Collette*." The order contains no further discussion or analysis supporting or explaining its conclusion. Under a fair reading of *Kreiner*, the legal and factual assertions of this short analysis are unsupportable.

First, the order's legal proposition seems to contradict *Kreiner*'s own language. Simply comparing a previous plaintiff's injuries to a subsequent plaintiff's injuries is not consistent with *Kreiner*'s requirement of a case-by-case analysis, *Kreiner*, *supra* at 134:

> [I]n order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life."[19]

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[19] We agree with the dissent that the "serious impairment of body function" inquiry must "proceed[] on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations." . . . Whether an impairment that precludes a person from throwing a ninety-five miles-an-hour fastball is a "serious impairment of body function" may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while.

The majority order here seems to ignore the above footnote by holding that because Jones's injuries are substantially similar to the plaintiff's in

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[1] Indeed, the Court of Appeals in this case expressly applied *Kreiner*. I do not accept that the Court of Appeals is so inept as to misconstrue *Kreiner*'s thorough, 26-page opinion such that peremptory reversal by a one-paragraph order suffices. In short, if *Kreiner* is so easily misunderstood, its precepts must deserve revision or clearer articulation. Yet, the majority order offers no further guidance on how to apply it.

Straub, Jones's injuries are insufficient. Essentially, the order holds that if the injury suffered by the "accountant who likes to play catch with his son every once in a while" is insufficient, then "the professional baseball player" who suffers the same injury is likewise precluded from recovering noneconomic damages. *Id*. This is incorrect because, even assuming that Jones's injuries were identical to Straub's, Jones is entitled to an individual case-by-case evaluation of his injuries as they relate to his normal life, assuming Jones and Straub have different normal lives. Any other holding makes the above passage from *Kreiner* meaningless. Accordingly, despite my continued objection to *Kreiner*, if that opinion must be applied by the lower courts, I would not change its holding through peremptory order by presupposing that Jones's and Straub's normal lives were identically affected by their injuries.

Second, the order's one-sentence analysis erroneously contends that Jones's injuries "were substantially similar to" Straub's. This is patently incorrect.

As described in *Kreiner*, Straub

> injured three fingers on his nondominant hand when his motorcycle collided with an automobile on September 19, 1999. He suffered a broken bone in his little finger and injured tendons in his ring and middle fingers. Straub underwent outpatient surgery on September 23, 1999, to repair the tendons. No medical treatment was required for the broken bone. He wore a cast for about one month following surgery to assist the healing of the tendons. He also took prescription pain medication for about two weeks following the surgery and completed a physical therapy program.
>
> About two months following the surgery, Straub's doctor noted that Straub's injuries were healing nicely. Around the same time, Straub returned to work . . . , initially working [part time], but returning to full-time work about three weeks later, on December 14, 1999. . . . [H]e testified that until late December 1999, he had difficulty doing household chores, such as washing dishes, doing yard work, and making property repairs. He was also unable to operate his archery shop during the hunting season in the fall of 1999. Operating his shop required him to repair bows, make arrows, and process deer meat. In mid-January 2000, however, he was able to resume playing bass guitar in a band that performed on weekends. By the time of Straub's deposition, he could perform all the activities in which he had engaged before the accident, although he was still unable to completely straighten his middle finger. He was also still unable to completely close his left hand, which decreased his grip strength. [*Kreiner*, *supra* at 122-123.]

Jones's injuries are demonstrably different from Straub's. They lasted longer, were qualitatively different, and were physically different.[2]

In August 2003, Jones was injured in a car accident that was caused by defendant, Olson. After the accident, Jones was taken to a hospital when he complained of neck and back pain, among several other less-severe injuries. He was released from the hospital after 9 to 10 hours. Eventually, Jones was diagnosed with having fractured vertebra in his neck (at C7), for which he was fitted with a "C-collar" for two months. Also, MRI scans revealed disc bulges in his neck at C6-7 and C5-6 levels. The neck and back injuries were caused by him hitting his head on the window pylon in his car.

Jones continued seeing a neurologist through January 2004 for treatment of his neck and back injuries. As of November 2003, he was complaining of persistent pain in his neck with radiating numbness into his shoulders and arms. By January 2004, he reported continued neck and back pain with decreased rotation and movement of both, but denied radiating numbness. From January 2004 to February 2004, he underwent physical therapy, with good results. From the accident until February 12, 2004, he had not been medically released to return to work, which entailed pouring and setting up cement walls. On February 12, he was released to restart work for only three hours a day for two days a week. This limited schedule was increased to full time within two to four weeks after the initial work restart date (approximately early April 2004).

During the entire six months Jones was off work, he was unable to do several activities that he normally did in his pre-accident life.[3] Those activities included hunting, snowmobiling, playing softball, doing yard work, and taking long walks with his girlfriend (which he commonly did four or five nights a week). Also, during the first two months after the accident, Jones was unable to be intimate with his girlfriend, dress himself, feed himself, drive a car, or take his son to school. Since early or mid-March 2004, when he regained full-time work status, Jones has resumed all pre-accident work activities and pre-accident normal life activities.

A review of these facts demonstrates that Jones's injury is different from Straub's. In sum, Straub broke his little finger and injured two others, which caused him to be unable to work and do home maintenance for slightly over two months. Whereas, Jones broke his neck and strained his back, which rendered him almost completely dependent on his family for two months and unable to work or enjoy recreational activities for a total of six months. The only thing remotely similar, much less "substantially similar," regarding Straub's and Jones's injuries is that they were

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[2] While I agree with Justice WEAVER's recitation of the facts regarding Jones's injuries, they bear reiterating to note their differences from Straub's injuries.

[3] Despite discussions of whether Jones's *current* employer had work for him during this entire 6-month period, the fact remains that Jones was indisputably, medically unable to perform his profession for *any* employer during the entire period.

both caused by a car accident. Other than that, they are factually distinguishable, which is of great legal import in *Kreiner*'s case-by-case analysis.

Finally, if the two cases encompassed in *Kreiner* are usable by way of comparison, it is unclear why Straub's injuries are applicable here, while Kreiner's are not. Moreover, the order does not explain whether only Straub's injuries can be used in such a comparative analysis. I would not leave the lower courts with such little guidance. Nonetheless, assuming that there is some basis for only comparing Jones's injuries with Straub's, Jones's injury meets *Kreiner*'s threshold test.

Therefore, while retaining my continued disagreement with *Kreiner*, I would not disturb the Court of Appeals holding that Jones's claim meets the statutory threshold of a "serious impairment of [a] body function," as defined by the majority in *Kreiner* and the editors of *Random House Webster's College Dictionary* (1991). *Kreiner*, *supra* at 130.

I dissent.

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). Every law-abiding car owner in Michigan who has obediently, as required by law, purchased no-fault automobile insurance with the expectation of being able to recover damages for serious impairment of bodily function in the unfortunate event of serious injury should know about this case.

By importing the concept of permanency of injury into MCL 500.3135—a concept that is nowhere referenced in the text of the statute—the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN), in *Kreiner v Fischer*, 471 Mich 109 (2004), actively and judicially legislated a permanency and temporal requirement to recover noneconomic damages in automobile accident cases. The *Kreiner* interpretation of MCL 500.3135 is an unrestrained misuse and abuse of the power of interpretation masquerading as an exercise in following the Legislature's intent.

I dissent from the majority of four's reversal of the judgment of the Court of Appeals in this case because the majority's analysis and application of *Kreiner v Fischer* continues the misinterpretation of MCL 500.3135. Although the Court of Appeals reached the right result, I would grant leave to appeal to correct the majority's misinterpretation of MCL 500.3135 in *Kreiner*.

I. FACTS OF *JONES v OLSON*

On August 1, 2003, the plaintiff, Douglas Jones, was westbound on M-115 when the defendant, Kathleen Olson, pulled out directly in front of the plaintiff's vehicle. The defendant's car hit the front right side of the plaintiff's car. The plaintiff sustained injuries and complained of head and neck pain. The plaintiff was taken to Mercy Hospital after the accident. Doctors diagnosed the plaintiff with a fractured vertebrae in his neck and fitted him with a C-collar. The plaintiff was released after 9 to 10 hours and was advised to consult a neurologist.

The plaintiff continued to complain of persistent neck and shoulder pain and numbness in his shoulders and arms. A magnetic resonance

imaging report of the plaintiff's spine showed disc bulges at the C6-7 and C5-6 levels. The plaintiff continued to see his neurologist and underwent physical therapy sessions through February 2004. In March 2004, the plaintiff returned to work full-time where he helped pour and set cement walls.

The plaintiff testified that during the months that he was unable to work, he was also unable to hunt, go snowmobiling, play softball, do yard work, or take long walks with his girlfriend—activities he enjoyed before the accident. Further, the plaintiff stated that for the first few months after the accident, he had difficulty dressing and feeding himself. He also required the help of his mother, grandmother, and girlfriend to prepare his son for school in the mornings. Plaintiff testified that he was able to return to work and resume all normal activities in March 2004.

The defendant refused to pay the plaintiff noneconomic damages. The plaintiff filed suit for damages with the Wexford Circuit Court. The defendant moved for summary disposition, asserting that the plaintiff had failed to establish a genuine issue of material fact regarding whether he suffered a serious impairment of bodily function. The circuit court granted the defendant's motion for summary disposition, and the plaintiff appealed. The Court of Appeals reversed the circuit court and remanded the case for trial. Unpublished opinion per curiam, issued September 21, 2006 (Docket No. 268929).

The majority of four now reverses the Court of Appeals judgment by order, stating that the plaintiff's injuries in this case are substantially similar to the injuries considered in *Kreiner*'s companion case, *Straub v Collette*.

With all due respect, I disagree with the majority's interpretation and application of MCL 500.3135 in this case, just as I did in *Kreiner* when joining Justice CAVANAGH's dissent. 471 Mich at 139.

II. MCL 500.3135 AND *KREINER v FISCHER*

MCL 500.3135 states in pertinent part:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> * * *
>
> (7) As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

In *Kreiner v Fischer* the majority incorrectly interpreted MCL 500.3135 and created a test for determining when a person injured in an

automobile accident can recover noneconomic damages. The majority outlined a seemingly reasonable three-part test:

1. Determine that there is no factual dispute concerning the nature and extent of the person's injuries; or, if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of bodily function. See *Kreiner* at 131, 132.

2. If a court can decide the issue as a matter of law, the court must next determine if an important bodily function of the plaintiff has been impaired. See *Kreiner* at 132. The injury must be objectively manifested. *Id*.

3. If a court finds an objectively manifested impairment of an important bodily function, the court must then determine whether the impairment affects the plaintiff's general ability to lead his or her normal life. *Id*. A "multifaceted inquiry" into the plaintiff's lifestyle before and after the accident will determine whether the plaintiff's "general ability" to lead his or her life has been affected.

The majority's interpretation and application of MCL 500.3135 in *Kreiner* is flawed. The first two prongs in the majority's judicially created test are reasonable and derive from the language of MCL 500.3135. However, the third prong of the test, the determination of whether someone's "general ability" to lead his or her life has been affected, is flawed. The majority of four interpreted the phrase "general ability" in MCL 500.3135 to mean that a plaintiff cannot recover noneconomic damages for serious impairment of bodily function unless the impairment affects his or her life for an undefined and extended period of time—a requirement never mentioned in the text of MCL 500.3135.

The *Kreiner* majority invoked selective dictionary definitions to outline a test to determine when a person's "general ability" to lead his or her life is affected. The *Kreiner* majority stated:

> *Random House Webster's College Dictionary* (1991) defines "general" as "considering or dealing with broad, universal, or important aspects." "In general" is defined as "with respect to the entirety; as a whole." *Id.* "Generally" is defined as "with respect to the larger part; for the most part." *Id*. *Webster's New International Dictionary* defines "general" as "the whole; the total; that which comprehends or relates to all, or the chief part; a general proposition, fact, principle, etc.;—opposed to particular; that is, opposed to special." Accordingly, determining whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is, "for the most part" able to lead his normal life. [*Kreiner, supra*, 471 Mich at 130.]

In reaching the conclusion that a plaintiff's "general ability" to lead his or her life is affected only if he or she is unable to "for the most part" lead a normal life, the *Kreiner* majority selectively chose one definition of "general" among the many definitions available. More importantly, the *Kreiner* majority exalted the chosen definition as *the only* possible definition to determine what "general ability" under MCL 500.3135 means; according to the *Kreiner* analysis, the Legislature could not have meant "general ability" to mean anything other than "for the most part."

Such an interpretation is faulty and unreasonable. The *Kreiner* majority did not consider, nor did it discuss, other definitions of "general," and the consequences of applying those definitions in interpreting MCL 500.3135. For example, the *American Heritage Dictionary* (2004) defines "general," among other things, as "not limited in scope, area, or application; not limited to or dealing with one class of things; diversified." Under this definition, MCL 500.3135 can be interpreted to mean that a person's "general ability" to lead his or her life is affected *if any part of the life is affected*, without limitations in scope, area, or application. This interpretation is diametrically opposed to the *Kreiner* majority's interpretation of "general ability," and yet it derives from the same source: a dictionary definition of the word "general."

The above example illustrates the *Kreiner* majority's error in using a selective dictionary definition as the be-all-and-end-all source for determining what a particular word means within a statute. A dictionary is defined, among other things, as "a reference book containing an alphabetical list of words, with information given for each word, usually including meanings, pronunciation, and etymology; a glossary." *American Heritage Dictionary* (2004). A dictionary is meant to be a *reference*, not an exhaustive source for all etymological information.

In the legal context, using a dictionary to unwaveringly determine the legislative intent behind a statute is nothing more than barely hidden judicial activism. Instead of determining the true intent behind a statute, a majority of the Court can now simply agree upon a single dictionary definition, taken from among many dictionary definitions, as the controlling definition for the statute. Worse, given the expansive nature of dictionary definitions where all possible, sometimes contradictory, definitions are listed, a majority can pick and choose a definition that is most appealing to the majority's own point of view, even if a chosen definition defies common sense.

For all intents and purposes, the *Kreiner* majority held that unless a person "for the most part" can no longer live his or her life, he or she cannot recover noneconomic damages under MCL 500.3135. The only way a person can no longer "for the most part" live his or her life is if the "overall or broad ability" to "conduct the course of his life" is affected. While paying lip service to the contrary, the *Kreiner* majority faction in essence held that a plaintiff cannot recover noneconomic damages for serious impairment of bodily function unless the impairment affects his or her life *ad infinitum*.

As Justice CAVANAGH correctly stated in his dissent in *Kreiner*, "nothing in the plain text of MCL 500.3135(7) suggests that the Legislature intended temporal limitations or permanency be considered when making the 'serious impairment of body function' determination." *Kreiner v Fischer*, *supra* at 149. By importing the concept of permanency of injury into MCL 500.3135—a concept that is nowhere referenced in the statute—the *Kreiner* majority actively and judicially legislated an additional requirement for obtaining noneconomic damages in automobile accident cases.

III. CONCLUSION

The majority's brief order relying on the faulty analysis in *Kreiner* in this case merely states that the plaintiff's injuries are "substantially similar to those considered in *Kreiner*'s companion case, *Straub v Collette*." Regardless of whether the injuries are the same in kind or different, the plaintiff's general ability to lead his life after the accident was affected. As noted by the Court of Appeals:

> Plaintiff's general ability to lead his normal life was put entirely on hold for the first two months after the accident, and returned only gradually over the following four months. Plaintiff's lifestyle before the injury was dramatically different from his lifestyle for the six months after the accident. Following the *Kreiner* Court's dictate that an injury need not be permanent to constitute a serious impairment, we hold that where, as here, an injury entirely disrupts a person's ability to lead his normal life, the fact that the person eventually recovers does not preclude recovery for that injury. [*Jones v Olson*, *supra*, slip op at 2.]

Additionally, it is irrelevant whether the facts of the present case are similar to the facts in *Straub v Collette*, because the majority's analysis of MCL 500.3135 in *Kreiner* is flawed and should be revisited. The *Kreiner* majority judicially created a new requirement for recovery of noneconomic damages that is not found in the text of the MCL 500.3135.

I dissent from the majority's reversal of the judgment of the Court of Appeals in this case because I disagree with the majority's analysis and application of *Kreiner v Fischer*. Although the Court of Appeals correctly determined that the plaintiff's general ability to conduct the course of his normal life has been affected as a result of his injuries, as required to recover noneconomic damages under MCL 500.3135, I would grant leave to appeal to reconsider the majority's interpretation of MCL 500.3135 in *Kreiner v Fischer*.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

WILLER v TITAN INSURANCE COMPANY, No. 133596. On March 6, 2008, the Court heard oral argument on the application for leave to appeal the February 23, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Wayne Circuit Court, and we remand this case to that court for entry of an order granting summary disposition to the defendant. On this record there is no genuine issue of material fact in dispute that the plaintiff failed to show that the causal connection between her injuries and her scraping the windshield of her vehicle was anything beyond "incidental, fortuitous or 'but for' " such that the injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" within the meaning of MCL 500.3105(1). The stay of trial court proceedings, ordered on February 6, 2008, is dissolved. Court of Appeals No. 273805.

MARKMAN, J. (*concurring*). I concur with the order reversing the judgment of the trial court and remanding the case for the entry of an order of summary disposition in defendant's favor. However, because I disagree with the majority's application of MCL 500.3105(1), I write separately to explain my rationale.

While scraping ice and snow off the windshield of her car on a March evening in 2005, plaintiff slipped and fell on a patch of ice beside her car and suffered injuries. Her car was insured with defendant, and she filed a claim for first-party no-fault benefits. This claim was denied, and the instant lawsuit was filed. Defendant moved for summary disposition, arguing that plaintiff had not been "maintaining" her vehicle under MCL 500.3105(1) at the time of her injury, and that there was an insufficient connection between plaintiff's scraping the windshield and her injury. The trial court denied this motion. Defendant then filed an interlocutory application for leave to appeal with the Court of Appeals, which was also denied. Unpublished order of the Court of Appeals, entered February 23, 2007 (Docket No. 273805). Defendant then appealed to this Court, arguing that plaintiff's claim was barred under both MCL 500.3105(1) and MCL 500.3106(1). We ordered oral argument on whether to grant defendant's application.

The majority concludes that summary disposition is appropriate here because no reasonable juror could conclude that plaintiff can satisfy MCL 500.3105(1). I respectfully disagree. Section 3105(1) states:

> Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

The majority focuses on the requirement that an injury must "arise out of" the maintenance of the vehicle. When construing the meaning of this phrase in § 3105, this Court has stated: "Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery." *Thornton v Allstate Ins Co*, 425 Mich 643, 660 (1986). This Court more recently interpreted the same phrase in the context of scoring a defendant's offense variables:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. [*People v Johnson*, 474 Mich 96, 101 (2006).]

Thus, the phrase "arising out of" requires a plaintiff to show that the injury "sprang from" or "resulted from" the maintenance of the vehicle.

In my judgment, plaintiff has presented sufficient evidence to survive defendant's motion for summary disposition based on § 3105(1). Plaintiff

was scraping her windshield when she fell. In my judgment, a reasonable juror could conclude that the fall "sprang from" some movement by plaintiff pursuant to her act of scraping the windshield. Accordingly, a reasonable juror could conclude that plaintiff's slip on the ice "arose out of" the maintenance of her vehicle. Therefore, summary disposition for defendant based on § 3105(1) is inappropriate.

However, defendant also argues that, even if plaintiff meets the requirements of MCL 500.3105(1), MCL 500.3106(1) presents an additional statutory hurdle that plaintiff must satisfy in order to survive summary disposition. That provision states:

> Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

Because § 3106(1) states than an injury generally does not "arise out of" the maintenance of a parked vehicle as a motor vehicle "unless" one of the three exceptions is satisfied, § 3106(1) indicates that, in every case involving a parked vehicle, a plaintiff must demonstrate that one of the three listed exceptions is satisfied.

However, this Court previously has not required plaintiffs in parked-vehicle cases to satisfy § 3106(1) if § 3105(1) is satisfied. In *Miller v Auto-Owners Ins*, 411 Mich 633, 641 (1981), this Court opined that "[t]he policies underlying § 3105(1) and § 3106 . . . are complementary rather than conflicting." Accordingly, "[c]ompensation is . . . required by the no-fault act without regard to whether [the plaintiff's] vehicle might be considered 'parked' at the time of injury." *Id*. In other words, under *Miller*, a plaintiff who satisfies § 3105(1) in a parked-vehicle case is not also obligated to satisfy § 3106(1).

Miller's interpretation of the interplay between § 3105(1) and § 3106(1) is, in my view, clearly erroneous. Section 3105(1) permits recovery only if the insured vehicle is being used "as a motor vehicle." Section 3106(1) states that a parked vehicle is not being used "as a motor vehicle" unless one of the three exceptions is applicable. Accordingly, every plaintiff in a parked-vehicle case must satisfy § 3106(1) in order to recover.

Because *Miller* was wrongly decided, it must be determined whether it should be overruled by considering "the effect on reliance interests and whether overruling would work an undue hardship because of that

reliance." *Robinson v Detroit*, 462 Mich 439, 466 (2000). To make this determination, *Robinson* requires consideration of "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*. *Miller* is not "so embedded," in my judgment. In *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635 (1997), we stated that "where a [plaintiff] suffers an injury in an event related to a parked motor vehicle," such a plaintiff must "establish[] that he falls into one of the three exceptions to the parking exclusion in subsection 3106(1)." Moreover, we reiterated the requirement that a plaintiff in a parked-vehicle case must satisfy § 3106(1) in *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 217 n 3 (1998), and in *Stewart v Michigan*, 471 Mich 692, 697 (2004). Accordingly, this Court has called into question the continuing validity of *Miller* for over 10 years. Under these circumstances, I cannot conclude that *Miller* is "so embedded" in Michigan law that overruling it will produce "real-world dislocations." Nor do I discern any "reliance" interests upon *Miller* that would counsel against it being overruled.

The continued co-existence of *McKenzie* and *Miller* causes confusion insofar as litigants can plausibly argue that, under *McKenzie*, § 3106 applies in cases involving dual-use vehicles, while under *Miller*, § 3106 does not apply if a single-use vehicle is involved. See *Kennedy v Farm Bureau Ins Co*, memorandum of law of the Monroe Circuit Court, issued January 13, 2006 (Docket No. LC-05-019503-NF). Such a distinction is unwarranted by the language of the statute, which nowhere distinguishes between single- and dual-use vehicles. This Court has stated that "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Robinson*, *supra* at 467. By contravening the language of § 3105 and § 3106, *Miller* undercut the reliance that average citizens are entitled to place on the law enacted by their elected representatives.

It is apparent from the record that plaintiff here is unable to satisfy any of the three exceptions in § 3106(1). Her vehicle was not "parked in such a way as to cause unreasonable risk of the bodily injury which occurred." MCL 500.3106(1)(a). She was not injured by "physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used," or during the "loading or unloading process." MCL 500.3106(1)(b). Finally, her injury did not occur while she was "occupying, entering into, or alighting from the vehicle." MCL 500.3106(1)(c). Accordingly, plaintiff's action must be dismissed.

CORRIGAN, J. I join the statement of Justice MARKMAN.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the peremptory order of the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) reversing the judgment of the Wayne Circuit Court and remanding this case to that court for the entry of an order granting summary disposition to the defendant.

I would deny leave to appeal because the plaintiff has presented sufficient evidence to survive the defendant's motion for summary

disposition.[1] Specifically, I would deny leave to appeal because I agree with the ruling by the Wayne Circuit Court that a juror could conclude that when the plaintiff fell while she was scraping snow and ice off of her vehicle's windshield, the plaintiff was engaged in "maintenance" of her motor vehicle as contemplated under MCL 500.3105(1) and *Miller v Auto-Owners Ins Co,* 411 Mich 633 (1981).

I further note that despite the fact that plaintiff's vehicle was parked at the time she was engaged in its maintenance, this Court has upheld recovery under such circumstances despite the fact that one of the three parked-vehicle exceptions was not at issue.[2] Specifically, in *Miller*, *supra* at 641, this Court held that "[c]ompensation is . . . required by the no-fault act without regard to whether [the plaintiff's] vehicle might be considered parked at the time of injury." It defies common sense to expect one to perform maintenance on one's vehicle while the vehicle is not parked. Clearly one cannot be expected to scrape the windshield of one's vehicle while sitting behind the wheel and driving the vehicle down the road. Any reasonable person would conclude that in order to safely perform vehicle maintenance, one must do so while the vehicle is parked.

While Justice MARKMAN, with Justice CORRIGAN concurring, asserts in his concurrence that *Miller* was wrongly decided, *Miller* has been in effect for 27 years—time enough to become "so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but real-world dislocations." *Robinson v Detroit,* 462 Mich 439, 466 (2000).

Under these circumstances, the trial court did not err in denying the defendant's motion for summary disposition and plaintiff should have been allowed to present her case to a jury.

I would not peremptorily reverse the judgment of the circuit court and would deny leave to appeal.

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[1] Justice MARKMAN, joined by Justice CORRIGAN, concurs with this conclusion, but then joins in the order for peremptory reversal and remand claiming that *Miller v Auto-Owners Ins Co,* 411 Mich 633 (1981), was wrongly decided.

[2] Under MCL 500.3106(1) accidental bodily injury does not arise out of the maintenance of a parked vehicle unless:

> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

MINTER v CITY OF GRAND RAPIDS, No. 133988. On January 9, 2008, the Court heard oral argument on the application for leave to appeal the April 12, 2007, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the judgment of the Kent Circuit Court granting the defendants' motion for summary disposition. Although the Court of Appeals majority correctly affirmed the Kent Circuit Court's order granting the defendants' motion for summary disposition regarding the plaintiff's broken toe and cervical strain, the majority erred in reversing the circuit court's order granting the defendants' motion for summary disposition regarding the plaintiff's closed head injury and scar. Reported below: 275 Mich App 220.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the majority of four's (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN's) reversal of the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissent and reinstatement of the trial court's grant of defendants' motion for summary disposition, because the Court of Appeals majority and dissenting analyses and application of *Kreiner v Fischer*, 471 Mich 109 (2004), continue the misinterpretation of MCL 500.3135 brought about by the majority of four's opinion in *Kreiner*. Although the Court of Appeals majority may have reached the correct result, I would grant leave to appeal to reconsider and correct the majority's misinterpretation of MCL 500.3135 in *Kreiner*.

By importing the concept of permanency of injury into MCL 500.3135—a concept that is nowhere referenced in the text of the statute—the majority of four, in *Kreiner*, actively and judicially legislated a permanency and temporal requirement to recover noneconomic damages in automobile accident cases.[1] The *Kreiner* interpretation of MCL 500.3135 is an unrestrained misuse and abuse of the power of interpretation, masquerading as an exercise in following the Legislature's intent, which needs to be corrected to comport with the actual text of MCL 500.3135.

KELLY, J. I join the statement of Justice WEAVER.

KELLY, J. (*dissenting*). I would grant leave to appeal in this case because I disagree with the majority's reliance on the Court of Appeals dissenting opinion.

I am troubled by the analysis of the issue of serious impairment of body function in that opinion. The statutory definition of serious impairment of body function requires us to examine the effect of an impairment on a person's "general ability to lead *his or her* normal life."[1] The definition requires us to begin by looking at what plaintiff did before her accident. Instead, the Court of Appeals dissent begins by looking at what plaintiff did not do. It describes plaintiff as an elderly woman who, before her accident, received Social Security disability benefits, needed help from family members with household chores, and did not drive a car. In short, plaintiff did not work, did not engage in housework, and did not

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[1] For further analysis of the problems created by the majority of four's *Kreiner* opinion, see my dissent in *Jones v Olson*, 480 Mich ___, ___ (2008).

[1] MCL 500.3135(7).

drive. After the accident, she continued to receive Social Security disability benefits, continued to need help from her family members, and continued not to drive. Thus, she does not work, does not engage in housework, and does not drive. The before-and-after-accident comparison compares negatives and tells us nothing about how the accident affected plaintiff's life.

We should be careful not to punish this or any injured person for not being young, healthy, self-sufficient, employed, and a driver before suffering injury in an accident. The statute does not speak in terms of "*a*" model normal life. Yet, the Court of Appeals dissent concluded that plaintiff failed to establish that her impairment "interfered with her general ability to lead *a* normal life." The dissent's approach and its conclusion are contrary to the statutory language. This Court should not unthinkingly endorse them.

In addition, the Court of Appeals split three ways on the issue whether the scar on plaintiff's face constituted permanent serious disfigurement. At oral argument, even defendants' attorney urged the Court to grant leave to consider the various approaches the Court of Appeals has taken on this issue. Yet, without the benefit of briefing or any serious discussion of the issue, the majority endorses the objective approach of the Court of Appeals dissent.

It is unclear to me why this approach is better than the others. A facial scar can cause significant embarrassment to the person bearing it. And, as the lead Court of Appeals opinion suggests, it may disrupt the person's ability to communicate. While the record is not well developed on this point, plaintiff did suggest in her deposition that she had trouble frowning. This Court should consider whether facial scars should be evaluated in a more nuanced and dynamic framework.

For the reasons stated above, I would grant leave to appeal in this case.

PEOPLE V KINNISON, No. 134706. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall consider whether either of appellate counsel's two stated reasons for failing to timely file defendant's motion for resentencing and his delayed application for leave to appeal entitled defendant to have his April 10, 2007, application for leave to appeal considered under the standard applicable for direct appeals. Defendant's application should be considered under the standard for direct appeals if the Court of Appeals concludes either that the delay was caused by a trial court error and/or by counsel's reasonable conclusions regarding the filing period, or because counsel behaved unreasonably and, therefore, rendered ineffective assistance. See *Roe v Flores-Ortega,* 528 US 470, 477 (2000); *Peguero v United States,* 526 US 23, 28 (1999). We do not retain jurisdiction. Court of Appeals No. 277280.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for reconsideration of the defendant's April 10, 2007, application for leave to appeal under the standard applicable to direct appeals because we believe that the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel.

HALL v MERCY MEMORIAL HOSPITAL CORPORATION, No. 135705. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. As opined by the dissenting judge in the Court of Appeals, a remand for consideration of *Kirkaldy v Rim*, 478 Mich 581 (2007), is unnecessary. We remand this case to the Court of Appeals for consideration as on leave granted. The motion for stay is granted. Trial court proceedings are stayed pending the completion of this appeal. Court of Appeals No. 276814.

KELLY, J. I agree that a remand to the trial court for consideration of *Kirkaldy v Rim*, 478 Mich 581 (2007), is unnecessary, but would not remand this case to the Court of Appeals for consideration as on leave granted. Rather, I would simply deny leave in all other respects and remand this case to the trial court for reinstatement of its order denying the defendant doctor's motion for summary disposition. Court of Appeals No. 276814.

CAVANAGH, J. I join the statement of Justice KELLY.

Leave to Appeal Denied April 25, 2008:

PEOPLE v HULBERT, No. 134834. We are not persuaded that the questions presented should be reviewed by this Court, except that this Court agrees with the concurring judge in the Court of Appeals that there is no need for the resentencing to be before a different judge. Court of Appeals No. 276435.

CAVANAGH, J. I would grant leave to appeal.

In re CHURCH (DEPARTMENT OF HUMAN SERVICES v CHURCH) NO. 2, No. 136184; Court of Appeals No. 279652.

Reconsideration Granted April 25, 2008:

ODOM v WAYNE COUNTY, No. 133433. The motions for leave to file briefs amicus curiae are granted. The motion for reconsideration of this Court's January 11, 2008, order is considered, and it is granted. We vacate our order dated January 11, 2008. On reconsideration, the application for leave to appeal the February 1, 2007, judgment of the Court of Appeals is granted. The parties shall include among the issues to be briefed: (1) what is the proper interpretation of MCL 691.1407(3) ("[MCL 691.1407(2)] does not alter the law of intentional torts as it existed before July 7, 1986."); (2) can intentional torts claims be brought under MCL 691.1407(2); and (3) for an intentional tort claim, what must a plaintiff plead to avoid governmental immunity?

The Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, the Wayne County Prosecutor's Office, and the Michigan Association of Police Organizations are invited to file additional briefs amicus curiae. The Attorney General is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Leave to appeal denied at 480 Mich 1015. Court of Appeals No. 270501.

Summary Dispositions April 25, 2008:

PEOPLE v CARICO, No. 135559. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The defendant was entitled to an appeal by right from the March 13, 2007, order denying resentencing. See MCR 7.202(6)(b)(iv). The motion to remand is denied as moot. Court of Appeals No. 277973.

Leave to Appeal Denied April 28, 2008:

PEOPLE v JACK DAVID, No. 133629; Court of Appeals No. 275515.

PEOPLE v HAWTHORNE, No. 133729; Court of Appeals No. 265473.

HURLEY MEDICAL CENTER v THAMES, No. 133814; Court of Appeals No. 273267.

BROWN-BEY v DEPARTMENT OF CORRECTIONS, No. 134012; Court of Appeals No. 277003.

PEOPLE v YOSHEYAH THOMAS, No. 134148. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272334.

PEOPLE v RUSHIN, No. 134163; Court of Appeals No. 277213.

PEOPLE v ANTHONY PRICE, No. 134175. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 273419.

PEOPLE v ROOT, No. 134177. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 274274.

PEOPLE v KENDRICK LEE, No. 134200; Court of Appeals No. 277005.

GOMERY v CREST FINANCIAL, INC, No. 134547; Court of Appeals No. 264906.

PEOPLE v CARSWELL, No. 134578; Court of Appeals No. 268081.

PEOPLE v SLOTKOWSKI, No. 134607; Court of Appeals No. 275350.

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).

In re PAPAZIAN ESTATE (PAPAZIAN v PAPAZIAN), No. 134653; Court of Appeals No. 273795.

PEOPLE v MARIO LEE, No. 134915; Court of Appeals No. 268053.

PEOPLE v ARNOLD MOORE, No. 134943; Court of Appeals No. 270835.

PEOPLE v DIAZ, No. 135237; Court of Appeals No. 280753.

PEOPLE v KENDELL ROBERTS, No. 135238. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279410.

PEOPLE v AGUIRRE, No. 135258. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276102.

PEOPLE v ALLEN RODGERS, No. 135312; Court of Appeals No. 277478.

PEOPLE v BASAT, No. 135323. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277082.

PEOPLE v HORACE WALLACE, No. 135336. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279946.

PEOPLE v GEORGE STEWART, No. 135348. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279131.

PEOPLE v ATA, No. 135357. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278924.

PEOPLE v JAMAAL DOUGLAS, No. 135365. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279280.

PEOPLE v DRAUGHN, No. 135367; Court of Appeals No. 279041.

PEOPLE v HUERTA-RODRIGUEZ, No. 135368. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 280243.

PEOPLE v CHERRY, No. 135371. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277287.

PEOPLE v HINDS, No. 135372. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278367.

PEOPLE v CHRIST, No. 135392. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 280999.

PEOPLE v LAIDLAW, No. 135397. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277725.

PEOPLE v POOLE, No. 135398. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 276973.

PEOPLE v MCKAY, No. 135399. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277907.

PEOPLE v KAPLAN, No. 135403. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 279114.

PEOPLE v INDIA PORTER, No. 135404. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279449.

PEOPLE v ARCHIE EVANS, No. 135410. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278106.

PEOPLE v WEBB, No. 135412. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280142.

PEOPLE v MANKOFF, No. 135415; Court of Appeals No. 280511.

PEOPLE v PETTY, No. 135428. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277027.

PEOPLE v KENNETH BROWN, No. 135429. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279881.

PEOPLE v POTTS, No. 135446; Court of Appeals No. 270685.

PEOPLE v MICHAEL EARL YOUNG, No. 135457. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279393.

PEOPLE v GULLEY, No. 135468; Court of Appeals No. 276266.

PEOPLE v BUIE, No. 135472; Court of Appeals No. 270414.

PEOPLE v MOULTRIE, No. 135473. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277425.

PEOPLE v FULLER, No. 135475. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279220.

PEOPLE v KIMBROUGH, No. 135481. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279443.

PETERSEN v RIVERVIEW POLICE DEPARTMENT, No. 135482; Court of Appeals No. 276558.

PEOPLE v JAMES LAWSON, No. 135491; Court of Appeals No. 280869.

PEOPLE v HYROSHA WILSON, No. 135501; Court of Appeals No. 271738.

BECK v TGM BROADBAND CABLE SERVICES, No. 135521; Court of Appeals No. 277384.

PEOPLE v VANRENSELAAR, No. 135530; Court of Appeals No. 279667.

PEOPLE v DURAN, No. 135543; Court of Appeals No. 273061.

PEOPLE v SODERBERG, No. 135553; Court of Appeals No. 281776.

PEOPLE v OCHOA-RODRIGUEZ, No. 135565; Court of Appeals No. 271212.

PEOPLE v JAMES TAYLOR, No. 135582; Court of Appeals No. 272132.

PEOPLE v CARL WRIGHT, JR, No. 135591; Court of Appeals No. 273148.

CARLESS v PAROLE BOARD, No. 135600; Court of Appeals No. 270616.

PEOPLE v FLENNOY, No. 135603; Court of Appeals No. 266547.

PEOPLE v PENIGAR, No. 135604; Court of Appeals No. 281369.

PEOPLE v PFENNINGER, No. 135611; Court of Appeals No. 272711.

10 & SCOTIA PLAZA, LLC v GRINDERZ OAK PARK, No. 135612; Court of Appeals No. 276787.

PEOPLE v WHITMAN, No. 135617; Court of Appeals No. 271930.

PEOPLE v REGINALD GILLAM, No. 135624; Court of Appeals No. 270760.

PEOPLE v WAIRE, No. 135626; Court of Appeals No. 281632.

PEOPLE v RONALD FOSTER, No. 135628; Court of Appeals No. 272366.

PEOPLE v LEWIS HARRIS, No. 135630; Court of Appeals No. 271929.

GUARDIAN ALARM COMPANY OF MICHIGAN v MAY, No. 135635; Court of Appeals No. 269901.

PEOPLE v AARON MITCHELL, No. 135654; Court of Appeals No. 269141.

PEOPLE v DESHAWN HOWARD, No. 135661; Court of Appeals No. 272248.

PEOPLE v OMECINSKYJ, No. 135664; Court of Appeals No. 271184.

PEOPLE v JAMAL THOMAS, No. 135668; Court of Appeals No. 270679.

PEOPLE v NATHANIEL GILBERT, No. 135672; Court of Appeals No. 273644.

GROSS v LANDIN, No. 135674; Court of Appeals No. 275077.

YALDO v YALDO, No. 135675; Court of Appeals No. 277694.

PEOPLE v MELTON, No. 135676; Court of Appeals No. 272308.

WASHINGTON MUTUAL BANK, FA v COMMUNITY SHORES BANK, No. 135678; Court of Appeals No. 274959.

FISHER v CORNELL ENGINEERING, No. 135681; Court of Appeals No. 270252.

PEOPLE v ALBERT, No. 135684; Court of Appeals No. 281538.

PEOPLE v POYNTER, No. 135687; Court of Appeals No. 272160.

PEOPLE v BELLAMY, No. 135690; Court of Appeals No. 268462.

PEOPLE v HERNANDEZ-DIAZ, No. 135691; Court of Appeals No. 273180.

PEOPLE v HILLS, No. 135693; Court of Appeals No. 269504.

PEOPLE v JOLIET NELSON, JR, No. 135694; Court of Appeals No. 280685.

PEOPLE v WADE, No. 135695; Court of Appeals No. 280709.

PEOPLE v CURTIS BAKER, No. 135696; Court of Appeals No. 273006.

PEOPLE v SEARCY, Nos. 135697, 135698; Court of Appeals Nos. 282489, 282491.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v DENT, No. 135701; Court of Appeals No. 282039.

CORRIGAN, J. did not participate for the reasons she stated in *People v Parsons*, 728 NW2d 62 (2007).

PEOPLE v CLAUDIO, No. 135711; Court of Appeals No. 273007.

PEOPLE v BOXLEY, No. 135713; Court of Appeals No. 281756.

KELLY, J. I would grant leave to appeal.

PEOPLE v KNAPPENBERGER, No. 135715; Court of Appeals No. 270572.

PEOPLE v TYRONE COOPER, No. 135716; Court of Appeals No. 272071.

PEOPLE v RONALD ROSS, No. 135719; Court of Appeals No. 281562.

PEOPLE v LEONARD BAKER, No. 135721; Court of Appeals No. 272246.

PEOPLE v CRIMES, No. 135723; Court of Appeals No. 270212.

PEOPLE v ANDY ANDERSON, No. 135724; Court of Appeals No. 272307.

PEOPLE v TOPLIN, No. 135729; Court of Appeals No. 273370.

PEOPLE v OSTRANDER, No. 135732; Court of Appeals No. 281830.

PEOPLE v CINTRON, No. 135737; Court of Appeals No. 271995.

REID v WILLIAMSTOWN TOWNSHIP, No. 135740; Court of Appeals No. 271284.

PEOPLE v WENTWORTH, No. 135741; Court of Appeals No. 281611.

PEOPLE v CARLOS SIMMONS, No. 135747; Court of Appeals No. 272630.

FRANKLIN PROPERTIES LTD v MOLYBDENUM UNLIMITED COMPANY, No. 135748; Court of Appeals No. 278669.

PEOPLE v WISE, No. 135749; Court of Appeals No. 277915.

PEOPLE v ROOSEVELT WILLIAMS, No. 135751; Court of Appeals No. 280481.

PEOPLE v JEFFREY MCCRAY, No. 135753; Court of Appeals No. 278592.

PEOPLE v BULEY, No. 135757; Court of Appeals No. 271801.

PEOPLE v AMEIR HARRIS, No. 135758; Court of Appeals No. 273685.

CAVANAGH and KELLY, JJ. We would grant leave to appeal to consider defendant's claim that his convictions for possession of a firearm during

the commission of a felony and for felon in possession violate the prohibition against double jeopardy.

PEOPLE v ANDRE SIMMONS, No. 135759; Court of Appeals No. 269555.

PEOPLE v ERIC WILLIAMS, No. 135768; Court of Appeals No. 273942.

PEOPLE v CALVIN, No. 135771; Court of Appeals No. 274240.

PEOPLE v DUNMIRE, No. 135774; Court of Appeals No. 272737.

PEOPLE v KNAJDEK, No. 135775; Court of Appeals No. 273909.

PEOPLE v JAMES BELL, No. 135776; Court of Appeals No. 269716.

PEOPLE v MORITZ, No. 135777; Court of Appeals No. 275210.

PEOPLE v POUNCY, No. 135780; Court of Appeals No. 270604.

PEOPLE v RONALD REYNOLDS, No. 135784; Court of Appeals No. 281721.

PEOPLE v TEMPLETON, No. 135785; Court of Appeals No. 271082.

PEOPLE v ROZIER, No. 135792; Court of Appeals No. 281637.

PEOPLE v CHARLES MEADOWS, No. 135796; Court of Appeals No. 278299.

PEOPLE v CHAMPION, No. 135797; Court of Appeals No. 280931.

PEOPLE v LOVE, No. 135799; Court of Appeals No. 272631.

PEOPLE v VAUGHN LEE, No. 135800; Court of Appeals No. 273825.

PEOPLE v QUILL, No. 135803; Court of Appeals No. 281543.

PEOPLE v RIGEL, No. 135804; Court of Appeals No. 273235.

PEOPLE v RIGGINS, No. 135805; Court of Appeals No. 272070.

PEOPLE v LAPLANTE, No. 135809; Court of Appeals No. 282025.

PEOPLE v RONALD COCHRANE, No. 135810; Court of Appeals No. 269470.

PEOPLE v SEAN WILSON, No. 135814; Court of Appeals No. 279559.

PEOPLE v CHEESE, No. 135815; Court of Appeals No. 272311.

PEOPLE v IVY, No. 135816; Court of Appeals No. 271789.

PEOPLE v MAURICE WILLIAMS, No. 135819; Court of Appeals No. 281535.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissent from the denial order of *People v Regains*, 477 Mich 1038 (2007).

PEOPLE v ANTHONY DWAYNE JAMES, No. 135822; Court of Appeals No. 270194.

PEOPLE v NGUYEN, No. 135823; Court of Appeals No. 269409.

PEOPLE v ASLANI, No. 135824; Court of Appeals No. 280905.

GRISWOLD v GENESYS REGIONAL MEDICAL CENTER, No. 135829; Court of Appeals No. 275223.

PEOPLE v CORIELLE JOHNSON, No. 135831; Court of Appeals No. 267822.

PEOPLE v ANTHONY LEE, No. 135832; Court of Appeals No. 282576.

PEOPLE v GREGORY HAMILTON, No. 135840; Court of Appeals No. 275479.

PEOPLE v KIM HARVEY, No. 135844; Court of Appeals No. 274216.

PEOPLE v HENDERSON, No. 135855; Court of Appeals No. 279861.

PEOPLE v ADRIAN LEWIS, No. 135857; Court of Appeals No. 273739.

PEOPLE v KIBBY, No. 135858; Court of Appeals No. 281987.
KELLY, J. I would grant leave to appeal.

PEOPLE v TERRANCE STEWART, No. 135867; Court of Appeals No. 274618.

PEOPLE v HERBERT ALLEN, No. 135868; Court of Appeals No. 282401.

PEOPLE v ELIE, No. 135873; Court of Appeals No. 275081.

PEOPLE v NEWELL, No. 135874; Court of Appeals No. 282151.

PEOPLE v POUNDERS, No. 135878; Court of Appeals No. 272039.

PEOPLE v CHARVAT, No. 135884; Court of Appeals No. 271754.

PEOPLE v RONALD ROSS, No. 135886; Court of Appeals No. 281563.

COTTER v WISNER, No. 135887; Court of Appeals No. 278280.

MCCOY v LAMOTTE COACHLIGHT CORPORATION, No. 135889; Court of Appeals No. 272440.

LEWIS-CLARK v GLAZIER, No. 135892; Court of Appeals No. 273716.

Reconsideration Granted April 28, 2008:

In re HROBA TRUST (HROBA v HROBA), No. 135277. The motion for reconsideration of this Court's February 6, 2008, order is granted. On reconsideration, we modify our order dated February 6, 2008. For the reasons stated in that order, the Court of Appeals erred in reversing the Oakland County Probate Court's judgment on res judicata grounds. But rather than reinstate the probate court's judgment, we remand this case to the Court of Appeals for consideration of the remaining issues not addressed by that court during its initial review of this case. We do not retain jurisdiction. Summary disposition entered at 480 Mich 1059. Court of Appeals No. 266783.

Reconsiderations Denied April 28, 2008:

JORDAN v MERCY MEMORIAL HOSPITAL, No. 131670. Summary disposition entered at 480 Mich 979. Court of Appeals No. 259224.

PEOPLE v FONZA JACKSON, No. 132060. Leave to appeal denied at 480 Mich 1102. Court of Appeals No. 268470.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the Wayne Circuit Court for an evidentiary hearing to determine whether an appeal was taken from the Wayne County Probate Court Juvenile Division order waiving jurisdiction over defendant to the Detroit Recorder's Court, for the reasons set forth in my dissenting statement in this case, 480 Mich 1102 (2008).

BERO MOTORS, INC v GENERAL MOTORS CORPORATION, No. 132540. Leave to appeal denied at 480 Mich 1053. Court of Appeals No. 257675.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in Justice CORRIGAN's dissenting statement in this case, 480 Mich 1053 (2008).

In re BALDWIN TRUST (SHOAFF v WOODS), Nos. 133622, 133623. Summary disposition entered at 480 Mich 915. Reported below: 274 Mich App 387.

MARTIN v SMG, No. 134358. Summary disposition entered at 480 Mich 1043. Court of Appeals No. 273528.

STRUCK v KUSMIERZ, No. 135138. Leave to appeal denied at 480 Mich 1060. Court of Appeals No. 276219.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals as on leave granted for that court to determine whether a person suffering from a post-traumatic stress disorder is suffering from an "objectively manifested" impairment of an important bodily function under MCL 500.3135(7).

DENK v MARDEROSIAN, No. 135329. Leave to appeal denied at 480 Mich 1076. Court of Appeals No. 276746.

Leave to Appeal Granted April 30, 2008:

SCIOTTI v 36TH DISTRICT COURT, No. 134328. The parties shall include among the issues to be briefed: (1) whether the plaintiff produced viable statistical evidence of racial discrimination in support of each of his claims; (2) whether the courts below erred in treating the plaintiff's distinct claims of discrimination in hiring/promotion as a single course of conduct; (3) whether and to what extent the plaintiff and each successful applicant was qualified or not qualified for each distinct position, and whether the evidence in each circumstance was sufficient to demonstrate that, more likely than not, the failure to promote the plaintiff included an element of purposeful racial discrimination; (4) whether the defendant provided a race-neutral reason for each decision; and (5) whether there is a sufficient evidentiary basis to conclude that, more likely than not, each decision was a pretext for racial discrimination.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 266160.

PEOPLE v BORGNE, No. 134967. The parties shall address: (1) whether the defendant's constitutional rights under *Doyle v Ohio,* 426 US 610, 619 (1976), were violated, (2) whether the claim of error under *Doyle* was properly preserved at trial, (3) the resulting appropriate standard of review on appeal, and (4) whether any error was harmless under the applicable standard of review.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 269572.

GENERAL MOTORS CORPORATION v ALUMI-BUNK, INC, No. 135117. The parties shall address: (1) whether there is an exception to the economic loss doctrine–which provides that parties to a purely commercial dispute are limited to the remedies of the Uniform Commercial Code, MCL 440.1101 *et seq*.; see *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 520, 528 (1992)–for claims of fraud in the inducement, see *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365 (1995); and, if so, (2) whether the fraud claims in this case are sufficiently distinguishable from the contract claims for purposes of applying the fraudulent inducement exception. Court of Appeals No.270430.

PEOPLE v HAROLD SHAFIER, III, No. 135435. The parties shall address: (1) whether the defendant's constitutional rights under *Doyle v Ohio,* 426 US 610, 619 (1976), were violated, (2) whether the claim of error under *Doyle* was properly preserved at trial, (3) the resulting appropriate standard of review on appeal, and (4) whether any error was harmless under the applicable standard of review.

We further order the Allegan 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 Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 277 Mich App 137.

Leave to Appeal Denied April 30, 2008:

KORPAL v SHAHEEN, No. 133717; Court of Appeals No. 266418.

CAVANAGH, WEAVER, and KELLY, JJ. We would reverse the portion of the judgment of the Court of Appeals that dismissed *with* prejudice the plaintiffs' additional claims regarding the chest x-rays, because the dismissal should have been *without* prejudice. See *Kirkaldy v Rim*, 478 Mich 581 (2007). We would remand this case to the trial court for entry of an order dismissing the plaintiffs' additional claims without prejudice.

COATES v BASTIAN BROTHERS, INC, No. 135011; reported below: 276 Mich App 498.

CAVANAGH,WEAVER, and KELLY, JJ. We would grant leave to appeal.

WAYLAND v NEW LIGHT NURSING HOME CORPORATION, No. 135152; Court of Appeals No. 271821.

ADAMUS v BIGGER, No. 135351; Court of Appeals No. 278724.

SMITH v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 135536; Court of Appeals No. 277422.

PEOPLE v DAVID HALL, No. 135807; Court of Appeals No. 271409.

CORRIGAN, J. I would reverse the judgment of the Court of Appeals and reinstate the defendant's conviction, for the reasons stated in the Court of Appeals dissenting opinion.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal May 2, 2008:

In re RAYMOND ESTATE (MORSE v SHARKEY), No. 134461. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the will's language is sufficient to convey the possibility that the class of "brother[s] and sisters that survive me" might have no members; (2) whether the language "or to the survivor or survivors thereof" creates an alternative devise to the descendants of predeceased siblings of the testator (or Claude Raymond) which only takes effect if *all* of the testator's (or Claude Raymond's) siblings predecease the testator; (3) what significance, if any, should be attributed to the placement of the language "share and share alike" in the middle of the pertinent clause, rather than at the end; and (4) what effect, if any, the antilapse statute (MCL 700.2603) should have on the construction of the will language at issue. The parties should not submit mere restatements of their application papers. Reported below: 276 Mich App 22.

Leave to Appeal Granted May 2, 2008:

BUDGET RENT-A-CAR SYSTEM, INC v CITY OF DETROIT, No. 133887. The parties shall include among the issues to be briefed: (1) whether claimant Mark Hurt's bodily injury arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," under MCL 500.3105(1); (2) whether Hurt's bodily injury was accidental, under MCL 500.3105(4); (3) the impact, if any, of § 22 of the Uniform Motor Vehicle Accident Reparations Act, a model act on which Michigan's no-fault law is based, which states: "A person intentionally causing or attempting to cause injury to himself or another person is disqualified from . . . benefits for injury arising from his acts," and "[a] person intentionally causes or attempts to cause injury if he acts or fails to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow"; and (4) whether the following Court of Appeals opinions correctly interpret MCL 500.3105(4): *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 19 (2004); *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 226 (1996); *Bronson Methodist Hosp v Forshee*, 198 Mich App 617,

630 (1993); and *Frechen v Detroit Auto Inter-Ins Exch,* 119 Mich App 578, 582 (1982). Specifically, with regard to issue (4), the parties shall address whether establishing that an injury was suffered or caused intentionally under § 3105(4) requires a determination that the person subjectively intended the injury or, instead, requires an objective analysis of whether the person acted with knowledge "that bodily injury [wa]s substantially certain to be caused by his act or omission." Court of Appeals No. 271703.

MARKMAN, J. (*concurring*). In addition to the issues listed in the majority's order, I would direct the parties to address the effect, if any, of the "absurd results" rule on this case. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006); *People v McIntire*, 461 Mich 147 (1999).

TOMECEK V BAVAS, No. 134665. The parties shall include among the issues to be briefed: (1) whether an action under the Land Division Act, MCL 560.101 *et seq.*, can be used to burden existing, substantive property rights; (2) whether this Court should recognize an easement by necessity for utilities; and (3) whether an easement by necessity may be recognized when purchasers had notice of a restrictive covenant barring any such easement in the absence of certain conditions.

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: 276 Mich App 252.

PEOPLE V SHAHIDEH, No. 135495. The parties shall include among the issues to be briefed: (a) whether MCL 768.20a governs a request by an incarcerated defendant for an independent psychiatric evaluation to determine whether an insanity defense may be available where no notice of intention to assert an insanity defense has been filed; (b) if the statute governs, whether the subsections of MCL 768.20a are to be construed seriatim, such that an independent psychiatric evaluation may not be requested under subsection 3 without first complying with subsections 1 and 2; and, (c) if the statute does not apply, whether the defendant's constitutional rights were violated by the trial court's decision to deny access to the defendant for an independent psychiatric evaluation while he was in jail.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 277 Mich App 111.

Leave to Appeal Denied May 2, 2008:

HILL V CITY OF WARREN, No, 134720; reported below: 276 Mich App 299.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal, but I write to point out an error in a portion of the Court of Appeals opinion interpreting the class-certification requirements of MCR 3.501(B).

MCR 3.501(B)(1)(a) requires that a motion for class certification must be filed "within 91 days after the filing of a complaint that includes class action allegations." Here, plaintiffs filed a class-action complaint on May 2, 2000, and an amended class-action complaint on June 14, 2000. Plain-

tiffs filed a motion for class certification on June 26, 2000, well within the 91-day requirement of MCR 3.501(B)(1)(a). The trial court denied that motion, setting off a string of appellate challenges that have continued for over seven years.

Plaintiffs sought leave to appeal the trial court's order denying class certification, which the Court of Appeals denied.[1] Plaintiffs then filed a motion for reconsideration. The Court of Appeals granted rehearing, reversing and remanding to the circuit court for entry of an order granting class certification.[2] This Court held the case in abeyance pending the Court's consideration and release of its opinion in *Pohutski v City of Allen Park* (Docket No. 116949), and *Jones v City of Farmington Hills* (Docket No. 117935).[3] Upon the release of *Pohutski*, 465 Mich 675 (2002), this Court vacated the Court of Appeals order and remanded this case to the Court of Appeals for plenary consideration.[4] The Court of Appeals again reversed the circuit court's denial of class certification.[5] Defendant again sought leave to appeal in this Court. We reversed the Court of Appeals and remanded to the trial court for further proceedings, holding that "[t]he Macomb Circuit Court's denial of class certification is not clearly erroneous."[6]

On remand to the trial court, plaintiffs filed a "renewed" motion for class certification, some four years after plaintiffs filed their original complaint. The trial court granted the motion, stating that it was treating the motion as a motion for reconsideration of its original ruling. On reconsideration, the trial court held that "after much careful consideration of the record and pleadings filed since the court's initial decision denying class certification," it was "persuaded that the commonalities in the case outweigh the causation and damages issues to be resolved." Defendants again filed an interlocutory application for leave to appeal, which the Court of Appeals denied for failure to persuade that court of the need for immediate review.[7] This Court remanded to the Court of Appeals for consideration as on leave granted to consider whether *Pohutski*, affected the class-certification issue.[8] On remand, the Court of Appeals affirmed the trial court in a published opinion.[9]

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[1] *Hill v City of Warren*, unpublished order, entered December 1, 2000 (Docket No. 229242).

[2] *Hill v City of Warren*, unpublished order, entered January 29, 2001 (Docket No. 229292).

[3] *Hill v City of Warren*, 641 NW2d 857 (2002).

[4] *Hill v City of Warren*, 466 Mich 871 (2002).

[5] *Hill v City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2003 (Docket No. 229292).

[6] *Hill v City of Warren*, 469 Mich 964 (2003).

[7] *Hill v City of Warren*, unpublished order, entered April 11, 2005 (Docket No. 259706).

[8] *Hill v City of Warren*, 474 Mich 916 (2005).

[9] *Hill v City of Warren*, 276 Mich App 299 (2007).

The Court of Appeals affirmed the trial court's grant of plaintiffs' "renewed" motion for class certification, in part, on its misinterpretation of MCR 3.501. The Court of Appeals held that plaintiffs complied with MCR 3.501, comparing a motion for certification to a motion for decertification and noting:

> There is no time limitation on a motion for decertification, and indeed a party could theoretically file municipal motions, subject to the prohibition against groundless motions found in MCR 2.114. The plain language of the court rule mandates that *a* motion for certification be brought within 91 days of the complaint; it does not forbid subsequent motions or mandate any particular timing requirements for bringing them. [Emphasis in original; citation omitted.][10]

The Court of Appeals interpretation of MCR 3.501 is not supported by the rule's plain language. MCR 3.501(B)(1)(a) provides:

> Within 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.

Neither this provision nor any of the remaining provisions of MCR 3.501 provides any textual support for the Court of Appeals conclusion that a plaintiff may file multiple class-certification motions without any time limits. Instead, MCR 3.501(B)(1)(b) and (3)(a) contemplate only one class certification motion. In outlining the procedures for certification of class actions, MCR 3.501(B)(1)(b) states that "[t]he time for filing *the* motion may be extended by order on stipulation of the parties or on motion for cause shown." (Emphasis added.) MCR 3.501(B)(3)(a) states that "[e]xcept on motion for good cause, the court shall not proceed with consideration of *the* motion to certify . . . ." This Court has previously explained that the word "the" indicates the singular, whereas "a" connotes an indefinite or general article. *Robinson v Detroit*, 462 Mich 439, 461-462 (2000) (distinguishing "the proximate cause" from "a proximate cause"). MCR 3.501(B)(1)(b) could have provided that "the time for filing *a* motion may be extended by order on stipulation of the parties or on motion for cause shown." MCR 3.501(B)(3)(a) could have provided that "the court shall not proceed with consideration of *a* motion for certification." Both provisions, however, did not so provide. Absent a provision in MCR 3.501 indicating otherwise, we interpret "*the* motion to certify" and "the time for filing *the* motion" as allowing one motion for class certification.

Moreover, multiple class-certification motions are not contemplated. MCR 3.501 provides specific procedures when a party cannot proceed with a class-certification motion within the first 91 days. As noted above, MCR 3.501(B)(1)(b) provides that the time for filing the class-certification motion may be extended by order on stipulation of the parties or on motion for cause shown. And MCR 3.501(B)(3)(b) provides that "[t]he court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures." The court rule does not offer

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[10] *Id*. at 306.

other expansive options. Therefore, the Court of Appeals erred in construing MCR 3.501 to authorize multiple motions for class certification.[11]

The Court of Appeals, however, also relied on MCR 2.119(F)(1), which provides that *"[u]nless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A]*, 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion." MCR 2.604(A) provides, in relevant part, as follows:

> Except as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties.

Under MCR 2.604(A), a trial court has the power to revisit its prior rulings unless it has entered a final judgment that adjudicates all the claims, rights, and liabilities of the parties. Here, plaintiffs filed their motion for class certification within 91 days of filing their class-action complaint. While the trial court initially denied plaintiffs' motion, that denial was not a final judgment on all the claims, rights, and liabilities of the parties. Therefore, the trial court did not err in reconsidering its prior ruling on plaintiffs' class-certification motion under MCR 2.604(A). On that basis, I concur in the order denying leave to appeal.

PEOPLE V LIGHT, No. 135332. We take this opportunity to emphasize that it is improper for a prosecutor to make a personal attack on defense counsel, suggesting to jurors in closing argument that counsel is intentionally trying to mislead them. Although such conduct may not require reversal in a given case, it is still improper and unbecoming of a representative of the state. Court of Appeals No. 270211.

CORRIGAN, J. (*concurring*). I concur with the order denying leave to appeal. I write separately because I disagree with the order's implication that the prosecutor engaged in misconduct during closing argument by suggesting that defense counsel was intentionally trying to mislead the jury. The Court of Appeals considered and properly rejected defendant's argument that the prosecutor's remarks were improper:

> Defendant claims that the prosecutor made several improper remarks during the rebuttal argument. First, defendant takes issue with the prosecutor's comment that defense counsel clouded up the facts and muddied the waters, and the prosecutor was going to cleanse the water for the jury. The next comment at issue is the prosecutor's reference to the defense as a cockroach defense.

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[11] The Court of Appeals also erred in stating that MCR 3.501 could allow a party to file multiple motions for class decertification. Nothing in the rule lends support to such an interpretation.

> Viewing these remarks in context, the prosecutor was fairly responding to defense counsel's closing argument. Defense counsel spent considerable time talking about the collection of the evidence at the scene as a "shoddy investigation," especially because the evidence technicians did not collect any of the blood around the body, just assuming that the blood was all Healey's, therefore losing any evidence of the killer. In addition, because there was no finding of defendant's blood near the body, the testimony was consistent with defendant's story.
>
> In response, the prosecutor complimented defense counsel's argument and made the comment about cleansing the water to the jury to indicate that he planned to respond to the argument with a clear summary of the evidence that was presented to support the prosecution's case. During the prosecution's explanation of the evidence, he [the prosecutor] used an analogy of the defense mechanisms different animals in the animal kingdom use to survive and compared the defense argument to the way an octopus squirts a big cloud of dark ink to make it difficult to see. Then, the prosecutor continued that a variation would be the cockroach defense, where the facts can be contaminated by crawling around all over them until there's reasonable doubt. [*People v Light*, unpublished opinion per curiam of the Court of Appeals, issued August 28, 2007 (Docket No. 270211), slip op at 5.]

I agree with the Court of Appeals analysis. Although a prosecutor generally may not suggest that defense counsel is intentionally attempting to mislead the jury, the prosecutor's comments must be considered in light of defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593 (2001). A prosecutor may permissibly suggest that defense counsel was trying to distract the jury from the truth when the remarks are made in rebuttal to defense counsel's argument. *Id.* Specifically, such remarks are not improper when made in response to defense counsel's argument that the police conducted a sloppy investigation. *People v Kennebrew*, 220 Mich App 601, 608 (1996). Further, "[a] prosecutor need not limit her arguments to 'the blandest possible terms.' " *People v Williams*, 265 Mich App 68, 71 (2005), aff'd 475 Mich 101 (2006).

Here, to illustrate his point that defense counsel was attempting to "muddy[] the waters" in order to create a reasonable doubt, the prosecutor used an analogy of the defense mechanisms that animals use to survive. The prosecutor explained that an octopus squirts a cloud of ink to make it difficult to see what is behind the cloud. He then stated that a variation would be the "cockroach defense," where the facts can be contaminated by crawling all over them to create a reasonable doubt. Defense counsel did not object to the prosecutor's comments. Although the prosecutor's suggestion that defense counsel was attempting to "cloud up" or "contaminate" the facts would, by itself, be improper, it was not improper in the context of defense counsel's argument. As the Court of Appeals explained, the prosecutor's statements were made in direct response to defense counsel's closing argument, by which defense counsel

tried to create a reasonable doubt by characterizing the collection of evidence at the scene as being the result of a "shoddy investigation." The prosecutor told the jury that he would "cleanse the water" for them and provide a clear summary of the evidence. The prosecutor's statements were reasonable, given that they were in response to defense counsel's closing argument attacking the competence of the investigation. *Kennebrew*, *supra* at 608.

YOUNG, J. I would deny leave to appeal without the further statement found in the majority's order.

SMALL v WYSONG, Nos. 135512, 135538; Courts of Appeals No. 275332.

MARKMAN, J. (*concurring in part and dissenting in part*). Although I would deny leave to appeal with regard to the characterization by the Court of Appeals of plaintiff's two other claims, I believe that the court erred in characterizing as an ordinary-negligence claim plaintiff's claim that an x-ray should have been conducted following her appendectomy and before her incision was closed. Because this seems to me a matter significantly beyond common knowledge, *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411 (2004), I believe that this claim sounds in medical malpractice.

YOUNG, J. (*dissenting*). For the reasons stated in the Court of Appeals dissenting opinion, I would reverse the Court of Appeals judgment in part and affirm the trial court's ruling that plaintiff's complaint sounded in medical malpractice rather than ordinary negligence.

CORRIGAN, J. I join the statement of Justice YOUNG.

In re O'BERRY (DEPARTMENT OF HUMAN SERVICES v O'BERRY), No. 136224; Court of Appeals No. 279493.

Reconsiderations Denied May 2, 2008:

RAMANATHAN v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS, No. 133170. Summary disposition entered at 480 Mich 1090. Court of Appeals No. 266238.

WEAVER, J. I would grant the motion for reconsideration.

MARKMAN, J. (*dissenting*). For the reasons stated in my previous statement, 480 Mich 1090, 1091 (2008), I would grant defendant's motion for reconsideration and, on reconsideration, would reverse the judgment of the Court of Appeals and dismiss the remaining claims against defendant.

PEOPLE v JAMES PERRY, No. 136005. Leave to appeal denied at 480 Mich 1106. Court of Appeals No. 284102.

WEAVER and CORRIGAN, JJ. We would grant the motion for reconsideration.

MARKMAN, J. I would grant the motion for reconsideration and hold this case in abeyance for *People v Watkins* (Docket No. 135787), 480 Mich 1167 (2008), in which this Court has granted leave to appeal to consider constitutional and other issues pertaining to MCL 768.27a.

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.

Reconsideration Denied September 10, 2007:

GRIEVANCE ADMINISTRATOR v TROMBLEY, No. 133099.

Rehearings Denied September 18, 2007:

THE GREATER WAY BIBLE WAY TEMPLE OF JACKSON v CITY OF JACKSON. Reported at 478 Mich 373.

GOLDSTONE v BLOOMFIELD TOWNSHIP PUBLIC LIBRARY. Reported at 479 Mich 554.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant rehearing.

Order Entered September 18, 2007:

PROPOSED AMENDMENT OF RULE 7.215 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.215 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FROM COURT OF APPEALS.

(A)-(I) [Unchanged.]

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) [Unchanged.]

(2) Conflicting Opinion. If a ~~A~~ panel ~~that~~ follows a prior published decision only because it is required to do so by subrule (1), and if the ultimate disposition of the case is thereby affected, the panel must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision and the disposition it would have

reached had it not been required to follow the prior published decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

(3) Convening of Special Panel.

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether ~~the particular question is both outcome determinative and warrants convening~~ a special panel should be convened to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). ~~Special panels may be convened to consider outcome-determinative questions only.~~

(b)-(c) [Unchanged.]

(4)-(7) [Unchanged.]

Staff Comment: The September 18, 2007, proposed amendment of MCR 7.215 reflects revisions recommended by the Michigan Court of Appeals. The amendment would shift responsibility for making an "outcome-determinative" assessment from the entire bench to the panel deciding the case in which the conflict is raised. The amendment would also require the panel to state the disposition it would have reached had it not been required to follow the prior published decision.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-06. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Motion for Clarification Denied September 18, 2007:

PEREZ v FORD MOTOR COMPANY, No. 131655; Court of Appeals No. 249737 (on remand).

Rehearings Denied September 28, 2007:

TRENTADUE v BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY. Reported at 479 Mich 378.

CAVANAGH and KELLY, JJ. We would grant rehearing.

WEAVER, J. (*dissenting*). I dissent from the majority of four's decision to deny plaintiffs' motion for a rehearing and repeat the concluding paragraph of my dissent from the majority's opinion in this case, issued July 25, 2007:

> Because I disagree with the majority's conclusion that with the enactment of the Revised Judicature Act, the Legislature sought to

> abrogate the discovery rule, I would affirm the Court of Appeals decision applying the common-law discovery rule and tolling the period of limitations where plaintiff could not have reasonably discovered the elements of a wrongful death cause of action within the limitations period. [*Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 407 (2007) (WEAVER, J., dissenting).]

Clearly, the majority of four's decision in this case reaches an absurd and unjust result, and lacks common sense.

MICHIGAN CITIZENS FOR WATER CONSERVATION v NESTLÉ WATERS NORTH AMERICA INC. Reported at 479 Mich 280.

CAVANAGH and KELLY, JJ. We would grant rehearing.

WEAVER, J. (*dissenting*). I would grant plaintiffs' motion for reconsideration and reverse the holding[1] of the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) that plaintiffs do not have standing to bring a claim under the Michigan environmental protection act[2] with respect to the Osprey Lake Impoundment and wetlands 112, 115, and 301.

Further, I would grant plaintiffs' motion for reconsideration to consider whether the majority of four's holding violated plaintiffs' right "to petition the Government for a redress of grievances," a right guaranteed by the First Amendment of the United States Constitution.[3] The importance of this issue stems not only from the instant case, but also from various other holdings by the same majority denying citizens protection of the laws and access to the Michigan court system, even when legal rights may have been violated. See *Kreiner v Fischer*, 471 Mich 109 (2004) (reducing no-fault insurance rights); *Maldonado v Ford Motor Co*, 476 Mich 372 (2006) (preventing trial by jury); *Bierlein v Schneider*, 478 Mich 893 (2007) (preventing an injured child from utilizing an existing Michigan court rule to collect a settlement); and *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007) (eliminating the common-law discovery rule, thereby depriving a plaintiff of an opportunity to file a good-faith claim and of access to courts).

In re CERTIFIED QUESTION FROM THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS (MILLER v FORD MOTOR COMPANY). Reported at 479 Mich 498.

CAVANAGH and KELLY, JJ. We would grant rehearing.

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[1] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007).

[2] MCL 324.1701 *et seq*.

[3] US Const, Am I forbids Congress, in pertinent part, from passing laws abridging "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment applies to the states through the Fourteenth Amendment. *Mills v Alabama*, 384 US 214, 218 (1966).

WEAVER, J. (*dissenting*). I dissent from this Court's decision to deny plaintiff's motion for reconsideration. I would grant the motion for reconsideration and vacate the Court's decision answering a certified question from the Fourteenth District Court of Appeals of Texas.

This Court's decision to answer the certified question in this case should be vacated because MCR 7.305(B), the Michigan court rule allowing the Court to answer certified questions from other courts, goes beyond this court's constitutional authority to answer certified questions.[1] Further, the majority's decision to answer the certified question in this case is unprecedented and unnecessary.[2]

Rehearing Denied October 5, 2007:

PEOPLE v NYX. Reported at 479 Mich 112.

CORRIGAN, J. (*concurring*). I concur in the denial of the motion for rehearing, but I write separately to clarify that double jeopardy principles do not bar the prosecutor from charging defendant with and retrying him for second-degree criminal sexual conduct. Defendant may be retried for that offense because he successfully appealed his conviction and the reversal was *not* based on insufficient evidence to support the guilty verdict. See *Burks v United States*, 437 US 1 (1978); *Tibbs v Florida*, 457 US 31 (1982); *Lockhart v Nelson*, 488 US 33 (1988).

WEAVER, J. I join the statement of Justice CORRIGAN.

YOUNG, J. (*concurring*). I join in Justice CORRIGAN's concurrence in the denial of the appellant's motion for rehearing, as it is unnecessary for this Court to provide further explication on what is a bedrock double jeopardy principle. See *United States v Ball*, 163 US 662 (1896); *Stroud v United States*, 251 US 15 (1919); *Louisiana ex rel Francis v Resweber*, 329 US 459

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[1] See *In re Certified Question* (*Miller v Ford Motor Co*), 479 Mich 498, 548 (2007) (WEAVER, J., dissenting); see also *Proposed Amendment of MCR 7.305*, 462 Mich 1208 (2000) (WEAVER, J., dissenting); *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (2001) (WEAVER, J., dissenting); *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc)*, 468 Mich 109, 134 (2003) (WEAVER, J., concurring in the result only); *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225 (2005) (WEAVER, J., concurring); *In re Certified Question* (*Bankey v Storer Broadcasting Co*), 432 Mich 438, 467-471 (1989) (opinion by LEVIN, J.).

[2] See *In re Certified Question (Miller v Ford Motor Co)*, *supra* at 553 (2007) (WEAVER, J., dissenting); see also Berg, *Cherry picking: In deciding a certified question from Texas, the MSC took the law it liked, and left the rest*, Michigan Lawyers Weekly, August 20, 2007, p 1 ; 21 Mich L W 1129; <http://www.milawyersweekly.com/subscriber/archives_FTS.cfm?page=mi/07/8200770.htm&recID=414432&QueryText=asbestos> (accessed September 17, 2007).

(1947); *Green v United States*, 355 US 184 (1957); *United States v Tateo*, 377 US 463 (1964); *United States v Ewell*, 383 US 116 (1966); *United States v Scott*, 437 US 82 (1978); *Tibbs v Florida*, 457 US 31 (1982); *Justices of Boston Muni Court v Lydon*, 466 US 294 (1984); *Montana v Hall*, 481 US 400 (1987); *Lockhart v Nelson*, 488 US 33 (1988); *Monge v California*, 524 US 721 (1998).

Orders Entered October 16, 2007:

PROPOSED AMENDMENT OF RULES 2.119, 7.204, AND 7.205 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 2.119, 7.204, and 7.205 of the Michigan Court Rules. This proposal is a republication of proposed amendments initially published November 7, 2006, in this file, and reflects significant changes from the original proposal. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.119. MOTION PRACTICE.

(A)-(E) [Unchanged.]

(F) Motions for Rehearing or Reconsideration.

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

(2)-(3) [Unchanged.]

(G) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

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

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

(a) [Unchanged.]

(b) 21 days after the entry of an order ~~denying~~ deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other

~~postjudgment~~relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period ~~or within further time the trial court may have allowed during that 21-day period~~;

(c)-(d) [Unchanged.]

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

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

(a) [Unchanged.]

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

(c) [Unchanged.]

(d) within 42 days after the entry of an order denying a motion for a new trial, for ~~judgment~~directed verdict of acquittal, or ~~for resentencing~~ to correct an invalid sentence, if the motion was filed within the time provided ~~by~~ in MCR 6.419(B), 6.429(B)~~(1)~~, or 6.431(A)~~(1)~~, as the case may be.

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

(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed within

(1) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule~~.~~; or

(2) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period.

For purposes of ~~this rule~~ subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(B)–(E) [Unchanged.]

(F) Late Appeal.

(1)–(2) [Unchanged.]

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

(a) [Unchanged.]

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other ~~postjudgment~~relief from the order or judgment appealed was filed within the initial 21-day appeal period ~~or within further time the trial court may have allowed during that 21-day period~~, then the 12 months are counted from the entry of the order ~~denying~~ deciding the motion.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the ~~6-month period prescribed~~ time provided in MCR 6.310(C), 6.419(B), 6.429(B), and 6.431(A), or if

(a)–(c) [Unchanged.]

A motion for rehearing or reconsideration of a motion mentioned in subrule (F)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (F)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The proposed amendments of MCR 7.204 and MCR 7.205 would clarify that a party who seeks to appeal to the Court of Appeals has 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed to file a claim of appeal or an application for leave to appeal, if the motion is filed within the initial 21-day appeal period. For consistency, the time limit for filing a motion for rehearing or reconsideration under MCR 2.119(F)(1) would be increased from 14 to 21 days, and the phrase "or within further time the trial court may have allowed during that 21-day period" was stricken from MCR 7.204(A)(1)(b) and MCR 7.205(F)(3)(b).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-36. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULES 3.204 AND 3.212 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.204 and 3.212 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

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

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

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

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

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

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

(4) A party may file a supplemental pleading required by this subrule without first seeking and obtaining permission from the court. The supplemental pleading must be served as provided in MCR 3.203(A)(2), and an answer must be filed within the time allowed by MCR 2.108.

(B) When more than one circuit court action involving support, custody, or parenting time of a child is pending, or more than one circuit court has continuing jurisdiction over those matters because of prior

actions, an original or supplemental complaint for the support, custody, or parenting time of a different child of the same parents must be filed in whichever circuit court has jurisdiction to decide the new action. If more than one of the previously involved circuit courts would have jurisdiction to decide the new action, or if the action might be filed in more than one county within a circuit:

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

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

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

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

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

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

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

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

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

RULE 3.212. POSTJUDGMENT TRANSFER OF DOMESTIC RELATIONS CASES.

(A) Motion.

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

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

(B) Conditions.

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

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

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

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

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

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

(C) Unless the court orders otherwise for good cause, if a friend of the court becomes aware of a more recent final judgment involving the same parties issued in a different county, the friend of the court must initiate a transfer of the older case to the county in which the new judgment was entered if neither of the parents, any of their children who are affected by the judgment in the older case, nor another party resides in the county in which the older case was filed.

(~~C~~D) Transfer Order.

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

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

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

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

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

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

Staff Comment: The proposed amendments of MCR 3.204 would consolidate multiple actions involving more than one child of the same parents in a single action so that all issues between the parents can be

determined in a single action. The proposed amendments would also require multiple cases involving children of the same parents to be filed in the same county when possible to allow a single judge to consider all support, custody, and parenting time matters involving the same family.

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

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2008, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 2.306 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.306 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probably adoption of the proposal in its present form.

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

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION.

(A)-(C) [Unchanged.]

(D) Motion to Terminate or Limit Examination.

(1) Any objection during a deposition must be stated concisely and in a nonargumentative and nonsuggestive manner.

(2) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose on the person or persons responsible an appropriate sanction, including the reasonable costs and attorney fees incurred by any party as a result thereof.

~~(1)~~(3) At any time during the taking of the deposition, on motion of a party or of the deponent and on a showing that the examination is being conducted in bad faith or in a manner unreasonably to annoy, embarrass, or oppress the deponent or party, or that the matter inquired about is privileged, a court in which the action is pending or the court in the county or district where the deposition is being taken may order the person conducting the examination to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in MCR 2.302(C). If the order entered terminates the examination, it may resume only on order of the court in which the action is pending.

~~(2)~~(4) On demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to move for an order. MCR 2.313(A)(5) applies to the award of expenses incurred in relation to the motion.

~~(3)~~(5) If a party knows before the time scheduled for the taking of a deposition that he or she will assert that the matter to be inquired about is privileged, the party must move to prevent the taking of the deposition before its occurrence or be subject to costs under subrule (G).

~~(4)~~(6) A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the depostion or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer the testimony of the deponent pertaining to the evidence objected to at the deposition. A party who asserts a privilege regarding medical information is subject to the provisions of MCR 2.314(B).

(E)-(G) [Unchanged.]

Staff Comment: This proposal would require objections to be concise, nonargumentative, and nonsuggestive, and would allow a court to impose sanctions against an attorney who fails to comply with the requirement. The proposed changes are similar to language contained in FR Civ P 30(d)(1).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2008, at P.O. Box 30052, Lansing, MI 38909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2007-09.

Leave to Appeal from the Attorney Discipline Board Denied October 29, 2007:

GRIEVANCE ADMINISTRATOR v BUTCHER, No. 134460.

Order Entered October 31, 2007:

PROPOSED AMENDMENT OF RULE 2.510 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rule 2.510 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.510. JUROR PERSONAL HISTORY QUESTIONNAIRE.

(A)–(D) [Unchanged.]

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

Staff Comment: The proposed amendment of MCR 2.510 would require that, in a district-court district comprised of a city located in two or more counties, jurors must be selected for district court attendance regardless of the county in which the juror resides or the county where the cause of action arose, pursuant to MCL 600.1324.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-21. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 2, 2007:

In re TRUDEL, No. 121995. The motion for entry of a default judgment is considered pursuant to MCR 3.101(S), and it is granted. A default judgment in the amount of $15,241.66 is granted against the garnishee.

WEAVER, J. (*dissenting*). I would deny the Judicial Tenure Commission's motion for the Supreme Court to enter a default judgment against the garnishee defendant, California Charley's Corporation. The respondent, Judge Trudel, is the apparent sole shareholder of that corporation, and there is no constitutional authority to assess costs against the

respondent. Therefore, there is no corresponding authority to enter a default judgment against the garnishee defendant. Thus, the commission's motion should be denied.

See my statement concurring in the September 22, 2006, order in this matter denying appointment of a receiver and relief from orders. 477 Mich 1202, 1203 (2006). In that statement, I objected to the commission's attempt to have the Supreme Court order the assessment and collection of costs against the respondent because there is no constitutional authority for the Supreme Court to assess costs against a judge as a respondent in a matter involving the Judicial Tenure Commission.

Subsection 2 of Const 1963, art 6, § 30 establishes the Supreme Court's limited authority to discipline and provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge . . . ." As I stated in my concurrence in *In re Noecker*, 472 Mich 1, 18-19 (2005), "[n]othing in this constitutional provision gives this Court any authority to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her."

While under Const 1963, art 6, § 30(2) the Supreme Court also has the authority to "make rules implementing this section [concerning the Judicial Tenure Commission],"[1] the Supreme Court *cannot* create Judicial Tenure Commission rules that authorize the Judicial Tenure Commission to recommend to the Supreme Court something that the Supreme Court does not have constitutional authority to do. The rule-making authority available to the Supreme Court is limited to making rules "implementing this section." And, because "this section" provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge," this Court only has the authority to make rules implementing the section in connection with the *censure, suspension with or without salary, or retirement or removal of a judge*. Assessment and collection of costs is not included in this authority to discipline a judge. As the Supreme Court does not have authority to assess and collect costs granted to it by the Michigan Constitution, there is no corresponding rule-making authority to provide for the Judicial Tenure Commission to recommend to the Supreme Court the assessment and collection of costs against a respondent judge. This Court may not delegate authority that it lacks in the first place.

KELLY, J. (*dissenting*). I would deny the motion for entry of a default judgment because it appears that the interrogatories that serve as the basis for the default judgment were not served within the time permitted by MCR 3.101(L)(1).

Order Entered November 20, 2007:

PROPOSED AMENDMENT OF RULE 2.203 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an

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[1] While not pertinent to the matter now before us, the Supreme Court also has the authority to make rules "providing for confidentiality and privilege of proceedings." Const 1963, art 6, § 30(2).

amendment of Rule 2.203 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.203. JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS.

(A) Compulsory Joinder of claims and counterclaims. ~~In a pleading that states a claim against an opposing party, the~~ A pleader must join in a complaint or counterclaim every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction, except that such a claim need not be stated if at the time the action was commenced, the claim was the subject of another pending action.

(B)-(F) [Unchanged.]

Staff Comment: The current Michigan Court Rules contain a compulsory joinder provision, which generally requires that all claims arising from the same transaction or occurrence be combined, and a permissive counterclaim provision, which allows, but does not require, parties to bring a counterclaim. The Federal Rules of Civil Procedure contain opposite provisions; i.e., a compulsory counterclaim provision at FR Civ P 13, and a permissive claim joinder provision at FR Civ P 18. This proposal would require the compulsory joinder of counterclaims, similar to the federal rules.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-25. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Leave to Appeal From the Attorney Discipline Board Denied November 29, 2007:

GRIEVANCE ADMINISTRATOR v DIB, No. 134180.

Order Entered December 4, 2007:

PROPOSED AMENDMENT OF RULE 9.208 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.208 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 9.208. EVIDENCE.

(A)-(B) [Unchanged.]

(C) Discovery.

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

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

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

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

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

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

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

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

Staff Comment: This proposal would require all parties to a Judicial Tenure Commission proceeding that is scheduled for a public hearing to

exchange material in their possession that they intend to introduce as evidence at the hearing. Currently, this requirement applies only to the Judicial Tenure Commission. The proposal also would require the parties to give supplemental notice of any additional material at least 10 days before a scheduled hearing.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2007-36.

Order Entered December 5, 2007:

In re ANONYMOUS JUDGE V JUDICIAL TENURE COMMISSION, No. 134505. The motion to seal the file is granted, in order to preserve the confidentiality of Judicial Tenure Commission proceedings provided by MCR 9.221. The complaint for superintending control is considered, and relief is denied, because the Court is not persuaded that it should grant the requested relief.

KELLY, J. (*concurring*). I concur in the decision to deny the relief sought in the belief, shared I think by others on the Court, that the Judicial Tenure Commission will act on plaintiff's requests for disqualification before taking any other formal action in this matter.

Order Entered December 21, 2007:

PROPOSED NEW RULE 8.126 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering adoption of proposed new Rule 8.126 of the Michigan Court Rules, as well as proposed amendments of Rule 9.108 of the Michigan Court Rules and Rule 15 of the Rules Concerning the State Bar of Michigan. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing held by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.126. TEMPORARY ADMISSION TO THE BAR

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

(1) Procedure.

(a) Motion. The Michigan attorney with whom the out-of-state attorney is associated shall file an appearance and a motion that seeks permission for the appearance by the out-of-state attorney with the court or administrative tribunal or agency. The motion shall be supported by an affidavit of the out-of-state attorney seeking temporary admission, which shall verify (1) the jurisdictions in which the attorney is or has been licensed or has sought licensure; (2) that the attorney is not disbarred or suspended in any jurisdiction, and is not the subject of any pending disciplinary actions, and that the attorney is licensed and is in good standing in all jurisdictions where licensed; and (3) that he or she is familiar with the Michigan Rules of Professional Conduct. The out-of-state attorney shall attach to the affidavit a certificate of good standing from each jurisdiction in which the attorney is licensed. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, and believes the out-of-state attorney's representations are true. The out-of-state attorney shall also sign the motion.

(b) The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission. Within seven days after receipt of the copy of the motion, the Attorney Grievance Commission must notify the court or administrative tribunal or agency if the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances.

(c) Order, Fee. If the court or administrative tribunal grants permission to appear, it shall enter an order, a copy of which it must send to the Michigan attorney. The Michigan attorney in turn shall send a copy of the order to the Attorney Grievance Commission. The order shall state that

the appearance by the out-of-state attorney is effective on the date the attorney pays a fee equal to the discipline and client-protection portions of a SBM member's annual dues. The fee may be waived if the client is indigent. The fee shall be paid to the State Bar of Michigan for the exclusive use of the Attorney Grievance Commission.

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

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

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

(B)-(D) [Unchanged.]

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

(1)-(7) [Unchanged.]

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

~~(8)~~(9) perform other duties provided in these rules.

RULE 15. ADMISSION TO THE BAR

Sec. 1 [Unchanged.]

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

Sec. 3 [Unchanged.]

Staff comment: This proposal would allow an out-of-state attorney to be authorized to appear temporarily (also known as pro hac vice appearance) in no more than three cases within a 365-day period. The rule would impose a fee equal to the discipline and client-protection fund portions of a bar member's annual dues (currently $135) for each appearance, because misconduct will subject the out-of-state attorney to disciplinary action in Michigan. The Attorney Grievance Commission would keep a record of all such temporary appearances ordered by Michigan courts, and would be entitled to receipt of the fee paid in applying for the temporary admission.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2008, at P.O.

Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-08. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Leave to Appeal from the Attorney Discipline Board Denied January 8, 2008:

GRIEVANCE ADMINISTRATOR v WEIDEMAN, No. 135090.

Superintending Control Denied January 22, 2008:

In re BELLVILLE, No. 135249.

In re BROGUE, No. 135269.

Orders Entered January 23, 2008:

PROPOSED AMENDMENT OF RULE 2.603 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.603 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) [Unchanged.]

(B) Default Judgment.

(1) [Unchanged.]

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

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

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

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

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

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: This proposal would require that only negotiable instruments be filed with the clerk for cancellation when applying for a default judgment.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2006-10.

PROPOSED AMENDMENTS OF RULES 2.614, 7.101, 7.209, AND 7.302 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 2.614, 7.101, 7.209, and 7.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its current form.

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

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A)-(C) [Unchanged.]

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

(E)-(G) [Unchanged.]

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

(A)-(G) [Unchanged.]

(H) Stay of Proceedings.

(1) Civil Actions.

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

(b) An appeal does not stay execution unless

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

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

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

(c) The stay bond must be set by the trial court in an amount adequate to protect the opposing party. If the appeal is by a person against whom a money judgment has been entered, it must be not less than 11/4 times the amount of the judgment. The bond must:

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

(ii) contain the conditions that the appellant

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

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

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

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

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

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

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

(2) Probate Proceedings.

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

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

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

(4) Criminal Cases. Unless a bond pending appeal is filed with the trial court, a criminal judgment may be executed immediately even though the time for taking an appeal has not elapsed. The granting of bond and the

amount of it are within the discretion of the trial court, subject to the applicable laws and rules on bonds pending appeals in criminal cases.

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

(I)-(P) [Unchanged.]

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A) Effect of Appeal; Prerequisites.

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

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

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

(B)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

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

(a) When the stay is sought before an appeal is filed and a bond is required, the party seeking the stay shall file a bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

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

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

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

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

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

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

(F)-(I) [Unchanged.]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(G) [Unchanged.]

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

Staff Comment: This proposal would impose an automatic stay in a case in which a party files a claim of appeal of a denial by the trial court of the party's claim of governmental immunity. Under this proposal, no order would be necessary for the stay to operate.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's §website. When filing a comment, please refer to ADM File No. 2006-11.

Order Entered January 29, 2008:

PROPOSED AMENDMENT OF RULE 2.504 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.504 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website, www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.504. DISMISSAL OF ACTIONS.

(A) [Unchanged.]

(B) Involuntary Dismissal; Effect.

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

(2) In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence the defendant, or the court on its

own initiative, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has ~~shown~~ no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

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

(C)-(E) [Unchanged.]

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

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-32. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered February 5, 2008:

PROPOSED AMENDMENT OF RULE 6.201 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.201. DISCOVERY.

(A) [Unchanged.]

(B) Discovery of Information Known to the Prosecuting Attorney. ~~Upon request, the~~The prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney; and

(2) upon request,

(a) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

~~(3)~~ (b)any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

~~(4)~~ (c)any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

~~(5)~~ (d)any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C)-(J) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.201(B)(1) would eliminate the requirement that the prosecuting attorney provide the defendant with any exculpatory information or evidence known to the prosecuting attorney only upon request. This proposal also clarifies that the prosecuting attorney is required to provide such information or evidence regardless of whether it is requested by the defendant. The Court would appreciate specific comments on whether a court rule requiring the prosecuting attorney to provide the defendant with exculpatory information or evidence is necessary, in light of the prosecuting attorney's constitutional obligation to do so under *Brady v Maryland*, 373 US 83 (1963), and, if so, whether the proposed amendment of MCR 6.201(B)(1) is consistent with the requirements of *Brady*.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-38. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 7.202 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.202 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,

(ii) an order designated as final under MCR 2.604(B),

(iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

(v) An order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying summary disposition under MCR 2.116(C)(10) in which a defendant raises a claim of governmental immunity;

(b) [Unchanged.]

Staff Comment: This proposed amendment would clarify that motions for summary disposition that involve claims of governmental immunity based on MCR 2.116(C)(7) and (C)(10) that are denied are appealable by right in the Court of Appeals. This proposed language is designed to address the jurisdictional issue that arose in the cases of *Newton v Michigan State Police*, 263 Mich App 251 (2004), and *Walsh v Taylor*, 263 Mich App 618 (2004).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-09. Your comments will be posted, along with the comments of others, at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered February 6, 2008:

In re THE HONORABLE NORENE S REDMOND, No. 134481. On order of the court, the Judicial Tenure Commission has issued a decision and recom-

mendation for discipline, and the Honorable Norene S. Redmond has consented to the commission's finding of fact and its recommendation for discipline.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.
>
> The JTC should consider these and other appropriate standards that it may develop in its expertise, when it offers its recommendations.

In this case those standards are being applied to the following findings of the Judicial Tenure Commission, which we adopt as our own:

> 1. Respondent is, and at all material times was, a judge, of the 38th District Court in Eastpointe, Michigan. With respect to Grievance No. 06—16451, Respondent was sitting as a judge of the 41A District Court (Shelby Township) acting pursuant to Joint Local Administrative Order D37 2005—01J. As a judge, she is subject to all the duties and responsibilities imposed on her by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.
>
> Grievance No. 2006-16451

2. On January 14, 2006, Jeannine Somberg's 16-year-old son, Nicholas, called 911 and reported that his mother hit him with a belt. The Shelby Township Police responded and noticed Nicholas had a red welt on his left arm. Nicholas refused to sign a statement.

3. Ms. Somberg, who was outside when the police arrived, was uncooperative with one of the officer's attempts to have her go inside. When the officer tried to arrest her, she ran into the house and locked herself and her 12-year-old autistic son in the bathroom. She eventually exited the bathroom. The Shelby Township officers arrested her for domestic violence and for resisting arrest and obstruction of justice. The misdemeanor domestic violence charge carried a maximum sentence of 93 days and the felony resisting arrest and obstruction of justice charge carried a maximum of two years prison.

4. The following day, Sunday, January 15, 2006, Respondent presided over a bond hearing for Ms. Somberg, who was unrepresented. Respondent set bond at $5,000.00/10%. Ms. Somberg, who had been transferred within the Macomb County Jail complex, awaited release upon her parents' payment of $500.

5. After the bond hearing, there was a disturbance in the adjacent hallway. Ms. Somberg's 16-year-old son Nicholas referred to Respondent as an "asshole" out of the presence of Respondent and his mother. A law enforcement official relayed the incident to Respondent, who promptly went back on the record, approximately 15 minutes after the bond hearing had ended. Respondent then raised Ms. Somberg's bond to $25,000.00 cash/surety without knowledge or presence of Ms. Somberg, and without citing MCR 6.106(H)(2)(a):

"THE COURT: This is the matter of Jeannine Lucido Somberg. Miss. [sic] Somberg had been before me this morning on a domestic violence case, involving her son, her 16 year old [sic] son who was in the courtroom along with family members. I took the appropriate information set a conditional bond, and given the nature of what she told me, regarding a special needs son, I set the bond at $5,000.00, 10 percent."

"Upon the bond being set, in the hallway, it came to my attention that there was an incident involving the sheriff's department and Shelby Township Police Officers, in which the alleged victim in this matter, was threatening in his manner and tone, along with other family members, and the 16 year old — was it the — the 16 year old [sic] proceeded to call me an asshole, in the officer's presence, which then was brought to my attention as well. And given the circumstances in this matter, and given the possible violent, and assaultive nature, not only of the alleged victim, the

family and the Defendant, the bond will be $25,000.00 cash surety only. All other terms and conditions apply."

[5a]. Respondent initially set bond for Ms. Somberg in the amount of $5,000.00/10%. Minutes after Ms. Somberg had been removed, Ms. Somberg's 16-year-old son Nicholas was overheard in the hallway referring to Respondent as an "asshole" by county officials, who reported the incident to Respondent. Respondent went on the record 15 minutes after the bond hearing had concluded and increased Ms. Somberg's bond to $25,000.00 cash or surety, referring to the "asshole" comment. Ms. Somberg's parents had already gone to pay the original $500.00 bond to get her released, learned it had been changed to a $25,000.00 cash bond and returned to court. Approximately half an hour later, Respondent went on the record again with Ms. Somberg's parents and son present. Nicholas Somberg acknowledged he was the one at fault, and repeatedly asked to be punished instead of his mother, either by being jailed or placed in juvenile detention until Tuesday. Respondent castigated him for his behavior but did not lower the bond or reinstate the original bond.

[5b]. Respondent asserted her decision to increase the bond was to "protect" the family from potential domestic violence. She had, however, already issued a no contact except for mental health order between Ms. Somberg and Nicholas.

6. At trial, a jury found Ms. Somberg not guilty of the underlying charge of domestic violence, but guilty of resisting and obstructing.

Grievance No. 2006-16509

7. James Braun was charged with two felonies: embezzlement from a vulnerable adult and larceny in a building, along with Isaac Lovell. The men had taken about $800 in cash from the premises and had given an inflated estimate for a painting job to a 90-year-old woman. The woman paid them approximately $3,000.00, which was excessive for the amount of work done.

8. The maximum sentence for the embezzlement count is 5 years and/or $10,000.00. The maximum sentence for the larceny count is a maximum of four years and/or $5,000.00.

9. On June 29, 2005, Respondent arraigned James Braun in 38th District Court.

10. There were television cameras in the courtroom.

11. Mr. Braun's attorney, George Michaels, pointed out that Mr. Braun had no prior adult or juvenile criminal record, no history of substance abuse or addiction, had recently moved with his parents and wife to Ortonville, Michigan, and would likely be sentenced to probation. He accordingly asked for a low bond to be

set. Mr. Braun provided Respondent with his recently obtained Michigan telephone number, but had not yet changed his driver's license from Florida to Michigan.

12. Eastpointe Police Department Detective Neil Childs stated that the Police Department felt anyone who would take advantage of a 90-year-old is a threat to the public, that the Police Department did not believe that Mr. Braun had ties to the area because he gave the police officers a North Fort Myers, Florida address and that Ortonville is not considered close, and that the vehicle Mr. Braun was riding in with the co-Defendant had work orders from Delaware. Detective Childs asked for the highest possible bond that the Court felt was appropriate.

13. Respondent set bond for Mr. Braun at $750,000.00.

14. After the matter went to Circuit Court, the embezzlement-from-a-vulnerable-adult and larceny-in-a-building charges against Mr. Braun were dropped pursuant to a plea agreement. He pled no contest to a charge of false pretenses and was sentenced to one year probation with credit for 12 days served.

15. Isaac Lovell was charged with two felonies: embezzlement from a vulnerable adult and larceny in a building, along with James Braun. The men had taken about $800 in cash from the premises, and had given an inflated estimate for a painting job to a 90-year-old woman. The woman paid them approximately $3,000.00, which was excessive for the amount of work done.

16. The maximum sentence for the embezzlement count is 5 years and/or $10,000.00. The maximum sentence for the larceny count is a maximum sentence of four years and/or $5,000.00.

17. On June 29, 2005, Respondent arraigned Isaac Lovell. Mr. Lovell's attorney, Michael J. Dennis, pointed out that Mr. Lovell had a minimal prior criminal history, was married, had an 11-month-old child, and had recently established ties with the community of Ortonville, Michigan, having purchased a mobile home where he and his family lived in a trailer park in a mobile home he had purchased.

18. Eastpointe Police Department Detective Neil Childs pointed out that Mr. Lovell's criminal history dated back to 1996 in Florida for driving while license suspended, 1998 (Osceola County) for domestic violence battery, 2001 (Pinellas Park Police) for driving while license suspended, an obstruction charge for failing to appear on the driving while license suspended, 2004 for driving while license suspended in Orange County, and 2004 driving under the influence and driving while license suspended. On behalf of the Eastpointe Police Department, Detective Childs said that they had to assure the alleged victim that she and the other residents of the

state that they will be protected [sic]. Detective Childs pointed out that Mr. Lovell have [sic] given an out-of-state address to the officers. Detective Childs expressed concerns about Mr. Lovell's ties to the area and whether or not he would return to court. Detective Childs also pointed out that Mr. Lovell appeared in the NABI ("National Association of Bunco Investigators") book, by name, picture, and date of birth as a "traveler" who has had contact with this type of activity at some point in his past.

19. Respondent set bond for Mr. Lovell at $1,000,000.00.

[19a]. Respondent's comment, in response to Mr. Braun's attorney's observation that considering all the circumstances his client would undoubtedly get probation, to the effect that it was a shame if convicted that that was the case, contributed to the appearance that the grossly excessive bails she set for Mr. Braun ($750,000) and Mr. Lovell ($1,000,000) were intended to be punitive.

20. After the matter went to circuit court, the embezzlement-from-a-vulnerable-adult and larceny-in-a-building charges against Mr. Lovell were dropped pursuant to a plea agreement. He pled no contest to a charge of false pretenses and was sentenced to one year probation with credit for 12 days served.

Grievance Nos. 2006-16771 and 2007-16812

21. Carmen Granata, a 23-year-old veterinarian technician, was cited on November 5, 2006, for violating the city noise ordinance.

22. Ms. Granata admitted hosting a large party. After attending a concert some of the guests returned. Neighbors called the police to complain about the noise. The police initially did not observe any violations but advised Ms. Granata about the complaints. Some time around 4:00 a.m., one of the guests went outside to use a cell phone, and yelled or spoke loudly. The police, who were waiting in a car down the street, approached and ticketed Ms. Granata.

23. On November 21, 2006, Ms. Granata appeared before Respondent in *pro per*. She pled guilty to the misdemeanor noise violation. Ms. Granata had no prior criminal record. The maximum penalty for the ordinance violation was 90 days and/or $500.00.

24. During the hearing, Respondent read a petition from certain of Ms. Granata's neighbors who complained about the parties and the number of guests who frequented Ms. Granata's house, allegedly causing disturbances. Respondent did not disclose

that she knew some of the neighbors. Respondent also read favorable letters from certain of Ms. Granata's neighbors into the record.

25. Respondent allowed three of Ms. Granata's neighbors who had signed the petition, Jeffrey and Melissa Walsh, and Richard Jordan to speak out about their past experiences with Ms. Granata. Respondent does not contest that Richard Jordan was himself arrested in front of Ms. Granata's house for disorderly conduct and resisting arrest the night she was ticketed. Neither Mr. Jordan nor law enforcement officials disclosed this fact to Respondent on the record.

26. Respondent referred to Ms. Granata's neighbors as "the people who built this damn city" and agreed with one of them, "I wouldn't be scared of them either. They're just punks." Respondent repeatedly referred to Ms. Granata's residence as a "flophouse" and how she would be "livid" by the alleged activity.

27. Respondent imposed a sentence upon Ms. Granata which included fines and costs and two years reporting probation with the first 30 days served in the Macomb County Jail, and several other strict terms, including, but not limited to, reporting twice monthly, daily preliminary breath tests at the police department and 38th District Court, subjection to home visits, 100 hours of community service, no parties unless approved by the neighbors who signed the petition, and no one to spend the night at her home except Ms. Granata and her brother who reside there.

[27a]. Notwithstanding the petition signed by some of the defendant's neighbors complaining about parties at her house and the loud and occasionally gross behavior by some of the guests, Respondent repeatedly permitted neighbors who were present to interrupt and further challenge the 23-year-old unrepresented defendant. Respondent failed to maintain appropriate decorum, engaged in similar conduct by echoing some of the neighbors' comments and complaints regarding alleged incidents not part of the noise violation charge to which the defendant had pled guilty, contributing to the appearance that Respondent was motivated by personal ire and to seek public approbation in sentencing Ms. Granata as she did.

28. On November 28, 2006, Respondent granted Ms. Granata's *Ex-Parte* Emergency Motion for Work Release. On December 4, 2006, Respondent denied Ms. Granata's motion to set aside the plea.

The standards set forth in *Brown* are also being applied to the following conclusions of the Judicial Tenure Commission, which we adopt as our own:

Respondent's conduct, as drawn from the stipulated and found facts, constitutes:

a. Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, § 30 and MCR 9.205;

b. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, § 30, and MCR 9.205;

c. Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Michigan Code of Judicial Conduct ("MCJC"), Canon 1;

d. Failure to bear in mind that the judicial system is for the benefit of the litigant and the public, not the judiciary, contrary to MCJC, Canon 1;

e. Conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary, in violation of MCJC, Canon 2A;

f. Failure to respect and observe the law and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to MCJC, Canon 2B;

g. Allowing family, social, or other relationships to influence judicial conduct or judgment, in violation of MCJC, Canon 2C;

h. Failure to be patient, dignified, and courteous to those being dealt with in an official capacity, contrary to MCJC, Canon 3A(3);

i. Failure to adopt the usual and accepted methods of doing justice; failure to avoid the imposition of humiliating acts or discipline, not authorized by law in sentencing; and failure to endeavor to conform to a reasonable standard of punishment, contrary to MCJC, Canon 3A(9);

j. Demonstrating a severe attitude toward witnesses, tending to prevent the proper presentation of the cause or ascertainment of the truth, and failure to avoid a controversial manner or tone in addressing litigants or witnesses, in violation of MCJC, Canon 3A(8);

k. Setting grossly excessive bail amounts and failing to appropriately and reasonably consider the provisions of MCR 6.106 regarding bond;

l. Setting harsh and excessive bail, and inflicting unusual punishment, contrary to Michigan Const. 1963, Art. I, § 16.

m. Setting harsh and excessive bail and inflicting unusual sentence, in violation of U.S. Const. Am. VIII: "Excessive bail shall not be required, nor excessive fines imposed, no cruel and unusual punishments inflicted."

n. Persistent failure to treat persons fairly and courteously, contrary to MCR 9.205(B)(1)(c);

o. Conduct prejudicial to the administration of justice, in violation of MCR 9.104(1);

p. Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2);

q. Conduct contrary to justice, in violation of MCR 9.104(A)(3); and

r. Conduct that violates the standards or rules of professional responsibility adopted by the Michigan Supreme Court, contrary to MCR 9.104(4).

After reviewing the recommendation of the Judicial Tenure Commission, the respondent's consent, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Norene S. Redmond be publicly censured. This order stands as our public censure.

WEAVER, J. (*concurring*). I concur in the order of this Court agreeing with the recommendation of the Judicial Tenure Commission that the respondent, the Honorable Norene S. Redmond, be publicly censured on the basis of the findings of fact to which the respondent stipulated.

I write separately to note that the commission's recommendation includes findings based on facts to which the respondent did not stipulate. Specifically, paragraph 3 of the settlement agreement states:

> 3. The parties stipulate that a set of stipulated facts ("Stipulated Facts") shall be presented to the Commission, which shall be the sole factual basis for the Commission's decision and recommendation in this matter.

Because the commission exceeded the scope of the agreement to which the respondent stipulated by basing its recommendation on additional facts not included in the original stipulation, the respondent would likely be relieved from her corresponding promise to accept public censure. However, because the respondent has not challenged the inclusion of additional facts beyond the facts to which she stipulated, I concur in the order of public censure.

CORRIGAN, J. I join the statement of Justice WEAVER.

Orders Entered March 18, 2008:

PROPOSED AMENDMENT OF RULES 6.302 AND 6.310 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices

and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.302 PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

(1) The court shall not participate in discussions between the prosecutor and the defendant's lawyer or the defendant, if the defendant is proceeding pro se, concerning a plea agreement.

~~(1)~~ (2) The court must ask the prosecutor and the defendant's lawyer or the defendant, if proceeding pro se, whether they have made a plea agreement.

~~(2)~~ (3) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant. A plea agreement may include an agreement on a specific sentence disposition or sentencing range, including an agreement on the applicability of a particular sentencing provision or factor of the sentencing guidelines.

~~(3)~~ (4) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or sentencing range, or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to where the agreement is for a specific sentence disposition or sentencing range ~~or recommended by the prosecutor~~; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement ~~without having considered the presentence report~~ or takes the plea agreement under advisement, and the agreement includes a sentence recommendation by the prosecutor, it must explain to the defendant that the court is not bound to follow the prosecutor's sentence ~~disposition or~~ recommendation ~~agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement~~.

~~(4)~~ (5) [Renumbered but otherwise unchanged.]

(D)-(F) [Unchanged.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

~~(a)~~ the plea involves ~~a prosecutorial sentence recommendation or~~ an agreement for a specific sentence disposition or sentencing range, and the court states that it is unable to follow the agreement ~~or recommendation~~; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea. ~~; or~~

~~(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.~~

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and MCR 6.310 would make the rules consistent with the federal rules, which preclude judicial involvement in negotiating plea agreements and limit the ability of defendants to withdraw guilty pleas.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-16. Your comments and the comments of others will be posted at the following address: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered March 25, 2008:

PROPOSED AMENDMENT OF RULE 4.201 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and schedules of public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(F) [Unchanged.]

(G) Claims and Counterclaims.

(1) Joinder.

(a) A party may join:

(i) A money claim or counterclaim described by MCL 600.5739. A money claim must be separately stated in the complaint. A money counterclaim must be labeled and separately stated in a written answer.

(ii) A claim or counterclaim for equitable relief.

(b) ~~If personal jurisdiction over the defendant was not obtained~~ Unless service of process under MCR 2.105 was made on the defendant, a money claim must be

(i) dismissed without prejudice ~~if the defendant does not answer or appear~~, or

(ii) adjourned until ~~personal jurisdiction over the defendant is obtained~~ service of process is complete if the defendant does not appear or file an answer to the complaint.

(c) A court with a territorial jurisdiction which has a population of more than 1,000,000 may provide, by local rule, that a money claim or counterclaim must be tried separately from a claim for possession unless joinder is allowed by leave of the court pursuant to subrule (G)(1)(e).

(d) If trial of a money claim or counterclaim

(i) might substantially delay trial of the possession claim, or

(ii) requires that the premises be returned before damages can be determined, the court must adjourn the trial of the money claim or counterclaim to a date no later than 28 days after the time expires for issuing an order of eviction. A party may file and serve supplemental pleadings no later than 7 days before trial, except by leave of the court.

(e) If adjudication of a money counterclaim will affect the amount the defendant must pay to prevent issuance of an order of eviction, that counterclaim must be tried at the same time as the claim for possession, subrules (G)(1)(c) and (d) notwithstanding, unless it appears to the court that the counterclaim is without merit.

(2) Removal.

(a) A summary proceedings action need not be removed from the court in which it is filed because an equitable defense or counterclaim is interposed.

(b) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(H)-(O) [Unchanged.]

Staff Comment: The proposed amendment of MCR 4.201(G)(1)(b) would clarify that service of process for purposes of a money claim is sufficient if completed pursuant to MCR 2.105; otherwise, if the defendant does not appear or file an answer to the complaint, a money claim must be dismissed without prejudice, or adjourned until service of process is complete.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. Your comments and the comments of others will be posted at www.courts.mi.gov /supremecourt/resources/administrative/index.htm.

Order Entered April 1, 2008:

PROPOSED AMENDMENT OF RULES 3.901, PROPOSED ADOPTION OF NEW RULE 3.930 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.901 and the adoption of Rule 3.930 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.901. APPLICABILITY OF RULES.

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901- ~~3.928~~ 3.930, 3.980, and 3.991-3.993 apply to delinquency proceedings and child protective proceedings.

(2)–(5) [Unchanged.]

Rule 3.930 Receipt and Return or Disposal of Exhibits in Juvenile Proceedings.

(A)Receipt of Exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court case file management standards.

(B)Return or Disposal of Exhibits. At the conclusion of a trial or hearing, exhibits may be retrieved by the parties submitting them except that any weapons and drugs shall be returned to the confiscating agency for proper disposition. If the exhibits are not retrieved by the parties within 56 days after the conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties.

(C) Confidentiality. If the court retains an exhibit after a hearing or trial and the exhibit is confidential as provided by MCR 3.903(A)(3), the court must continue to maintain the exhibit in a confidential manner.

Staff Comment: The proposal would allow the court to return or destroy exhibits within 56 days of the completion of the trial or hearing. In addition, the admission of an exhibit into evidence would not change the confidential nature of that exhibit, and the court would be required to maintain confidential exhibits in accordance with MCR 3.903(A)(3).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-28. Your comments and the comments of others will be posted at: www.courts.mi.gov /supremecourt/resources/administrative/index.htm.

Order Entered April 8, 2008:

Proposed Amendment of Rules 2.107 and 2.117 of the Michigan Court Rules. On order of the Court, this is to advise that the Court is considering amendments of Rules 2.107 and 2.117 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov /supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

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

(A)-(B) [Unchanged.]

(C) Manner of Service. Service of a copy of a paper on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally;

(b) leaving it at the attorney's office with the person in charge or, if no one is in charge or present, by leaving it in a conspicuous place; or

(c) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there.

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally; or

(b) leaving it at the party's usual residence with some person of suitable age and discretion residing there.

(3) Mailing. Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing.

(4) E-mail. Some or all of the parties may agree to service by e-mail by filing a stipulation in that case. E-mail service shall be subject to the following conditions:

(a) The stipulation for service by e-mail shall set forth the e-mail addresses of the parties or attorneys that agree to e-mail service, which shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission.

(b) The parties shall set forth in the stipulation all limitations and conditions concerning e-mail service, including but not limited to:

(i) the maximum size of the document that may be attached to an e-mail;

(ii) designation of exhibits as separate documents;

(iii) the obligation (if any) to furnish paper copies of e-mailed documents; and

(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.

(c) Documents served by e-mail must be in PDF format or other format that prevents the alteration of the document contents.

(d) A paper served by e-mail that an attorney is required to sign may include the attorney's actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).

(e) Each e-mail that transmits a document shall include a subject line that identifies the case by court, party name, case number, and the title or legal description of the document(s) being sent.

(f) An e-mail transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday. Service by e-mail under this subrule is treated as service by delivery under MCR 2.107(C)(1).

(g) A party may withdraw from a stipulation for service by e-mail if that party notifies the other party or parties in writing at least 28 days in advance of the withdrawal.

(h) Service by e-mail is complete upon transmission, unless the party making service learns that the attempted service did not reach the e-mail address of the intended recipient.

(i) The e-mail sender shall maintain an archived record of sent items that shall not be purged until the conclusion of the case, including the disposition of all appeals.

(5) Electronic Service. Notwithstanding any other provision of these rules or law, by administrative order of the trial court, the court may electronically serve a party with any required notice or document, unless the party or the party's attorney has notified the court in writing that he or she elects for good cause not to receive service in such a manner. For purposes of this subrule:

(a) electronic service includes e-mail or facsimile service.

(b) good cause includes the fact that the attorney or party does not have ready access to a facsimile machine or e-mail communication.

(D)-(G) [Unchanged.]

RULE 2.117. APPEARANCES.

(A) Appearance by Party.

(1) A party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose. In the latter event, the party must promptly file a written appearance and serve it on all persons entitled to service. The party's address and telephone number must be included in the appearance. If the court has adopted an administrative order pursuant to MCR 2.107(C)(5), and if a party has not notified the court in writing that the party elects for good cause not to receive service electronically, the written appearance of the party or the first responsive pleading filed with the court shall include the party's e-mail address and facsimile number to which court-issued notices or documents in the case may be forwarded to comply with service requirements.

(2) Filing an appearance without taking any other action toward prosecution or defense of the action neither confers nor enlarges the jurisdiction of the court over the party. An appearance entitles a party to receive copies of all pleadings and papers as provided by MCR 2.107(A). In all other respects, the party is treated as if the appearance had not been filed.

(B) Appearance by Attorney.

(1) In General. An attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party.

(2) Notice of Appearance.

(a) If an appearance is made in a manner not involving the filing of a paper with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. The attorney's address and telephone number must be included in the appearance.

(b) If an attorney files an appearance, but takes no other action toward prosecution or defense of the action, the appearance entitles the attorney to service of pleadings and papers as provided by MCR 2.107(A).

(c) If the court has adopted an administrative order pursuant to MCR 2.107(C)(5), and if an attorney for a party has not notified the court in writing that the attorney elects for good cause not to receive service electronically, the written appearance of the attorney or the first responsive pleading filed with the court shall include the attorney's e-mail address and facsimile number to which court-issued notices or documents in the case may be forwarded to comply with service requirements.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court ordered conference or trial.

(C) [Unchanged.]

Staff comment: The proposed amendments would allow a court to enter an order authorizing electronic service of notices and documents unless the party or attorney files written notice with the court that he or she for good cause elects not to receive service electronically. Good cause is defined to include the fact that a party or attorney does not have ready access to a facsimile machine or e-mail communication. Electronic service would include service by facsimile or e-mail.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-30. Your comments and the comments of others will be posted at www.courts.mi.gov /supremecourt/resources/administrative/index.htm.

Orders Entered April 25, 2008:

ESTATE OF BUCKNER v CITY OF LANSING, No. 133772. On order of the Court, leave to appeal having been granted and the briefs and oral argument of the parties having been considered by the Court, we reverse in part the March 15, 2007 judgment of the Court of Appeals. MCR 7.302(G)(1). Under the doctrine of governmental immunity, MCL 691.1401 *et seq*., governmental agencies are entitled to immunity "for *all* tort liability whenever they are engaged in the exercise or discharge of a

governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156 (2000) (emphasis in original). However, the Legislature has provided six specific exceptions to this general immunity; at issue here is the highway exception to immunity, MCL 691.1402(1). A governmental agency with jurisdiction over a highway has the duty to "maintain the highway in reasonable repair." MCL 691.1402(1); *Nawrocki*, *supra* at 160. The term "highway" includes "sidewalks." MCL 691.1401(e). In order to show that a governmental agency failed to "maintain [a] highway in reasonable repair," a plaintiff must demonstrate that a "defect" exists in the highway. *Nawrocki*, *supra* at 158; *Haliw v City of Sterling Hts*, 464 Mich 297, 309 n 9 (2001). Because the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a "defect" in the sidewalk, plaintiffs have not shown that defendant violated its duty to "maintain" the sidewalk "in reasonable repair." Thus, there is no need for this Court to address the issue of proximate causation. Accordingly, MCL 691.1402(1) bars plaintiffs' suit. We remand this case to the Ingham Circuit Court for entry of an order granting defendant's motion for summary disposition and for further proceedings not inconsistent with this order. Reported below: 274 Mich App 672.

MARKMAN, J. (*concurring*).

I concur with the order. I write separately only to respond to several arguments in Justice WEAVER's dissent, which have the potential to mislead future litigants and which seek to replace the policy determinations of the Legislature, as explained in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), with those of Justice WEAVER.

The central proposition of Justice WEAVER's dissent is that, under MCL 691.1402(1), municipalities have a "statutory duty to maintain [a] highway 'in reasonable repair and in a condition reasonably safe and fit for travel.' " *Post* at 1246. However, *Nawrocki* (a decision in which Justice WEAVER joined) quite clearly explains that the duty established under the first sentence of MCL 691.1402(1) is limited to keeping the highway "in reasonable repair":

> The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: "[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." [*Nawrocki*, *supra* at 160.]

Nawrocki thus clearly asserts that the duty of a municipality under MCL 691.1402(1) is limited to maintaining highways in "reasonable repair."[1]

Justice WEAVER's dissent then goes to extraordinary lengths to distinguish *Haliw v Sterling Hts*, 464 Mich 297 (2001), noting that *Haliw* involved a natural accumulation of snow, unlike the instant case.[2] However, the only relevant consideration for deciding the instant case is that a municipality's duty is limited to "maintaining the [sidewalk] in reasonable repair," and under that language plaintiff must show some defect in the sidewalk. The fact that *Haliw* involved a natural accumulation of snow, and the instant case does not, is utterly irrelevant and beside the point.

After distinguishing *Haliw* on the facts, Justice WEAVER's dissent then relies on several cases to support its contention that a plaintiff may recover for an injury that arises from an unnatural accumulation of ice and snow. What Justice WEAVER's dissent fails to acknowledge is that two of these cases—*Kowalczyk v Bailey*, 379 Mich 568 (1967), and *Johnson v City of Marquette*, 154 Mich 50 (1908)—did not involve the application of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., which was enacted in 1964. Although the third case cited by the dissent, *Hampton v Master Products, Inc*, 84 Mich App 767 (1978), did refer to the GTLA, *Hampton* relied on *Kowalczyk*, a pre-GTLA case, to conclude that an unnatural accumulation could permit recovery. Accordingly, Justice WEAVER's reliance on these cases is misplaced because all of them have been superseded with the 1964 enactment of the GTLA, which was the subject of thorough interpretation in *Nawrocki*.

Justice WEAVER's dissent rightly notes that the facts of this case are extremely tragic. However, the question before this Court is not how to ensure that plaintiffs obtain a recovery; rather, we must determine whether, under the laws of our state, a recovery has been authorized against a municipality under the present circumstances. For under our laws, "[i]t is well settled" that a municipality is generally "immune from tort liability while engaging in a governmental function unless an

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[1] *Nawrocki* further clarified a municipality's duty: " 'The duty to repair would generally limit the government's liability to cases in which there are defects.' " *Nawrocki*, *supra* at 177 n 32 (citation omitted). This Court has repeatedly equated the duty to "repair" with a duty to fix "defects." *Nawrocki*, *supra* at 158; *Haliw v Sterling Hts,* 464 Mich 297, 309 n 9 (2001); see also *Teufel v Watkins*, 267 Mich App 425, 429 n 1 (2005) ("The plain meaning of 'reasonable repair' as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises.").

[2] Justice WEAVER's dissent also expends a great deal of effort distinguishing *MacLachlan v Capital Area Transp Auth*, 474 Mich 1059 (2006). Given that the majority's order never cites *MacLachlan*, I am unsure why Justice WEAVER believes it necessary to do so. The order is a simple and straightforward application of *Nawrocki*.

exception [in the GTLA] applies." *Haliw*, *supra* at 302; see also MCL 691.1407(1). Consequently, to conclude that defendant is not liable for damages under the GTLA is, as in every other such case, not the equivalent of this Court lauding defendant's performance of its municipal responsibilities or approving its sense of public priorities.

To reach its result, Justice WEAVER's dissent transforms *Nawrocki*, irrelevantly distinguishes *Haliw*, and relies upon opinions long since superseded by new statutes. Most significantly, it accords unnatural meanings to the words of the law. Although I too have harbored concerns about the impact of our state's governmental immunity law, see, e.g., *Reid v Detroit*, 474 Mich 1116 (2006); *Ewing v Detroit*, 468 Mich 886 (2003), any solution must lie in legislative amendment, not in the revision of statutory law by this Court.

CAVANAGH, J. (*dissenting*).

I would affirm the rulings of the trial court and the Court of Appeals that denied summary disposition for defendant city of Lansing. I also concur with part III(C) of Justice WEAVER's dissenting statement.

WEAVER, J. (*dissenting*).

I dissent from the order reversing the Court of Appeals judgment affirming the trial court's denial of summary disposition for the defendant, the city of Lansing. Because both lower courts properly concluded that a question of fact exists regarding whether the city created an unnatural accumulation of snow and ice, the plaintiffs should be permitted to present that question of fact to a jury.

The majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) has now decided that, despite the statutory mandate requiring governmental entities to maintain highways (including sidewalks) in reasonable repair and in a condition reasonably safe and fit for travel, the city's creation of an unnatural accumulation of snow and ice "does not constitute a 'defect' in the sidewalk" and therefore, the plaintiffs have failed to establish that the city violated its duty to maintain the sidewalk in reasonable repair. However, while the majority does not view an unnatural accumulation of snow and ice to be a "structural defect," the statutory duty to maintain a highway "in reasonable repair and in a condition reasonably safe and fit for travel" is not limited to a duty to repair "structural defects." Because both the statute and prior cases interpreting the duty to repair a highway indicate that an *unnatural accumulation* of snow and ice is a "defect" that a governmental entity has an obligation to address given its duty to maintain the sidewalk in reasonable repair and in a condition reasonably safe and fit for travel, and because a question of fact exists regarding whether the city created an unnatural accumulation of snow and ice, I dissent and would affirm the judgment of the Court of Appeals affirming the circuit court's denial of the city's motion for summary disposition.

Further, the majority of four's completely incorrect extension of *Nawrocki v Macomb Co Rd Comm*[1] by a one-page order, instead of by a

[1] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000).

full opinion, appears to be an attempt by the majority to conceal its latest example of judicial activism by unrestrained statutory interpretation.

I. FACTS

On January 29, 2005, at approximately 6:45 p.m., Chantell Buckner (then age seven), Lanecia Wright (then age 14), and LaQuata Wright (then age 13) were walking from their home on Saginaw Street to a nearby McDonald's Restaurant located at the north corner of Saginaw and Larch streets.[2] The three girls had been walking on the sidewalk on the north side of Saginaw Street, in a westbound direction facing oncoming traffic. However, when they reached the intersection of Saginaw and Prudden streets, the sidewalk became impassable because of a large, unnatural accumulation of snow and ice that had been plowed off Saginaw Street and piled onto the sidewalk by the city of Lansing.

The city of Lansing's public service department had a policy of not clearing the north sidewalk along Saginaw Street to discourage pedestrians from walking on the north sidewalk.[3]

When the north sidewalk of Saginaw Street became impassable because of the snow and ice piled onto it, the girls decided to walk in the roadway along the north curb of Saginaw Street. As the girls walked alongside the curb, a car headed east toward the girls struck Chantell Buckner and LaQuata Wright. Both girls suffered massive injuries, and Chantell died as a result of her injuries.[4]

After the accident, it became evident that the city's decision not to clear the sidewalk likely stemmed from the fact that the sidewalk itself, irrespective of snow and ice, was defective in that it had never been completed after a construction project in 1998. When the city constructed Prudden Street in 1998, it damaged the existing sidewalk along

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[2] By January 29, 2005, the city had received approximately 26.5 inches of snow since January 1, 2005. The average temperature for the two weeks before January 29 was below freezing. The largest snowfall occurred one week before the accident at issue here when, on January 22, the city received 12.6 inches of snow in one day.

[3] During a February 3, 2005, Lansing City Council meeting, a city employee of the public service department stated that the "sidewalk gets plowed occasionally but there is discretion given to the employee, but the general practice during heavy snow fall is to only plow the South side of that particular road." See also *Sidewalk Near Site of Fatality to Close,* Lansing State Journal, Feb. 1, 2005, at 1A and *City Considers Extending Sidewalk Near Hit-and-Run,* Lansing State Journal, Feb. 11, 2005, at 1A.

[4] The car's driver was defendant Luther Wampler (now deceased), who was allegedly intoxicated at the time his car collided with the girls. He was subsequently charged with operating a vehicle while intoxicated, MCL 257.625, and failing to stop at the scene of an accident, MCL 257.618.

Saginaw Street such that the north sidewalk of Saginaw between Prudden and Larch streets was defective. [5] This portion of the sidewalk (where the snow was piled up so as to make it impassable for the girls) remained in disrepair until after January 2005, i.e., after the accident.

The plaintiffs' original complaint against the city alleged failure to maintain, clear, shovel, or remove the unnatural accumulation of snow and ice from the north sidewalk. Essentially, the plaintiffs alleged that the city was liable under the highway exception to governmental immunity for injuries that resulted because of the city's failure to clear the unnatural accumulation of snow and ice from the north sidewalk of Saginaw Street.[6]

The city subsequently brought a motion for summary disposition asserting that under the law of *natural* accumulations, an actual defect in the sidewalk surface must exist.[7] The plaintiffs then filed an amended complaint alleging that the sidewalk underneath the snow and ice was itself defective and that this defect caused the girls' injuries or death. The city also filed a motion for summary disposition with regard to the plaintiffs' amended complaint.

The circuit court denied both of the city's motions for summary disposition, stating with respect to the first complaint:

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[5] A city employee admitted that it had been an unwritten policy of the city not to plow the north sidewalk for over 20 years. Thus, apparently even before the Prudden Street installation, the city had not plowed the area in question.

[6] MCL 691.1402(1) provides in pertinent part:

> Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

MCL 691.1401 defines "governmental agency" and "highway" as:

> (d) "Governmental agency" means the state or a political subdivision. [A city is a political subdivision.]
>
> (e) "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

[7] *Haliw v Sterling Hts,* 464 Mich 297 (2001).

> Plaintiff's contention is that there was an unnatural accumulation that occurred and the unnatural accumulation doctrine is still good law and distinguishes itself from the *MacLachlan*[8] case and the Court concurs. I was affirmed, so that I know the case. I know it well. I do believe that doctrine is still good law. The unnatural accumulation was not argued in front of the Court of Appeals or the Supreme Court, which clearly makes the facts in the Court's opinion distinguishable. Therefore, based on the oral argument and the Plaintiff's response, Defendant's Motion is denied.

The city appealed, and the Court of Appeals affirmed the circuit court's denial of the city's motion for summary disposition with respect to the plaintiffs' first complaint on the basis that the "City could be found liable for creating an unnatural accumulation of snow that caused the accident, notwithstanding the provisions of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*."[9]

The city again appealed, and the plaintiffs filed a cross-appeal. This Court granted leave and requested that the parties consider

> (1) whether the children's decision to risk walking in the street prevents the plaintiffs from establishing proximate causation; (2) whether the city of Lansing is entitled to governmental immunity because the injuries did not occur on the sidewalk that the city allegedly failed to maintain, i.e., the injuries were not the direct result of the allegedly unmaintained condition; and (3) whether the statutory duty to "maintain the highway in reasonable repair," MCL 691.1402(1), imposes obligations relating only to structural-type defects, or whether it includes a duty not to place temporary obstacles on a highway that render it impassable. [*Buckner Estate v City of Lansing,* 480 Mich 895 (2007).]

II. STANDARD OF REVIEW

This Court reviews the applicability of the governmental immunity statute, a question of law, de novo.[10] An appellate court also reviews de

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[8] *MacLachlan v Capital Area Transportation Auth,* 474 Mich 1059 (2006).

[9] *Buckner v City of Lansing,* 274 Mich App 672, 673 (2007). The Court of Appeals reversed the circuit court's denial of the city's motion for summary disposition with regard to the second complaint on the basis that "plaintiffs came forward with insufficient evidence to establish a genuine issue of fact regarding whether the alleged defect in the city's sidewalk proximately caused the accident at issue." *Id*.

[10] *Ostroth v Warren Regency GP, LLC*, 474 Mich 36, 40(2006).

novo a lower court's grant or denial of a motion for summary disposition.[11]

III. ANALYSIS

The governmental tort liability act (GTLA)[12] "provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function."[13] The city of Lansing is a governmental agency that is immune from tort liability for its negligence while engaged in a governmental activity, unless one of the five statutory exceptions to governmental immunity applies.[14] The exception at issue here is the highway exception, MCL 691.1402:

> (1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. . . .

MCL 691.1401 defines "governmental agency" and "highway" as:

> (d) "Governmental agency" means the state or a political subdivision.
>
> (e) "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways,

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[11] *Cowles v Bank West*, 476 Mich 1, 13 (2006).

[12] MCL 691.1401 *et seq*.

[13] *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 595 (1984).

[14] The five statutory exceptions are: (1) the highway exception, MCL 691.1402; (2) the motor-vehicle exception, MCL 691.1405; (3) the public-building exception, MCL 691.1406; (4) the proprietary-function exception, MCL 691.1413; and (5) the governmental-hospital exception, MCL 691.1407(4).

> crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

Inserting the definitions into § 1402, the highway exception to governmental immunity provides: "Each governmental agency [which includes cities] having jurisdiction over a highway [which includes sidewalks] shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury . . . by reason of failure of a governmental agency to keep a highway . . . in reasonable repair and in a condition reasonably safe and fit for travel may recover . . . damages." Pared down even further for purposes of this case, the plaintiffs' position is that pursuant to MCL 691.1402, the city, having jurisdiction over the sidewalk in question, has a duty to "maintain the [sidewalk] in reasonable repair so that it is reasonably safe and convenient for public travel." Further, the personal injuries sustained by the girls in this case occurred "by reason of failure of [the city]" "to keep [the sidewalk] in reasonable repair and in a condition reasonably safe and fit for public travel."

A. *Nawrocki Only Concerns Defects in "the improved portion of the highway designed for vehicular travel."*

In *Nawrocki*, this Court was only concerned with an injury that occurred on an improved portion of the highway. This Court did not address a city's duty to maintain sidewalks "in reasonable repair and in a condition reasonably safe and fit for travel."[15] The plaintiff, Rachel

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[15] MCL 691.1402(1). Justice MARKMAN insists, *ante* at 1244, that our decision in *Nawrocki* limited the duty to keep a highway "in reasonable repair so that it is reasonably safe and convenient for public travel" only to keep a highway that is designed for vehicular travel "in reasonable repair." That statement is correct, and I joined the majority's decision in that respect. However, the discussion of duty in *Nawrocki* was limited to the facts presented in that case, which specifically concerned an injury sustained as a result of a *county's failure to maintain a highway designed for vehicular travel.*

The present case is distinguishable not only because it concerned a *city's failure to maintain a sidewalk*, but also because it concerned a city's duty with respect to the creation of *an unnatural accumulation of snow on a city sidewalk*. As we noted in *Nawrocki*, *supra* at 176, the duty of the state and county road commissions to keep a highway "in reasonable repair" "is significantly limited, extending '*only* to the improved portion of the highway *designed for vehicular travel.*' " (Emphasis in original.) The reason this duty is limited in such fashion is that the state and county governmental agencies do not have as *broad* a duty as other governmental agencies (that broader duty extending not just to highways designed for vehicular travel, but also to bridges, sidewalks, trailways, crosswalks, and culverts, MCL 691.1401[e]) because the fourth sentence of MCL 690.1402(1) limits the state and the counties to a duty to repair

Nawrocki, after getting out of a truck from the passenger side and walking to the end of the truck to step off the curb and onto the street, seriously injured her ankle when she stepped into cracked and broken pavement in the roadway. This Court held that the county had a duty to protect pedestrians from dangerous or defective conditions in the improved portion of the highway designed for vehicular travel, even when the injury did not arise as the result of a vehicular accident. This Court went on to hold:

> [T]he *location* of an alleged dangerous or defective condition, *as narrowly defined in the fourth sentence of the statutory clause*, is the critical factor in determining whether a plaintiff is successful in pleading in avoidance of governmental immunity under the highway exception.
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> * * *
>
> While it is true that the second sentence of *MCL 691.1402(1)*; MSA 3.996(102) (1) generally allows "any person" to recover damages from a governmental agency with highway jurisdiction, *the fourth sentence of the statutory clause specifically limits the state and county road commissions' duty, and resultant liability for breach of this duty, "only to the improved portion of the highway designed for vehicular travel."* The plain language of this sentence, though limiting the duty and resultant liability, does not expressly exclude any particular *class* of injured traveler from recovering damages under the highway exception. Thus, we believe that pedestrians who sue the state or a county road commission are not automatically and entirely excluded, as a class, from the protections of the statutory clause.[16]

The italicized language above establishes that this Court viewed the *limited* duty for the "improved portion of the highway" as applicable only to the state and to counties. Accordingly, the *broader* duty applicable to governmental agencies in general, as set forth in the first sentence of MCL 691.1402(1), is still intact. In other words, even after *Nawrocki*, cities still have a "duty to maintain the highway [including sidewalks] in reasonable repair so that it is reasonably safe and convenient for public travel."[17] And an individual who is injured as a result of the govern-

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and maintain highways designed for vehicular travel. In that respect, state and county governmental agencies have no duty to maintain a sidewalk "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 690.1402(1).

[16] *Nawrocki*, *supra* at 168-170 (emphasis added).

[17] MCL 691.1402(1).

ment's failure "to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency."[18]

The majority's order improperly extends the limited holding in *Nawrocki* to this case, in which a defect in the improved portion of the highway is not even at issue. *Nawrocki* does not stand for the proposition that in order for a plaintiff to properly allege a claim of negligence against a city for failure to maintain a sidewalk in reasonable repair, the plaintiff must first show there was a defect in the sidewalk itself. There is simply no language in the statute, or in *Nawrocki,* supporting that conclusion. In fact, a footnote in that case exposes the error in the majority's strained interpretation of the holding in *Nawrocki*:

> We acknowledge that repairing and maintaining the improved portion of the highway in a condition reasonably safe and convenient for public travel represents a *higher duty of care* on the part of government than repairing and maintaining it for *vehicular* travel.[19]

The reference to "public travel" is a reference to travel on surfaces other than roadways designed for "vehicular travel," that is, sidewalks, bridges, trailways, crosswalks, and culverts. Because this Court did not extend its holding to require that a plaintiff alleging a city's failure to maintain a sidewalk in reasonable repair must show an actual defect in "bridges, sidewalks, trailways, crosswalks, and culverts on the highway,"[20] *Nawrocki* is inapplicable to this case, which concerns the unnatural accumulation of snow and ice on a city sidewalk.

Moreover, the majority of four's completely incorrect extension of *Nawrocki* in a one-page order, as opposed to a full opinion, appears to be an attempt by the majority to conceal another example of judicial activism by unrestrained statutory interpretation.

B. *Haliw Only Addresses the Natural Accumulation of Snow and Ice; MacLachlan Does Not Address the Unnatural Accumulation of Snow and Ice*

Unlike *Nawrocki*, *Haliw* did concern the accumulation of snow and ice, but the question was whether a *natural* accumulation of snow and ice alone rose to the level of creating a defect upon which liability could rest. The plaintiff slipped on a patch of ice created by a depression in a city sidewalk. Water had pooled in the depression and subsequently hardened into ice. There were no other rough edges or defects in the depression and the ice that formed was level with the sidewalk. It was on the basis of these precise facts that this Court concluded that the "accumulation" of ice was "natural" and that because the hole, by itself, did not contribute to the plaintiff's injury, the city was not liable.

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[18] *Id*.

[19] *Nawrocki*, *supra* at 172 n 28 (emphasis added).

[20] MCL 691.1401(e).

Specifically, this Court held that "an independent defect, other than the accumulation of ice or snow, must be at least a proximate cause of a plaintiff's injury in order for the plaintiff to recover under the statute."[21] Thus, *Haliw* established only that a plaintiff cannot recover on a claim against a governmental agency where the sole proximate cause of the slip and fall is the *natural accumulation* of ice or snow:

> [W]e reject the proposition that the presence of ice alone, *which naturally accumulates* and which is the sole proximate cause of a slip and fall, satisfies the remaining elements of the negligence analysis employed in actions against governmental agencies. In the absence of a persistent defect in the highway (i.e., a sidewalk), rendering it unsafe for public travel at all times, and which combines with the *natural accumulation of ice or snow* to proximately cause injury, a plaintiff cannot prevail against an otherwise immune municipality.[22]

Importantly, in *MacLachlan,* this Court was faced with a case where there was a question of fact concerning whether the snow and ice on a roadway were the result of a natural or unnatural accumulation. The plaintiff was getting off a bus when he came face-to-face with a "wall of snow and ice" created when the city of Lansing plowed the street and had not yet cleared the snow and ice pushed to the side of the road. As the plaintiff walked alongside the wall in an attempt to find an opening so that he could get to the sidewalk, he was hit by a car. The circuit court granted summary disposition to the city, but the Court of Appeals reversed the circuit court's order, concluding that there was a question of fact regarding whether the snow pushed off to the side was the result of a natural or unnatural accumulation of snow and ice. In particular, the Court discussed the distinction between natural versus unnatural accumulations of snow and ice:

> Under the long-recognized "natural accumulation" doctrine, " 'a governmental agency's failure to remove the natural accumulations of ice and snow on a public highway does not signal negligence of that public authority.' " When, however, the accumulation of ice and snow is the result of unnatural causes, the municipality may be liable.
>
> If there is any question regarding whether the condition was natural or unnatural, determination of this question of fact is within the province of a jury. Here, however, there is no dispute that the wall of ice and snow was created by the plowing efforts of the City of Lansing. Thus, reasonable minds could not differ on the fact that the snow wall was an unnatural accumulation.

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[21] *Haliw*, *supra* at 309 n 9.

[22] *Id*. at 312 (emphasis added).

> We recognize that a city should not be punished merely for removing snow from the roadway. However, a municipality can be held liable if in clearing ice and snow it "introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation." Here it is alleged that a wall of snow and ice, three-to-four-feet high and created by the defendant city, caused an unusual obstacle that increased the hazard to decedent. A jury may conclude that the city's act of piling ice and snow so high that it would be difficult, if not impossible, to traverse, introduced a new element of danger that exceeded the inconvenience posed by a natural accumulation. Plaintiff through his expert presented evidence that the city had adequate time to remove the snow wall from the bus stop and that it would not have been an unreasonable burden in light of the potential risk for the city to leave or create an opening in the piled snow to allow access to the sidewalk in an area designated as a bus stop. We accordingly conclude that plaintiff has created a justiciable question of fact relative to the alleged unnatural accumulation of ice and snow in the form of a snow wall and in avoidance of governmental immunity.[23]

In so holding, the Court of Appeals acknowledged that a city could be "held liable if, in clearing ice and snow, it 'introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation.' "[24]

This Court reversed the judgment of the Court of Appeals. However, the Court's order did not address the issue of natural versus unnatural accumulation of snow and ice; instead it merely stated that "[t]here was no defect in the roadway rendering it unsafe for public travel at all times."[25] Thus, this Court's order did not address a key underlying issue in the case: whether the plaintiff's injuries occurred as a result of the defendant city's failure to remove an *unnatural accumulation* of snow and ice from the roadway. All that this Court's order in *MacLachlan* makes clear is that *there was no defect in the highway rendering it unsafe for public travel*. This Court did not speak definitively to the issue of unnatural accumulation of snow and ice after *Nawrocki* and *Haliw*.

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[23] *MacLachlan v Capital Area Trans Auth*, unpublished opinion per curiam of the Court of Appeals, decided January 20, 2005 (Docket No. 252221), pp 5-6 (emphasis added; citations omitted).

[24] *Id*., citing *Skogman v Chippewa Co Rd Comm*, 221 Mich App 351, 354 (1997).

[25] *MacLachlan*, 474 Mich at 1059.

In summary, after *Nawrocki*, it appears clear that this Court has limited state and county liability under the highway exception to defects that appear in the improved portion of the roadway. This case does not concern a defect in the improved portion of the roadway. The question here is whether, given the city's duty to maintain sidewalks in reasonable repair, the city could be held liable for intentionally creating an unnatural accumulation of snow and ice so as to make the sidewalk impassable. Thus, *Nawrocki* is not applicable to this case. *Haliw* establishes that a governmental entity is not liable for a natural accumulation of snow or ice, and while there was a question of fact in *MacLachlan* concerning whether the snow and ice at issue were the result of a natural or unnatural accumulation, this Court's order in that case does not establish that a governmental entity will not be liable for an unnatural accumulation of snow and ice.

C. *Cities Have a Duty to Maintain Sidewalks in Reasonable Repair*

In *Jones v Enertel, Inc*,[26] this Court unanimously affirmed the statutory duty set forth in MCL 691.1402 requiring cities to maintain sidewalks in reasonable repair:

> MCL 691.1402(1), part of the governmental tort liability act (GTLA), imposes a general duty on municipalities to keep "a highway," including a sidewalk on the highway, under its jurisdiction in reasonable repair:
>
> "Except as otherwise provided in section 2a[2] each governmental agency having jurisdiction over a highway *shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel*. A person who sustains bodily injury or damage to his or her property by reason of *failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel* may recover the damages suffered by him or her from the governmental agency. [Emphasis added.]"
>
> The emphasized language places a duty on municipalities to maintain their sidewalks on public highways in reasonable *repair*. This means that municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair. This is a greater duty than the duty a premises possessor owes to invitees under common-law premises liability principles. The basic duty owed to an invitee by a premises possessor is "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Accordingly, as we discussed in *Lugo*, this duty does not generally require a premises possessor to remove open and obvious conditions because, absent special aspects, such conditions are not

[26] *Jones v Enertel, Inc*, 467 Mich 266 (2002).

> unreasonably dangerous precisely because they are open and obvious. However, such reasoning cannot be applied to the statutory duty of a municipality to maintain sidewalks on public highways because the statute requires the sidewalks to be kept in "reasonable repair." The statutory language does not allow a municipality to forego such repairs because the defective condition of a sidewalk is open and obvious. Accordingly, we conclude that the open and obvious doctrine of common-law premises liability cannot bar a claim against a municipality under MCL 691.1402(1).[27]

The question in this case is whether the statutory duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel" includes a duty not to place temporary obstacles on a highway that render it impassable. The plain language of the statute requires a city to "maintain the highway [including sidewalks] in reasonable repair." The statute further provides that if an individual is injured "by reason of failure of a governmental agency to keep a highway [including sidewalks] under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel," the injured party can recover damages from the governmental agency.[28] If a sidewalk is made impassable because of an intentional act by the city, the city has not fulfilled its duty. The goal of the legislative directive to maintain highways in reasonable repair is to make highways, including sidewalks, "reasonably safe and convenient for public travel."[29] If a city intentionally makes a sidewalk impassable by creating an obstacle of unnatural accumulated snow and ice, it has failed to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." And if plaintiffs can establish that the injuries sustained by the girls occurred because the city failed to keep the sidewalk in "reasonable repair and in a condition reasonably safe and fit for travel," plaintiffs can recover damages from the city.[30]

Moreover, Michigan courts have previously held that a city can be held liable if, in the process of clearing snow and ice, the city "introduced a new element of danger not previously present, or *created an obstacle to travel, such as a snow bank*, that exceeds the inconvenience posed by a natural accumulation."[31] In fact, in *Kowalczyk v Bailey*,[32] this Court specifically held that cities can be held statutorily liable "for injuries caused by their negligent failure to remove obstructions in their streets after notice thereof."

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[27] *Jones*, *supra* at 268-269 (emphasis added).

[28] MCL 691.1402(1)

[29] *Id*.

[30] *Id.*

[31] *Skogman*, *supra* at 354 (emphasis added).

[32] *Kowalczyk v Bailey*, 379 Mich 568, 572 (1967).

Kowalczyk was cited by the Court of Appeals in a case concerning the village of Yale's duty to remove snow from a sidewalk, *Hampton v Master Products, Inc*.[33] The plaintiff, Dolly Hampton, was injured after she slipped on a snow bank formed on a sidewalk in the village of Yale. The plaintiff alleged that the village had neglected its duty to keep the sidewalks in a condition safe for public travel. The plaintiff introduced photographic exhibits into evidence depicting that "the snow bank was much higher than any snow surrounding it" and there was also testimony "that the village had plowed the street adjacent to the sidewalk."[34] On the basis of this evidence, the Court of Appeals concluded that "[a] jury could reasonably infer from this that the village was responsible for the unnatural accumulation of snow."[35] Specifically, the Court noted

> This unnatural accumulation created an obstruction on the sidewalk which should have been removed so that the village could fulfill its duty of keeping the highways "reasonably safe and convenient for public travel." MCL 691.1402; MSA 3.996(102). The village was liable for injuries caused by its negligent failure to remove the obstruction after it had notice thereof. *Kowalczyk v Bailey,* 379 Mich 568; 153 NW2d 660 (1967).
>
> * * *
>
> In this case, the testimony revealed that the drift had been present two days and that the city had plowed the streets. The jury could reasonably have inferred that the defendant Village of Yale had caused the drift to be placed across the sidewalk through the use of its snowplows. A jury could deem the agents of Yale responsible for producing the drift where it was as high as it was.[36]

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[33] *Hampton v Master Products, Inc*, 84 Mich App 767 (1978). Justice MARKMAN, ante at 1245, questions my reliance on cases that preceded the enactment of the GTLA; however, the fact that there are pre-GTLA cases establishing a duty by cities to maintain sidewalks in a condition that is safe for public travel and that a post-GTLA case cites pre-GTLA cases provides even stronger evidence that the enactment of the GTLA in no way abrogated the existing duty of a city to maintain a sidewalk in a condition that is safe for public travel. Had such duty been abrogated, the *Hampton* Court would not have cited a pre-GTLA case that made reference to the continued existence of such a duty.

[34] *Id*. at 772.

[35] *Id*.

[36] *Id*. at 772-773.

For the past 100 years, Michigan courts have held that a jury should be allowed to consider whether a city was liable when there is a question about the accumulation of snow and ice on a highway or sidewalk. For example, in *Johnson v City of Marquette*,[37] the plaintiff's wife was killed after the horse-drawn sleigh in which she was riding was overtaken by a runaway team of horses. In that it was proper for a jury to consider whether the city was negligent in failing to remove snow from the street crossing in question, the Court stated:

> We do not think it open to serious question that there was evidence in this case that at this crossing there was an unnatural accumulation of snow and ice, occasioned by shoveling from the railroad track, so as to produce a hump on either side of the track of several inches in depth; thus increasing the height of the bank on either side. We think it was at least a question for the jury as to whether this left the highway in a condition reasonably safe and fit for travel. It is true that the natural accumulations of snow and ice and the natural results of traveling on the same do not of themselves make a case of faulty highway which justifies a jury in finding a municipality in fault. But that is not this case, as the evidence was ample to show that snow was thrown and piled on this highway in such a manner as to make an unnatural hump or ridge on either side of the track.[38]

Of note in *Johnson* is the fact that the decedent's cause of death was not due to the fact that the sleigh in which she was riding came into contact with the unnatural accumulation of snow and ice. Instead, the decedent was trampled to death after the driver of another horse-drawn sleigh lost control of the team when he came upon the unnatural "hump" of snow and ice in the roadway. Again, this Court held that it was proper for the jury to consider whether the decedent's death was proximately caused by the city's negligence:

> The question of whether there is sufficient causal connection between the defective highway and the injuries to the plaintiff's intestate to justify the court in submitting this case to the jury has been sufficiently discussed in dealing with the question of proximate cause. If it is open to the jury to find that the driver would not have lost the control of the team but for the defect in the highway, then the connection between the wrong and the injury is sufficient to justify a recovery.[39]

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[37] *Johnson v City of Marquette*, 154 Mich 50 (1908).

[38] *Id.* at 53.

[39] *Id.* at 57.

To summarize, Michigan courts have previously held that cities have a duty under MCL 691.1402 to remove unnatural accumulations of snow and ice that create obstructions on highways and sidewalks. Courts have also recognized that if there is a question of fact concerning whether the snow and ice are the result of a natural or unnatural accumulation, juries should be permitted to weigh the evidence and determine whether the governmental entity is liable for failing to remove an unnatural accumulation of snow that proximately causes a plaintiff's injuries.

Applying the law to the facts in this case, neither the Court of Appeals nor the circuit court erred in denying the city's motion for summary disposition. Here, the city was aware that the sidewalk in question was defective and admitted to intentionally piling up plowed snow and ice onto the defective north sidewalk to encourage pedestrians to use the south sidewalk. Consequently, there is a question of fact regarding whether the accumulation of snow and ice was natural or unnatural. The city was aware of the risk that pedestrians (including children) would walk on the road because of unplowed sidewalks. In fact, the city had both an ordinance and a recently adopted city resolution calling for all citizens to clear the sidewalks in front of their property in order to make the sidewalks passable and to prevent pedestrians from walking on the street. Given the city's duty to maintain the sidewalk in reasonable repair "and in a condition reasonably safe and fit for travel," a jury should have been allowed to consider whether the city was negligent in failing to remove the snow and ice from the sidewalk.

IV. CONCLUSION

In this tragic case, the majority of four has summarily dispensed with the plaintiffs' claim against the city on the basis that the accumulation of snow and ice was not a "defect." In addition, the majority of four's incorrect extension of *Nawrocki* in a one-page order, instead of in a full opinion, appears to be an attempt by the majority to conceal its latest example of judicial activism by unrestrained statutory interpretation. I would find that both lower courts properly concluded that a question of fact exists regarding whether the city created an unnatural accumulation of snow and ice. Accordingly, the plaintiffs should be permitted to bring that question of fact before a jury.

The statutory duty to maintain the highway "in reasonable repair and in a condition reasonably safe and fit for travel" is not limited to a duty to repair "structural defects." Because both the statute and prior cases interpreting the highway-repair duty can be interpreted so as to find that an *unnatural* accumulation of snow and ice is a "defect" that a governmental entity has an obligation to address given its duty to maintain the sidewalk in reasonable repair and in a condition reasonably safe and fit for travel, and because a question of fact exists with regard to whether the city created an unnatural accumulation of snow and ice, I dissent and would affirm the judgment of the Court of Appeals affirming the circuit court's denial of the city's motion for summary disposition.

KELLY, J. (*dissenting*).

I would affirm the lower courts' denials of defendant's motion for summary disposition. As I noted in my dissent in *Nawrocki v Macomb Co Rd Comm*,[1] the second sentence of the highway exception[2]

> imposes liability on a government agency having jurisdiction over a highway for failure "to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel . . . ." Thus, liability not only extends to highways in a state of disrepair, but to those in a condition not reasonably safe and fit for travel.[3]

The city of Lansing in this case plowed snow over a city sidewalk, impeding foot travel on it. Hence, a question of fact exists whether the city failed to keep the sidewalk in a condition reasonably safe and fit for travel. Therefore, I concur with part III(C) of Justice WEAVER's dissenting statement.

Orders Entered April 29, 2008:

PROPOSED AMENDMENT OF RULES 2.301, 2.302, 2.401 AND 2.506 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendment of Rules 2.301, 2.302, 2.401, and 2.506 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

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

RULE 2.301 COMPLETION OF DISCOVERY.

(A) In circuit and probate court, the time for completion of discovery shall be set by an order entered under MCR 2.401(B)(2)(a), and issues relating to the discovery, preservation, and claims of privilege with respect to electronically stored information shall be dealt with by an order entered under 2.401(B)(2)(c).

(B)-(C) [unchanged.]

RULE 2.302 GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

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[1] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000).

[2] MCL 691.1402(1).

[3] *Nawrocki*, 463 Mich at 192 (KELLY, J. dissenting).

(B)Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, ~~or~~ other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2)-(4) [Unchanged.]

(5) Electronically Stored Information. A party must preserve information, including electronically stored information, that the party knows, or reasonably should know, may lead to the discovery of admissible evidence. A party who wishes to destroy such information may apply to the court for leave to do so upon good cause shown.

(6) Limitation of Discovery of Electronic Materials. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for the discovery.

(7) Information Inadvertently Produced. If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C)-(H) [Unchanged.]

RULE 2.401 PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS.

(A) [Unchanged.]

(B) Early Scheduling Conference and Order.

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. In addition to those considerations enumerated in subrule (C)(1), during this conference the court should consider:

(a) whether jurisdiction and venue are proper or whether the case is frivolous,

(b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410, ~~and~~

(c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case., and

(d) discovery, preservation, and claims of privilege of electronically stored information.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including

(i) the initiation or completion of an ADR process,

(ii) the amendment of pleadings, adding of parties, or filing of motions,

(iii) the completion of discovery,

(iv) the exchange of witness lists under subrule (I), and

(v) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.

(c) The scheduling order also may include provisions concerning discovery of electronically stored information, any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production, preserving discoverable information, and the form in which electronically stored information shall be produced.

~~(c)~~(d) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.

(i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of the order, a party may file and serve a written request for amendment of the order detailing the reasons why the order should be amended.

(ii) Upon receiving such a written request, the court shall reconsider the order in light of the objections raised by the parties. Whether the reconsideration occurs at a conference or in some other manner, the court must either enter a new scheduling order or notify the parties in writing that the court declines to amend the order. The court must schedule a conference, enter the new order, or send the written notice, within 14 days after receiving the request.

(iii) The submission of a request pursuant to this subrule, or the failure to submit such a request, does not preclude a party from filing a motion to modify a scheduling order.

(C)-(I) [Unchanged.]

RULE 2.506 SUBPOENA; ORDER TO ATTEND.

(A) Attendance of Party or Witness.

(1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and to produce notes, records, documents, photographs, or other portable tangible things as specified.

(2) A subpoena may specify the form or forms in which electronically stored information is to be produced subject to objection. If the subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing electronically stored information need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for such discovery.

~~(2)~~ (4) The court may require a party and a representative of an insurance carrier for a party with information and authority adequate for responsible and effective participation in settlement discussions to be present or immediately available at trial.

~~(3)~~ (5) A subpoena may be issued only in accordance with this rule or MCR 2.305, 2.621(C), 9.112(D), 9.115(I)(1), or 9.212.

(B)-(I) [Unchanged.]

CORRIGAN, J. (*concurring*). I concur in publishing for comment proposed amendments to MCR 2.301, 2.302, 2.401, and 2.506. These amendments, submitted by the State Bar of Michigan, would update the civil discovery rules to account for the exchange of electronically stored information. I write separately because I am concerned about certain aspects of MCR 2.401(B)(1) and (2)(c). I believe that we should ultimately strive to eliminate the court from routine participation in cases involving electronic discovery. I recognize that we are living in times of transition. Nevertheless, such discovery of electronically stored information should eventually occur without the need for court involvement. I thus invite the bench and bar to submit any proposals suggesting alternative language that would assist us to routinize the production of electronically stored information upon receipt of a discovery request without the necessity of court involvement.

Staff comment: This proposal, submitted by the State Bar of Michigan, would amend Michigan's discovery rules concerning electronically stored information, and would make the rules consistent with the federal rules.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-24. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered May 6, 2008:

PROPOSED AMENDMENT OF RULE 6 OF THE BOARD OF LAW EXAMINERS. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6 of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered by the Court at a public administrative hearing. The schedules and agendas for such hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Please note that if this matter proceeds in the ordinary course by publication followed by consideration at a public hearing to be held later this year, and if the Court adopts this proposal, the fee increase would be effective for applicants taking the February 2009 bar examination.

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

RULE 6. FEES.

The fees are: an application for examination, $340 ~~$300~~ and an additional fee for the late filing of an application or transfer of an application for examination, $100; an application for reexamination~~re-examination~~, $240 ~~$200~~; an application for recertification, $200; an application for admission without examination, $600 plus the requisite fee for the National Conference of Bar Examiners' report. Checks must be payable to the State of Michigan.

Staff comment: The proposed order increases the fees for application for the bar examination from $300 to $340, and for reexamination from $200 to $240. The proposed increase in fees would allow for the implementation of the change in policy regarding grading Michigan bar examinations that is reflected in the attached notice.

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

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 31, 2008, at

P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-20. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt.

PROPOSED AMENDMENT OF RULES 3.903 AND 3.920 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.903 and 3.920 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)–(2) [Unchanged.]

(3) "Confidential file" means

(a) [Unchanged.]

(b) the contents of a social file maintained by the court, including materials such as

(i)–(v) [Unchanged.](vi)victim statements.;

(vii) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver.

(4)–(26) [Unchanged.]

(B)–(E) [Unchanged.]

RULE 3.920. SERVICE OF PROCESS.

(A)–(G) [Unchanged.]

(H)Proof of Service.

(1)–(3) [Unchanged.]

(4)Content. The proof of service must identify the papers served. A proof of service for papers served on a foster parent, preadoptive parent, or relative caregiver shall be maintained in the confidential social file as identified in MCR 3.903(A)(3)(b)(vii).

(5) [Unchanged.]

Staff Comment: The proposal would clarify that information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver is part of the confidential file and, therefore, a proof of

service that includes identifying or location information regarding those parties must also be maintained in the confidential file.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 31, 2008, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-22. Your comments and the comments of others will be posted at: www.courts.mi.gov./supremecourt/resources/administrative/index.htm.

Index-Digest

INDEX–DIGEST

CRIMINAL LAW

REPORTS OF CRIMES

1. The prosecution is not required to prove beyond a reasonable doubt that the crime sought to be reported was attempted or committed in order to obtain a conviction for the offense of preventing or attempting to prevent through the unlawful use of physical force a person from reporting a crime attempted or committed (MCL 750.483a[1][b]). *People v Holley*, 480 Mich 222.

DYING DECLARATIONS—*See*

EVIDENCE 1

ESTOPPEL AND WAIVER—*See*

INSURANCE 1

EVIDENCE

HEARSAY

1. A statement is admissible under the dying declaration exception to the hearsay rule if the declarant is unavailable as a witness and made the statement concerning the cause or circumstances of what he or she believed to be impending death while believing that his or her death was imminent; the declarant's age alone does not preclude the admission of a dying declaration, and a child may have the capacity to be conscious of his or her own impending death for purposes of the exception; whether a child was conscious of his or her impending death must be determined on a case-by-case basis (MRE 804[b][2]). *People v Stamper*, 480 Mich 1.
2. The excited utterance exception to the hearsay rule does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement that relates to the startling event or condition may be admitted, and a court may consider the statement itself, along with other evidence, in determining whether the startling event or condition has been established (MRE 104[a], 803[2], 1101[b][1]). *People v Barrett*, 480 Mich 125.

EXCITED UTTERANCE EXCEPTION—*See*

EVIDENCE 2

pel can apply when the facts support them. *McDonald v Farm Bureau Ins Co*, 480 Mich 191.

MEDICAL COVERAGE

2. An independent review organization's recommendation under the Patient's Right to Independent Review Act concerning whether the Commissioner of the Office of Financial and Insurance Services should uphold or reverse a health carrier's adverse determination concerning coverage is not binding on the commissioner (MCL 550.1911). *Ross v Blue Care Network*, 480 Mich 153.

INTERFERENCE WITH REPORTS OF CRIMES—*See*

CRIMINAL LAW 1

IRREVOCABILITY—*See*

STATUTES 1

JOINT AND SEVERAL LIABILITY—*See*

NEGLIGENCE 2

LIMITATION OF ACTIONS—*See*

INSURANCE 1

LOSS OF CONSORTIUM—*See*

GOVERNMENTAL IMMUNITY 1, 2, 3

MEDICAL COVERAGE—*See*

INSURANCE 2

MOTOR-VEHICLE EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 2, 3

NEGLIGENCE

CONSTRUCTION SITES

1. *Latham v Barton Malow Co*, 480 Mich 105.

JOINT AND SEVERAL LIABILITY

2. The common-law setoff rule, which permits an injured party to pursue multiple tortfeasors jointly and severally and recover separate judgments but allows only a single compensation for a single injury, remains the law in Michigan for vehicle-owner vicarious-liability cases, in which an automobile owner is entirely liable for the negligence of a driver who uses the automobile with the

Minors Act are irrevocable, and the custodial property placed in such an account is indefeasibly vested in the minor (MCL 554.521 *et seq*.). *People v Couzens*, 480 Mich 240.

TAXABLE VALUE—*See*

TAXATION 2

TAXATION

PROPERTY TAX

1. A nonprofit charitable institution that claims a tax exemption for property owned and occupied by the institution while occupied by that institution solely for charitable purposes for which the institution was incorporated must, at a minimum, have a regular physical presence on the property; an institution that leases the property to others for their own personal use and has no regular physical presence on the property does not occupy the property for purposes of the exemption (MCL 211.7o[1]). *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44.

REAL PROPERTY

2. Public-service improvements consisting of public infrastructure located on utility easements or land that ultimately becomes public do not constitute "additions" to property within the meaning of that term in the constitution as amended by Proposal A in 1994; the statutory provision defining "additions" as including public-service improvements is unconstitutional (Const 1963, art 9, § 3; MCL 211.34d[1][b][viii]). *Toll Northville Ltd v Northville Twp*, 480 Mich 6.

TOLLING—*See*

INSURANCE 1

UNDERINSURED MOTORIST BENEFITS—*See*

INSURANCE 1

UNIFORM TRANSFER TO MINORS ACT—*See*

STATUTES 1

VICARIOUS LIABILITY OF VEHICLE OWNERS—*See*

NEGLIGENCE 2